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PERSPECTIVE

EPA outlines key PFAS regulatory developments on the horizon

By Patrick Veasy and Madeline Weissman

During the early stages of the Biden administration, efforts to regulate per- and poly-fluoroalkyl substances, aka “PFAS,” were largely piecemeal and driven by various proposals in Congress. Last month, however, the U.S. Environmental Protection Agency issued a “Strategic Roadmap” that sets forth the agency’s comprehensive plan to study and regulate PFAS. The roadmap will have a significant impact on municipal and industrial entities.

Nicknamed “forever chemicals,” PFAS are a broad group of man-made chemicals used in a wide range of consumer products and industrial processes due to their qualities to be waterproof, stain-resistant, and nonstick. As a result, PFAS are ubiquitous and have been released into the environment and drinking water supplies through their myriad applications. Importantly, these forever chemicals are reported to have a variety of adverse health effects.

Early Efforts to Regulate

The Biden administration has taken a number of actions to regulate PFAS since February, when the EPA developed a rule per the Safe Drinking Water Act and published a final determination to regulate perfluorooctanoic acid and perfluorooctane sulfonic acid — the two most common PFAS compounds — in drinking water.

In April, the EPA changed the way it reviewed PFAS entering the marketplace to more closely align with Toxic Substances Control Act regulations. It also published an

updated toxicity assessment for perfluorobutane sulfonic acid and created the EPA Council on PFAS.

Between June and July, the EPA proposed a rule requiring manufacturers and importers of PFAS to provide more data, restarted the process of designating PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act, and released the first set of preliminary data for PFAS collected under the Toxics Release Inventory.

More recently, the EPA published a final human health toxicity assessment for “GenX” chemicals (a type of forever chemical) and announced steps toward evaluating the existing data for four PFAS for listing under the Resource Conservation and Recovery Act and strengthening the ability to clean up PFAS contamination through the act’s corrective action process.

The Strategic Roadmap

Prior efforts to address PFAS culminated on October 18 when EPA Administrator Michael S. Regan announced the agency’s Strategic Roadmap. The roadmap sets timelines by which the EPA plans to take specific regulatory actions and commits to new policies aimed at safeguarding public health, protecting the environment, and initiating enforcement actions tied to PFAS under various statutes. The EPA’s PFAS Council developed the roadmap, which includes three guiding strategies: (1) increase investments in research, (2) leverage authorities to take action now to restrict PFAS chemicals from being released into the environment, and (3) accelerate the clean-up of PFAS contamination.

The following regulatory schemes

encompass some of the major elements of the roadmap, especially for industry and the water sector. Other regulatory schemes outlined in the roadmap include enhancing PFAS reporting under the Toxics Release Inventory and TSCA, studying PFAS air emissions, and implementing other general strategies to address and study PFAS toxicology and other related impacts to human health and the environment.

Regulating PFAS in Water

The Strategic Roadmap focuses on PFAS monitoring and regulation of drinking water, ground water and aquatic life. The roadmap also presents the EPA’s intent to set water quality standards for effluent discharges.

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Undertake nationwide monitoring for PFAS: The EPA plans to improve its understanding of PFAS in the nation’s drinking water supplies. A final rule is expected before the end of the year.

Establish a national primary drinking water regulation: Although the EPA has not established national drinking water regulations for any PFAS compound, the roadmap states that the EPA is developing a proposed National Primary Drinking Water Regulations for perfluorooctanoic acid and perfluorooctane sulfonic acid. The EPA hopes to issue a final rule in fall 2023.

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Restrict discharges from industrial sources: The EPA intends to restrict PFAS discharges from multiple industrial categories through its Effluent Limitations Guidelines program. ELGs establish national technology-based regulatory limits on the level of specified pollutants in wastewater discharged into surface waters and into sewage treatment facilities. The EPA expects to work on these developments in 2022 and beyond.

Leverage federal- and state-issued permits to reduce discharges: The EPA intends to use existing authority under the National Pollutant Discharge Elimination System to monitor effluent data in order obtain more information on the sources of PFAS and the quantity discharged. The roadmap indicates that the EPA will propose monitoring requirements at facilities where PFAS are expected or suspected to be present in water discharges. Additionally, the EPA will propose that NPDES permits include certain conditions, such as pretreatment programs, best management practices, and public notification requirements. These actions

are expected during winter 2022.

Publish final recommended ambient water quality criteria: The EPA will also develop national ambient water quality criteria for PFAS pertaining to aquatic life, drinking water and fish consumption. This effort is intended to work in tandem with the creation of PFAS toxicity assessments. The EPA expects aquatic life criteria in winter 2022, and human health criteria in fall 2024.

PFAS as CERCLA Hazardous Substances

The Strategic Roadmap lays out the EPA's plans to designate perfluorooctanoic acid and perfluorooctane sulfonic acid (and potentially other PFAS compounds) as hazardous substances under CERCLA, which will bolster EPA's ability to regulate and address PFAS contamination.

The EPA's proposed rulemaking would require facilities to report on releases that meet or exceed the reportable quantity provided for those substances. Such designations would have a variety of legal implications including: (1) the

potential reopening of closed Superfund sites or updating current remedial actions under existing Superfund sites; (2) the designation of new Superfund sites; and/or (3) new potentially responsible parties could be liable to help pay for costs to cleanup PFAS contamination associated with such sites. The EPA expects this proposed rulemaking to be available for public comment in spring 2022. Further, the EPA intends to develop a separate rulemaking to seek input on whether other PFAS compounds should similarly be listed under CERCLA, which is expected in spring 2022.

Enforcement

Many of the regulatory schemes addressed in the Strategic Roadmap are intended to aid the EPA in enforcement against past, present and future PFAS releases. The roadmap outlines which environmental statutes the EPA may use to further identify and control the spread of PFAS.

The EPA will use enforcement tools to better identify and address PFAS releases at facilities. It will

initiate actions under multiple environmental statutes to inspect, issue information requests, and collect data regarding contamination and risks posed by PFAS. The EPA may require responsible parties to put controls in place to limit future releases and remediate contaminated drinking water and soils.

Conclusion

The EPA's Strategic Roadmap clearly indicates the Biden administration's commitment to understanding, preventing and cleaning up existing PFAS contamination even though it does not contain any specific rules or requirements at this point. Going forward, municipal and industrial entities within the regulated community will want to monitor the EPA's rulemaking efforts to further evaluate potential legal risk and regulatory requirements relevant to their public services and business. The regulated community should also continue to monitor updates from the EPA to evaluate best management practices and whether to seek legal guidance to avoid potential liability.