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EPA Issues PFAS Enforcement Discretion Policy Addressing Environmental Cleanup Liability

On April 19, 2024, the U.S. Environmental Protection Agency (EPA) released its PFAS Enforcement Discretion and Settlement Policy Under CERCLA, addressing environmental cleanup liability for per- and polyfluoroalkyl substances (PFAS). The EPA's issuance of the policy came just two days after the agency formally announced it would list two PFAS, perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), as "hazardous substances" under the nation's Superfund law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a decision with long-term consequences for site closure and contaminated site cleanup.

In light of CERCLA's joint-and-several strict liability framework, the EPA's decision comes as no surprise as an attempt to mollify the impact on passive potentially responsible parties (PRPs). For many businesses, however, the EPA's policy will feel like the agency has cut off their hand, only to give them a few fingers back. Indeed, whether a company is considered passive or a major PRP for the release of PFAS into the environment, is an issue that will take years – and even decades – before the liability contours under CERCLA and the PFAS Enforcement Discretion Policy come into focus.

Entities Entitled to PFAS Enforcement Discretion

According to the EPA, the purpose of its PFAS Enforcement Discretion Policy is to "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. For purposes of this policy only, these parties are referred to as

major PRPs." As a result, the agency has signaled that it does not intend to seek cleanup costs or response actions from the following types of PRPs:

- Community water systems and publicly owned treatment works (POTWs);
- Municipal separate storm sewer systems (MS4s);
- Publicly owned / operated municipal solid waste landfills;
- Publicly owned airports and local fire departments; and
- Farms where biosolids are applied to the land.

PFAS are ubiquitous in the environment, having been utilized since the 1940s in a wide range of life-essential products, such as fire-fighting foam and food packaging, as well non-stick cookware and water-resistant fabrics in clothing and carpets. The EPA's action to list PFOA and PFOS as CERCLA hazardous substances is just one of many wide-sweeping actions taken by the agency under its PFAS Strategic Roadmap, including its April 10, 2024, final rule promulgation of drinking water standards setting PFOA and PFOS maximum contaminant levels (MCLs) at 0.000000000004 g/L, or 4 parts per trillion (PPT). 89 Fed. Reg. 32532 (Apr. 26, 2024).

Other Entities May Also Qualify for PFAS Enforcement Discretion

The EPA's PFAS Enforcement Discretion Policy suggests that other PRPs, similarly with a passive nexus, may also qualify for enforcement discretion. In particular, the EPA states it will evaluate a variety of fairness and equitable factors under an approach considering a totality of circumstances, including:

- Whether the entity is a state, local, or Tribal government, or works on behalf of or conducts a service that otherwise would be performed by a state, local, or Tribal government.
- Whether the entity performs a public service role in:
  - Providing safe drinking water;
  - Handling of municipal solid waste;
  - Treating or managing stormwater or wastewater;
  - Disposing of, arranging for the disposal of, or reactivating pollution control residuals (e.g., municipal biosolids and activated carbon filters);
  - Ensuring beneficial application of products from the wastewater treatment process as a fertilizer substitute or soil conditioner; or

    - Performing emergency fire suppression services.
- Whether the entity manufactured PFAS or used PFAS as part of an industrial process.
- Whether, and to what degree, the entity is actively involved in the use, storage, treatment, transport, or disposal of PFAS.

Bear in mind, of course, that CERCLA's liability regime authorizes PRPs to purse their own response actions and initiate their own private cost recovery lawsuits. In a private party section 107 cost recovery action, there is no limit on who a PRP can seek joint-and-several liability from (assuming all other statutory elements for a CERCLA cause of action are met). So while the EPA's policy provides some indication that the government will not pursue a cleanup action or costs of response, the EPA has no ability to prevent private-party PRPs from pursuing any and all CERCLA liable companies, even *de minimis* and *de micromis* parties. Named defendants would presumably counterclaim with a CERCLA section 113 contribution action or similar 113 contribution third-party claims to institute an equitable allocation process.

How courts and allocators will consider the EPA's PFAS Enforcement Discretion Policy in situations where the EPA has not entered into judicially or administratively approved settlement agreements barring major PRPs from pursuing such claims, or otherwise granting explicit contribution protection to passive PRPs, will take years and decades before the development of any meaningful clarity on who ultimately pays and how clean is clean. Consequently, all businesses and entities that have had any role in the release of PFAS into the environment, whether as a current or past owner or operator, arranger, or transporter, will want to evaluate liability protections as part of a proactive risk mitigation strategy to avoid the inequitable toll of a CERCLA claim.

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