

Now is the Time to Evaluate PFAS Liability

Alert

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If your organization has not already started thinking about PFAS (per- and polyfluoroalkyl substances), there's no time like the present. PFAS refers to a family of man-made, environmentally persistent chemicals (often referred to as "forever chemicals") with a chain of carbon-fluorine bonds. They are used in a variety of consumer and industrial products such as nonstick cookware, waterproof clothing, cosmetics and, historically, in firefighting foam and airport defoaming agents. After years of legislative debate, the Biden administration has plans to comprehensively regulate PFAS via a series of rulemaking and agency action. The reach of these rules will impact manufacturers and users of PFAS, downstream distributors and utilities where PFAS is present, to name a few.

On October 18, the [White House released a statement](#) announcing the Biden-Harris administration's "Comprehensive Approach to Address PFAS in Air, Water, and Food," which includes actions from eight federal agencies, and the creation of an Interagency Policy Committee on PFAS, with the goals of: (1) researching PFAS exposure pathways impacts; (2) preventing PFAS from entering the environment; and (3) expanding PFAS cleanup efforts. In short, the strategy is to research, restrict and remediate PFAS chemicals.

A key feature of the announcement is the Environmental Protection Agency's (EPA) "[PFAS Roadmap](#)." The PFAS Roadmap builds on prior PFAS-related efforts of the Biden-Harris administration, including the formation of the EPA Council on PFAS earlier this year, proposals in the American Jobs Plan and efforts to pass a bipartisan Infrastructure Deal and Build Back Better Agenda, all of which call for the investment of billions of dollars to monitor and treat PFAS in drinking water. In September, the EPA had announced a new focus on setting new effluent limitation guidelines for PFAS manufacturer discharges under the Clean Water Act. [We continue to track those actions from our prior alert.](#)

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The PFAS Roadmap outlines EPA's plans for PFAS regulations over the next four years to (1) require tracking PFAS in municipal water supplies under the Safe Drinking Water Act (SDWA); (2) include PFAS in the definition of "hazardous substance" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); (3) identify sources of PFAS emissions and evaluate whether PFAS should be a "hazardous air pollutant" (HAP) under the Clean Air Act; and (4) expand disclosure of PFAS in reporting under the Toxic Substances Control Act (TSCA).

The PFAS Roadmap establishes aggressive timelines to implement EPA's goals. EPA will publish a national PFAS testing strategy by the end of 2021, which will likely require public water systems serving more than 3,300 people to monitor the 29 PFAS chemicals and lithium, and report the results to EPA beginning January 2023. The EPA plans to use this data to determine what substances will require more scrutiny under TSCA as it develops expanded Toxic Release Inventory reporting obligations in spring 2022. Pursuant to the 2020 National Defense Authorization Act, certain industry sectors already must report certain PFAS releases in TRI. In addition, the EPA plans to propose SDWA and CERCLA standards for perfluorooctanoic acid and perfluorooctanesulfonic acid by the fall of 2022, with drinking water standards becoming effective as early as fall 2023. The EPA also announced plans to publish a final toxicity assessment for hexafluoropropylene oxide dimer acid and its ammonium salt, otherwise known as "GenX chemicals," in fall 2021 with health advisories thereafter in spring 2022.

Although the PFAS Roadmap does not establish specific dates by which these new PFAS rules will become effective, the EPA is hosting two national webinars to engage with stakeholders and discuss next steps. The webinars will take place on [October 26](#) and [November 2](#).

EPA is not the only federal agency considering PFAS actions in the short-term. Other federal agency actions related to PFAS research, restriction and remediation, will occur in tandem. For example:

- Between now and 2023, the Department of Defense (DOD) is conducting PFAS cleanup assessments at DOD properties where PFAS may have been used or released using expanded testing capabilities which can detect up to 29 types of PFAS chemicals in soil and groundwater.
- The Department of Homeland Security (DHS) has established an Emerging Contaminants Working Group to coordinate PFAS remediation from past use of firefighting foams and possible water-source contamination. The Federal Emergency Management Agency, a branch within DHS, has awarded a research grant to study the extent of firefighter exposure and health impacts of PFAS in firefighting foam.
- The Center for Disease Prevention and Control's (CDC) National Institute for Occupational Safety and Health is beginning to study firefighter exposure and measuring PFAS levels in firefighter gear. Further, both DOD and the Federal Aviation Administration are investing in research and development of PFAS-free firefighting foam.

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- The Food and Drug Administration is expanding its industry outreach regarding food packaging meant to limit human PFAS exposure as well as PFAS testing and analysis methods to identify suspected food contamination. PFAS in non-stick cookware and other food preparation uses may be phased out over the course of three years under agreements with manufacturers achieved in 2020.
- The U.S. Department of Agriculture has begun testing for PFAS in meat and poultry products and is supporting further research on the causes and implications of PFAS in the food system.
- The Department of Health and Human Services is keeping a finger on the pulse of emerging science on the health effects of PFAS exposure through a CDC and Agency for Toxic Substances and Disease Registry study currently underway in eight states to identify non-drinking water exposure pathways.
- In addition to Superfund research regarding the transportation and ultimate disposition of PFAS once they are released to the environment, the National Institute of Health Science, at EPA's request, is also evaluating whether PFAS exposure could have immune effects that would weaken responses to vaccination.

In addition to these and other federal regulatory actions under the PFAS Roadmap, various states are also taking independent action to more aggressively regulate PFAS. In Minnesota, for example, the state has developed its own [PFAS blueprint](#) identifying PFAS related regulatory priorities.

Similar to the EPA PFAS Roadmap, Minnesota is considering designating PFAS as a “hazardous substance” under the Minnesota Environmental Response and Liability Act and requiring companies to disclose additional information regarding the use of PFAS in their products. Regulatory interest in PFAS is happening in a variety of states such as Alaska, Arizona, California, Colorado, Massachusetts, Michigan, New York, New Jersey, New Hampshire and Vermont, to name a few. Many states have adopted or are considering drinking water standards for PFAS that may already be in place, and may be lower than the federal health advisory level. Some state efforts also include the designation of PFAS as a “hazardous substance” and restricting the sale and use of PFAS in food packaging and take-out containers in states like California and Maine.

The landscape for PFAS chemicals is rapidly changing from manufacturing to monitoring to remediation. Stinson's environmental attorneys are prepared to help you evaluate potential PFAS issues and navigate the complex interplay of these developments.

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