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EPA ANNOUNCES ACTION PLAN FOR TWO PFAS, INCLUDING IN CONSUMER PRODUCTS

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PFAS are currently the subject of significant regulatory action, research, litigation, and public debate based on recent reports which claim that two PFAS, Perfluorooctanoic Acid ("PFOA") and Perfluorooctane Sulfonate ("PFOS"), that were formerly used in a variety of industries may be carcinogens or reproductive toxicants. Several states have begun investigating and regulating the levels of PFAS in drinking water, and in some cases, for example Minnesota and New York, have sued manufacturers of the chemicals themselves or products that historically contained PFOA and PFOS, bringing claims for the recovery of natural resource damages, trespass, nuisance, and negligence.

EPA has historically addressed these chemicals through a stewardship program under which the companies that manufactured PFOA and PFOS agreed to voluntarily stop their production, and companies that used PFOA and PFOS agreed to stop importing them. Now, however, Acting Administrator Wheeler is under increasing bipartisan pressure to take federal regulatory action.

Into the teeth of this debate, EPA unveiled its much-anticipated PFAS Action Plan (the Plan) on February 14, 2019 (also see a helpful one page summary). The Action Plan does not actually make any determinations, or propose or set any new regulatory standards for this wide group of chemicals. Instead, it provides a comprehensive preview of the next several years' worth of federal investigation into, and regulation of these diverse chemicals which are used in a variety of industries to make products including water resistant clothing and athletic equipment, non-stick cookware, water and grease resistant food packaging, and fire-fighting foam.

Specifically, the Plan focuses on a number of initiatives that generally impact four areas: groundwater, drinking water, human health risks, and chemical and consumer product regulation. Below we summarize the key components of the Plan for each of these four Impacted Areas.

We will provide a targeted analysis of each of the Impacted Areas identified in the Action Plan in the weeks to come, focusing on the specific proposed steps, and the anticipated impact on different industry groups. In the meantime, note that EPA has already started the process of listing PFOA and PFOS as "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and appears committed to completing that process.

Once complete, the listing has far-reaching consequences because it will allow EPA to require "responsible parties" to pay to clean up PFOA and PFOS contamination in groundwater on, and emanating from their property.

Overall, the Action Plan provides manufacturers, users, and consumers of PFAS with an opportunity to assess where and how best to engage to ensure that any new regulations reflect the best science regarding PFAS. Bryan Cave Leighton Paisner LLP regularly counsels our clients on environmental investigation, remediation, due diligence, and real estate transactions, and would be happy to discuss any further questions that you might have. Please feel free to contact the authors of this article, Tom Lee, Bryan Keyt or your regular contacts at the firm.

Impacted Area	**EPA's Proposed Action**	**Impact**	**Anticipated Timing**
Groundwater	Listing PFOA and PFOS as CERCLA "hazardous substances."	Allows EPA to require responsible parties to carry out and/or pay for cleanup. Also may trigger similar actions under state environmental cleanup regulations.	The regulatory development process began in 2018, and is ongoing.
	Develop interim cleanup recommendations to address groundwater contamination.	EPA's cleanup guidance for cleanup actions under CERCLA, RCRA corrective action programs, and state cleanup programs.	Anticipated in 2019.
	Develop test methods to detect PFAS in non-drinking water media including other water matrices, solids (soil, sediment, fish tissue), and air.	Improved test methods will allow agencies and private parties to more accurately assess the presence of PFAS in different media, including groundwater, and that data may form	2019-2021

		the basis for future regulation.	
	Research to identify the performance and costs associated with different treatment and remediation approaches to address PFAS in different media.	These new remediation techniques can then be incorporated into state and federal cleanup programs, and adopted by private parties.	2019
	EPA will partner with the Environmental Council of States to develop an interactive map showing sources and concentrations of PFAS in the environment.	The map will allow government agencies, municipalities, and private parties understand the location and extent of PFAS in different media.	2019
Drinking Water	EPA will propose a national drinking water regulatory determination for PFOA and PFOS.	The first step towards a Maximum Contaminant Level, and the implementation of national drinking water regulations for these two chemicals.	Proposal will be released in 2019, followed by public comment.
	Expand drinking water analytical Method 537 to include GenX chemicals, and additional PFAS.	Improved test methods allowing the reliable detection of additional PFAS in drinking water will allow for expanded data collection, which may ultimately	Revisions to Method 537 will be released in 2019.

	form the basis of future regulations.	
Update EPA's online drinking water treatability database to incorporate information about drinking water treatment effectiveness and costs to treat for different PFAS.	Resource for EPA, states, agencies, and private parties to evaluate effective treatment options.	Ongoing
More PFAS will be added to the list of chemicals included in the 2020 Unregulated Contaminant Monitoring Rule, and at lower minimum reporting levels.	The additional data can then be used both to understand the prevalence of different PFAS in drinking water, and as the basis for future regulations.	Anticipated 2020
Determine if available data supports the development of Clean Water Act Section 304(a) ambient water quality criteria for human health for PFAS.	If promulgated by EPA, and adopted by states and tribes as water quality standards, these criteria can be used to set permit limits of discharges to a waterbody and to determine if the waterbody requires cleanup.	2021
Seek information from industry to determine whether	Industries that use PFAS as part of their manufacturing	Data collection will start in 2019.

	effluent limitations guidelines should be used to regulate PFAS.	process may receive requests for information from EPA, which may be used as the basis for future discharge permit limits.	
Health Risk Assessment	Finalize toxicity assessments for GenX chemicals and PFBS, and develop toxicity values for PFBA, PFHxA, PFHxS, PENA, and PFDA.	Government and private entities can use the toxicity assessments along with exposure data to help characterize potential public health risks.	2019 – Final toxicity assessments for GenX and PFBS. 2020 – Draft toxicity assessments for PFBA, PFHxA, PFHxS, PENA, and PFDA.
	Generate toxicology data for a wider range of PFAS using new approaches (e.g. high throughput screening, computational toxicology tools, and chemical informatics)	EPA acknowledges that there is limited toxicological information for many PFAS. This new information may form the basis for future regulation.	Ongoing.
Chemical Regulation and Consumer Products	Issue new Significant New Use Rules (SNUR) under TSCA for additional PFAS.	Products containing new PFAS that are subject to a SNUR are subject to an EPA risk assessment. EPA's goal is to act as a "gatekeeper" for chemical substitutes for PFOA, PFOS and	Started in 2016 and is ongoing.

		other long-chain PFAS.	
	Update EPA's CompTox Chemistry Dashboard to include lists of PFAS chemicals.	The Dashboard will serve as a public clearinghouse for PFAS information.	Ongoing.
	Consider adding PFAS to the Toxics Release Inventory.	Federal and industrial TRI-reporting facilities would then have to report releases, waste management, and pollution prevention data for the listed PFAS.	2019

RELATED CAPABILITIES

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