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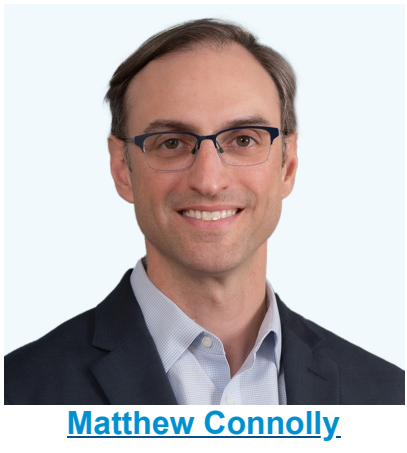

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Welcome to the September edition of Nutter's *Environment & Energy Insights*, a monthly update of current trends in environment and energy law. This month we cover:

- EPA's regulation of "forever chemicals" (known as per- or polyfluroalkyl substances or PFAS) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

EPA Regulation of PFAS Under CERCLA

For our September *Insights*, we delved into a single topic: EPA regulation of "forever chemicals" (known as per- or polyfluroalkyl substances or PFAS) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The possible ramifications and uncertainties of the designation of PFAS under CERCLA continue to play out as industry groups seek court review of EPA's final rule, issued earlier this summer. (We analyzed the rule in our **May *Insights***).

To briefly summarize, the rule regulates two forms of PFAS, a class of compounds that have been used for a wide range of industrial and consumer applications. EPA's rule designated perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under CERCLA. This designation was based upon EPA's determination that the release of PFOA and PFOS "may present substantial danger to public health or welfare or the environment" because of EPA's claimed demonstrable adverse health effects from human exposure including developmental issues, liver, immune, and carcinogenic effects, together with the persistence of these compounds in the environment. EPA also conducted a totality of the circumstances analysis, determining that the advantages of designation outweigh the disadvantages. Advantages considered include elimination of barriers to cleanup, enforcement authority to compel potentially responsible parties to conduct or pay for cleanup, and imposition of notification requirements for releases of PFOA and PFOS in excess of one pound in a 24-hour period. The costs of designation were generally deemed to be either nominal and administrative in nature, or vague and indirect.

Five petitions for review challenging the rule itself have since been filed with the United States Court of Appeals for the District of Columbia Circuit. Petitioners are interest groups representing a range of industries, including chemical production, waste and recycling, and forestry.

Practically speaking, designation of PFOA and PFOS as hazardous substances subjects a broad range of industrial and municipal actors to potential CERCLA liability, because of the ubiquity of these compounds. While the full extent of positions to be taken remains unclear following the filing of the petitions for review, parties are rightfully fearful of being held liable under CERCLA even where they never (1) produced PFOA and PFOS, (2) intentionally incorporated them into their products, or (3) directly profited from their use or creation. Although EPA has indicated that it would exercise its enforcement discretion to "focus enforcement on parties who significantly contributed to the release of PFAS chemicals into the environment," and that it "does not intend to pursue entities where equitable factors do not support seeking response actions or costs under CERCLA," the uncertainty and scope of potential liability is daunting to anyone who may have come into contact with PFAS incidentally. Even where EPA exercises restraint in its enforcement, this would not prevent actions by third parties, including PFOA and PFOS manufacturers who may seek to limit liability by bringing claims against parties further down the chain of distribution.

It remains to be seen whether the rule is upheld in court, if Congress provides liability protections, and how EPA exercises its enforcement discretion.

This advisory was prepared by Matthew Connolly, Matthew Snell, and Joseph Jannetty in Nutter's Environmental and Energy practice group. If you would like additional information, please contact any member of our practice group or your Nutter attorney at 617.439.2000.

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