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ADVISORY

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U.S. ENVIRONMENTAL PROTECTION AGENCY PFAS ENFORCEMENT DISCRETION

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Last month, the U.S. Environmental Protection Agency (EPA) listed two per- and polyfluoroalkyl substances (PFAS) chemicals – commonly referred to as "forever chemicals" – as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Listing these two PFAS, specifically perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), impacts whether and to what extent these hazardous substances must be investigated and, as necessary, remediated under CERCLA going forward. The listing also potentially impacts certain sites that had previously been deemed to require no further action under CERCLA, particularly sites where PFAS were known to have been used, stored or released.

Days after listing PFOA and PFOS as hazardous substances under CERCLA, the Agency issued its **PFAS Enforcement Discretion and Settlement Policy** under CERCLA (the PFAS Policy). While the PFAS Policy likely will elicit more questions than answers about potential liability under CERCLA for sites where potentially responsible parties (PRPs) believed CERCLA liability to have been resolved, companies and governmental entities should carefully watch what enforcement actions the EPA pursues in the coming years (and how they are resolved) to better understand the Agency's enforcement priorities, including the use and implementation of the PFAS Policy. What's more, the PFAS Policy focuses on the pursuit of CERCLA enforcement actions by the federal government but does nothing to limit or modify a private litigant's potential recovery for response costs incurred to address PFAS. Said differently, EPA cannot and will not bar private litigants from pursuing CERCLA claims against PRPs to recover PFAS-related response costs. It is likely that PFAS litigation will continue to increase as parties seek to recover costs for PFAS-related investigation and remediation activities.

The PFAS Policy does offer some clarity for certain categories of PRPs. The EPA has said it does not intend to pursue cleanup costs or response actions from the following categories of PRPs: (i) community water systems and publicly owned treatment works; (ii) municipal separate storm sewer systems; (iii) publicly owned operated municipal solid waste landfills; (iv) publicly owned airports and local fire departments; and (v) farms that apply biosolids to land.

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This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

While not expressly or categorically listed in the PFAS Policy as entities eligible for enforcement discretion, other categories of PRPs may qualify based on the Agency's consideration of "fairness and equitable factors," including: (i) whether the entity is a government, or works on behalf of or conducts a service otherwise performed by a government; (ii) whether the entity performs a public service role in (A) providing safe drinking water, (B) handling municipal solid waste, (C) treating or managing stormwater or wastewater, (D) disposing of, arranging for the disposal of, or reactivating pollution control residuals, (E) ensuring beneficial application of products from the wastewater treatment process as a fertilizer or substitute or soil conditioner, or (F) performing emergency fire suppression services; (iii) whether the entity manufactured PFAS or used PFAS as part of an industrial process; or (iv) whether, and to what degree, the entity is actively involved in the use, storage, treatment, transport, or disposal of PFAS. The PFAS Policy indicates that, "[i]n helping to ensure equitable outcomes in addressing PFAS contamination, the above factors are instructive in determining whether an entity's CERCLA responsibility should be limited."

Whether the EPA utilizes the PFAS Policy with regularity to establish enforcement priorities is yet to be seen. Further, the upcoming presidential election, and any associated change in the federal governmental administration, could have a significant impact on whether the EPA will utilize and/or rely on the PFAS Policy to establish enforcement priorities. And while the PFAS Policy has no bearing on whether and to what extent private CERCLA litigants seek cost recovery for PFAS-related response costs, it is possible that mediators, arbitrators, allocators and/or judges could look to the PFAS Policy when assigning an equitable or allocable share of CERCLA liability to a particular PRP in the context of PFAS response costs.

Should you have questions relating to PFAS, including EPA's recent actions under CERCLA, please contact Michael Miller directly at **mmiller@wiggin.com** or 203-498-4438.