EPA Designates PFOA and PFOS as CERCLA Hazardous Substances

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The United States Environmental Protection Agency (EPA) announced Friday that it has issued its final rule designating two per- and polyfluoroalkyl substances (PFAS)—perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers—as hazardous substances. In its press release EPA states that "[t]he designation of PFOA and PFOS as hazardous substances under CERCLA enables the agency to use one of its strongest enforcement tools to compel polluters to pay for or conduct investigations and cleanup, rather than taxpayers." EPA has indicated that it will use this designation to go after "those who significantly contributed to the release of PFAS chemicals into the environment," such as PFAS manufacturers or certain federal and industrial facilities."

Simultaneous with finalizing this designation of PFOA and PFOS as hazardous substances, EPA has released a PFAS Enforcement Discretion and Settlement Policy Under CERCLA, where EPA reiterates its intent to go after parties responsible for significant releases of PFOA and PFOS, including federal facilities, such as DOD sites. EPA has indicated it will not pursue response actions or cost recovery under CERCLA against a handful of specific facilities where equitable factors do not support such actions including:

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
5. Farms where biosolids are applied to the land

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Beyond these specifically identified entities, EPA has also indicated that it may extend the same enforcement discretion to additional otherwise responsible parties where the following equitable factors so warrant:

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

There is, however, no commitment that parties meeting the equitable criteria will get the same treatment as those public entities specifically called out in the policy.

EPA has also indicated that it may, where warranted, protect the parties who it has determined to not pursue from cost recovery or contribution claims by those responsible parties EPA has pursued by including language in settlement agreements with such responsible parties that they will not pursue claims against certain non-settling parties or by entering into settlement agreements with the protected parties themselves to bar others from bringing actions against them.

EPA's actions have not provided the regulatory exemption and liability protection from CERCLA liability for PFAS contamination that these "receivers" had hoped, time will tell how EPA exercises its discretion going forward. Legislative relief may still be warranted.

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