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EPA Finalizes Groundbreaking Rule to Regulate Two PFAS under CERCLA

Alert

04.19.2024

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On Friday, April 19, 2024, the U.S. Environmental Protection Agency (EPA) released a pre-publication version of its Final Rule (the Rule) designating two widely used per- and polyfluoroalkyl substances (PFAS) – Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) – as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund).[1] This highly-anticipated rule will have far-ranging impacts, including new reporting obligations, new considerations in real estate transactions, increased enforcement and increased litigation related to the cleanup of contaminated sites. To emphasize this point, we note that on Aug. 19, 2023, EPA announced a new National Enforcement and Compliance initiative to address exposure to PFAS.

The Rule will take effect 60 days after it is published in the *Federal Register*.

ABOUT THE RULE

The Rule amends 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.[2]

After the Rule takes effect, entities will be required 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. The reportable quantity for PFOA and PFOS is considerably lower than the reportable quantity for many other hazardous substances, often set at 100 pounds or more.

In addition, by designating PFOA and PFOS as CERCLA hazardous substances, EPA can now compel responsible parties to either clean up a site contaminated with those chemicals or reimburse EPA for the full cost of remediation. While many industries and municipal utility providers submitted comments requesting statutory exemptions from the Rule, the final Rule contains no industry-specific exemptions. Other significant consequences of the Rule include:

- 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 PFOA and PFOS 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, as 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.
- 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).

In addition, the designation of PFOA and PFOS as CERCLA hazardous substances means that those chemicals must now be considered as part of a Phase I Environmental Site Assessment under ASTM Standard E1527-21 for purposes of meeting the "all appropriate inquiries" standard. Prospective purchasers of real estate must comply with the all appropriate inquiries standard to qualify for one of CERCLA's innocent purchaser defenses. This could include conducting a limited Phase II investigation involving sampling for PFAS compounds in soil, vapor and groundwater to confirm the presence or absence of PFAS prior to acquiring the property and creates new considerations regarding due care obligations of property owners. Although it will not establish an absolute requirement to conduct a Phase II investigation, sampling and analysis for PFOA and PFOS may be required to maintain Bona Fide Prospective Purchaser (BFPP) status if there is evidence of a continuing release or imminent threat of release. It may also justify a more thorough review of fire suppression systems and fire-fighting incidents on the property.

WHO WILL BE IMPACTED BY THE RULE?

The Rule will significantly impact many industries, including but not limited to manufacturers of PFOA or PFOS or products containing those substances, downstream users of PFOA and PFOS, waste management facilities, wastewater treatment facilities and owners of properties where PFOA and PFOS contamination

is or could be located. Other potentially affected entities include aviation operations, paper mills and operations that use polymers, photographic film material, pesticides, as well as some medical devices, landfills, firefighting training facilities, metal plating facilities and textile coating operations. Insurers, investment firms and private equity firms should consider potential liabilities under the Rule.

Notably, EPA released its "PFAS Enforcement Discretion and Settlement Policy Under CERCLA" on Friday, April 19, 2024, as well, which sets forth how the agency plans to exercise its enforcement discretion under the Rule. EPA's guidance states that it does not intend to pursue entities "where equitable factors do not support seeking response actions or costs under CERCLA," including, but not limited to, community water systems, publicly-owned treatment works, municipal separate storm sewer systems, publicly-owned and/or -operated municipal solid waste landfills, publicly-owned airports and local fire departments, and farms where biosolids are applied to the land. But, the enforcement discretion policy is not mandatory, so these entities should still be on alert as to what this Rule could mean for them.

EPA's recent Rule setting federal maximum contaminant limits (MCLs) for certain PFAS works in conjunction with this Rule by impacting remedy selection for PFOA and PFOS. Remedy selection under CERCLA requires consideration of protectiveness and applicable or relevant and appropriate requirements, and the applicable or relevant and appropriate requirements for groundwater include the federal MCLs.

NEXT STEPS

Potentially affected entities should be proactive and prepared when the Rule takes effect. Companies should analyze historical information about where and when PFOS and PFOA were used in operations to understand the scope of potential contamination.

Companies should also begin to assess potential insurance coverage, a time-consuming task. Because PFAS have been used since the 1950s, both commercial general liability (CGL) and more recent pollution-specific insurance policies might provide coverage for third-party PFAS-related claims. The key issue will be whether these policies contain pollution exclusions that restrict coverage. Of particular relevance, the pollution exclusion did not appear in CGL policies until 1973, and the absolute pollution exclusion – which will bar coverage – did not appear until 1985. Historical CGL policies will likely provide coverage where historical contamination is alleged. Even if such policies have low limits or limits eroded by previous claims, they will still be valuable because of an insurer's duty to defend.

Finally, companies that are tasked with cleaning up a PFOA and/or PFOS contaminated site should be aware of EPA's recently updated Interim Guidance on the Destruction and Disposal of PFAS and Materials Containing PFAS.[3] Affected stakeholders will have 180-days from the date of publication in the *Federal Register* to comment on the updated Interim Guidance. The updated Interim Guidance recommends that

decision-makers generally prioritize the use of destruction and disposal technology options with a lower potential for environmental release of PFAS. EPA lists the following disposal and destruction options from lowest to highest based on their relative potential to release PFAS to the environment: interim storage with controls; underground injection; landfilling; and thermal treatment. While EPA did not take a position on the use of new or emerging technologies such as mechanochemical degradation, electrochemical oxidation, gasification and pyrolysis and supercritical water oxidation – all of which EPA acknowledges have shown promise for PFAS destruction – the Interim Guidance includes a framework that decision-makers can employ to determine if a new technology would work at their site.

Stinson attorneys are actively tracking the evolving regulatory landscape around PFAS. For more information on the evolving regulatory landscape around PFAS, please contact one of the attorneys listed or the Stinson LLP contact with whom you regularly work.

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1. In the preamble to the Rule, EPA states that available scientific information indicates that human exposure to PFOA and/or PFOS is linked to a broad range of adverse health effects, including developmental effects to fetuses during pregnancy or to infants (e.g., low birth weight, accelerated puberty, skeletal variations), liver effects (e.g., tissue damage), immune effects (e.g., antibody production and immunity) and other effects (e.g., cholesterol changes). The agency also states that the toxicity assessments prepared in support of its recent National Primary Drinking Water Regulation for PFAS indicate that PFOA and PFOS may cause carcinogenic effects in humans and animals.
2. Specifically, the list of hazardous substances in Table 302.4 of 40 C.F.R. part 302 will be amended to include PFOA, PFOS and their salts and structural isomers.
3. The National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA) directed EPA to address the destruction and disposal of PFAS and specific PFAS-containing materials, including aqueous film-forming foam, contaminated media, textiles (other than consumer goods) and various wastes from water treatment. Looking forward, the NDAA requires EPA to review and update the guidance as appropriate, but no less frequently than every three years.

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