DANIEL J. BROWN L.L.C.

Law Practice Focused on
Sustainability & Environmental Protection

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PFOS & PFOA Designated as *Hazardous Substances*

On May 8, 2024, EPA promulgated its final rule designating two PFAS compounds - perfluorooctane sulfonate (PFOS) and perfluorooctonoic acid (PFOA) - as hazardous substances under CERCLA (also commonly known as Superfund). PFAS, or per- and polyfluoroalkyl substances, have been widely used in a variety of industrial and consumer applications for decades, including firefighting foams, non-stick cookware, and water-repellant fabrics.

As its name suggests, CERCLA is a comprehensive statute. It covers, among other things, release notification, cleanup of contaminated sites, and recovery of costs associated with such cleanups. Thus, the impact of these designations is multi-faceted. Perhaps most significant is the impact this designation will have on liability for response costs associated with the cleanup of contaminated sites where hazardous substances are present. Under CERCLA, liability of covered entities and persons for response costs associated with cleanup of hazardous substances at contaminated sites is extremely broad. Such liability is strict, meaning that liability attaches without regard to negligence or fault. In addition, such liability is joint and several, meaning that at least in theory, a single responsible party that only contributed a portion of the contamination present at the site can be held liable for 100 percent of the response costs.

Due to their chemical structure, PFOS, PFOA, and other PFAS are quite persistent in the environment and are highly resistant natural breakdown processes. In addition, most environmental regulatory bodies consider PFAS to be a threat to human health at extremely low concentrations. As such, these regulatory bodies have established very strict cleanup levels for these compounds. Given the ubiquitousness and persistence of, as well as the extremely low cleanup thresholds for, PFAS, these designations could have a significant impact on contaminated sites throughout the country.

EPA's PFAS Enforcement Discretion and Settlement Policy Under CERCLA

In anticipation of the promulgation of the final rule designating PFOS and PFOA as hazardous substances under CERCLA, EPA issued its PFAS Enforcement Discretion and Settlement Policy Under CERCLA on April 19, 2024 (referred to herein as the "Enforcement and Settlement Policy"). On a superficial level, the Enforcement and Settlement Policy takes account of EPA's broad authority to force potentially responsible parties (PRPs) to undertake cleanup actions and/or pay for response costs. More specifically, the title of the policy reflects the fact that EPA has multiple pathways for pursuing such actions. Some of these pathways are very much in the nature of enforcement actions, while other pathways arise out of EPA's unique role under CERCLA as a litigant who holds most of the cards when pursuing options to settle litigation.

While the Enforcement and Settlement Policy references EPA's enforcement discretion, the real focus of the policy is - or at least should be - on EPA's ability to pursue and settle litigation. The reason for this is that the Enforcement and Settlement Policy isn't really about who EPA may pursue, so much as who EPA intends to protect. And when it comes to protecting certain PRPs from liability, EPA's ability to do so arises from its settlement authority, and not its enforcement discretion.

The Enforcement and Settlement Policy expresses a clear intent on the part of EPA to pursue manufacturers and industrial users of PFOS and PFOA, and to protect publicly owned treatment works, and waste disposal facilities, municipal airports, and certain governmental facilities installations. Under CERCLA though, PRPs are generally free to pursue contribution claims against other parties that may also have liability for response costs at a contaminated site. Some of these parties may include the same categories of parties that EPA wishes to protect.

As the Enforcement and Settlement Policy points out, there are two means by which EPA can protect such parties. Both such means arise from EPA's authority to pursue and settle litigation to require cleanups and/or seek response costs. First, in pursuing settlements with manufacturers or users of PFOS or PFOA, EPA can demand that the terms of the settlement include a waiver on the part of the major PRP to pursue any contribution claims against categories of parties that EPA wishes to protect. Second, EPA can enter into settlements with parties it wishes to protect. Under CERCLA, as part of such settlements, EPA can extend contribution protection to these settling parties. This would shield these settling parties from any contribution claims brought by manufacturers and users of PFOS or PFOA.

What the Enforcement and Settlement Policy does not address is that while EPA holds most of the cards when pursuing settlement strategies in CERCLA litigation, it is not necessarily in the driver's seat. A manufacturer or user of PFOS or PFOA who believes it has strong contribution claims against parties whom EPA wishes to protect is not necessarily required to enter into a settlement with EPA. Its other options may not be great. However, if the manufacturer or user in question believes that waiving its claims against other PRPs is worse, it may decide to roll the dice and forego the opportunity to settle with the government.

Second, a manufacturer or user of PFOS or PFOA can challenge a settlement that EPA

proposes to enter for the primary purpose of offering contribution protection to the other settling parties. Such challenges are rarely successful. A court will uphold a proposed settlement so long as it is fair, reasonable, and in the public interest. However, even if it is not a very good option, it is still an option. If a PRP believes it has strong equitable claims against certain other PRPs, and it does not wish to lose its ability to pursue contribution claims against such PRPs, it may want to take a shot at challenging the proposed settlement.

So, as always, EPA holds most of the cards when pursuing litigation and settlement strategies pursuant to its authority under CERCLA. However, it doesn't hold all the cards. PRPs who believe they have strong contribution claims against other PRPs whom EPA wishes to protect may have the deck stacked against them, but they still have options for maintaining or pursuing such claims, regardless of who EPA seeks to protect.

EPA to Study PFAS Content of POTW Influent Streams

EPA recently issued a notice announcing its effort to collect data on the content of PFAS in industrial effluent streams discharged to the nation's largest publicly owned treatment works (POTWs). This data collection effort is part of a study that will likely be used to support the development of potentially stringent effluent limitations guidelines (ELGs) for these influent streams. The notice was published on March 26, 2024. The public comment period for the data collection effort described in the notice ended on May 28, 2024. Thus, some of the largest POTWs in the country will likely be called upon soon to respond to requests for information in connection with the data collection effort.

According to the notice, EPA plans to conduct the data collection effort in two phases. In the first phase, the POTWs with the 400 highest daily flow rates in the U.S. will be required to complete a comprehensive questionnaire. Included among the information sought by EPA in this questionnaire will be information relating to industrial users of the POTWs, and information on known or suspected discharges of PFAS to the POTWs. POTWs will also be required to collect and analyze the effluent of certain industrial dischargers. In the second phase, certain POTWs will be required to collect grab samples of sewage sludge for PFAS.

Industrial users should consider and evaluate the possibility of their POTW discharges being sampled and analyzed for PFAS. In addition, POTWs subject to this data collection effort may use their own information collection authority under sewer use ordinances and industrial pretreatment permits in order to collect information they may need for a full and complete response to EPA's questionnaire. Industrial users should be cognizant of the possibility of receiving such requests, and consider how they might want to respond.

L.L.C.

Daniel J. Brown, L.L.C.
4062 Peachtree Rd.
Suite A #304
Atlanta Georgia 30319
(404) 850-1111

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