

# EPA's Recent Release of its "Fall 2022" Unified Regulatory Agenda – Upcoming PFAS-Related Actions

Released January 2023

The US Environmental Protection Agency (EPA) and the Department of Defense (DoD) recently released their [Fall 2022 Unified Agendas of Regulatory and Deregulatory Actions](#) detailing upcoming rulemakings, including actions related to per- and polyfluoroalkyl substances (PFAS). As reflected by [EPA's release](#) of drinking water health advisories for certain PFAS on June 15, 2022, federal agencies are initiating PFAS-related regulatory actions that will pose new compliance challenges with [far-reaching implications](#) for a broad spectrum of the regulated community and affected stakeholders. The Fall Unified Agenda includes the following PFAS-related regulatory actions of interest:

## DoD – Defense Acquisition Regulatory Council (DARC)

- [Proposed rule to restrict certain items containing PFOS or PFOA](#): DoD is proposing to amend its Federal Acquisition Regulation Supplement to implement section 333 of the National Defense Authorization Act (NDAA) for Fiscal Year 2021. Section 333 of the NDAA prohibits DoD from procuring any covered item that contains perfluorooctane sulfonate (PFOS) or perfluorooctanoic acid (PFOA). Prohibited items include nonstick cookware or cooking utensils for use in galleys or dining facilities and upholstered furniture, carpets, and rugs treated with stain-resistant coatings. DoD pushed back its intended publishing date for a proposed rule from July 2022 to April 2023.

## EPA – Office of Water (OW)

- [Proposed rule to regulate PFOA and PFOS in drinking water](#): EPA's 2021 [Regulatory Determination](#) to regulate PFOA and PFOS in drinking water triggered deadlines under the Safe Drinking Water Act (SDWA) to issue proposed maximum contaminant level goals (MCLGs) and maximum contaminant levels (MCLs) for PFOA and PFOS within 24 months, followed by final national primary drinking water regulations (NPDWRs) promulgated within 18 months after the proposals. NPDWRs are typically based on maximum contaminant levels (MCLs), which are required by the SDWA to be as close as practicable to the MCLGs, but EPA's plans to develop PFOA and PFOS NPDWRs while considering regulating other PFAS are described in its [PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024 \(PFAS Strategic Roadmap\)](#). This proposed action follows EPA's release of interim Health Advisories for PFOA and PFOS in June 2022 and its adoption of the [fifth Unregulated Contaminant Monitoring Rule \(UCMR5\)](#) in December 2022 to require public water systems to collect drinking water occurrence data for 29 PFAS. The implications of the health advisories are discussed in [this Hunton Andrews Kurth LLP blog post](#). EPA did not publish a proposed rule to regulate PFOA and PFOS in drinking water by its goal of December 2022, delaying plans to finalize this rule until January 2024.

## EPA – Office of Land and Emergency Management (OLEM)

- [Proposed rule to designate PFOA and PFOS as CERCLA hazardous substances](#): EPA's proposed action to designate PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was one of the most awaited actions set forth in the PFAS Strategic Roadmap and carries potentially vast implications for federal, state, and local authorities, private parties, and sites across the country. Issued in September 2022, EPA's proposed rule, if finalized, would open the floodgates to Superfund liability for actual or potential PFOA and PFOS releases and activate the full panoply of powerful CERCLA enforcement authorities. Designating PFOA and PFOS as CERCLA hazardous substances could result in the addition of more sites to the National Priorities List, cause disruption to ongoing remediation activities, reopen existing Superfund sites, and increase litigation costs. Significantly, EPA determined that the associated liability and cleanup costs are only

“indirect” costs, and the only costs that were considered were minimal reporting costs. Hunton Andrews Kurth [previously reported](#) on the significant implications of the proposed rule. EPA plans to finalize this rule in August 2023.

- **[Pre-rule on PFAS-related designations as CERCLA hazardous substances](#)**: EPA is also considering seeking public input on further PFAS-related designations under CERCLA by issuing an Advance Notice of Proposed Rulemaking (ANPRM). The agency may request public comments on possibly designating as CERCLA hazardous substances any additional PFAS, including substances known to be precursors to PFOA and PFOS or specific classes or subclasses of PFAS. EPA delayed publishing its request for public comment until February 2023.
- **[Listing of PFOA, PFOS, PFBS, and GenX as RCRA hazardous constituents](#)**: In response to petitions from the Governor of New Mexico, Public Employees for Environmental Responsibility, and the University of California Berkeley School of Law on behalf of five other organizations, EPA is evaluating the existing toxicity and health effects data on four PFAS constituents to determine if they should be listed as RCRA hazardous constituents and subject to corrective action requirements at hazardous waste treatment, storage, and disposal facilities. A proposed rule is expected to be released in August 2023.

#### **EPA – Office of Chemical Safety and Pollution Prevention (OCSP)**

- **[Final rule on PFAS reporting and recordkeeping under Section 8\(a\)\(7\) of the Toxic Substances Control Act \(TSCA\)](#)**: EPA published a [proposed rule](#) addressing reporting and recordkeeping requirements for PFAS under Section 8(a)(7) of TSCA in June 2021. Under the proposed rule, persons that have manufactured or imported certain PFAS and PFAS-containing articles in any year since January 1, 2011 would be subject to reporting and recordkeeping requirements. Despite the acknowledged likelihood of international trade and investment effects, EPA expects that the rule would enable it to better characterize PFAS sources and quantities in the United States. Hunton Andrews Kurth has [previously commented](#) on the expansive nature of EPA’s proposed rule. EPA’s Agenda delays finalizing this rule from December 2022 to March 2023.
- **[Proposed rule to change reporting requirement for PFAS and community right-to-know toxic chemical release reporting](#)**: EPA has released a [proposal](#), pursuant to Section 313 of the Emergency Planning and Community Right to Know Act (EPCRA) and Section 6607 of the Pollution Prevention Act (PPA), to add PFAS to the List of Lower Thresholds for Chemicals of Special Concern (Chemicals of Special Concern). Adding PFAS to this list will eliminate the use of the *de minimis* exemption and the option to use Form A and limit the use of range reporting. In addition, EPA is proposing to eliminate the use of the Supplier Notification Requirement’s *de minimis* exemption for facilities that manufacture or process chemicals included on the Chemicals of Special Concern list. Eliminating the *de minimis* exemption for supplier notification purposes is intended to help facilities to identify potential sources of PFAS and other Chemicals of Special Concern, which EPA believes will result in a more complete picture of the releases and waste management quantities for these chemicals. Without a *de minimis* exemption, Toxics Release Inventory (TRI) reporting burdens will likely increase, and more companies will unexpectedly become subject to reporting obligations. While EPA intended to release the rule in September 2022, it was not released until December 2022. EPA intends to finalize this rule in November 2023.
- **[Proposed rule to add certain PFAS to the Toxics Release Inventory](#)**: EPA is developing a rulemaking to add certain PFAS to the TRI list in direct response to a statutory mandate under Section 7321(d) of the NDAA for Fiscal Year 2020. EPA is required to evaluate whether certain specific PFAS meet the EPCRA Section 313 listing criteria by December 2021 and is required to add any PFAS that EPA determines meet the listing criteria by December 2023. EPA has delayed the release of the proposed rule to May 2023 and plans to finalize this rule in February 2024.
- **[Proposed inactive inventory PFAS Significant New Use Rule](#)**: EPA released a [proposed significant new use rule \(SNUR\)](#) under Section 5(a)(2) of TSCA for certain uses of PFAS designated as “inactive” on the TSCA Inventory. Persons subject to the Inactive Inventory PFAS SNUR would be required to notify EPA at least 90 days in advance of manufacturing or processing these PFAS for uses of any kind because EPA intends to deem any use of these inactive PFAS to be significant new uses (unless subject to an exemption). EPA delayed publishing the proposed rule from September 2022 to January 2023 and plans to finalize this rule in December 2023.

**The following items have been added to EPA’s “long-term” action list:**

- [Amendments to CWA Effluent Limitations Guidelines \(ELGs\)](#) for the Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF) point source category to address PFAS discharges from facilities manufacturing PFAS. Publication of a proposed rule has been delayed from September 2023 to May 2024.
- [Amendments to Metal Finishing ELGs](#) to address PFAS discharges in chromium electroplating wastewater. The proposed rule is expected to be released by December 2024.

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*Hunton Andrews Kurth LLP’s environmental team has the legal knowledge and scientific background required to address [PFAS](#)-related regulatory and compliance challenges. Our natural resource and chemical attorneys work together with our firm’s in-house scientist and policy advisors to create comprehensive strategies for our clients nationwide.*

**Please contact our team regarding PFAS-related questions:**



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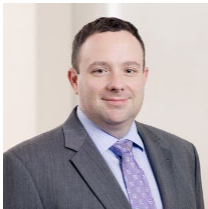
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