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EPA Will Propose to Designate PFOA and PFOS as CERCLA Hazardous Substances.

The U.S. Environmental Protection Agency (EPA) announced on August 26, 2022, that it will propose to designate perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), "two of the most widely used per- and polyfluoroalkyl substances (PFAS)," as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The proposal will include the salts and structural isomers of PFOA and PFOS. The rulemaking would require entities to report immediately releases of PFOA and PFOS that meet or exceed the reportable quantity (RQ). EPA will publish a notice of proposed rulemaking (NPRM) in the Federal Register "in the next several weeks," beginning a 60-day comment period. EPA has posted a prepublication version of the NPRM.

The NPRM proposes to designate PFOA and PFOS, including their salts and structural isomers, as hazardous substances under CERCLA Section 102(a). Upon designation, any person in charge of a vessel or an offshore or onshore facility, as soon as they have knowledge of any release of such substances at or above the RQ, must immediately report such releases to the federal, state, Tribal, and local authorities. The proposed RQ for these designations is one pound or more in a 24-hour period. According to the NPRM, once EPA has collected more data on the size of releases and the resulting risks to human health and the environment, it may consider issuing a regulation adjusting the RQs for these substances.

The five broad categories of entities potentially affected by this action include:

- PFOA and/or PFOS manufacturers (including importers and importers of articles);
- PFOA and/or PFOS processors;
- Manufacturers of products containing PFOA and/or PFOS;
- Downstream product manufacturers and users of PFOA and/or PFOS products; and
- Waste management and wastewater treatment facilities.

In addition, when selling or transferring federally-owned real property, federal agencies would be required to meet all of the property transfer requirements in CERCLA Section 120(h), including providing notice when any hazardous substance "was stored for one year or more, known to have been released, or disposed of" and providing a covenant warranting that "all remedial action necessary to protect human health and the environment with respect to any [hazardous substances] remaining on the property has been taken before the date of such transfer, and any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States." EPA notes that there would also be an obligation for the Department of Transportation (DOT) to list and regulate PFOA and PFOS as hazardous materials under the Hazardous Materials Transportation Act (HMTA).

According to the NPRM, the final designations would provide additional tools that the government and others could use to address PFOA/PFOS contamination and, thus, could facilitate an increase in the pace of cleanups of PFOA/PFOS contaminated sites. The indirect, downstream effects of these

designations could include the following:

- EPA and other agencies exercising delegated CERCLA authority could respond to PFOA and PFOS releases and threatened releases without making the imminent and substantial danger finding that is required for responses now;
- EPA and delegated agencies could require potentially responsible parties to address PFOA or PFOS releases that pose an imminent and substantial endangerment to public health or welfare or the environment;
- EPA and delegated agencies could recover PFOA and PFOS cleanup costs from potentially responsible parties, to facilitate having polluters and other potentially responsible parties, rather than taxpayers, pay for these cleanups; and
- Private parties that conduct cleanups that are consistent with the National Oil and Hazardous Substances Contingency Plan (NCP) could also recover PFOA and PFOS cleanup costs from potentially responsible parties.

According to the NPRM, in addition to this action, in 2022, EPA will be developing an advance notice of proposed rulemaking (ANPR) seeking comments and data to assist in the development of potential future regulations pertaining to other PFAS designation as hazardous substances under CERCLA.

Commentary

The proposal comes as no surprise and it is part of EPA's broad PFAS Action Plan. The designation of these chemicals, found everywhere in contaminated media, would mean that CERCLA's liability and cost recovery scheme would apply to the cleanup of contaminated media once the rule is issued in final, as is expected. Reporting requirements would also apply to releases of one pound or more of PFOA and PFOS within a 24-hour period that are not otherwise exempt from reporting.

Not everyone is thrilled with the initiative. Senator Capito (R-WV) expressed concern with the "uncertainty and unintended consequences" of the proposal and urged EPA to prioritize the development of technologies to detect, remove, and destroy PFAS at the government's expanse, not manufacturers. The Environmental Working Group, on the other hand, has identified some 42,000 industrial and municipal sites in the United States known or suspected still to be using PFAS, although how many are known or suspected of using PFOA and PFOS is unclear.

The remediation implications of the proposal are staggering. Given the ubiquity of the substances and their many uses, few entities will be spared CERCLA and related cleanup liability in cases where PFOA and PFOS contamination is found. Many are expected to comment on the proposal.

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