U.S. EPA Issues 'Game Changing' Listing of PFOA and PFOS Under CERCLA

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The U.S. Environmental Protection Agency's (EPA) implementation of its PFAS Strategic Roadmap through federal rulemakings has continued at a fast clip in 2024, most notably with Friday's issuance of the highly anticipated final rule designating the two most prevalent PFAS compounds, perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The designation has widespread ramifications, not just from a regulatory and legal liability perspective but also its impact across a broad spectrum of the U.S. economy, including business and real estate transactions, lending decisions, contract negotiations, site remediations, and even environmental, social and governance (ESG) reporting obligations.

The designation enables U.S. EPA to exercise its authority under CERCLA to require investigation and cleanup of sites that have been contaminated with PFOA and PFOS. Potentially responsible parties (PRPs), including owners and operators (both current and at the time of release and/or disposal) of properties where PFOA and PFOS were released, as well as arrangers and transporters of materials containing PFOA and PFOS, now have potential CERCLA liability. And because CERCLA liability is retroactive, current owners and operators of properties contaminated by PFOA and PFAS may now be required to investigate and remediate past releases, even if they did not own the property when the releases or contamination occurred, let alone cause or contribute to the release.

In addition, the listing will also (1) prompt the filing of numerous state or private cost-recovery and contribution claims across the country, (2) require state and federal reporting under the Emergency Planning and Community Right-to-Know Act and CERCLA for the releases of a reportable quantity (≥1 lb.) to the environment, (3) elevate PFOA and PFOS hazardous substances to be investigated under Phase I/II environmental site assessments

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conducted in connection with environmental due diligence, (4) increase remediation costs at hundreds of active sites, as well as some sites thought to be closed years ago, and (5) subject PFOA and PFOS to regulation under the Hazardous Materials Transportation Act. The listing also impacts thousands of PFAS-related claims already pending in a multidistrict litigation court in South Carolina.

Along with the final rule, U.S. EPA published an enforcement discretion policy. In it, the Agency stated that it does not intend to pursue response actions or cost-recovery under CERCLA against publicly-owned airports, farms where biosolids were applied to the land, fire departments, municipal solid waste landfills, community water systems, and publicly-owned wastewater treatment works. Instead, it will focus its enforcement authorities on PRPs who "significantly contributed to the release of PFAS to the environment, including entities that manufactured PFAS or used PFAS in the manufacturing process, federal facilities, and other industrial parties." However, what the term "significantly contributed" means is not defined. Moreover, U.S. EPA's exercise of enforcement discretion does not stop state and private parties from filing third-party contribution and cost-recovery claims. Depending on the situation, businesses and local governments that face actual or threatened claims based on the new listing may consider evaluating with legal counsel whether they should take the invitation under U.S. EPA's enforcement policy to negotiate an administrative settlement that would provide a statutory contribution bar against such claims.

If you would like to discuss how this regulation impacts your business or local government, please contact the authors or any member of the firm's Environmental Practice Group.

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