

CERCLA PFAS Concerns Grow Among Some States

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We [previously provided an update](#) regarding the EPA's notification to the White House Office of Management and Budget (OMB) that it intends to move forward with regulating PFOA and PFOS as "hazardous substances" under CERCLA. We further detailed the [growing movement](#) among some industries to carve out a PFAS CERCLA exemption. Now, several state environmental officials are advocating for an exemption, which would necessarily shield some industries from liability, but open other industry types up to liability issues.

Regardless of the outcome, as we have predicted many times previously, the "hazardous substance" designation under CERCLA will have enormous financial impacts on companies with any sort of legacy or current PFOA and PFOS pollution concerns. Insurers, investment firms, and private equity alike must pay attention to this change in law when considering their respective interests in corporations.

PFAS CERCLA Exemptions

Once a substance is classified as a "hazardous substance" under [CERCLA](#), the EPA can force parties that it deems to be polluters to either cleanup the polluted site or reimburse the EPA for the full remediation of the contaminated site. Without a PFAS Superfund designation, the EPA can merely attribute blame to parties that it feels contributed to the pollution, but it has no authority to force the parties to remediate or pay costs. The designation also triggers considerable reporting requirements for companies. Currently, those reporting requirements with respect to PFAS do not exist, but they would apply to industries well beyond just PFAS manufacturers.

Three industries in particular met with the OMB earlier in 2022 to explain the enormity of regulatory and cleanup costs that the industries would face with a CERCLA designation of PFOA and PFOS – water utilities, waste management companies, and the International Liquid Terminals Association. These industries in particular are concerned about bearing the burden of enormous cleanup costs for pollution that third parties are responsible for. Industries are urging the OMB and EPA to consider other ways to achieve regulatory and remediation goals aside from a CERCLA designation.

During an April 5, 2022 meeting of the Environmental Council of the States (ECOS), several states also expressed concerns regarding the impact that a CERCLA designation for PFAS types would have in their states and on their constituent companies. The state environmental leaders discussed

with EPA representatives how the EPA would view companies in their states that fall into categories such as waste management and water utilities, who are already facing uphill battles in disposing of waste or sludge that contains PFAS.

Realizing that the EPA is likely set on its path to designate at least two PFAS as “hazardous substances”, though, industries are asking the EPA to consider PFAS CERCLA exemptions for certain industries, which would exempt certain industry types from liability under CERCLA. It is highly questionable whether the EPA has the authority to create such exemptions under CERCLA. It might be possible for industries to press Congress to introduce legislation that would create such exemptions; however, given that there is already considerable federal legislative effort to regulate PFAS (and PFOA and PFOS in particular), it is uncertain whether those lobbying efforts would succeed, either.

PFAS Superfund Designation: Impact On Businesses

The downstream effects of a PFOA and PFOS designation would be massive. Companies that utilized PFOA and PFOS in their industrial or manufacturing processes and sent the PFOA/PFOS waste to landfills or otherwise discharged the chemicals into the environment will be at immediate risk for enforcement action by the EPA given the EPA’s stated intent to hold all PFAS polluters of any kind accountable. Waste management companies should be especially concerned given the large swaths of land that are utilized for landfills and the likely PFAS pollution that can be found in most landfills due to the chemicals’ prevalence in consumer goods. These site owners may be the first targeted when the PFOA/PFOS designation is made, which will lead to lawsuits filed against any company that sent waste to the landfills for contribution to the cost of cleanup that the waste management company or its insured will bear.

Also of concern to companies are the re-opener possibilities that a CERCLA designation would result in. Sites that are or were previously designated as Superfund sites will be subject to additional review for PFOA/PFOS concerns. Sites found to have PFOA/PFOS pollution can be re-opened by the EPA for investigation and remediation cost attribution to parties that the EPA finds to be responsible parties for the pollution. Whether through direct enforcement action, re-opener remediation actions, or lawsuits for contribution, the costs for site cleanup could amount to tens of millions of dollars, of course depending on the scope of pollution.

Conclusion

Now more than ever, the EPA is clearly on a path to regulate PFAS contamination in the country’s water, land and air. The EPA has also for the first time publicly stated when they expect such regulations to be enacted. These regulations will require states to act, as well (and some states may still enact stronger regulations than the EPA). Both the federal and the state level regulations will impact businesses and industries of many kinds, even if their contribution to drinking water contamination issues may seem on the surface to be de minimus. In states that already have PFAS drinking water standards enacted, businesses and property owners have already seen local environmental agencies scrutinize possible sources of PFAS pollution much more closely than ever before, which has resulted in unexpected costs. Beyond drinking water, though, the EPA PFAS plan shows the EPA’s desire to take regulatory action well beyond just drinking water, and companies absolutely must begin preparing now for regulatory actions that will have significant financial impacts down the road.

National Law Review, Volumess XII, Number 110

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