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EPA DESIGNATES PFOS AND PFOA AS CERCLA HAZARDOUS SUBSTANCES

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SUMMARY

On April 19, 2024, the United States Environmental Protection Agency ("EPA") announced that it is designating perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS") as Hazardous Substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). As discussed below, this designation will, among other things, affect remediation efforts, notification requirements, and due diligence activities. It also will have ripple effects across many state regulations that reference CERCLA Hazardous Substances.

Originally proposed in September 2022, finalization of the rule has been significantly delayed, largely due to the over 64,000 public comments received. Importantly, one of the major concerns is how the CERCLA listing would impact municipally owned passive receivers of PFAS like landfills, publicly owned treatment works, airports, and farms that have land applied biosolids. To address those concerns, EPA issued an Enforcement Discretion Guidance document simultaneously while issuing the final rule which provides some relief to those entities.

The final rule, related website, and press release provide additional information. Once the rule is published in the Federal Register, it becomes effective in sixty (60) days, absent any legal challenges.

WHAT GENERAL INDUSTRIES ARE AFFECTED?

EPA describes and highlights seven categories of businesses that are potentially affected by this rule:

(1) PFOA and/or PFOS manufacturers (including importers);

(2) PFOA and/or PFOS processors;

(3) Manufacturers of products containing PFOA and/or PFOS;

(4) Downstream users of PFOA and PFOS;

(5) Downstream users of PFOA and/or PFOS products;

(6) Waste management facilities; and

(7) Wastewater treatment facilities.

While the listed industries will be impacted by the new listing, and EPA has provided a more expanded list of industries that fall into these categories, EPA's list omits many other industries and businesses that will also be impacted. Most notably, the rule will affect current and former owners and operators of real properties, as we discuss in more detail below. The rule will also change the way that real property due diligence is conducted, and it will bring PFAS issues more clearly into focus in both real estate and corporate transactions.

HOW DOES THIS RULE IMPACT MY BUSINESS?

There are numerous ways this designation may affect your business, including:

- **Phase I Environmental Site Assessments ("Phase I ESAs"):** PFOA and PFOS must now be evaluated in Phase I ESAs pursuant to the current ASTM standard (ASTM E1527-21) in order to satisfy the All Appropriate Inquiries standard. Including these substances in Phase I ESA reports will alter the way that PFAS risk is assessed and underwritten in real estate transactions, and it may impact the availability of environmental insurance coverage. For additional information, please review BCLP's client alert that addresses these issues in further detail.

- **Potentially Responsible Parties ("PRPs"):** Current or former owners or operators of a facility may be jointly and severally liable for the investigation and remediation of CERCLA Hazardous Substances. For example, EPA could order your business to address historic or ongoing PFOA or PFOS releases as a PRP (including re-opener liability as noted below). Even if your business is not named as a PRP, it could be subject to contribution claims by various entities seeking to allocate some portion of their cleanup costs, associated with remediating PFOA or PFOS. In addition, PRPs, that include current or former facility owners or operators, generators, arrangers, and transporters, now face potential liability arising from the disposal of PFOA and PFOS materials.

- **Site Reopeners or Modifications:** Depending on the terms of any prior settlements or closure documents, sites that have been remediated and/or closed through a regulatory process may be subject to "reopening" to address PFOA and PFOS contamination. Moreover, sites that are currently undergoing an investigation or remediation process may now be required to investigate and address PFOA and PFOS impacts.

- **Reporting Requirements:** Under the Emergency Planning and Community Right-to-Know Act ("EPCRA"), any person in charge of a vessel or a facility must immediately report releases of PFOA and PFOS to various entities, including the National Response Center, if they exceed the reportable quantity threshold. The reportable quantity for each of these PFAS compounds is **one pound within a 24-hour period**, which is significantly lower than the typical range of 100-5,000 pounds for reportable quantities for other Hazardous Substances. EPA has developed some helpful information discussing this requirement.

- **Hazardous Materials Transportation Act ("HMTA"):** The Department of Transportation must list and regulate PFOA and PFOS as Hazardous Materials under HMTA. This could impact how these substances are transported by your business and relevant requirements such as training, placarding, packaging, etc.

- **Transfer Requirements for Government-Owned Property:** Federal agencies that transfer or sell their property will be required to provide information about the storage, release, or disposal of PFOA or PFOS, pursuant to CERCLA § 120(h). If deemed appropriate, an agency will issue a covenant verifying that it has cleaned up any existing contamination or will take the necessary actions to do so in the future.

ENFORCEMENT

Resting upon the "Polluter Pays" principle, EPA discusses in the final rule how PFOA and PFOS "present substantial danger to public health or welfare" when released into the environment. As a result, on April 19, 2024, EPA also released a memorandum entitled *PFAS Enforcement Discretion and Settlement Policy Under CERCLA* ("PFAS Policy Memo"), which provides "direction to all EPA enforcement and compliance staff about how EPA will exercise its enforcement discretion under CERCLA in matters involving PFAS."

Several key take-aways from this guidance include the following:

- EPA's enforcement is expected to focus on PFAS manufacturers and others who use PFAS in manufacturing.

- EPA has stated it does not intend to focus on publicly owned, passive receivers of PFOA and PFOS including, but not limited to, community water systems and publicly owned treatment works, municipal separate storm sewer systems, publicly owned/operated municipal solid waste landfills, publicly owned airports and local fire departments, and farms where biosolids are applied to the land. EPA's rationale is that the "equitable factors do not support seeking response actions or costs under CERCLA." Significantly, EPA may also require settling PRPs to waive the right to pursue claims against these types of parties as it relates to PFOA and/or PFOS. Notably, this is not a blanket exemption for enforcement, and EPA still has the authority

to investigate and order remedial action at these types of facilities, but it is a clear indication that these types of facilities will not be the primary focus for enforcement.

- Settlements could also include "in-kind" services, such as monitoring or institutional controls.

The challenge for businesses and entities subject to potential CERCLA claims is that this PFAS Policy Memo is merely a non-enforceable EPA policy and not a binding regulation. Further, the PFAS Policy Memo does not insulate businesses or entities from CERCLA claims by entities other than EPA.

WHAT COMES NEXT?

As discussed, this rule will trigger several different types of requirements. Below is a non-exhaustive list of some of the types of increased activity we anticipate may reasonably result from this rule:

- Future listing of PFOS and PFOA as Hazardous Substances under state laws (giving state agencies enhanced authority to pursue enforcement or recover costs);
- Review of sites currently or formerly subject to investigation or remediation to add PFOA or PFOS as constituents;
- Increased due diligence activity in both real estate and corporate (M&A, lending) transactions which could affect financing, availability of insurance, and underwriting;
- Increased due diligence in supply chain management/supply chain inquiries;
- Increased cost recovery and contribution activity among PRPs (including litigation); and
- Additional product compliance rulemaking to phase out PFOA and PFOS from products.

CONCLUSION

While the final CERCLA listing for these two compounds comes as no surprise, it is quite impactful to businesses in many ways. For more information on PFAS chemicals, and the regulatory and litigation risks that they pose, please visit our PFAS webpage. If you have a question about how to manage PFAS risk in any jurisdiction, including in transactional and litigation settings, contact Tom Lee, Bryan Keyt, Erin Brooks, or any other member of our PFAS team at BCLP.

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