

EPA Designates PFOA and PFOS as Hazardous Substances Under CERCLA



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On April 19, 2024, EPA promulgated its highly anticipated final rule (the “Rule”) designating two types of PFAS – perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) – as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). The Rule will become effective July 8, 2024.

PFAS – per- and polyfluoroalkyl substances – are a group of chemical compounds known for their ability to resist heat, oil, stains, grease, and water. Because of their resistance to degradation, they were historically used in a variety of consumer products such as carpets, non-stick cookware, firefighting foam, and food packaging. Also because of this durability, PFAS do not break down naturally, leading to bioaccumulation in the environment, wildlife, and humans. The Rule was proposed in September 2022, in response to several studies positing that exposure to PFAS (PFOA and PFOS in particular) may increase the risk of certain types of cancer and other adverse health effects.

Under CERCLA, the federal government has the authority to assess and remediate or require [potentially responsible parties (PRPs) to remediate contaminated sites and respond to releases or threatened releases of hazardous substances, pollutants, and contaminants. The Rule may result in the reopening of previously closed or dormant CERCLA sites. Hazardous substance designation also creates a requirement to report releases of one pound or more under both CERCLA and the Emergency Planning and Community Right-to-Know Act (EPCRA).

The Rule also will have a significant impact on commercial real estate transactions, as the classification of PFOA and PFOS as hazardous substances brings them within the scope of Phase I Environmental Site Assessments under the new ASTM E-1527-21 standard. The presence of PFOA or PFOS on a property may result in their identification as a recognized environmental condition (REC), which may warrant additional investigation and, in some cases remediation.

In tandem with the Rule, EPA released a PFAS Enforcement Discretion and Settlement Policy Under CERCLA (Enforcement Policy), which explains that EPA will only bring enforcement actions against entities that significantly contributed to the release of PFAS into the environment. This list consists of parties that have manufactured or used PFAS in a manufacturing process, federal facilities, and other industrial parties. Specifically, the Enforcement Policy states that EPA does not intend to pursue response actions against farmers, municipal landfills, water utilities, publicly owned treatment works, municipal separate storm sewer systems, publicly owned airports, and local fire departments. This Enforcement Policy is likely a response to the concerns of many parties, who raised concerns that classifying PFOA and PFOS as hazardous substances would carry enormous remediation costs due to their pervasiveness in consumer products and various industries. While the Enforcement Policy should provide some comfort, EPA's stated enforcement discretion does not protect parties from third-party claims.

For questions regarding this client alert and further impacts of the Rule, please contact Partners Berj Parseghian (bparseghian@lippes.com) or Amy Reichhart (areichhart@lippes.com), or Associate Madelyn VanDorpe (mvandorpe@lippes.com).

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