The U.S. Environmental Protection Agency (EPA) announced a Final Rule on April 19, 2024, designating two of the most common per- and polyfluoroalkyl substances (PFAS)—PFOA and PFOS, including their salts and structural isomers—as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

[1] This rule will be effective 60 days after publication in the *Federal Register*. EPA simultaneously announced a PFAS Enforcement Discretion and Settlement Policy.[2]

This Update summarizes the Final Rule and the Enforcement Policy and analyzes the implications for regulated entities.

Background

With its Final Rule, EPA has established another federal regulation for two of the thousands of PFAS chemicals that are used in a broad range of applications, from food packaging to cookware to firefighting foam. PFAS persist in the environment and can be found in most major water bodies; they have also been linked by some studies to a variety of health impacts.

EPA has aggressively targeted PFAS on several fronts, which are detailed in its PFAS Strategic Roadmap.[4] For example, EPA recently addressed PFAS under the Safe Drinking Water Act, issuing the first federal standards for certain PFAS in drinking water.[5]

EPA first proposed designating PFOA and PFOS as hazardous substances under CERCLA in August 2022. Generally, CERCLA governs "hazardous substances" identified under other statutes, including the Clean Water Act and the Resource Conservation and Recovery Act, among others. CERCLA also allows EPA to directly identify CERCLA-specific hazardous substances, and the new PFAS rule is EPA's first-ever exercise of that authority.

In the wake of the 2022 proposal, regulated entities, including those that operate public drinking water systems, raised concerns about their potential liability under CERCLA. Since public water systems routinely store, transport, and treat water contaminated with PFAS, these downstream users could face significant litigation costs and risks as potentially responsible parties (PRPs) under CERCLA, despite only passively handling PFAS that were first released into the environment by other entities, sometimes decades ago.

Highlights of the Final Rule and Enforcement Policy

In its Final Rule, EPA officially designated PFOA and PFOS as hazardous substances under CERCLA, meaning that retroactive, strict, and joint and several liabilities could apply to:

- Current owners and operators of facilities contaminated with these PFAS.
- Past owners and operators of facilities at the time of a PFOA or PFOS release.
- Persons who "arranged for disposal" or treatment of PFOA or PFOS.
- Certain transporters of these PFAS.

To establish liability, EPA (in its enforcement role) or private plaintiffs must still demonstrate that a "release" or "threatened release" of a "hazardous substance" from a "facility" caused them to incur cleanup costs.

EPA also announced that it will focus "on holding accountable those parties that have played a significant role in releasing or exacerbating the spread of PFAS in the environment," including manufacturers of PFAS and related products, those that use or used PFAS in the manufacturing process, and other industrial parties.[6] Accordingly, EPA, in exercising its enforcement discretion, does not intend to pursue CERCLA enforcement actions against certain groups of PRPs where "equitable factors" do not support seeking cleanup costs. EPA's list of these presumptively exempt parties includes the following:

- Community water systems and publicly owned treatment works.
- Municipal separate storm sewer systems.
- Publicly owned/operated municipal solid waste landfills.
- Publicly owned airports and local fire departments.
- Farms where biosolids are applied to the land.[7]

The exemption is contingent on an entity's "full cooperation with EPA, including providing access and information when requested and not interfering with activities that EPA is taking or directing others to undertake to implement a CERCLA response action."[8] Those entities must still promptly report most PFOA and PFOS

releases.[9]

Since private entities can seek contributions from other PRPs for costs related to cleanup of hazardous substances, EPA plans to enter into appropriate settlement agreements with entities in the five groups listed above, which will protect them from potential claims by other PRPs.[10]

Nevertheless, the Enforcement Policy only applies to EPA actions brought under CERCLA and does not apply to other federal statutes or state statutes/programs that regulate PFAS. It also does not prevent private parties from seeking cost recovery or contribution related to PFOA/PFOS, although it indicates that EPA will require private parties to waive claims against other PRPs in the five categories above as part of EPA's settlement of PFAS-related CERCLA actions against "major PRPs."[11]

Key Takeaways

- Additional sites may be listed as Superfund sites because of PFOA and/or PFOS contamination. This could also result in the reopening of past Superfund sites due to PFOA or PFOS contamination, even where cleanup of other contaminants is complete.
- This designation triggers the applicable release reporting requirements under CERCLA and the Emergency Planning and Community Right-to-Know Act. Facilities must report releases of PFOA or PFOS at or above the reportable quantity of one pound within any 24-hour period.
- Companies will need to expand the scope of pre-purchase due diligence to establish the Bona Fide Prospective Purchaser requirements and potentially avoid incurring liability for sites contaminated with PFOA or PFOS.
- EPA enforcement presumptively will be limited with respect to downstream users like water and waste systems, airports, fire departments, and farms.
- PRPs associated with sites contaminated with PFOA or PFOS should expect increased litigation risks and costs due to citizen suits or litigation with other PRPs.
- Remediation cost estimates, budgets, and/or reserves may need to be adjusted to account for the cost of addressing PFAS contamination.
- Owners, operators, and manufacturers who use or produce PFAS compounds may want to check with their insurance providers as to whether PFAS compounds are or can be covered under their pollution liability policies.
- All entities, including manufacturers of consumer products, who make, use, or handle PFOA or PFOS (in addition to other PFAS) should closely monitor EPA's enforcement and settlement activities under this new rule, as well as the potential additions of other PFAS to the list of hazardous substances under CERCLA.

We are actively tracking these issues and have a large PFAS team that can help companies evaluate how these developments could affect them.

Endnotes

[1] U.S. ENV'T PROT. AGENCY, Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 40 C.F.R. Part 302 (Apr. 19, 2024).

[2] David M. Uhlmann, *PFAS Enforcement Discretion and Settlement Policy Under CERCLA*, U.S. ENV'T PROT. AGENCY (Apr. 19, 2024) (hereinafter "Enforcement Policy").

[4] *PFAS Strategic Roadmap: EPA's Commitments to Action 2021–2024*, U.S. ENV'T PROT. AGENCY.

[5] We previously provided an update on this rule. See Andrea Driggs et al., *EPA's Landmark PFAS Drinking Water Standards*, PERKINS COIE (Apr. 15, 2024).

[6] Enforcement Policy at 2.

[7] *Id.* at 3.

[8] *Id.* at 10.

[9] *Id.*

[10] *Id.* at 3, 10.

[11] *Id.* at 3.

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