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PFAS UPDATE: 2022 FEDERAL PFAS REGULATORY RECAP

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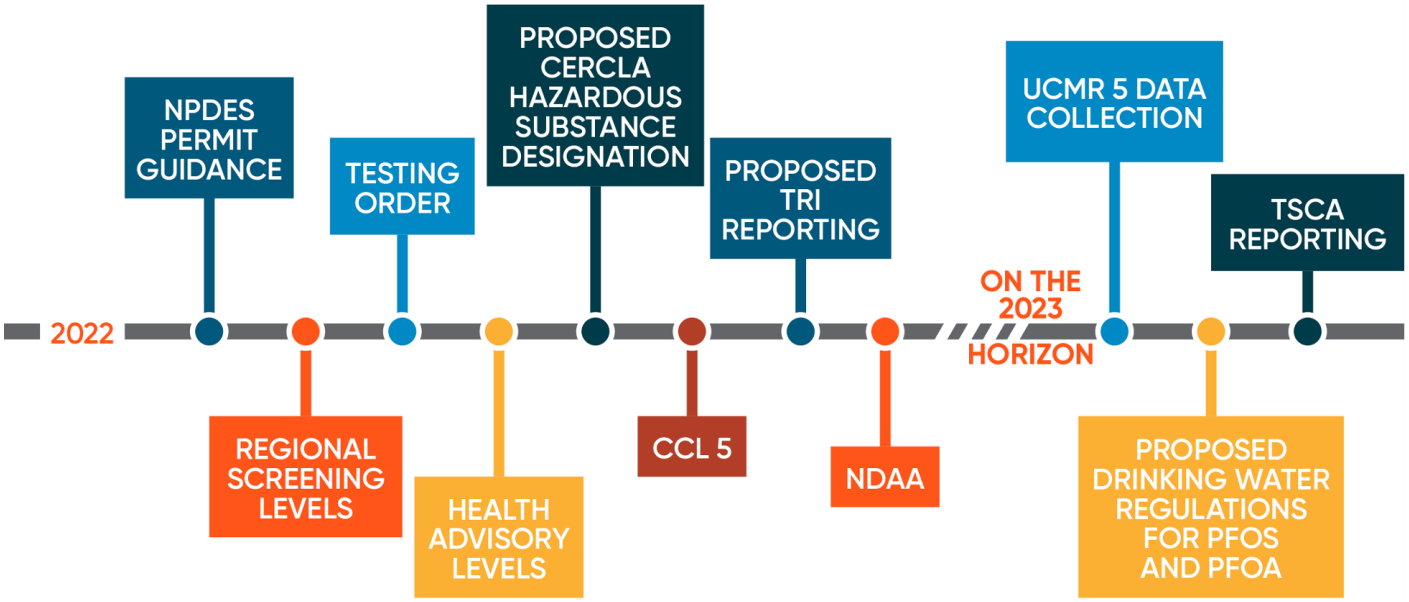
As anticipated, 2022 was another eventful year for the regulation of per- and polyfluoroalkyl substances ("PFAS") at the federal level. The United States Environmental Protection Agency ("EPA") took significant actions under a range of different regulatory programs and environmental statutes, and touched on key issues related to drinking water, site evaluation and cleanup, NPDES permitting, and chemical reporting.

While not intended to be a complete list, the following is an overview of some of those key developments, many of which are highlighted in EPA's November of 2022 PFAS Strategic Roadmap: A Year of Progress.



I. Clean Water Act and Drinking Water Actions

Drinking water impacts have been a major driver for regulatory action at both the state and federal levels over the last few years, and 2022 was no exception.

- Health Advisory Levels. Perhaps the most significant action taken in the PFAS space by EPA this year was its new Health Advisory ("HA") levels for four PFAS substances. Although these levels are non-binding, the HAs may be used by different agencies to investigate and remediate

PFAS substances. They are also a precursor to Maximum Contaminant Levels ("MCLs"), and provide an indication of the range of what the MCLs values will be. The HA levels are:

- PFOA: 004 ppt (Interim Value)
- PFOS: 02 ppt (Interim Value)
- GenX/HFPO-DA: 10 ppt (Final Value)
- PFBS: 2,000 ppt (Final Value)

As discussed in BCLP's client alert, the HA values for PFOA and PFOS are significantly lower than the 70 ppt HAs for PFOA and PFOS (either individually or combined) that EPA published in 2016, and are orders of magnitude lower than the detection levels that are currently achievable. Many have speculated that these incredibly low values are an indication that the MCLs for PFOA and PFOS will be similarly low.

- UCMR 5. The latest Unregulated Contaminant Monitoring Rule ("UCMR 5") for Public Water Systems ("PWS") covers 30 chemical substances, 29 of which are PFAS compounds (and the 30th is lithium). Most PWS are required to sample for the 30 compounds between 2023 and 2025, and according to EPA, "UCMR 5 will provide new data that is critically needed to improve EPA's understanding of the frequency that 29 PFAS (and lithium) are found in the nation's drinking water systems and at what levels." PWS have already raised concerns about the testing costs and the limited availability of qualified testing labs, so compliance with UCMR 5 will continue to be a challenge through 2025.
- CCL 5. EPA added "Per- and polyfluoroalkyl substances (PFAS)" to the Fifth Contaminant Candidate List ("CCL 5"). While it is not surprising that EPA would want to include PFAS substances on the CCL 5 list - which is essentially a watch list for unregulated chemicals found in drinking water - what is significant is that it is the first time that EPA added "Per- and polyfluoroalkyl substances (PFAS)" to the Fifth Contaminant Candidate List ("CCL 5") rather than listing specific PFAS compounds. That distinction between regulating PFAS as a group versus regulating them as individual compounds has been a differentiator between EPA's approach and that of many states, so it will be important to see whether the CCL 5 listing is an indication of an overall policy shift at EPA, or whether it is limited to this one instance.
- NPDES Permits. One of the major compliance challenges that has been looming on the horizon for certain industries is the anticipated need to comply with NPDES permit limits for PFAS compounds. In 2022, EPA issued two guidance memoranda explaining how PFAS should be addressed in certain types of NPDES permits.
  - April 28, 2022 Guidance. As discussed in BCLP's client alert, this guidance document explains that for federally issued permits, EPA will include requirements to monitor for PFAS,

include requirements to use best management practices ("BMPs") like product substitution and good housekeeping practices, and establish practices to address PFAS-containing firefighting foams in storm water. Importantly, this guidance only applied to the limited number of states where EPA has direct NPDES permitting authority.

- December 5, 2022 Guidance. Although not binding, this more recent guidance document provides recommendations to state agencies with NPDES permitting authority on how to address PFAS in those permits. Specifically, the guidance recommends that permits require: (1) quarterly monitoring for 40 PFAS compounds using Draft Method 1633; (2) reporting the monitoring data in Discharge Monitoring Reports; and (3) BMPs for discharges of PFAS substances, especially with respect to PFAS in firefighting foams as required in stormwater permits. This document also addresses biosolids and permit notification requirements.

We will see how these guidance documents translate into permit requirements in 2023, but they confirm EPA's commitment to addressing PFAS discharges from industrial wastewater sources.

II. TRI Reporting

The Toxics Release Inventory ("TRI") Program is one of the primary ways that many companies are required to report their chemical usage. The National Defense Authorization Act added 160 PFAS compounds to the TRI list in 2020, and EPA has subsequently added additional PFAS compounds to the list; however, those compounds have been subject to certain exemptions. In December 2022, EPA proposed classifying PFAS compounds as "Chemicals of Special Concern" on the TRI, thereby eliminating the use of the *de minimis* exemption for both manufacturers and suppliers. This designation will significantly increase the scope of PFAS TRI reporting obligations.

III. Other Federal Regulatory Actions

- Testing. EPA issued its first testing order pursuant to the National PFAS Testing Strategy. Specifically, it addresses a substance found in commercial firefighting foams and certain floor finishes. For additional information, refer to EPA's Press Release.

- Regional Screening Levels. EPA added five PFAS substances (PFOA, PFOS, PFHxS, PFNA, and GenX/HFPO-DA) to the list of risk-based Regional Screening Levels ("RSLs") for Chemical Contaminants at Superfund Sites. EPA also updated the RSL value of PFBS. As discussed in BCLP's client alert, EPA uses RSLs to determine whether a removal action or further investigation is needed to protect the environment, human health, and communities, so the creation of RSLs for PFAS compounds provides a clear path for the evaluation of certain PFAS compounds as part of site cleanup actions.

- NDAA. The National Defense Authorization Act for Fiscal Year 2023 ("NDAA") provided $20 million dollars for the armed services to extend the authorization to conduct an ongoing

human health assessment related to contaminated sources of drinking water from PFAS. Additionally, the NDAA has numerous sections that address PFAS substances, such as beginning on October 1, 2025, the Secretary of Defense may not enter into any contract for the purchase of firefighting personal protective equipment if it contains a PFAS substance.

IV. A Look Ahead

EPA is expected to continue to expand PFAS regulations in 2023, including three particularly significant actions.

A. CERCLA Hazardous Substance Designation

In September of 2022, EPA began the formal process of listing PFOA and PFOS as "Hazardous Substances" under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").

As discussed in our prior client alert, the listing will have obvious implications for EPA site cleanups and the potential reopeners of closed remediation sites, but will also have significant ripple effects that will impact due diligence requirements, cost recovery litigation, and state regulatory obligations that are tied to the CERCLA list.

B. MCLs for PFOA and PFOS in Drinking Water

According to the PFAS Strategic Roadmap, EPA originally planned to issue proposed MCLs for PFOA and PFOS in drinking water by the end of 2022. Recently, EPA estimated that the proposed listing should go into effect in March 2023, and the final regulation should be issued in September 2024, if not sooner. This action will result in enforceable national drinking water standards for two PFAS compounds.

C. TSCA Reporting Requirements

EPA proposed a new PFAS reporting requirement under TSCA. If finalized, manufacturers, including importers, would be required to report all products containing PFAS compounds which they manufactured in or imported to the U.S. after January 1, 2011. EPA is currently responding to the avalanche of public comments, many of which focus on EPA's alleged miscalculation of compliance costs. While the volume of public comments has slowed the rulemaking process, EPA is anticipated to issue a revised rule early this year, and it is possible that the final rule will be issued in 2023. If the final rule is consistent with the current proposed language, it will result in a truly massive undertaking for all U.S. manufacturers and importers.

V. Conclusion

As should be apparent from all of the actions described above, both the current administration and the legislature have been focused on regulating PFAS compounds in a variety of sources and under

different regulatory programs. Businesses that historically or currently interact with these compounds should consider identifying and evaluating their potential risk. BCLP will continue to monitor and report on PFAS-related government actions at both the federal and state levels throughout 2023, which is expected to be just as active as 2022.

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, Emma Cormier, or any other member of our PFAS team at Bryan Cave Leighton Paisner LLP.

RELATED CAPABILITIES

- PFAS

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