

EPA Pushes Back PFAS Hazardous Substance Designation

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On June 13, 2023, the Environmental Protection Agency (EPA) released its Spring 2023 Unified Agenda, which pushes back the estimated publication of a final rule designating certain per- and polyfluoroalkyl substances (PFAS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Specifically, the final rule on PFAS CERCLA designation for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) has been delayed from August 2023 to February 2024.

The EPA's Spring 2023 Unified Agenda also delayed the addition of PFAS to the Toxics Release Inventory (TRI). The EPA is now targeting to publish its proposed rule adding PFAS to the TRI in December 2023 and finalize the rule in November 2024, a delay of seven and nine months, respectively.

The designation of PFAS as hazardous substances under CERCLA would establish liability for current and former owners and operators of facilities where hazardous wastes were released or disposed, as well as generators and arrangers of disposal or transportation of hazardous substances and transporters of hazardous substances. This means that any entity handling designated PFAS could become liable for the recovery and remediation costs of PFAS releases or threatened releases and would need to comply with federal law on transportation and disposal of hazardous waste. The delay in the CERCLA designation presents several implications, including the potential for broader hazardous substances designations and more time for congressional action.

The delay also gives Congress more time to respond to the proposed designation and offer statutory protections for water and wastewater utilities and other passive receivers such as solid waste disposal facilities and composting facilities. The delay may also indicate that EPA is taking time to further develop its CERCLA Enforcement Discretion Policy. In the event that Congress does not provide a statutory exemption for water systems and other passive receivers, the policy would clarify EPA's intention to focus enforcement of the new CERCLA designations on PFAS manufacturers and those whose conduct releases significant amounts of PFAS into the environment. The policy is expected to recommend non-enforcement against passive receivers.

While the delay could spell relief for passive receivers, it is an unwelcome extension for some landowners and prospective purchasers of land that potentially contains PFAS. In the interim, environmental site assessments will likely increasingly evaluate PFAS, and site cleanup decisions may be informed by EPA's list of risk-based regional screening values.

Other upcoming PFAS regulations on track include the PFAS National Primary Drinking Water Regulation rulemaking, an anticipated proposed rulemaking to add PFOA, PFOS, perfluorobutane sulfonate (PFBS), and GenX (a subset of PFAS chemicals) to the Resources Conservation and Recovery Act (RCRA) list of hazardous

constituents, and a significant new use rule under the Toxic Substances Control Act (TSCA) that would require PFAS manufacturers and importers to notify EPA before resuming the manufacturing or import of any PFAS for a significant new use. All of these upcoming PFAS regulations will create far-reaching effects once finalized.

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