

EPA's Recent Release of its "Spring 2023" Unified Regulatory Agenda: Upcoming PFAS-Related Actions

Released June 2023

The US Environmental Protection Agency (EPA) and the Department of Defense (DoD) recently released their [Spring 2023 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 a proposed national primary drinking water regulation in March 2023, [the release](#) of an advanced notice of proposed rulemaking to designate additional PFAS as CERCLA Hazardous Substances in April 2023, and EPA's new TSCA [Framework to Prevent Unsafe PFAS from Entering the Market](#), 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 Spring 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 and 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 April 2023 to December 2023.

EPA—Office of Water (OW)

- **[Proposed rule to regulate PFOA and PFOS in drinking water](#)**: In March 2023, [EPA proposed](#) its long-awaited proposed rule to restrict certain per- and polyfluoroalkyl substances (PFAS) in drinking water under the Safe Drinking Water Act (SDWA). EPA's proposal went beyond setting maximum contaminant levels (MCLs) for PFOA and PFOS by proposing to regulate four additional PFAS including PFNA, PFHxS, perfluorobutane sulfonic acid (PFBS) and hexafluoropropylene oxide dimer acid (HFPO-DA) and its ammonium salt (also known as a GenX chemicals). This proposal is expected to have widespread impacts, affecting over 66,000 public water systems. EPA intends to finalize this rule in January 2024.

[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: Consistent with the [PFAS Strategic Roadmap](#), EPA is revising the guidelines for this source category. EPA released an Advanced Notice of Proposed Rulemaking (ANPRM) in March 2021 and publication of a proposed rule is expected in May 2024.

EPA—Office of Land and Emergency Management (OLEM)

- **[Proposed rule to designate PFOA and PFOS as CERCLA hazardous substances](#)**: EPA's September 2022 proposed rule to designate PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was one 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. The 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 LLP [previously reported](#) on the significant implications of the proposed rule. EPA has delayed finalization of this rule, and a final rule is not expected until February 2024. EPA also plans to issue an [enforcement discretion policy](#) for addressing PFAS contamination at Superfund sites.

- **[Pre-rule on PFAS-related designations as CERCLA hazardous substances](#)**: In April 2023, EPA sought public input on further PFAS-related hazardous substance designations under CERCLA by issuing an Advance Notice of Proposed Rulemaking (ANPRM). The comment period ends on August 11, 2023. The agency requests public comments on potential future designations as CERCLA hazardous substances for seven additional PFAS (PFBA, PFHxS, PFNA, HFPO-DA, PFBA, PFHxA and PFDA), for substances known to be precursors to PFOA, PFOS and the seven additional PFAS, and for designating categories of PFAS as hazardous substances. EPA has not provided a date by when it will propose a rulemaking for these additional PFAS designations.
- **[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. The four PFAS chemicals EPA will evaluate are: PFOA, PFOS, PFBS and HFPO-DA (or GenX). A proposed rule is currently under review at OMB and is expected to be released in August 2023.
- **[Definition of Hazardous Waste Applicable to Corrective Action for Solid Waste Management Units](#)**: Also in response to petitions, EPA plans to propose a rule in August 2023 that would modify RCRA regulations to clarify that the definition of “hazardous waste” found in RCRA section 1004(5) is applicable to corrective action for releases from solid waste management units. According to EPA’s [press release](#), this modification would clarify that emerging contaminants such as PFAS can be cleaned up through the RCRA corrective action process.

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 \(TSCA\)](#)**: In June 2021, EPA published a [proposed rule](#) addressing reporting and recordkeeping requirements for PFAS under section 8(a)(7) of TSCA. Under the proposed rule, companies that have manufactured or imported certain PFAS and PFAS-containing articles since January 1, 2011, would be required to report information on uses, production volumes, disposal, exposures and hazards to EPA. EPA conducted a Small Business Advocacy Review (SBAR) panel to evaluate the impacts of the rule on small businesses. The [report](#) from the SBAR panel was released for public comment in November 2022. We discuss the implications of the proposed PFAS reporting rule [here](#). A final rule is currently under review at OMB, and EPA is now expecting to finalize this reporting rule in September 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 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 it determines meet the listing criteria by December 2023. EPA has delayed the release of the proposed rule to December 2023 and plans to finalize this rule in November 2024. EPA will also issue a [final rule in June 2023](#), per section 7321 of the NDAA that provides a framework for PFAS to be added automatically to the TRI list on January 1 of the year following certain EPA actions. This final rule will amend EPCRA regulations to reflect the statutory addition of the PFAS that were automatically added to the TRI list pursuant to the NDAA, and are subject to TRI reporting for Reporting Year 2023.

- **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 (including importing) 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 plans to finalize this rule in December 2023.

On EPA’s “long-term” action list:

- **Amendments to Metal Finishing ELGs** to address PFAS discharges in chromium electroplating wastewater: The proposed rule is expected to be released by December 2024.

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:



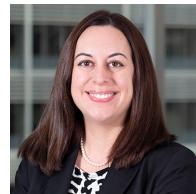
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