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Regulatory Update: EPA and New York Actions on PFOA and PFOS

There has been a growing focus on per- and polyfluoroalkyl substances (PFAS) recently. This focus will pose new challenges for the regulated community. This client update provides a brief overview of PFAS, a history of federal efforts to regulate them and a summary of recent regulatory actions by the Environmental Protection Agency (EPA) and the State of New York.

What Are PFAS?

PFAS is an umbrella term for a group of synthetic molecules characterized by a chain of carbon atoms bonded with fluorine atoms (known as the carbon-fluorine tail) connected to a non-fluorinated functional group head.[1] The carbon-fluorine bond has two desirable traits. First, it is repelled by fats, oils and water. Second, it is one of the strongest bonds in organic chemistry, making PFAS extremely stable and slow to break down.[2]

These two traits have proven extremely valuable, and two types of PFAS—perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA)—found their way into a number of industrial processes and commercial products.[3] PFOS and PFOA were used to create non-stick cookware and to stain-proof and waterproof carpets, furniture, clothes, leather, paper, paints and food packaging. Both chemicals have also been used to make aqueous film-forming foam, a component in firefighting foams commonly used at military bases and airports.

Due to these two traits, PFAS are relatively mobile and extremely stable in the environment. Exposure to PFAS in the environment may interfere with childhood development, disrupt the immunological and endocrine systems and raise the risk of high cholesterol and certain cancers.[4] Though studies on these risks have been inconclusive, there have been a number of recent efforts at the state and federal level to regulate PFAS.[5]

History of Federal Regulation of PFAS

PFAS have been subject to federal regulation and study for the past 20 years. EPA action on PFAS began in the late 1990s, when it received information that PFOS was widespread in both the environment and general

1 The name per- and polyfluoroalkyl substances describes the extent to which the carbon atoms are fluorinated. When all the carbon atoms except the functional group head are fluorinated, the compound is considered fully fluorinated (perfluoro-). Anything less than fully fluorinated is considered partially fluorinated (polyfluoro-). In other words, although there are more than 4,000 types of PFAS, all of them are either fully (per) or partially (poly) fluorinated.

2 The number of carbon-fluorine bonds impacts the stability of PFAS. Generally speaking, the more carbon-fluorine bonds, the stronger and more stable the compound. Compounds with more carbon-fluorine bonds are known as long-chain PFAS, whereas those with fewer are classified as short-chain PFAS. The regulatory focus is mostly on the long-chain PFAS.

3 In addition to being fully fluorinated, PFOS and PFOA are both long-chain PFAS, each with eight carbon atoms.

4 Agency for Toxic Substances & Disease Registry, *Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS) Frequently Asked Questions* (Aug. 22, 2017), *available at* https://www.atsdr.cdc.gov/pfas/docs/pfas_fact_sheet.pdf.

5 Agency for Toxic Substances & Disease Registry, *An Overview of Perfluoroalkyl and Polyfluoroalkyl Substances and Interim Guidance for Clinicians Responding to Patient Exposure Concerns* (May 7, 2018), *available at* https://www.atsdr.cdc.gov/pfas/docs/pfas_clinician_fact_sheet_508.pdf.

population.[6] EPA negotiated an agreement with the sole producer of PFOS to phase out production by December 2000. After PFOS was phased out, EPA promulgated a series of significant new use rules (SNURs) under the Toxic Substances Control Act (TSCA) to prevent the manufacture and import of PFOS without first notifying EPA.[7]

As EPA was promulgating significant new use rules to ensure that PFOS would not re-enter the marketplace, EPA turned its focus on PFOA. In 2006, EPA launched the 2010/2015 PFOA Stewardship Program, which aimed to remove all PFOA from facility emissions and product content by 2015. The Stewardship Program was a success, and EPA promulgated SNURs to keep PFOA out of the environment.[8]

While EPA worked to limit the production and importation of PFAS through TSCA, it began (albeit much more slowly) taking steps to regulate PFAS through the Safe Drinking Water Act (SDWA). Under the SDWA, EPA must set enforceable maximum contaminant levels (MCLs) of harmful pollutants present in drinking water.[9] The SDWA also requires EPA to consider new harmful pollutants. The SDWA accomplishes this by forcing EPA to publish a list every five years—the Contaminant Candidate List (CCL)—of new contaminants not yet subject to an MCL.[10] After publishing the CCL, the SDWA requires EPA to make determinations about whether to regulate at least five of the new contaminants on the CCL.[11] Even when EPA declines to list or regulate a contaminant, EPA may nonetheless issue a health advisory (HA), which is a non-enforceable, non-regulatory standard intended to serve as technical guidance for federal, state and local officials.[12] EPA may also force public water systems to monitor unregulated contaminants.[13]

Despite taking action on PFOS and PFOA under TSCA as early as the 1990s, EPA did not place either chemical on CCLs issued in 1998, 2005 or 2009. EPA's first action on PFOS and PFOA under the SDWA came in 2009, when it issued HAs for PFOS and PFOA of 0.2 parts per billion and 0.4 parts per billion, respectively.[14] Three years later, in 2012, EPA added PFOS and PFOA to the unregulated contaminant monitoring list, requiring public water suppliers to monitor the two chemicals from 2012 to 2015.[15]

A year later, in 2016, EPA took two major steps toward regulating PFOS and PFOA under the SDWA. First, EPA

6 EPA, *Risk Management for Per- and Polyfluoroalkly Substances (PFAS) Under TSCA*, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-management-and-polyfluoroalkyl-substances-pfass (last updated July 20, 2018).

7 The first significant new use rule (SNUR), promulgated in 2002, prevented the manufacture and import of thirteen PFAS specifically included in the agreement with the sole manufacturer of PFOS. 67 Fed. Reg. 11008 (Mar. 11, 2002) (to be codified 40 C.F.R. pt. 721), *available at* https://www.gpo.gov/fdsys/pkg/FR-2002-03-11/pdf/02-5746.pdf. EPA added another seventy-five chemicals to the first SNUR on December 9, 2002. 67 Fed. Reg. 72854 (Dec. 9, 2002) (to be codified 40 C.F.R. pt. 721), *available at* https://www.gpo.gov/fdsys/pkg/FR-2002-12-09/pdf/02-31011.pdf. Finally, on October 9, 2007, EPA promulgated a SNUR on 183 PFAS chemicals it believed were no longer manufactured in the United States. 72 Fed. Reg. 57222 (Oct. 9, 2007) (to be codified 40 C.F.R. pt. 721), *available at* https://www.govinfo.gov/content/pkg/FR-2007-10-09/pdf/E7-19828.pdf.

8 EPA promulgated a SNUR in December 2013, requiring companies to report all new uses of certain PFOA-related chemicals as part of carpets. 78 Fed. Reg. 62443 (Oct. 22, 2013) (to be codified 40 C.F.R. pts. 9, 721), *available at* https://www.govinfo.gov/content/pkg/FR-2013-10-22/pdf/2013-24651.pdf. Another SNUR intended to complement the Stewardship Program was proposed in 2015, but never finalized. 80 Fed. Reg. 2885 (Jan. 21, 2015) (to be codified 40 C.F.R. pt. 721), *available at* https://www.govinfo.gov/content/pkg/FR-2015-01-21/pdf/2015-00636.pdf.

9 Public Health Service Act § 1412(b)(3)(C); 42 U.S.C. § 300g-1(b)(3)(C).

10 *Id.* § 1412(b)(1)(B)(i); 42 U.S.C. § 300g-1(b)(1)(B)(i).

11 *Id.* § 1412(b)(1)(B)(ii); 42 U.S.C. § 300g-1(b)(1)(B)(ii).

12 *Id.* § 1412(b)(1)(F); 42 U.S.C. § 300g-1(b)(1)(F).

13 *Id.* § 1445(a)(2); 42 U.S.C. § 300j-4(a)(2).

14 EPA, Provisional Health Advisories for Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS) (Jan. 8, 2009), *available at* https://www.epa.gov/sites/production/files/2015-09/documents/pfoa-pfos-provisional.pdf.

15 77 Fed. Reg. 26072 (May 2, 2012) (to be codified 40 C.F.R. pts. 141-142), *available at* https://www.govinfo.gov/content/pkg/FR-2012-05-02/pdf/2012-9978.pdf.

added PFOS and PFOA to the fourth CCL.[16] Second, EPA set new HAs of 70 parts per trillion for both PFOS and PFOA, which superseded the much higher 2009 HAs.[17]

EPA's PFAS Action Plan

Amidst this backdrop, EPA released its Action Plan to regulate PFAS in February 2019. The Action Plan identifies concrete steps EPA is taking to address PFAS over the short (within two years) and long term. Broadly speaking, the Action Plan aims to (1) improve the body of research on PFAS; (2) regulate PFAS under several environmental laws, including SDWA, CERCLA, TSCA and the Emergency Planning and Community Right to Know Act (EPCRA); and (3) reduce exposure to the two PFAS that EPA has already determined to be carcinogenic, namely PFOS and PFOA. While the Action Plan proposes dozens of actions, the most significant are discussed below.

Addressing PFAS in Drinking Water:

- The Action Plan states that EPA will set MCLs for both PFOS and PFOA. This is possibly the most significant step outlined in the Action Plan. Although EPA did not announce MCLs in the document, adding two new MCLs is a significant step that will require notice and comment rulemaking. EPA anticipates setting MCLs for PFOS and PFOA in 2019.

Cleaning up Contaminated Sites and Groundwater:

- EPA set a short-term goal of designating PFOS and PFOA as "hazardous substances" under CERCLA. This would provide additional authority to address PFOS and PFOA contamination by forcing responsible parties to implement and/or pay for response actions. EPA anticipates completing this action in 2019.
- The Action Plan states that EPA is developing interim recommendations to address groundwater contaminated with PFOS and PFOA. These recommendations are intended to guide state and federal agencies in making site-specific cleanup determinations. EPA anticipates completing the interim cleanup standards in 2019.

Reducing Exposure:

- The Action Plan announces that EPA will promulgate a SNUR on PFAS chemicals. EPA is currently considering public comments received in connection with the SNUR it proposed in 2015, as well as the new statutory requirements added by the Frank R. Lautenberg Chemical Safety for the 21st Century Act.[18] This step is classified as a short-term goal.
- EPA is considering whether to add PFAS to the Toxics Release Inventory (TRI) under EPCRA. The TRI tracks releases of chemicals that may pose a threat to human health and the environment. Adding PFAS to the TRI would allow EPA to track discharges of PFAS into the environment. This is classified as a long-term goal.
- The Action Plan states that EPA will consider whether available data and research support the development of water quality criteria for PFAS under the Clean Water Act. If adopted, this would allow states to set permit limits on discharges of PFAS into waterbodies. However, it is a long-term goal that EPA does not anticipate completing until 2021.

16 81 Fed. Reg. 81099 (Nov. 17, 2016), *available at* https://www.govinfo.gov/content/pkg/FR-2016-11-17/pdf/2016-27667.pdf.

17 81 Fed. Reg. 33250 (May 25, 2016), *available at* https://www.epa.gov/sites/production/files/2016-05/documents/2016-12361.pdf.

18 *See supra* note 8 and accompanying text.

Understanding PFAS:

- The Action Plan announces that EPA will finalize toxicity assessments for GenX chemicals and perfluorobutanesulfonic acids (PFBS). This is significant because GenX and PFBS are two of the chemicals used to replace PFOS and PFOA. The toxicity assessments can be used by government agencies to characterize health risks associated with exposure to these chemicals. EPA anticipates that it will release final toxicity assessments for these chemicals in 2019.
- The Action Plan states that EPA will also develop draft toxicity assessments for five other PFAS (PFBA, PFHxA, PFHxS, PFNA and PFDA). As with the above toxicity assessments, once finalized, the toxicity assessment for these five chemicals will help inform agency decision-making. EPA anticipates that the draft toxicity assessments for these five chemicals will be published in 2020.

New York State Actions

Despite EPA's Action Plan, many states are forging ahead with their own regulations on PFAS, New York included. In December 2018, the New York State Departments of Health (DOH) and Environmental Conservation (DEC) announced that the New York State Drinking Water Council had recommended that the DOH adopt MCLs for PFOS and PFOA of 10 parts per trillion, substantially lower than EPA's nonbinding HAs.[19] The Drinking Water Quality Council's recommendation is now being considered by the Commissioner of Health, who has authority to either adopt the Council's recommendation or propose alternate MCLs. The MCLs will then be subject to a 60-day public comment period during which interested parties may comment on the MCLs. At the close of the comment period, the Commissioner of Health will consider the comments, make necessary changes and move to publish a final rule. If adopted, public water systems would need to test their water and comply with the adopted MCLs.

It is worth noting that the State of New York has taken steps to help communities address PFOS and PFOA in their drinking water supplies and meet the proposed MCLs. In October 2018, Governor Cuomo announced $200 million in grant funding to help communities upgrade their drinking water treatment systems.[20] It seems likely that, given these efforts, state-level MCLs for PFOS and PFOA is imminent.

Conclusion

Though it is far from certain whether EPA will implement the PFAS Action Plan, there is increasing focus on PFAS at the state and federal level that will almost certainly have wide-ranging effects in the years to come. Parties that deal with PFAS, including manufacturers, municipalities, utilities, buyers and those engaged in real-estate transactions of affected properties, need to stay informed on the regulatory changes.

Additional Assistance

For questions regarding PFAS and related regulatory changes, please contact any of the attorneys on our Environmental Practice Team. ■

19 Press Release, New York State Department of Health, Drinking Water Quality Council Recommends Nation's Most Protective Maximum Containment Levels for Three Unregulated Contaminants in Drinking Water (Dec. 18, 2018), *available at* https://www.health.ny.gov/press/releases/2018/2018-12-18_drinking_water_quality_council_recommendations.htm.

20 Press Release, Governor Cuomo Announces $200 Million to Address Emerging Contaminants in Drinking Water (Oct. 2, 2018), *available at* https://www.governor.ny.gov/news/governor-cuomo-announces-200-million-address-emerging-contaminants-drinking-water.

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