EPA's Enforcement Discretion and Settlement Policy for its PFAS CERCLA Rule | Part II: A Salve or Hot Air?

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PART II

As detailed in Part 1 of this *eAlert*, on April 19, 2024, the U.S. Environmental Protection Agency (EPA) announced its final rule designating perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (also known as the Superfund law). This *eAlert* details EPA's "PFAS Enforcement Discretion and Settlement Policy Under CERCLA" (the Policy).

Details on the Policy

The Policy is intended to "provid[e] direction to all EPA enforcement and compliance staff about how EPA will exercise its enforcement discretion under CERCLA in matters involving PFAS." The Policy is EPA's attempt to deal with the potentially inequitable consequences the new rule may impose on certain categories of responsible parties who, given CERCLA's liability scheme, may bear little-to-no actual culpability but could end up being responsible for significant costs to clean up Superfund sites.

The Policy states, "EPA does not intend to pursue otherwise potentially responsible parties where equitable factors do not support seeking response actions or costs under CERCLA." It then lists five such categories of parties whose operations may "release" PFAS constituents:

1. Community water systems and publicly owned treatment works (POTWs);
2. Municipal separate storm sewer systems (MS4s);

3. Publicly owned/operated municipal solid waste landfills;
4. Publicly owned airports and local fire departments; and
5. Farms where biosolids are applied to the land.

The Policy also notes that the above list is not exclusive and EPA will consider applying the equitable factors detailed therein in other circumstances as warranted.

As noted in Part I, the Policy also recognizes that parties such as POTWs and MS4s could find themselves subject to contribution claims from other potentially responsible parties (PRPs) who settle PFAS-related claims with EPA. It thus attempts to provide protection to such "passive receivers" by (1) including language in EPA's settlements with those PRPs protecting the groups listed above and (2) by directly settling with the groups listed above.

The Policy also lists certain important limitations and contingencies to the discretion EPA may exercise: (1) parties must fully cooperate with EPA, (2) EPA can still pursue parties that significantly contribute to the spread of significant quantities of PFOA or PFOS; (3) the policy may change if science changes; and (4) the Policy is guidance rather than a regulation that creates or expands any legal obligations.

Concerns About the Policy

This new rule is especially concerning to many in the water industry. Under CERCLA and how it has been interpreted in courts, publicly owned treatment works (POTWs) and municipal separate storm sewer systems (MS4s) are potentially exposed to liability based on, essentially, how their businesses operate. Similarly, water providers are also put in a difficult position. Many will be required to remove PFAS, including PFOA and PFOS, from their water based on the maximum contaminant level recently announced by EPA, which essentially sets a cap on how much of certain PFAS can legally be in water they provide. Providers may be at risk based on how they handle the effluent that is leftover after that treatment. Potentially the biggest cause for concern for all parties subject to the listing rule is one identified by EPA – the Policy is just a guidance document, describing EPA's current view on how it intends to address certain fact situations. It is not legally binding on EPA or the regulated community, nor does the new rule itself provide any legal safe harbor for the listed categories of providers. As happens with guidance documents, EPA could well determine to revise or discard the Policy entirely as it gains experience with its new rule.

Relatedly, as noted in Part I, another significant issue with the Policy is that it only applies to lawsuits brought by EPA. On its face the Policy does not provide the protected classes against claims brought by other PRPs who have settled with or had judgments imposed by EPA. To assuage these concerns, in the Policy EPA indicates that in settlements with other PRPs it will seek to require those parties to waive their contribution rights against parties that satisfy the equitable factors. Likewise, in the Policy EPA indicates that in appropriate cases it may seek to settle with a covered party to provide protection against claims from other PRPs.

A final concern for the listed parties is that in a given situation EPA may determine that the facts do not warrant the exercise of enforcement discretion, for example if a party's cooperation is insufficient (a concern it essentially identifies), or a party does not fall into the listed categories, or if equitable concerns favor enforcement over discretion. The lack of upfront clarity and predictably may prove troubling for some parties.

Alternative to the Policy

An alternative to the Policy is reflected in H.R. 7944, the "Water Systems PFAS Liability Protection Act," that was announced on April 11, 2024 by Representatives John Curtis (R-UT) and Marie Gluesenkamp-Perez (D-WA). While there are some differences, H.R. 7944 represents a legally-binding legislative solution to the problem the Policy seeks to address.

Undoubtedly, water systems potentially subject to PFAS-related liability would prefer H.R. 7944 over the Policy because it would statutorily enshrine the Policy's protections. Moreover, the legislation would address nearly all, if not all, of the concerns about the Policy. However, it is unclear whether H.R. 7944 has a realistic path to getting passed in the current session of Congress.

Overall Evaluation

The Policy reflects EPA's recognition that the new PFAS listing rule may produce substantial and inequitable impacts on certain classes of parties subject to the rule and proactively seeks to provide some clarity and comforting guidance. While only a partial solution, albeit it one with significant flaws, as a whole the Policy offers some meaningful relief. EPA and/or Congress may yet decide that more certain, binding relief is warranted; for now, responsible parties have at least some direction as they address PFAS-related liabilities under CERCLA.