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Proposed CERCLA Designation of PFOA and PFOS

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On May 8, 2024, the U.S. Environmental Protection Agency (EPA) published its final rule designating perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

The rule requires entities to report releases of PFOA and PFOS that meet or exceed reportable quantities to federal, state or tribal agencies as soon as they have knowledge of any such release. It also will facilitate an increase in the pace of cleanups of affected sites. EPA will now be able to conduct response actions if there is a release or threatened release of the designated per- and polyfluoroalkyl substances (PFAS) without having to establish an imminent and substantial danger to public health or welfare. In addition, EPA will be able to recover costs from potentially responsible parties and/or require potentially responsible parties to conduct the cleanups themselves.

Congressional Concerns About Passive Receivers

While much will be written about the effect of EPA's move, the congressional response bears watching. EPA's move sparked a number of legislators to respond with concerns over the burden created by the rule on "innocents," given CERCLA's strict liability framework. In particular, they expressed worry that passive receivers of PFAS, including water utilities, waste treatment plants and landfills, will end up bearing a disproportionate amount of the cost of cleanup. Sen. Shelley Moore Capito (R-WV), Ranking Member of the Environment & Public Works Committee (the Committee), expressed concern that the rule "puts local

communities and ratepayers on the hook for PFAS contamination they had nothing to do with in the first place" and vowed to respond.

In a March 2024 Committee hearing to examine the then-proposed designation under CERCLA, Sen. Capito also emphasized that CERCLA is designed to serve as a last stop in deeming a substance "hazardous"; before a substance is designated as such under CERCLA, it is usually first studied and regulated under other federal environmental laws. She noted that the "CERCLA first" approach could deny liability shields to passive receivers of PFAS contaminated waste and wastewater and give rise to frivolous lawsuits against water utilities, going against CERCLA's "polluter pays" principle. Sen. Capito's concerns were echoed by members of the panel testifying before the Committee; Michael D. Witt (General Counsel, Passaic Valley Sewerage Commission) questioned the sufficiency of protections offered by exemptions currently available under CERCLA and by EPA's potentially unenforceable claims that it will not proactively target passive receivers of PFAS waste. Robert Fox (testifying on behalf of the National Waste and Recycling Association & Solid Waste Association of North America) expanded upon Mr. Witt's concerns and postulated that waste facilities might refuse to accept PFAS-containing waste for fear of liability, which would disrupt the waste management system.

Separately, Sen. Dick Durbin (D-IL) and Rep. Betty McCollum (D-MN) raised similar concerns and introduced the Forever Chemical Regulation and Accountability Act (FCRA). While imposing reporting requirements on users and manufacturers of PFAS and requiring the phase-out of PFAS in certain products, FCRA would exclude from those requirements entities that receive PFAS in the normal course of their operations, including solid waste management facilities, composting facilities, treatment works and public water systems.

What Does This Mean for Fluoropolymers?

The response from the Hill offers opportunities for stakeholders to get involved and may even offer another bite at the apple of "what is a PFAS?" Sen. Capito previously sponsored a bill aimed at mitigating and remediating PFAS contamination that targeted non-polymeric PFAS and human-made side-chain fluorinated polymers while exempting PFAS that are less mobile in the environment. If the view is that EPA overstepped, similar efforts may get an unexpected boost. Even the introduction of bills like FCRA, which uses a broad chemical structure-based definition of PFAS, may offer an opportunity for manufacturers to provide comments as part of the public consultation process to narrow these definitions. This could

be critical to industries that rely on fluoropolymers, including clean energy, electric vehicles, medical device and microchip businesses.

Categories

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