

PFAS UPDATE: EPA'S STRATEGIC ROADMAP FOR PFAS

Oct 27, 2021

On October 18, 2021, the United States Environmental Protection Agency ("EPA") unveiled its new plan to investigate and regulate PFAS compounds under a variety of federal environmental laws including the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Clean Water Act, the Toxic Substances Control Act ("TSCA"), and others. Although the announcement does not create any new laws or regulations, it provides a helpful overview of the actions that EPA intends to take over the next three years.

According to EPA's [Press Release](#), the Strategic Roadmap for PFAS embraces three guiding principles: (1) to increase investments in PFAS research; (2) to leverage state and local authorities to take action to restrict releases of PFAS chemicals; and (3) to accelerate the remediation of PFAS contamination.

WHAT ARE THE PROPOSED REGULATORY ACTIONS?

Among other things, EPA is spearheading the following actions:

CERCLA

EPA plans to designate Perfluorooctanoic acid ("PFOA") and Perfluorooctane acid ("PFOS") as hazardous substances under CERCLA. Doing so means that EPA has the ability to order the investigation and remediation of those two compounds at EPA clean-up sites, and will have the authority to reopen closed sites which are shown to have PFOA and PFOS impacts. It also will have regulatory ripple effects since many state and federal programs use the CERCLA hazardous substances list as a basis for the compounds that they regulate.

DRINKING WATER LIMITS

To date, EPA has not established enforceable national drinking water limits for any PFAS substance, although several states already have done so. EPA expects to issue proposed drinking water limits for PFOA and PFOS. A national drinking water limit will require the entire country to evaluate the concentration of these two compounds in drinking water, and to implement treatment systems and permit limits to achieve the drinking water limits.

INDUSTRIAL WASTEWATER DISCHARGES

EPA will continue to establish Effluent Limit Guidelines (“ELGs”) and/or information gathering programs for wastewater discharges from the following industries: the organic chemicals, plastics and synthetic fibers (“OCPSF”) industry; metal finishing; electroplating; electrical and electronic components; textile mills; landfills; leather tanning and finishing; plastics molding and forming; paint formulating; pulp, paper, and paperboard facilities; and airports. This is a reaffirmation of the Preliminary Effluent Guidelines Program Plan 15 which we discuss in a previous [client alert](#).

NPDES PERMITS

The National Pollutant Discharge Elimination System (“NPDES”) will be revised to allow monitoring at facilities where PFAS are expected or suspected to be present in wastewater and stormwater discharges.

TRI REPORTING REQUIREMENTS

The Toxics Release Inventory (“TRI”) currently allows for some exemptions for PFAS reporting practices, which limits the amount of data that EPA has received for these chemicals. EPA will eliminate some of those exemptions, and EPA will continue to add more PFAS substances to the TRI.

TOXICITY ASSESSMENTS

EPA will publish toxicity assessments for Gen X and five other PFAS substances (PFBA, PFHxA, PFHxS, PFNA, and PFDA). These toxicity assessments can serve as the basis for future regulatory action by EPA and state agencies, and can serve as the basis for listing these compounds under state regulatory programs such as California’s Proposition 65.

AIR EMISSIONS

EPA will build the technical foundation necessary to evaluate and potentially propose PFAS air emissions under the Clean Air Act.

PFAS TESTING STRATEGY

EPA is developing a national PFAS testing strategy to better understand the toxicity of a wider range of PFAS substances, since very few have been evaluated to date. This process will help EPA identify and select PFAS substances for which EPA will require testing pursuant to TSCA. EPA plans to issue the first round of test orders on the selected PFAS substances by the end of 2021.

TSCA SIGNIFICANT NEW USE

EPA plans to issue TSCA orders for existing PFAS substances for which significant new use notices (e.g. a new manufacturing process for an existing PFAS, or a new use or user) have recently been filed with EPA. The orders would impose rigorous safety requirements as a condition of allowing the significant new use to commence, and appear to be an effort to walk back recent SNUR approvals.

PROPOSED DATA GATHERING

TSCA provides authority for EPA to collect existing information regarding PFAS substances. In June 2021, EPA published a [proposed data-gathering rule](#) that would collect certain information on any PFAS manufactured or used since 2011, including information on uses, production volumes, disposal, exposures, and hazards. EPA should finalize the rule before January 1, 2023, but businesses should start evaluating what relevant records are or are not available. For additional information, our firm published a [Client Alert](#) regarding this proposed rule.

See pages 10 – 21 of [EPA's Strategic Roadmap](#).

HOW WILL THIS ROADMAP AFFECT MY COMPANY?

There are three key reasons why your business should be interested in evaluating EPA's Strategic Roadmap at this time.

ALL U.S. FACILITIES NEED TO CONSIDER THEIR PFAS RISK

To date, certain states have regulated PFAS in different ways, but industries that did not operate in those states had limited regulatory risk from PFAS. The Roadmap makes it clear that will no longer be the case, and all U.S. facilities need to evaluate their potential regulatory and transactional risk based upon PFAS.

PERMIT LIMITS ARE COMING

Drinking water standards, as well as ELGs, will result in NPDES Permit limits for the discharge of certain PFAS compounds. Thus far EPA has only indicated that it will issue drinking water limits and ELGs for certain PFAS compounds, however, businesses should still evaluate whether and which PFAS substances are present in their wastewater streams in anticipation of future regulatory limits.

SITE CLEANUP AND ALL APPROPRIATE INQUIRIES

EPA has confirmed that it will designate PFOA and PFOS as "Hazardous Substances" pursuant to CERCLA. According to [EPA's Strategic Roadmap](#), "[s]uch designations would require facilities across the country to report on PFOA and PFOS releases that meet or exceed the reportable quantity assigned to these substances." (pg. 17). EPA or other agencies could also seek cost recovery or

contributions for costs incurred for the remediation of PFOA and PFOS. Perhaps most significantly, EPA can reopen sites that have already been remediated for other compounds if there is a concern that there may be PFAS impacts as well.

In addition, if PFOA and PFOS are added as hazardous substances under CERCLA, they must be evaluated as part of a company's due diligence when purchasing property in order to satisfy the all appropriate inquiries requirement. Practically speaking, this means that an evaluation of PFOA and PFOS impacts will need to be included in all Phase I Environmental Site Assessments after the listing is complete. For companies purchasing or selling industrial properties, this new requirement may have a material impact on property value, and the ability to obtain insurance.

CONCLUSION

PFAS risk has been the topic of discussion for several years, and thus far there have been varied regulations from certain states, but the Roadmap makes it clear that meaningful federal regulations will be issued in the next two or three years which will impact industries and facilities located in all 50 states. Businesses have an opportunity now to understand how they may be impacted, and it is imperative that businesses plan for those impacts.

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 EPA's Strategic Roadmap for PFAS, please contact Tom Lee, John Kindschuh, Dave Brankin, or any other member of our PFAS team at Bryan Cave Leighton Paisner LLP.

RELATED PRACTICE AREAS

- PFAS Team
- Environment

MEET THE TEAM



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