

# **REWIND AND (P)FAST FORWARD**

## **CURRENT DEVELOPMENTS IN PFAS REGULATION**

**2023-2024**

## REWIND AND (P)FAST FORWARD: CURRENT DEVELOPMENTS IN PFAS REGULATION

With a flurry of new regulatory activity involving per- and polyfluoroalkyl substances (PFAS), 2023 proved to be a milestone year for PFAS governance by the US Environmental Protection Agency (EPA). Among other key developments, EPA issued its final retrospective reporting rule for PFAS and released a proposed rule establishing the first enforceable national drinking water standards for six PFAS chemicals.

In view of expectations that the agency will continue this momentum to advance additional regulation, such as designating perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and finalizing its proposed drinking water standards, 2024 could prove to be another landmark year.

This report summarizes these and other major PFAS regulatory developments from 2023 and provides a look ahead to what 2024 holds.

### THE PAST YEAR IN PFAS

Several key developments in the emerging contaminants space materialized in 2023 that had a considerable effect on just about every industry that imports or manufactures products in, or that is or was an owner or operator of potentially contaminated property in, the United States. This included the issuance of proposed and final rules governing PFAS in chemicals and products, manufacturing, imports, and drinking water as well as at contaminated sites.

We anticipate that the groundswell of national PFAS regulation will continue into 2024 as EPA continues its push to achieve the agency's stated goals to "research, restrict, and remediate" PFAS contamination of air, land, and water.

#### Final PFAS Reporting Rules under Toxic Substances Control Act

Following several extensions to its statutory deadline, EPA released its final Toxic Substances Control Act (TSCA) reporting and recordkeeping requirements for PFAS in September 2023 (published in the *Federal Register* on October 11, 2023). While the final rules largely track the draft rules released in June 2021, they include revisions to address concerns raised during the comment period about the rules' potential breadth and associated compliance burdens. The final rules also expand the definition of PFAS to cover a greater range of specific chemicals.

Under the new TSCA reporting rules, any entity that has manufactured or imported PFAS—including "articles" containing PFAS—will be required to submit a detailed report on its usage of PFAS for each year since 2011. The reports are anticipated to provide a vast amount of information to EPA, and the public at large, about how and in what products PFAS are used, where and how they may be released into the environment, and the potential risks to human health associated with this class of chemicals.

As regulated entities evaluate their obligations under the new rules and collect the information required to be reported, they should also consider and begin planning for foreseeable next steps after submission of their report, including potential future regulation, requests for information, publication of reporting data by EPA, and enforcement and litigation risks, as well as potential public perception issues.

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The rules became final on November 13, 2023. For most covered entities, reports will be due on May 8, 2025 (or November 10, 2025 if certain conditions are satisfied). For more on this development, read our LawFlash [EPA Releases Long-Awaited Final PFAS Reporting Rules](#).

## **Rule Removes De Minimis Standard, Classifies PFAS As 'Chemicals of Special Concern'**

In the same month that it finalized the TSCA reporting rules, EPA also announced a rule that expands its efforts to gather information about PFAS usage by designating PFAS as “chemicals of special concern” and eliminating the de minimis exemption for reporting of PFAS that had previously been available to facilities subject to Toxics Release Inventory (TRI) reporting. Accordingly, facilities now must report on PFAS regardless of their concentration in mixtures. The rule also makes the former exemption unavailable for purposes of supplier notification requirements to downstream facilities for all chemicals on the list of chemicals of special concern.

With these changes, any quantity of PFAS covered by the rule now counts toward the 100-pound threshold subject to reporting under the Emergency Planning and Community Right-to-Know Act and Pollution Prevention Act and triggers the downstream notification obligation. The rule was published in the *Federal Register* on October 31, 2023 and became final on November 30, 2023.

## **Rule Proposed for Enforceable National Drinking Water Standards for PFOA, PFOS under SDWA**

EPA released its proposed rule for the first enforceable PFAS national drinking water standards in March 2023. The proposal would set a numeric maximum contaminant level (MCL) for PFOA and PFOS. The proposal also simultaneously set forth a preliminary determination to regulate and MCLs and MCL goals for perfluorononanoic acid (PFNA), perfluorohexanesulfonic acid (PFHxS), perfluorobutane sulfonic acid (PFBS), and hexafluoropropylene oxide dimer acid and its ammonium salt, more commonly known as GenX chemicals. EPA proposes to regulate these four PFAS as a mixture through the novel use of a hazard index calculation.

If finalized, this rule will be the first national primary drinking water regulation (NPDWR) under the Safe Drinking Water Act (SDWA) in decades. Published in the *Federal Register* on March 29, 2023, the landmark proposed rule seeks to regulate these PFAS chemicals at the lowest feasible and technically achievable levels possible. The comment period for this proposed rule closed on May 30, 2023, and the final rule is expected to be issued in January 2024.

For more on this development, read our *Law360* Expert Analysis [Proposed PFAS Water Standards Will Likely Face Pushback](#), our Insight [Exploring the Universe of PFAS Regulation and Litigation](#), or our LawFlash [EPA Proposes Enforceable Drinking Water Standards for PFOA, PFOS, and Four Other PFAS](#).

## **ANPRM for Listing Additional PFAS as Hazardous Substances under CERCLA**

EPA published an advance notice of proposed rulemaking (ANPRM) in April 2023 seeking public input on whether to designate PFAS other than PFOA and PFOS as hazardous substances under CERCLA. Specifically, EPA sought input on whether to designate as hazardous substances (1) seven other PFAS (PFBS, PFHxS, PFNA, HFPO-DA, PFBA, PFHxA, and PFDA), (2) precursors to PFOA, PFOS, and the seven aforementioned PFAS, and (3) categories of PFAS.

Industry members have cited this ANPRM as suffering from the same defects as EPA’s 2022 proposal to designate PFOA and PFOS as CERCLA hazardous substances, discussed further below. The comment period for the ANPRM closed on August 11, 2023.

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## Update on PFAS Disposal Guidance

The US Department of Defense (DOD) issued its Memorandum for Interim Guidance on Destruction or Disposal of Materials Containing PFAS in the United States (osd.mil) in July 2023, which identified the following four commercially available options—having environmental permits—to destroy or dispose of DOD PFAS-containing materials (in order of consideration): (1) carbon reactivation units (for used granular activated carbon only), (2) hazardous waste landfills, (3) solid waste landfills that have composite liners and gas and leachate collection and treatment systems, and (4) hazardous waste incinerators. DOD expects to provide similar updates annually.

Consistent with the Fiscal Year 2020 National Defense Authorization Act (Public Law No: 116-92) and EPA's October 2021 PFAS Strategic Roadmap, EPA has updated its December 2020 Interim PFAS Destruction and Disposal Guidance that, while slated for publication in December 2023, was still under review by the White House Office of Management and Budget (OMB) as of the date of publication.

The information in this update is critical to the anticipated finalization of the controversial rule listing PFOA and PFOS as hazardous substances under CERCLA as well as the proposed NPDWR under the SDWA.

## ANTICIPATED DEVELOPMENTS IN PFAS REGULATION IN 2024

### Enforceable National Primary Drinking Water Regulation under SDWA

First on EPA's list for 2024 is finalizing the NPDWR for PFAS under the SDWA. Given the range and number of comments submitted in response to the 2023 notice of proposed rulemaking, the inclusion of four PFAS for which a final regulatory determination has not yet been made, and the novel incorporation of a hazard index approach for four of the six PFAS that are proposed to be included in the rule, this rule (expected to be finalized in January 2024) is likely to be challenged.

Indeed, other recent regulatory challenges may give EPA cause for concern as it moves forward with finalizing the NPDWR. For instance, in *3M Co. v. Dep't of Environment, Great Lakes & Energy*, No. 364067, 2023 WL 5418164 (Mich. Ct. App. Aug. 22, 2023), the Michigan Court of Appeals upheld the lower court's finding that the state agency had failed to calculate costs associated with groundwater cleanup (which was automatically triggered by the drinking water rule) in developing drinking water standards for seven PFAS and therefore had violated the state's Administrative Procedure Act (APA).

On the other hand, the recent affirmation of New Jersey's rule amendments setting MCLs and groundwater quality standards for PFOA and PFOS in the face of a challenge by industry stakeholders and municipal water treatment providers might bolster EPA's confidence. *See in re N.J. Dep't of Env't Prot.'s June 1, 2020 Adopted Amends.*, No. A-0307-20, 2023 WL 4939334 (N.J. Super. Ct. App. Div. Aug. 3, 2023). In that case, the appellate court gave great deference to the state agency and rejected the appellants' assertions that the agency had failed to substantially comply with New Jersey's APA.

In the meantime, the enactment of this regulation will have far-reaching impacts on both upstream and downstream entities as well as at cleanups of Superfund sites.

### PFOA and PFOS to Be Designated Hazardous Substances under CERCLA

In September 2022, EPA proposed to designate PFOA and PFOS as CERCLA hazardous substances, which was noteworthy not only as the first designation of any PFAS as a hazardous substance, but also as the first potential designation of any chemical as a hazardous substance under CERCLA by rulemaking. In



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addition to requiring reporting of PFOA and PFOS releases under CERCLA, PFOA and PFOS would also be subject to investigation and remediation at National Priority List (NPL) sites.

Listing would have far-reaching ramifications, including adding new potentially responsible parties to existing Superfund sites, slowing progress at sites undergoing investigation and/or remediation, adding new sites to the already lengthy NPL based on PFAS contamination, and possibly reopening previously closed sites under the five-year review process—all of which would have significant potential to spur cost-recovery and contribution claims.

While EPA has indicated that it will issue enforcement discretion guidance to insulate “passive receivers,” the US Congress is also potentially moving forward with legislation with the same intent, which could change the landscape of CERCLA litigation at PFAS sites significantly.

There will also be several logistical challenges posed for investigation and remediation, including limitations of lab capacity and testing methods for PFAS, identification of defensible cleanup criteria (particularly when considering background), lags in the development of remediation/treatment methods, and the lack and potential absence of clear guidance for disposal/destruction of PFAS remediation wastes (as noted above, EPA has not updated its 2020 interim guidelines for disposal and destruction of PFAS wastes at the time of publication).

The proposed rule was sent to OMB on December 6, 2023 and is expected to be published in March 2024. For more information, read our Insights [The Wait Is Over: EPA Proposes Rule Designating PFOA and PFOS as Hazardous Substances under CERCLA](#) and [Exploring the Universe of PFAS Regulation and Litigation](#).

## Movement on RCRA Rules Anticipated

In response to several petitions, including one from the State of New Mexico, EPA has drafted two rulemakings under the Resource Conservation and Recovery Act (RCRA). The first would list certain PFAS as RCRA hazardous constituents under 40 CFR § 261 Appendix VIII. Hazardous constituents in the RCRA program are subject to corrective action at hazardous waste treatment, storage, and disposal facilities (TSDFs), making this an important addition.

The second seeks to formalize what EPA has termed its long-standing practice to require investigation and cleanup of waste that falls under the statutory definition of hazardous waste. Doing so would extend RCRA authority to require RCRA corrective action of PFAS and other contaminants of emerging concern without requiring a rulemaking process.

EPA originally had expected to propose these rules in summer 2023; the Fall 2023 Unified Agenda revised that expectation to December 2023. The draft rules were held up in OMB for an extended period. During the first week of December, OMB completed its review of the proposed rules “clarifying” that EPA has authority to require corrective action of substances meeting the statutory definition of hazardous waste. The OMB review of “Listing of PFOA, PFOA, PFBS and GenX as Resource Conservation and Recovery Act (RCRA) Hazardous Constituents” was completed on December 21, 2023.

## CONCLUSION

EPA’s steady focus on addressing PFAS contamination of air, land, and water in 2023 and into 2024 is expected to have far-reaching implications as new cleanup and reporting responsibilities for entities across many sectors of the economy begin to take effect. While some proposed rules pertaining to PFAS, particularly the NPDWR, could face pushback and delay, importers or manufacturers of products in the United States and current or former owners or operators of potentially contaminated property in the

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United States would do well to stay informed of these developments and prepare for increased regulation.

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