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PFAS UPDATE: CERCLA LISTING FOR PFOA AND PFOS IS ONE STEP CLOSER

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On January 10, 2022, the U.S. Environmental Protection Agency (“EPA”) submitted a proposed rule to the White House Office of Management and Budget (“OMB”) to designate perfluorooctanoic acid (“PFOA”) and perfluorooctanesulfonic acid (“PFOS”) as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”).

The agency’s proposal speaks to the current administration’s continued priority of addressing per and polyfluoroalkyl substances (“PFAS”) within the available statutory schemes. A hazardous substances designation under CERCLA will have far-reaching effects that encompass both future release reporting requirements and obligations to clean up historic PFOS and PFOA contaminated soil and groundwater.

WHEN WILL THE LISTING BE COMPLETE?

OMB reviews are usually completed within 90 days, but that time can be extended for an additional 30 days. Once OMB completes its review – probably in March or April 2022 – EPA can then publish the proposed rule for public comment.

As expressed in the PFAS Strategic Roadmap, EPA anticipates proposing a rule by the spring of 2022 and issuing a final rule by the summer of 2023. This action is consistent with that timeline.

HOW DOES THIS IMPACT MY BUSINESS?

EPA, in its submittal to OMB, characterizes the purpose of its proposed rule as necessary for data gathering and only identified the new PFOA and PFOS release reporting costs as notable impacts for businesses. While new release reporting requirements are far from nominal and should be identified as an economic impact of the proposed regulation, EPA misses the most significant implications of such a listing: PFOA and PFOS-related cleanup actions. By designating PFOA and PFOS as hazardous substances, EPA would have the authority to:

- Order the investigation and remediation of PFOA and PFOS at EPA clean-up sites, including cost recovery;

- Reopen closed sites which have PFOA and PFOS impacts;
- Private parties would also have a cause of action for cost recovery and contribution for costs incurred in the cleanup of PFOA and PFOS contaminated sites; and
- PFOA and PFOS will be included in the scope of all Phase I Environmental Site Assessments in order to satisfy numerous “hazardous substance” aspects of the All Appropriate Inquiries Rule.

Additionally, this designation may have regulatory ripple effects since many state and federal programs use the CERCLA hazardous substances list as a basis for state regulated compounds.

CONCLUSION

EPA’s submission to the OMB of the proposed rule escalates the impending reality of a PFOA and PFOS “hazardous substance” designation under CERCLA. We anticipate a spring release of the much-anticipated proposed rule in the federal register, and BCLP will be ready to weigh-in as to the substance of the penned rule.

For more information on PFAS chemicals, and the regulatory and litigation risks that they pose, please visit our [PFAS webpage](#). If you have a question about how to manage federal PFAS risk, or in any specific state jurisdiction, please contact Tom Lee, John Kindschuh, Elyse Voyer, or any other member of our PFAS team at Bryan Cave Leighton Paisner LLP.

RELATED CAPABILITIES

- Environment
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