EPA Announces Final Rule Designating Two PFAS as "Hazardous Substances" under CERCLA

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On April 19, 2024, the U.S. Environmental Protection Agency ("EPA" or "the Agency") released details of its highly anticipated rule listing perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS"), two forms of per- and polyfluoroalkyl substances ("PFAS"), as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund Law"). The rule marks the first exercise of EPA's authority to designate new "hazardous substances" regulated under CERCLA since the statute's passage over 40 years ago and is expected give rise to new cleanup actions, changes in scope and/or remedy in ongoing actions, the potential of re-opening formerly closed sites, and associated litigation affecting a broad range of industries and entities that have used or received the substances in their operations.

The designation of PFOA and PFOS as CERCLA hazardous substances also is expected to trigger multiple legal challenges, as well as administrative and legislative efforts to narrow the universe of potentially responsible parties ("PRPs") subject to potential liability in connection with the substances, and to provide protection to so-called "passive receivers" of them such as public water systems, publicly owned treatment works, airports, firefighting agencies, farmers who have applied biosolids to agricultural soils, among others. The rule specifically recognizes potentially affected entities, naming, among others, manufacturers of textiles, leather, petroleum, printing, plastics, rubber, glass, cement, steel, aluminum, vehicle parts, medical equipment, and home furnishings.

The rule goes into effect 60 days upon publication in the *Federal Register*.

CERCLA and PFAS: A Comprehensive Liability Scheme Meets a Pervasive Contaminant

The designation of two PFAS as hazardous substances is significant in part because of the nature of the chemicals involved: widely (and legally) used for decades across a broad swath of industries – from food packaging, clothing, cookware and numerous other consumer products to fire firefighting foams, machining fluids, and a host of industrial uses – with relatively minimal awareness, until recently, by users or the Agency of potential environmental or human health risks. Given the scope of usage and the prevalence of PFAS in soil and water at sites across the country, the introduction of PFAS to CERCLA's liability scheme will no doubt expand liability for entities that previously have not been targeted in PFAS litigation.

Passed in 1980, CERCLA was designed to provide broad federal authority to respond to releases or

threatened releases of “hazardous substances” that may endanger public health or the environment, and to broadly encompass multiple classifications of statutory “responsible parties” subject to liability to ensure timely cleanups and their funding. CERCLA is well known for its far-reaching retroactive, and strict liability scheme. Strict liability means that response costs may be imposed upon all parties that meet the statutory definition of a “responsible party,” including parties who own or operate contaminated property, caused the release or threatened release of hazardous substances, or who otherwise arranged for the disposal of hazardous substances at other sites. EPA can force PRPs to either cleanup the polluted site or reimburse the government for the full remediation of the contaminated site. Because of CERCLA’s joint and several liability scheme, any one PRP can be held liable for the full amount of the cost. Parties held liable are permitted to seek contribution costs from other PRPs. CERCLA PRPs may also be liable for Natural Resource Damages, as defined in the statute and associated regulation, and which include the often multi-million dollar efforts to assess those costs.

PFAS, an umbrella term for thousands of fluorinated chemicals, are commonly referred to as “forever chemicals” because of their persistence in the environment. Once PFAS are released to the environment, they resist breakdown, bioaccumulate and biomagnify through ecosystems, and permeate the environment. Since the 1950s, PFAS have been entrenched in everyday product use and manufacturing, present in aircrafts, textiles, water- or fire-resistant products, cookware, paint, bathroom products, most technology like cell phones, and many other items. PFAS are now understood by EPA and state regulatory authorities to be toxic at extremely low concentrations, with links being discovered between the chemicals and increased risks of birth defects, decreased fertility, thyroid disease and several forms of cancer, specifically testicular and kidney cancer.

Given their broad use in products and industrial processes cross many sectors of the economy, PFAS have been found in many water systems throughout the U.S., and have been detected as far as the Arctic Circle. The U.S. Centers for Disease Control reported in 2015 that 97% of Americans have PFAS in their blood and tissue, and additional, large-scale biomonitoring efforts are underway globally. The extent of the contamination is not fully known, as substantial testing only began in the last decade. Until recently, PFAS were largely unregulated, except by states that adopted their own regulations in the absence of action at the federal level.

Industry Impacts, Strict Liability, and Litigation

While environmental groups generally have praised EPA’s efforts to bring PFAS into to the CERCLA liability scheme, industry groups have expressed concern about the far-reaching consequences that potential liability across so many sectors that the listings will trigger. Accordingly, there has been significant effort to obtain liability carve-outs, particularly for downstream “passive receivers” of PFAS (*i.e.,* entities that unknowingly received PFAS in material used or processed at a facility, such as municipal landfills and drinking water and wastewater treatment facilities).

EPA’s announcement about the rule was accompanied by its release of an enforcement discretion policy, in which the Agency said it will likely decline to pursue cases against community water systems, publicly owned treatment works (“POTW”), municipal separate storm sewer systems, publicly owned/operated municipal solid waste landfills, publicly owned airports, local fire departments, and farms that apply biosolids to land. Additionally, EPA announced that they will apply “fairness and equitable factors” to other entities in deciding whether to pursue a case.

Despite those assurances, neither CERCLA nor the rule prohibit private parties from initiating lawsuits to recover costs spent in conducting response and remediation actions against entities who

EPA may decline to pursue. While the enforcement policy notes that the Agency will seek to require settling parties to waive their rights to sue parties that satisfy equitable factors, and may in fact mitigate some litigation risk concerns, the policy is not absolute and private parties may not be interested in including such a provision as part of their own settlement. Thus, even parties who do not manufacture PFAS, nor utilize them in their products, may find themselves before a court having to explain their relationship to the PFAS contamination.

On the legislative side, the Senate and House are considering bills seeking to address the expansive liability the CERCLA designation would impose on vast numbers of possible PRPs. Just two months after the ANPRM, the U.S. Senate Committee on Environment & Public Works ("EPW") published a bipartisan draft bill that narrowed the definition of PFAS, but did not include any liability exemptions for passive receivers or other sectors.

Nevertheless, enough pressure was put on the Senate EPW Committee to convene a March 2024 hearing on the matter. Across the board, the Senators seemed interested in creating a statutory liability carve-out for those who do not use PFAS or benefit from their presence but instead encounter them in operations incidentally from upstream inputs, also known as "passive receivers." There appears to be bipartisan interest in ensuring that PFAS manufacturers and polluters pay for remediation costs, but it is unclear whether any legislation will be forthcoming.

EPA's decision markedly expands the scope of PFAS liability, both in terms of retroactivity and by creating a nearly limitless class of PRPs from whom litigants can now bring action against. For inquiries on how this rule may affect you, please contact a member of the Kelley Drye environmental team.