

## Regulation of PFAS Chemicals Fully Underway

**U.S. EPA has issued two significant rulemakings formally regulating the PFAS chemicals PFOA and PFOS. Regulation of PFAS continues to gain momentum and will have major implications for the regulated community.**

April saw two major developments with the regulation of per- and polyfluoroalkyl substances, the so-called “forever chemicals” known as “PFAS.” On April 10, U.S. EPA issued drinking water standards for the PFAS chemicals PFOA and PFOS. On April 19, U.S. EPA followed up by designating those chemicals as “hazardous substances” under CERCLA. As discussed below, each rulemaking presents a host of compliance challenges for the regulated community, as well as significant implications for potential liability.

### New Drinking Water Standards

In general terms, PFAS is a body of chemicals that numbers in the thousands and have been utilized since the 1940s in a wide variety of consumer products ranging from non-stick cookware, clothing, fabrics and cosmetics, as well as applications such as firefighting foam. While the chemicals are highly effective in resisting grease, water and oil, they also do not break down in the environment and, therefore, persist in the environment and build up within people and animals over time.

The chemicals perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) are considered the most prevalent and consequently the most studied of the PFAS chemicals. Accordingly, U.S. EPA has signaled over the past couple of years that these chemicals would be evaluated and regulated first. For example, in June 2022, EPA issued interim drinking water health advisories for PFOA and PFOS, which replaced the 2016 advisory. While the prior recommendation in 2016 was set at 70 parts per trillion (ppt), EPA significantly tightened the recommendations down to 0.004 ppt for PFOA and 0.02 ppt for PFOS.

While the health advisories were largely informational, EPA’s April 10 final rule sets formal legally enforceable levels, or Maximum Contaminant Levels (MCLs), for PFOA, PFOS and certain replacement chemicals, as follows:

Compound	Final MCLG	Final MCL
PFOA	Zero	4.0 ppt
PFOS	Zero	4.0 ppt
PFHxS	10 ppt	10 ppt
PFNA	10 ppt	10 ppt
HFPO-DA (i.e. “GenX” Chemicals)	10 ppt	10 ppt
Mixtures containing two or more of PFHxS, PFNA, HFPO-DA, and PFBS	1 (unitless)	1 (unitless)

The new rule affirmatively requires public water systems to complete initial monitoring of these compounds by 2027, followed by ongoing compliance monitoring. Water systems are required to provide the public with information on the levels of these PFAS in their drinking water beginning in 2027. By

2029, public water systems must implement solutions that reduce PFAS levels if concentrations exceed MCLs. Again, water systems must notify the public of such exceedances. The new rule is effective on June 25, 2024.

Given the prevalence of such chemicals, the extremely low target concentrations, and the technical complexity of achieving such reductions, it is anticipated that the burden upon public water systems will be staggering. EPA's press release estimates that only 6-10 percent of the 66,000 public water utilities subject to the April 10 rule "may have to take action" and touts the availability of "readily available solutions" currently "on the market now" in the form of GAC, ion-exchange, and reverse-osmosis systems. However, this is likely an underestimation of the potential impact of the rule, and implementation of such technologies will be technically challenging and will impose extensive financial burdens, particularly in communities where the ability to raise service rates is limited. EPA points out that the Bipartisan Infrastructure Law provides \$9 billion in funding to address PFAS and other emerging contaminants, including over \$5 billion for small or disadvantaged communities, as well as offering free technical assistance. Nonetheless, the primary funding means is certainly going to be borne by the public in the form of increased water service rates, and will also be realized through increased costs of goods and services due to tighter regulation of industry.

### **PFAS Regulation under CERCLA**

The second major punch comes from EPA's decision to designate PFOA and PFOS as "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), which directly authorizes regulators to order cleanups of such compounds and also recover the costs for investigation and remediation. The rule becomes effective 60 days following publishing in the Federal Register.

As part of the rulemaking, EPA has simultaneously issued a new enforcement discretion policy to clarify EPA's enforcement targets. In particular, the policy provides that EPA will direct its enforcement authority on a case-by-case basis towards "parties that manufactured PFAS or used PFAS in the manufacturing process, federal facilities, and other industrial parties," but will not target those that "receive" PFAS-contaminated wastewater, such as community water systems and publicly owned treatment works, municipal separate storm sewer systems, publicly owned/operated municipal solid waste landfills, publicly owned airports and local fire departments, and farms where biosolids are applied to the land. The discretion not to target these entities is based upon certain "equitable factors", specifically:

- (1) Whether the entity is a state, local, or Tribal government, or works on behalf of or conducts a service that otherwise would be performed by a state, local, or Tribal government.
- (2) Whether the entity performs a public service role in:
  - Providing safe drinking water;
  - Handling of municipal solid waste;
  - Treating or managing stormwater or wastewater;
  - Disposing of, arranging for the disposal of, or reactivating pollution control residuals (e.g., municipal biosolids and activated carbon filters);
  - Ensuring beneficial application of products from the wastewater treatment process as a fertilizer substitute or soil conditioner; or
  - Performing emergency fire suppression services.
- (3) Whether the entity manufactured PFAS or used PFAS as part of an industrial process.

(4) Whether, and to what degree, the entity is actively involved in the use, storage, treatment, transport, or disposal of PFAS.

As part of the policy, EPA notes that it will seek to protect entities subject to its enforcement discretion from potential contribution actions by potentially responsible parties (“PRPs”) through “waiver of rights” provisions in any settlements with PRPs. EPA will also enter into protective settlement agreements with non-manufacturing entities in order to prevent third-party contribution claims.

Thus, the policy hamstrings CERCLA’s fundamental concept of joint-and-several liability and a liable party’s statutory ability to pursue contribution against other responsible parties. By excluding certain non-PFAS manufacturing parties from any allocation of response costs, manufacturing PRPs are likely to be on the hook for a disproportionate share of the response costs. Moreover, potential settlement discussions are likely to become more complicated given EPA’s insistence on demanding parties waive their rights to contribution actions.

The implications of these two rulemakings cannot be overstated for the regulated community. It is also noteworthy that these rulemakings are being implemented along with other agency efforts to regulate PFAS. In particular, in February, EPA issued two other proposed rules to regulate PFAS under the Resource Conservation and Recovery Act (“RCRA”) when implementing corrective action measures following a release, and a rule authorizing EPA or states to issue a determination that non-listed PFAS compounds meet the definition of “hazardous waste.”

These rulemakings are likely to attract legal challenges from a variety of sources. It has been reported that EPA received over 120,000 comments during the public comment period for the drinking water proposed rule, many challenging the underlying science, enforceability of the proposed standards, and the estimated costs to implement the rule. As such, there is a high likelihood that the rules will be challenged in the coming months.

Manufacturers and industry should be actively evaluating their operations for compliance with the rules and the potential for liability, while municipalities and public water utilities likewise need to have a strategic plan for addressing the regulation of PFAS.

For more information, please feel free to contact any of Roetzel’s EHS professionals.

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