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Alert | Environmental

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Potential Impact of EPA's PFAS Strategic Roadmap on CERCLA Cleanups

On Oct. 18, 2021, United States Environmental Protection Agency (EPA) Administrator Michael S. Regan announced the EPA's strategy to address certain per- and polyfluoroalkyl substances (PFAS): PFAS Strategic Roadmap: EPA's Commitment to Action 2021-2024. The agency set out three broad goals: to invest in research, restrict PFAS pollution, and remediate PFAS contamination.

The Strategic Roadmap details key actions the EPA plans to take with expected timelines under a host of statutory authorities, including the Safe Drinking Water Act (SDWA), the Toxic Substances Control Act (TSCA), the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This GT Alert underscores two key actions being undertaken under the SDWA and CERCLA and the potential implications for site cleanups.

Federal Drinking Water Standard

The EPA lays out a timeline for regulation of PFOA (perfluorooctanoic acid) and PFOS (perfluorooctane sulfonic acid) under the SDWA. Following the EPA's March 2021 final determination to regulate PFOA and PFOS in drinking water, the EPA anticipates issuing a proposed rule in fall 2022 and a final rule in fall 2023. In addition, by spring 2022, the EPA expects to develop non-regulatory advisories to encourage state, local, and tribal governmental action. The EPA also is evaluating additional PFAS and potential regulatory action – however, the EPA has not specified which PFAS are under consideration. The broadest

definition of PFAS includes thousands of chemicals, with different applications, chemical properties, and toxicological profiles. Until this point, a patchwork of state regulation has existed, with certain states adopting the non-enforceable 70 parts per trillion federal Health Advisory Level as an enforceable state limit, while others have adopted more restrictive regulations.

A nationwide maximum contaminant level (MCL) for PFOA and PFOS may impact site cleanups and remedy selection. For example, listing PFOA and PFOS as hazardous substances under CERCLA does not establish an enforceable cleanup standard – that designation alone does not establish a remedial action trigger or remedial action objective. A federal MCL, however, would impact remedy selection. Section 121 of CERCLA governs remedy selection, which requires consideration of protectiveness and applicable or relevant and appropriate requirements (ARARs). For groundwater, the ARARs are the Maximum Contaminant Level Goals or the MCL. If there is a federal MCL, then the MCL is the ARAR under CERCLA, and therefore, part of the CERCLA remedy selection. (A state standard may be an ARAR if certain conditions are met.)

Hazardous Substance Designation

The EPA seeks to designate PFOA and PFOS as CERCLA hazardous substances. The EPA expects its proposed rulemaking to be available for public comment in spring 2022, and the final rule by summer 2023. The EPA also is working on an Advance Notice of Proposed Rulemaking in order to seek public comment on whether precursors to PFAS, or other PFAS in addition to PFOA and PFOS, should be designated CERCLA hazardous substances.

Under CERCLA, a site is contaminated if it is the location of a "release" of a "hazardous substance," which causes the incurrence of response costs. Designating these compounds as hazardous substances may impact enforcement by EPA and state authorities as well as remedial actions and private party litigation. This designation may expand the sites under which a CERCLA cleanup may be conducted and enhance the EPA's and state agencies' ability to direct or undertake the remediation of sites with PFOA or PFOS contamination. The designation also may implicate sites where remedial actions already are being undertaken, and raises the possibility of the new or different remedial actions being imposed.

Questions may arise regarding reopeners at closed sites in light of the EPA's standard language in consent decrees. For example, if PFOS or PFOA was detected during site investigations, but the final remedy did not address PFOA or PFOS, can the presence of PFOA or PFOS constitute new information or unanticipated conditions to warrant a reopener? Some may argue it cannot be new information if previously detected, even if not regulated previously as a hazardous substance. Moreover, there would need to be a significant reason to undo prior closure work. Equally challenging may be questions as to whether private party allocations may take into account costs associated with remediation of PFOA or PFOS if the compounds were not considered as part of the Record of Decision.

Parties may wish to consider PFOA and PFOS during due diligence activities now – even before any final designation – depending on the site's prior use, surrounding area, and future intended use. Additionally, parties may wish to seek broader coverage for emerging contaminants, not merely PFOA or PFOS, in environmental indemnifications.

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The EPA will be hosting a webinar on Nov. 2.

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