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CERCLA Liability Heats Up: EPA Designates PFAS Chemicals Hazardous Substances

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In Brief: What You Need to Know

- The designation of perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) as hazardous substances will likely result in litigation over the U.S. Environmental Protection Agency's (EPA) Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) hazardous substance designation process.
- PFOA and PFAS are ubiquitous—found in a wide range of chemicals and materials—and parties should undertake research to ensure they know if products they produce or handle contain PFOA or PFOS. This includes being aware of the uses of these materials throughout their supply chain as parties can be responsible for the upstream use of the materials under CERCLA.
- Listing PFOA and PFOS will result in additional potentially responsible party (PRP) led cleanups.
- Parties that have disposed of, transported, or handled materials with PFOA or PFOS will be potentially liable for CERCLA cleanup costs.
- Parties that handle material containing PFOA or PFOS should pay close attention to how they are stored.
- Reporting requirements now exist for releases of PFOA or PFOS of one pound or more over a 24-hour period. This will require an understanding of the amount of PFOA or PFOS in your product to know what represents a release of one pound.
- EPA's recently released disposal guidance highlights that disposal options for PFOA and PFOS are limited.
- EPA's CERCLA PFOA and PFOS enforcement discretion policy provides very limited protections.
- Enforcement discretion will depend upon the facts and will not provide any protection from Natural Resource Damage Claims.

PFOA and PFOS Designated as Hazardous Substances

On April 19, 2024, EPA released its long-anticipated final rule designating two per- and polyfluoroalkyl substances (PFOS) chemicals, PFOA and PFOS, as hazardous substances under CERCLA Section 102. PFOA and PFAS are ubiquitous and found in a wide range of chemicals and materials. Because this is the first time any chemical has been designated



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as a hazardous substance by regulation, this process sets a precedent for future designations. With this designation EPA can now compel cleanup by responsible parties. Any entity that is or has been an owner or operator of a contaminated property, an arranger, or a transporter of a hazardous substance, and which activities involve a release of the hazardous substance, can be liable for cleanup and Natural Resource Damages. Business should be aware of and attempt to limit their use of PFOA and PFOS in their supply chains. This hazardous substance designation also requires facilities that experience a release of one pound or more of PFOA or PFOS over a 24-hour period to report the release to EPA.

While the rule is effective 60 days after publication in the Federal Register, there will undoubtedly be litigation soon after the rule is made final. Numerous commenters asserted that under CERCLA 102(a), EPA must consider costs prior to the designation. EPA disagreed. claiming the discretionary designation was appropriate based upon health effects and a “broader totality of circumstances” that EPA claims included consideration of costs and benefits.

EPA also disagreed with commenters who asked EPA to exclude certain materials or certain uses of PFOA or PFOS. For example, certain parties that could passively receive PFOA and PFOS, such composting facilities, argued that they should be excluded from liability. EPA did not believe it had the authority or an administrative record necessary to create such exemptions. This could be another basis for litigation as parties that submitted comments may believe they submitted ample information for EPA to make an exclusion.

Enforcement Discretion Guidance

On the same day, EPA released enforcement discretion guidance that stated EPA will not pursue "otherwise potentially responsible parties" unless equitable factors "support seeking response actions or costs …" The guidance identifies 5 specific entities the policy presumptively applies to:

1. Community water systems and publicly owned treatment works (POTWs);
2. Municipal separate storm sewer systems (MS4s);
3. Publicly owned/operated municipal solid waste landfills;
4. Publicly owned airports and local fire departments; and
5. Farms where biosolids are applied to the land.

For entities not listed above, EPA will still consider granting enforcement discretion based upon the below factors.

1. Whether the entity is a state, local, or Tribal government, or works on behalf of or conducts a service that otherwise would be performed by a state, local, or Tribal government;
2. Whether the entity performs a public service role in:
    - Providing safe drinking water;

- Handling of municipal solid waste;
- Treating or managing stormwater or wastewater;
- Disposing of, arranging for the disposal of, or reactivating pollution control residuals (e.g., municipal biosolids and activated carbon filters);
- Ensuring beneficial application of products from the wastewater treatment process as a fertilizer substitute or soil conditioner;

or

- Performing emergency fire suppression services;

3. Whether the entity manufactured PFAS or used PFAS as part of an industrial process; and
4. Whether, and to what degree, the entity is actively involved in the use, storage, treatment, transport, or disposal of PFAS.

In settlements with other PRPs, EPA will attempt to condition settlement on those PRPs waiving their right to seek third-party contribution from entities EPA has deemed meet eligibility requirements under the enforcement discretion policy. The guidance also states that it will attempt to protect PRPs by settling with them on presumably favorable terms and that precludes third-party contribution claims for matters settled against non-settling parties.

Intersection with Disposal Guidelines

This hazardous listing will further call into question safe and available disposal techniques for PFOA and PFOS. EPA recently released Interim Guidance on the Destruction and Disposal of Perfluoroalkyl and Polyfluoroalkyl Substances. The disposal guidance provides very little information on new and readily available disposal techniques. The technologies EPA identified as having a “lower potential for environmental release” are underground injection, landfilling, and thermal treatment. Each of these has limitations and it's likely proper disposal of PFOA and PFOS will become an increasingly more significant issue after this rule is implemented.

Conclusion

Parties that handle material that may contain PFOA or PFOS should ensure it is properly stored so it cannot be released, and then, seek guidance regarding disposing of the material in accordance with law. They should also understand the reporting requirements if there is a release.

If a party has disposed of material with PFOA and PFOS, it should review EPA enforcement discretion policy and review its records to determine where it disposed of the material. Parties should also be aware that EPA's enforcement discretion policy is not self-implementing. Even if a party is in a presumptive enforcement discretion category, it must show it is eligible under the factors and closely follow EPA settlements to determine if other PRPs have agreed to waive claims against its contribution. And it's worth

noting EPA offers no protection against Natural Resource Damage Claims.

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