EPA Issues Notice of Proposed Rulemaking to Designate Some PFAS as CERCLA Hazardous Substances

On August 26, 2022, the United States Environmental Protection Agency ("EPA") took a significant step in its efforts to regulate per- and polyfluoroalkyl substances ("PFAS") and remediate PFAS contamination by issuing its pre-publication Notice of Proposed Rulemaking to designate some PFAS compounds as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The designation covers two PFAS (out of thousands): perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS"). PFOA and PFOS have been used since the mid-twentieth century in a wide array of consumer products, including fire-fighting foams, non-stick cookware, waterproof gear, carpets, fabrics, and food packaging. Studies show that PFOA and PFOS can accumulate and persist in the environment and in living organisms for long periods of time (hence the moniker "forever chemicals") and that exposure to humans can cause cancer, reproductive, developmental, cardiovascular, liver, kidney, and immunological effects. Assuming it becomes final, this long-awaited rule will have far-reaching impacts on the regulatory and litigation landscape for all entities responsible for and/or contending with the effects of PFAS contamination, including municipalities, airport operators, and many others.

What is a CERCLA Hazardous Substance?

CERCLA regulates "hazardous substances," substances which, when released in the environment, may present substantial danger to humans or the environment. The Act delineates "hazardous substances" by reference to lists of substances regulated by other environmental laws. CERCLA also authorizes the Administrator of the EPA to promulgate regulations to designate additional hazardous substances not listed in other statutory provisions, though EPA has never done so – until now. In the proposed rule, EPA provides detail on why it is taking this novel action for PFOA and PFOS and how the proposed designation meets the statutory criteria.

What Does the Designation Mean?

Adding PFOA and PFOS to the list of hazardous substances would expand EPA's authority to investigate and remediate Superfund sites and is intended to reduce human exposure to these chemicals. It would provide the agency with the power to require sampling and response activities related to these compounds at all Superfund sites where PFAS may be present. This includes sites that already have final remedies implemented for other contaminants, where EPA may choose to "re-open" the site. The designation would also trigger release reporting to the National Response Center for releases above reportable quantities – in this case, releases of PFOA and PFOS of one pound or more within a 24-hour period. Finally, a hazardous substances designation will mean that EPA may require the cleanup of contaminated properties due to PFAS releases and permit EPA to pursue cost recovery or contribution actions for cleanup costs incurred. Other entities like

municipalities and private parties that incur response costs will also be able to recoup PFAS remedial costs in the form of a CERCLA cost recovery and/or contribution action.

Who Is Subject to CERCLA Liability?

CERCLA imposes liability on four classes of parties responsible, in whole or in part, for the presence of hazardous substances at a site: current owners and operators of a facility where there was a release of a hazardous substance, former owners and operators of a facility at the time of the release, generators and parties that arranged for the disposal or transport of the hazardous substances, and transporters of hazardous substances that selected the site where the hazardous substances were disposed. These entities are termed "potentially responsible parties" or "PRPs." CERCLA liability is retroactive in nature, meaning PRPs can be held liable for acts that happened before PFAS were designated as hazardous substances, or even before CERCLA's enactment. CERCLA liability is generally joint and several, meaning that any one PRP can be held liable for the entire cleanup, even if the harm was caused by multiple PRPs. CERCLA liability is also strict, meaning fault is irrelevant, and liability cannot be avoided by showing due care was exercised.

A PRP is potentially liable for cleanup costs, damages to natural resources, the costs of certain health assessments, and injunctive relief (i.e., performing a cleanup where a site may present an imminent and substantial endangerment). The law does provide some exemptions, defenses, and protections to liability that may apply in certain circumstances. For instance, a purchaser of a property on which there were past releases of hazardous substances may have a valid defense to CERCLA liability if it meets the criteria of a bona fide prospective purchaser, which requires performing all appropriate inquiry (i.e., a Phase I Environmental Site Assessment) before acquisition, not impeding the performance of a response action, and taking reasonable steps to stop any continuing release and prevent any threatened future release.

Likely PFAS PRPs and Effects of the Proposed Rule

Potential PFAS PRPs include, but are not limited to, municipalities and airport operators with firefighting operations that used or continue to use fire-fighting foam containing PFAS (as most were legally required to do for many years), water utilities or water districts with PFAS contamination, waste companies or municipalities whose landfills may contain or be leaching PFAS, and companies who used PFAS or manufactured products that contain PFAS. EPA's proposed rule opens up the possibility that these entities will be identified as PRPs and be the subject of PFAS-triggered enforcement activity, clean-up order, or even a suit from another PRP.

The proposed designation places airport operators in a particularly precarious position. For decades, operators of airports certificated under 14 C.F.R. Part 139 were legally required to regularly spray fire-fighting foam containing PFAS. The near-certain PRP status of many airport operators means the proposed designation would place them at outsized risk of EPA enforcement action or claims by adjacent landowners, communities, water suppliers, or residents for cleanup costs under CERCLA. EPA representatives have informally indicated that airport operators will likely not be a primary target for enforcement action, but the agency has made no formal statement on the topic. Regardless of the EPA's enforcement approach, airport operators will be vulnerable

to suits from third parties seeking assistance with cleanup costs. There remains a possibility that Congress will authorize an exemption from CERCLA liability for airport operators (and language to that effect previously made some progress in House committees), but it is not clear that any action would come before the effective date of the proposed designation.

The proposed rule would not be all bad news for PRPs. The designation would provide them with a new tool to recover PFAS remediation expenses. Entities planning to make use of CERCLA for cost recovery should make sure their remedial efforts today comply with the National Contingency Plan regulations at 40 C.F.R. Part 300, a necessary precondition for later recovery of costs under CERCLA. They may also want to initiate efforts to understand historic PFAS use and releases and what other entities on their property or nearby may bear responsibility for any releases. The establishment of a federal regulatory framework for PFAS going forward may also help both regulators and regulated entities alike by providing clarity and certainty.

What's Next?

EPA will publish the NPRM in the Federal Register in the next several weeks, and then hold a 60-day public comment period. The agency intends to issue a final rule by the summer of 2023. It is also developing another NPRM seeking comments and data to assist in the development of potential future regulations to designate other PFAS as hazardous substances.

The proposed rule is likely to draw vigorous comment and nationwide attention for many reasons. The agency specifically requests input on its interpretation of Section 102(a) as prohibiting it from considering costs as part of its decision to designate hazardous substances. It is the agency's first time designating new hazardous substances by rule, so its rationale is likely to be fully scrutinized. Since costs of the proposed rule are estimated to be substantial and the agency is already considering a follow-on rule for additional PFAS, affected entities will no doubt participate heavily with comments. PFAS are a scientifically complex and still evolving topic. Impacts on human health are not yet fully understood, though EPA and other researchers have concluded that PFAS pose potential concerns at extremely low concentrations (parts per trillion or less), they are ubiquitous worldwide, and they are extremely costly to address. These factors combined are sure to mean the proposed rule will be the focus of substantial political, public, and media attention.

For a link to the pre-publication version of the proposed rule, visit https://www.epa.gov/superfund/proposed-designation-perfluorooctanoic-acid-pfoa-and-perfluorooctanesulfonic-acid-pfos

For more information about PFAS, the proposed rule, or how PFAS regulation or liability may impact your organization, please contact Thomas A. Bloomfield, Polly B. Jessen, Sara V. Mogharabi, or Nicholas M. Clabbers.