

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

Released December 2023

The US Environmental Protection Agency (EPA) and the Department of Defense (DoD) recently released their [Fall 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 PFAS reporting and recordkeeping requirements under the Toxic Substances Control Act (TSCA) in October 2023 and the promulgation of a final significant new use rule ([SNUR](#)) in January 2024 for 329 PFAS that are designated as "inactive" on the TSCA Chemical Substance Inventory, 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 Fall 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 once again has pushed back the date for a proposed rule from December 2023 to June 2024.
- [Proposed rule to restrict DoD procurement of turnout gear for firefighters containing PFAS](#): DoD is proposing to amend its Federal Acquisition Regulation Supplement to implement section 345 of the National Defense Authorization Act (NDAA) for Fiscal Year 2023. Section 345 of the NDAA restricts DoD from procuring certain personal-protective firefighting equipment containing an intentionally added PFAS. DoD intends to propose this rule in March 2024.

EPA—Office of Water (OW)

- [Proposed rule to regulate PFOA and PFOS in drinking water](#): In March 2023, [EPA released](#) its long-awaited proposed rule to restrict certain 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 September 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. The final rule is currently at OMB for interagency review, and EPA expects to finalize this rule in March 2024. EPA also plans to issue an [enforcement discretion policy](#) for addressing PFAS contamination at Superfund sites.

- [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 was cleared by OMB in December 2023.
- [Definition of Hazardous Waste Applicable to Corrective Action for Solid Waste Management Units](#): Also in response to petitions, EPA planned to propose a rule in November 2023 (but has missed this expected release date) 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. A proposed rule was cleared by OMB in December 2023, and EPA is expected to release the proposal soon.

EPA—Office of Chemical Safety and Pollution Prevention (OCSPP)

- [Proposed rule to add certain PFAS to the Toxics Release Inventory \(TRI\)](#): The Fiscal Year 2020 NDAA required EPA to add certain PFAS to the list of chemicals covered by the TRI under the Emergency Planning and Community Right to Know law and provided a framework for EPA to add additional PFAS to TRI on an annual basis. For Reporting Year 2023 (reporting forms due by July 2024), the NDAA automatically added nine PFAS to the TRI list via a final rule released in June of 2023. For reporting year 2024 (reporting forms due by July 2025), the NDAA automatically added seven more PFAS to the TRI list. Also, pursuant to the NDAA, EPA is developing a rulemaking to add certain PFAS to the TRI list. EPA is required to evaluate whether certain specific PFAS meet the EPCRA section 313 listing criteria by December 2021 and add any PFAS that it determines meet the listing criteria by December 2023. EPA plans to release the proposed rule to February 2024 and finalize the rule by November 2024.
- [SNURs for PFAS](#): In January 2024, EPA finalized a TSCA significant new use rule (SNUR) for uses of [PFAS substances](#) that are on the “inactive” portion of the TSCA Inventory, meaning the substances have not been manufactured, imported, or processed in US commerce since 2006. Therefore, companies must submit significant new use notices (SNUNs) for 329 PFAS at least 90 days prior to manufacturing (including importing) or processing these chemicals.

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.
- [Further PFAS-Related Designations Under CERCLA](#) to address PFAS in the environment. In April 2023 EPA released an ANPRM to seek input on additional PFAS-related designations under CERCLA. EPA now intends to release a proposed rule by August 2025.
- [PFAS Requirements in NPDES Permit Applications](#) to address monitoring and/or reporting of PFAS. The proposed rule is expected to be released by February 2025 and finalized by December 2026.

Hunton Andrews Kurth LLP's environmental team has the legal knowledge and scientific background required to address [chemical](#) 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.

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