

EPA Announces Highly-Anticipated PFAS Action Plan

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On February 14, 2019, the Environmental Protection Agency (“EPA”) released its long-awaited [Per- and Polyfluoroalkyl Substances \(“PFAS”\) Action Plan](#) (“Action Plan”). Once widely used in manufacturing processes because of their water and grease resistant characteristics, PFAS chemicals are particularly prevalent in fire-fighting foam, textiles, packaging materials, some consumer goods, and cleaning solutions. Research indicates PFAS exposure may pose potential health risks and Congress, state regulators, and community groups have called on EPA to act on this issue. According to EPA, the new PFAS Action Plan is a comprehensive approach to federal regulation of these chemicals, utilizing multiple statutory mechanisms, up-to-date science, environmental monitoring, and enforcement actions to protect human health and minimize PFAS exposure. Notably, the plan articulates the manner in which EPA will use its statutory authorities (Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), the Toxic Substances Control Act (“TSCA”), the Safe Drinking Water Act, and Resource Conservation and Recovery Act imminent and substantial endangerment) to impose liability on parties that may be responsible for PFAS contamination. Parties who have used PFAS in production processes or products should take steps to assess their potential liability and address risks. Because the Plan details EPA’s future regulatory approaches, it identifies the specific regulatory actions in which citizens, states, industry, and other stakeholders may want to engage actively on this rapidly developing issue.

Regulatory focus on PFAS has increased in recent years as water monitoring programs around the country discovered multiple instances of PFAS contamination in groundwater and drinking water and in biomonitoring of the U.S. population. In the absence of a clear federal standard, several states moved forward with setting or proposing to set statewide drinking water advisories, and other federal agencies issued contradictory advisories, which creates the potential for a national patchwork of regulations and confusion as to what levels are protective of human health and the environment. Congress has demonstrated a strong desire to act on this issue through the formation of a Bipartisan Task Force on PFAS, the introduction of several bills that would regulate these chemicals, and a [request](#) sent by 20 senators for EPA to establish federal drinking water standards for PFAS. EPA’s announcement also comes as litigation alleging manufacturer liability for PFAS contamination continues to accelerate.

The Action Plan is a multi-level approach to addressing PFAS contamination through regulatory initiatives, continued enforcement, response actions, increased monitoring, and research. EPA plans to rely on its authority under CERCLA and TSCA to impose liability on parties responsible for PFAS contamination, order remediation at contaminated sites, and review additional compounds to determine the level of health risks for a much larger group of PFAS. The agency also plans to examine additional ways to impose liability on parties responsible for PFAS contamination such as through Effluent Limitation Guidelines (“ELGs”) or limits for PFAS in biosolids under the Clean Water Act. The Action Plan calls for coordination with federal agencies and state and local governments to identify instances of PFAS contamination and expand research on the effects these chemical may have on human health.

Specifically, the actions EPA plans to take on PFAS include:

- Moving forward with the process to set a Maximum Contaminant Level (“MCL”) for PFOA and PFOS – two chemicals in the PFAS family – under the Safe Drinking Water Act. The first step in this process is to propose a national drinking water regulatory determination for PFOA and PFOS by the end of 2019. However, proposing a drinking water standard is just the beginning of the standard setting process. Unlike an advisory, which only considers risk, the risk management decision of selecting a concentration for the standard and the technology that must be utilized to remove the PFAS is no trivial task and includes consideration of technical feasibility (e.g., are there feasible detection limits and can PFAS be removed from groundwater). As a result, a drinking water standard may be higher than an advisory level.
- Initiating the regulatory development process to list PFOA and PFOS as hazardous substances under CERCLA. This will make it somewhat easier and more expeditious to initiate a CERCLA action to remediate PFOA or PFOS contamination at current or legacy operations. Consequently, more potential responsible parties may be required to carry out and/or pay for site remediation or response actions under EPA’s Superfund program. It could also trigger reopener liability at previously remediated sites, where the prior cleanup may not even have monitored for PFAS.
- Developing interim cleanup recommendations for groundwater contaminated with PFOA and PFOS. These recommendations can be used to assist federal or state regulators and private parties with making site-specific cleanup decisions.
- Finalizing draft toxicity assessments for two PFAS compounds and GenX chemicals in 2019 and developing additional toxicity values for five other PFAS chemicals. These assessments, combined with exposure information, can be used to increase understanding of potential human health impacts of PFAS exposure and therefore trigger additional remediation actions.
- Issuing supplemental proposed Significant New Use Rules (“SNUR”) on PFAS compounds, which, in effect, ban the use of PFAS listed in the SNUR until EPA reviews the toxicity information on these compounds to ensure that any unreasonable risks are addressed prior to commercialization.
- Working cooperatively with the States to identify more sources and industrial sectors implicated in PFAS risk by, for example:
 - Identifying PFAS risks from chromic acid etch facilities. Minnesota and Michigan have identified high levels of PFOS releases from these facilities, even after PFOS was phased out of the manufacturing process.
 - Coordinating with the State of Michigan by overseeing a federal CERCLA time-critical removal action focused on hazardous substances at the Wolverine World Wide Tannery and House Street Disposal Site.
 - Working with North Carolina on potential releases from the Chemours Cape Fear plant.
 - Using the Toxic Release Inventory to assist in identifying potential existing sources of releases of TRI.
- Attempting to use the 2016 designation of PFAS as chemicals of mutual concern in Annex 3 of the Canada-United States Great Lakes Water Quality Agreement to reduce the release of these chemicals by developing a binational strategy for PFAS. Historically, EPA has used binational strategies for reducing dioxin, mercury, and other chemical releases. However, one legal question is whether such a strategy implementing a

bilateral executive agreement imposes requirements in excess of U.S. law.

As the announcement of the PFAS Action Plan signals increased attention to EPA's approaches to PFAS regulations, liability concerns for manufacturers and users of PFAS are likely to continue to mount. The Action Plan provides a number of ways that EPA can potentially impose liability on current or former manufacturers or users of PFAS. This is a rapidly evolving legal and regulatory issue that will undoubtedly provide multiple opportunities for engagement between stakeholders and the EPA. Affected parties should closely monitor these developments and utilize every opportunity to provide their views to EPA on this fast-moving issue.

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