

2023 PFAS Roundup



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Per- and polyfluoroalkyl substances (PFAS) are a class of synthetic chemicals characterized by a chain of strong fluorine and carbon bonds, making them resistant to heat and degradation, and able to repel water, oil, and grease. Given these characteristics, PFAS are prevalent in a variety of commercial products, including carpeting, clothing, non-stick cookware, and furniture. At the same time, this resistance to degradation allows PFAS to persist and accumulate in humans, wildlife, and the environment (i.e., soil and groundwater) for long periods when exposed.

Recent studies posit that human exposure to PFAS can cause cancer, developmental delays, fertility issues, weakened immune systems, and other adverse health effects. These health risks have caught the attention of both state and federal regulators, leading to the development of a strict regulatory program for the management of PFAS.

Every three years, the Environmental Protection Agency (EPA) releases [National Enforcement and Compliance Initiatives](#) (NECI) to address the most serious and widespread environmental problems facing the United States. EPA has, for the first time, included PFAS on the NECI for 2024-2027, declaring its intent to prioritize the following:

- Investigation of the presence of PFAS near facilities that manufactured PFAS-containing products;
- Oversight of PFAS characterization and elimination at federal facilities to ensure that the compliance at those facilities serves as a model for the regulated community; and,
- Starting in 2025, enforcement actions against entities that violate existing and future PFAS regulations.

EPA's key NECI goals are to identify sites with PFAS contamination, control ongoing releases that pose a threat to human health and the environment, ensure compliance with permits and other agreements to prevent and address PFAS contamination, and focus on endangerment issues as they arise.

New Regulations

EPA has recently released regulations implementing PFAS reporting requirements for manufacturers under the Toxic Substances Control Act (TSCA) and Emergency Planning and Community Right-to-Know Act (EPCRA).

In 2016, Congress amended TSCA and added Section 8(a)(7), which requires EPA to promulgate a rule requiring any entity that has manufactured any class of PFAS since January 1, 2011 to submit a report that must include the specific name and molecular structure of the chemical, the total amount of each chemical processed, all existing information concerning the health effects of each PFAS-containing substance or mixture, the number of individuals exposed, and the manner of disposal of each substance. EPA promulgated [its rule](#) fulfilling this statutory requirement on October 11, 2023 stating that it will assist EPA in its determination of the sources of PFAS contamination most prominent throughout the United States.

On October 31, EPA promulgated its [new PFAS Reporting Rule](#) (reporting rule) under Section 313 of EPCRA. Section 313 requires facilities that manufacture, process, or use certain listed chemicals in amounts above a certain threshold to report environmental releases of such chemicals annually. Further, the "supplier notification requirement" under EPCRA requires manufacturers to notify purchasers of products containing listed chemicals of the presence of those chemicals in the products. The same law contains a *de minimis* exemption that exempts certain releases from these reporting requirements if the release is in a quantity below a certain threshold and the chemical is not one of special concern.

PFAS have been subject to reporting for several years however, because they often show up only in small quantities, they were largely subject to the *de minimis* exemption from reporting. The reporting rule now lists PFAS as chemicals of special concern and, therefore, eliminates the *de minimis* reporting exemption for PFAS. As such, manufacturers will face much more stringent reporting requirements with respect to PFAS releases and management.

Looking Forward

EPA anticipates that it will finalize an adjusted version of its September 2022 [proposed rule](#) (proposed rule) classifying two PFAS—perfluorooctanoic acid and perfluorooctanesulfonic acid—as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 2024. The presence of hazardous substances in the environment triggers EPA's response authority under CERCLA. Consequently, as PFAS are ubiquitous in many locations, the proposed rule would drastically expand EPA's authority to order remediation and response actions. The proposed rule would also have costly effects on the development industry

as PFAS would fall within the scope of phase I environmental site assessments. Environmental consultants would be required to search for potential PFAS use in their review of properties' historical uses, which could lead to a significant increase in the number of recognized environmental conditions (RECs) identified in real estate transactions. EPA has not released the final version of the proposed rule, which may address these issues.

In addition to regulation under CERCLA, EPA also released a [proposed PFAS National Primary Drinking Water Regulation](#) (NPDWR) under the Safe Drinking Water Act (SDWA) that would set legally enforceable standards for six different PFAS in drinking water. Most affected by this forthcoming NPDWR will be states and tribes that provide drinking water to residents, as the NPDWR would require any public water system—defined as a system that provides water to at least 15 service connections or 25 people for a minimum of 60 days a year—to test for PFAS, notify the public of PFAS levels, and take remedial action if the levels of PFAS in drinking water exceeds the finalized standards.

Given the complex and far-reaching impacts of PFAS regulations, EPA and state governments will continue to develop regulatory schemes to address PFAS contamination and exposure. As these regulations evolve, and in light of EPA's enforcement initiatives, it is important for industries that may be impacted by these changes to evaluate their potential exposure and take appropriate steps to navigate this growing regulatory landscape.

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