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PFAS Chemicals Slated to Become CERCLA Hazardous Substances

Alert

09.01.2022

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On August 26, 2022, the U.S. Environmental Protection Agency (EPA) released a pre-publication copy of its long-awaited proposed rule to add the two most well-known and well-studied PFAS compounds—perflourooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS)—to the list of "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). EPA intends to publish the proposed rule in the Federal Register sometime in the next several weeks, which will trigger a 60-day public comment period. If finalized, the designation of PFOA and PFOS as CERCLA "hazardous substances" will create new reporting obligations and significantly increase the risk of enforcement and litigation related to the cleanup of contaminated sites.

WHAT ARE PFAS?

The term "PFAS" refers to a family of thousands of man-made chemicals that have been used in a wide range of consumer and industrial products since the 1940s. PFAS are used in commercial operations and manufacturing to make products resistant to water, grease, oil, stains, and fire. But the chemical properties that make PFAS so useful also means they do not break down easily and are highly mobile in the environment. Recent research suggests that exposure to PFAS may lead to adverse human health effects including high cholesterol, liver enzymes, decreased immune response to vaccination, thyroid disorders, pregnancy-induced hypertension and preeclampsia, and an increased risk of cancer (testicular and kidney cancer for PFOA; liver and thyroid cancer for PFOS).

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EPA'S PROPOSED RULE AND ANTICIPATED IMPACTS

EPA proposes to amend Part 302 of the CERCLA regulations to add PFOA and PFOS, including their salts (solids) and structural isomers (relevant variants), to the list of hazardous substances. This listing would require entities to report releases of PFOA and PFOS that meet or exceed a reportable quantity of one pound in a 24-hour period to the appropriate regulatory agencies, including the National Response Center. Notably, the proposed reportable quantity for PFOA and PFOS is considerably lower than the reportable quantity for many other hazardous substances, which are often set at 100 pounds or more.

Given that most uses of PFOA and PFOS were phased out in the mid-2000's, the bigger impact of EPA's proposal is that PFOA and PFOS will be subject to the federal CERCLA liability and cost recovery scheme. Once a substance is designated as a "hazardous substance" under CERCLA, EPA can force responsible parties to either clean up a contaminated site or reimburse EPA for the full cost of remediation. Accordingly, significant anticipated consequences of EPA's proposal include:

- Increased scrutiny of sites where biosolids have been land applied and previously authorized under a state delegated program (in these instances, biosolids containing PFAS constituents would not have been known or detected at the time of land application)
- The addition of more sites to the National Priorities List
- Increased costs at sites that are currently being studied and remediated if parties are required to address PFOA and PFOS impacts
- Requests for sampling and testing for PFAS at existing Superfund sites, and the potential reopening of existing Superfund sites if EPA determines, during a five-year review, that previously completed remedial actions are no longer protective of human health and the environment
- A significant increase in expensive and time-consuming Superfund litigation for actual or potential releases of PFOA or PFOS (CERCLA imposes a strict, and joint and several liability scheme meaning that even entities and industries that might have minimally contributed to contamination at a particular site can be held liable)

Right now, it is not clear what standards may govern a PFOA or PFOS cleanup action. There is a patchwork of regulation at the state level, ranging from binding cleanup levels to advisory guidance to no direction at all. EPA further complicated matters in June 2022 when it issued interim drinking water health advisories for PFOA and PFOS that lowered its prior advisories to levels below what existing analytical methods can even measure in drinking water. It may be that cleanup standards are determined on a case-by-case basis for the time being.

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WHO IS IMPACTED

If finalized as proposed, EPA's proposed rule will significantly impact many industries. Liability would not be limited to manufacturers of PFOA and PFOS or products containing those substances. It could instead extend to downstream users of PFOA and PFOS, landfills, wastewater treatment facilities, and owners of properties where PFOS or PFOS contamination has come to be located. Other potentially affected entities include aviation operations, paper mills, and operations that use polymers, photographic film material, pesticides, and some medical devices. Insurers, investment firms, and private equity firms should consider potential liabilities under this change in the law.

TIMING

As noted above, affected stakeholders must provide comments to EPA within 60 days of the proposed rule's publication in the Federal Register. After the close of the comment period, the agency is required to respond to the comments before publishing a final rule.

EPA's PFAS Strategic Roadmap indicates that EPA plans to finalize this rule in the summer of 2023. That timing could be delayed by a few months because EPA issued this proposed rulemaking several months later than anticipated. In addition, because the expected annual cost of the proposed rule is expected to be well above $100 million, EPA must complete a regulatory impact analysis before the rule can be finalized. This, too, could delay publication of a final rule into late 2023.

Finally, the EPA's pre-publication action is just one step in a larger effort to regulate PFAS under CERCLA. Later this year, EPA plans to issue an Advance Notice of Proposed Rulemaking that will consider designating additional PFAS as hazardous substances under CERCLA. While it is too early to tell whether EPA plans to designate PFAS compounds as hazardous substances on a chemical-by-chemical basis, GenX and PFBS are among the chemicals most likely to be subject to regulatory action sooner rather than later. GenX and PFBS were developed to replace PFOA and PFOS, respectively, and EPA issued final lifetime drinking water health advisories for the chemicals earlier this summer when it issued interim updated health advisories for PFOA and PFOS, too.

Stinson's environmental attorneys are keeping watch of all of the developments related to the regulation of PFAS, and are prepared to help you navigate the shifting regulatory landscape for PFAS and assess associated risks in real time.

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