Superfund Enforcement of PFAS Moves Closer as EPA Submits Proposed Hazardous Substance Designation to OMB

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What to Know

On January 10, 2022, EPA submitted for White House regulatory review its highly anticipated proposal to designate the two most widely studied per- and polyfluoroalkyl substances (PFAS), PFOA and PFOS, as hazardous substances under the federal Comprehensive Environmental Response, Compensation & Liability Act (CERCLA). If finalized as expected, the implications of the rule will be massive, as EPA's proposal is likely to result in a cascade of EPA investigation and enforcement at impacted sites, as well as private party cost recovery litigation.

Regulatory, Litigation and Due Diligence Outlook

Hazardous substance designations for PFOA and PFOS have the potential to impact many industries, whether users of these PFAS or not. The designations are likely to trigger EPA investigation and enforcement at new Superfund sites, cause EPA to reevaluate remedies at ongoing cleanups, as well as possibly reopen investigation at dormant sites undergoing long term operation and maintenance. Industries with current or legacy use of PFOA or PFOS could also find themselves designated as potentially responsible parties under CERCLA and subject to EPA enforcement.

At what level remediation of PFOA and PFOS is required will be a hotly contested question at impacted sites. EPA guidance currently recommends using a preliminary remediation goal of 70 ppt for PFOA and PFOS for "current or potential" drinking water sources. However, recent EPA evaluation of the potential human health risks may drive certain remedial target levels, particularly those involving drinking water, much lower. CERCLA cleanups would also incorporate any state standards for PFOA and PFOS.

This development is also expected to spur litigation by private parties, who could use CERCLA's cost recovery and contribution provisions to recover costs expended in the remediation of sites impacted by PFOA or PFOS. The hazardous substance designations have the potential to create significant financial impacts to industries with current or legacy PFOA and PFOS pollution concerns.

Finally, businesses acquiring other businesses or properties will have to ensure their due diligence process adequately considers the potential presence of PFOA and PFOS from historical releases. Failure to sufficiently assess PFOA and PFOS during the due diligence process could waive certain protections to liability afforded under CERCLA, with costly consequences.

What to Expect During the Rulemaking Process

CERCLA authorizes EPA to designate a substance as hazardous if that substance "may present substantial danger to the public health or welfare or the environment" when released in the environment. Whether a "substantial" danger exists, and at what level, is likely to be a focal point of public commentary during rulemaking. Regulation of hazardous chemicals under CERCLA can also occur by virtue of a hazardous designation under a different regulatory program including the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act (RCRA), or the Toxic Substances Control Act. While EPA plans to designate certain PFAS wastes as hazardous under RCRA, it has not yet initiated that rulemaking process.

Along with the hazardous designation, EPA would also be required to set a Reportable Quantity (RQ) for PFOA and PFOS if released in the environment. Although PFOA and PFOS have largely been phased out of production and manufacture in the United States, newly discovered contamination and other types of discharges from stockpiles of the substances could be subject to the reporting requirements. Commenters are likely to address EPA's assessment of the substances' chemical, physical and toxicological properties used to determine the RQ.

By executive order, review by the Office of Management and Budget (OMB) is limited to 90 days but can be shorter or extended an additional 30 days. Once OMB completes its review, EPA will then publish the proposed rule for public comment. This timing is consistent with that proposed in EPA's PFAS Roadmap, which anticipated proposing a rule by March 2022 and issuing a final rule by the summer of 2023.

Manufacturers and companies that could be affected by the new PFAS regulations should follow the EPA's rulemaking efforts. Lathrop GPM's attorneys are well-versed in a variety of PFAS related issues. For more information, please contact a Lathrop GPM attorney. Follow the PFAS Playbook to stay up to date on this and other new PFAS developments.