Another Regulatory Shoe Drops: EPA Designates 2 PFAS As Hazardous Substances Under CERCLA and Issues Enforcement and Settlement Policy

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Following on its setting MCLs for several per- and polyfluoroalkyl substances which we discuss here), the Environmental Protection Agency (EPA), on April 17, dropped another regulatory shoe—designating two types of PFAS, perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). See Final Designation of PFOA and PFOS as Hazardous Substances. The implications of this designation are far reaching.

As EPA Assistant Administrator Uhlman explains, in an April 19, 2024 Enforcement Discretion and Settlement Policy Under CERCLA, the result of this designation is that the "full strength of CERCLA" is now available to EPA and private parties to compel remediation of sites contaminated with those 2 PFAS. The implications of this designation include the creation of new Superfund sites, the alterations of current remediation plans, and, potentially, the reopening of closed sites and the addition of new PRPs to existing sites.

EPA's policy statements indicate EPA "will focus on holding accountable those parties that have played a significant role in releasing or exacerbating the spread of PFAS into the environment, such as those who have manufactured PFAS or used PFAS in the manufacturing process, and other industrial parties." And EPA, further, intends to take into account impacts of these 2 PFAS on environmental justice and overburdened communities in establishing enforcement priorities.

EPA further explains: "EPA 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 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 may extend its enforcement discretion to other parties as well. These statements, however, should not come as comfort for most. Moreover, EPA's enforcement discretion is a policy and not binding on private parties in CERCLA litigation.

There is a wide range of companies that may have used PFOS and PFOA, or products containing them, that are not on the enforcement policy's extremes of the largest manufactures of PFAS, on the one hand, and a municipal fire department, on the other. Further, while EPA's statements regarding its current philosophy on enforcement may be indicative of its plans in the not-to-distant future, the rule it promulgates requires that no such discretion be exercised.

The implications of this designation, therefore, should significantly impact PFAS manufacturers and significant users, and will likely will have a ripple effect on CERCLA remediations, both existing and new, throughout the country, because of the ubiquitousness of these 2 PFAS in the environment.