

Cos. Should Brace For More EPA Action On PFAS Under Biden

By **Sam Boxerman, Brittany Bolen and Marshall Morales** (March 12, 2021)

Per- and polyfluoroalkyl substances, or PFAS, have been an increasing focus of Congress and the U.S. Environmental Protection Agency in recent years, and the Biden administration has made clear that it will expand and expedite those efforts. Most recently, President Joe Biden's EPA administrator, Michael Regan, stated during his U.S. Senate confirmation hearing that PFAS "will be a top priority for this administration."

The regulated community should take note of two new EPA PFAS guidance documents, two regulatory actions related to PFAS in drinking water and recent EPA action to rescind a risk evaluation for one PFAS compound it conducted during the past administration.

These actions will affect manufacturers that utilize certain PFAS in making consumer and commercial products, as well as users of materials that contain PFAS bound for disposal.

More importantly, these actions herald further actions on PFAS by EPA under various statutory authorities. From manufacturing to retail, businesses should consider auditing their potential uses of PFAS to manage risk.

Background on PFAS

PFAS are a broad chemical category that, depending on which of several definitions are used, potentially contains thousands of synthetic compounds that have been developed since the 1940s.

PFAS are made up of carbon chains of varying lengths with fluorine atoms bonded along the chains. The carbon-fluorine bond is one of the strongest chemical bonds, and it provides PFAS with their unique chemical properties, such as chemical and thermal stability.

PFAS have been used in many industrial and consumer applications. Their heat resistance has been applied for use in firefighting foam, and their stain resistance and slipperiness lends them to use in industrial processes as lubricants and surfactants and in coating consumer products, from cooking pans to winter coats.

Some of those same desirable properties have also resulted in increasing governmental scrutiny, due to their persistence and resistance to degradation. PFAS have been subjected to regulatory scrutiny, due to the risks certain PFAS compounds may pose to



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human health and the environment.

The chemical properties and toxicity of PFAS compounds vary widely — and there are variable amounts of data on each one. Making this more complicated, certain PFAS can degrade into other PFAS. So, although we use the term PFAS for convenience, they are not a single class of chemicals for substantive purposes like toxicological classification.

PFAS have received significant media attention in recent years, with particular coverage paid to certain PFAS compounds found in groundwater near military and industrial sites. Legislative and regulatory activity have also increased markedly — most notably with Congress including PFAS provisions in the National Defense Authorization Act for fiscal year 2020, and with the EPA publishing its updated PFAS Action Plan in February 2020.

Among other provisions, the 2020 NDAA required the EPA to issue, by December 2020, "interim guidance on the destruction and disposal of [PFAS] and materials containing [PFAS]."

The PFAS Action Plan provided that the EPA would continue developing restrictions on certain PFAS compounds under a variety of authorities, including those granted to the agency by the Toxic Substances Control Act, or TSCA.

One of those mechanisms under the TSCA is the EPA's authority to issue significant new use rules, or SNURs, which allow the agency to regulate any new uses of particular chemical substances. The EPA issued a SNUR for a certain set of PFAS compounds in July 2020 and published related guidance in December, as discussed further below.

Interim Guidance on Destruction and Disposal of PFAS

As directed by the 2020 NDAA, the EPA issued the draft interim guidance on the destruction and disposal of PFAS and materials containing PFAS in December 2020, with comments due by Feb. 22. The interim guidance is best seen as a synthesized and up-to-date compilation of likely sources of and methods for destroying or disposing of PFAS.

The interim guidance identifies a broad set of PFAS-containing materials in its scope: manufacturing waste streams, aqueous film-forming foam, solids and biosolids, textiles (other than consumer goods), spent water treatment materials, and landfill leachate. Most of these are well-known potential sources of PFAS.

However, the interim guidance does not limit its scope to particular PFAS compounds that may be found in those materials. It applies to commercial and industrial applications of PFAS, but is not intended to apply directly to consumers.

The interim guidance also compiles technologies that may be used for the destruction or disposal of PFAS or PFAS-containing materials. It features three options, including one destruction option and two disposal options.

Thermal treatment, or hazardous waste combustion, can destroy PFAS by breaking down PFAS molecules. If complete, combustion would be an effective disposition of PFAS compounds — but as the guidance explains, the thermal process may generate some intermediate fluorinated compounds, thereby not fully destroying potentially hazardous substances.

The two disposal options include landfills and underground injection. As the EPA explains,

these would need to be engineered to prevent PFAS from migrating into the environment.

The agency also raises the possibility of interim storage for PFAS waste until technologies are better developed to manage them — i.e., two to five years. However, depending on the quantities of PFAS involved, such interim storage could prove expensive and impractical.

The interim guidance also considers how PFAS destruction or disposal may affect more vulnerable populations living near likely destruction or disposal sites. Here, the EPA is primarily concerned about air emissions during combustion, or leachate reaching groundwater from disposal or storage options.

The EPA identifies children, people with preexisting health conditions, and workers involved with PFAS-containing materials as likely vulnerable populations, and notes that other populations could be considered for further study, such as those of lower socioeconomic status or indigenous communities.

Looking ahead, the interim guidance identifies a robust range of research topics on PFAS distribution and disposal options, as well as research into PFAS measurement methods. The EPA commits to reviewing this guidance every three years, and updating as necessary.

The 2020 NDAA provided substantial funding for PFAS research, including \$100 million per year for four fiscal years. Accordingly, we expect this interim guidance to be updated as technology develops and as PFAS management policy continues to mature.

Manufacturing and industrial sectors that have used PFAS, and have potential PFAS contamination, should monitor these developments, as the technology for managing PFAS likely will continue to develop rapidly in the coming years.

EPA Significant New Use Rule: Guidance on Surface Coatings Using Certain PFAS

The TSCA gives the EPA authority to control uses of existing chemicals in commerce in the U.S. through SNURs. In July 2020, the EPA issued a SNUR for long-chain perfluoroalkyl carboxylate and perfluoroalkyl sulfonate chemical substances.

In January, the EPA finalized guidance for the SNUR as related to surface coatings. The SNUR applies to 26 PFAS compounds used in manufactured or imported products; the surface coating guidance advises on how the SNUR applies to coatings, one of the most common PFAS applications.

Industries that are likely to be affected by the rule include manufacturers or importers of the restricted PFAS, fiber and carpet mills, home furnishing wholesalers, electronics manufacturers, and medical device manufacturers.

Notably, most SNURs apply only to chemical substances and mixtures, but not imported articles. However, in this case, the surface coating guidance notes that the SNUR lifted the imported article exemption — which greatly extends its scope to encompass certain manufactured items.

The SNUR requires notice to, and approval from, the EPA prior to any new use of certain PFAS. If a particular use was ongoing when the EPA published the proposed rule in January 2015, then that use is considered an ongoing use, and not subject to the notice requirement.

At a high level, those ongoing uses include certain uses in coatings, surfactants and barriers, as well as in manufactured products like automotive parts. Companies that use any of the substances named in the SNUR should review carefully whether their use is within scope of designated ongoing uses, and not subject to the notice requirement.

The EPA issued the surface coating guidance less than one week after the close of the public comment period on the draft guidance. Some parties raised concerns that the guidance purported to limit the coatings covered by the SNUR to those with "direct contact with humans or the environment during the article's normal use or reuse."

We have yet to see whether the change in administration and recent executive orders will mean changes in the guidance. Notwithstanding the fate of the surface coating guidance, the SNUR at issue here counsels in favor of businesses addressing regulatory risk, by staying aware of how they may use PFAS in their processes or products — and evaluating whether there are viable substitutes.

Addressing PFAS in Drinking Water

The Safe Drinking Water Act, or SDWA, prescribes a robust scientific process for the EPA to establish drinking water standards for unregulated contaminants that may present a risk to public health.

In January, as part of the SDWA process, the EPA issued a final determination to regulate two PFAS — perfluorooctanoic acid and perfluorooctanesulfonic acid — in drinking water. On Feb. 22, the EPA announced it was reissuing the final determination. On March 3, the final determination was published in the Federal Register, which begins the two-year process for proposing a national drinking water standard.

The EPA also repropose the Fifth Unregulated Contaminant Monitoring Rule on Feb. 22, which lays out monitoring requirements for 29 PFAS in drinking water. The SDWA directs the EPA to issue a new list of unregulated contaminants every five years. If the rule is finalized, the data gathered as a result of the rule will improve the EPA's understanding of additional PFAS, and inform future actions to set drinking water standards.

The proposal will be open for a 60-day comment period, following publication in the Federal Register. PFAS users have a strong interest in these analyses, as drinking water standards can of course become groundwater cleanup standards at contaminated sites.

Looking Ahead on PFAS

As one of its last PFAS actions before the change in administration, the EPA released a final toxicity assessment for one PFAS compound — perfluorobutanesulfonic acid. However, on Feb. 9, the agency pulled back the assessment, and issued a news release reporting that career scientists determined the assessment was compromised by political interference and infringement on scientific independence.

The news release cites Biden's Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking, which was issued on Jan. 27. Looking ahead, it is unclear when the EPA will conclude this additional review and release final toxicity values for perfluorobutanesulfonic acid.

Another forthcoming Biden administration PFAS action could include a decision to proceed with Federal Register publication for an action issued in the final days of the last

administration that was subject to the White House regulatory freeze memo — namely, an advanced notice of proposed rulemaking regarding perfluorooctanoic acid and perfluorooctanesulfonic acid.

The action would list them as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act, also known as the Superfund law, or as hazardous wastes under the Resource Conservation and Recovery Act.

These are just the most recent actions on PFAS. Be prepared for a steady stream of weekly — or daily — headlines regarding these substances. For regulated entities, there are some key ways to manage risk related to PFAS and cut through the noise. These strategies generally feature two main themes: facilities and products.

For those concerned about PFAS at facilities, it is important to understand how and when PFAS compounds may be used in processes or wastes. One of the most common instances of this is aqueous film forming foam used for firefighting, often for flammable liquid fires.

But PFAS are also used in a wide range of chemical applications that could result in environmental or worker exposures. A facilitywide audit for PFAS usage would allow for compliance with existing PFAS requirements, as well as planning for risk from additional PFAS regulations.

For those concerned about PFAS in products, such as manufacturers or retailers, we recommend first conducting an audit of supply chains for potential PFAS compounds identified by EPA or state government regulatory actions. There are various sensible ways to focus such efforts — such as by prioritizing a review of coatings, food packaging, clothing or other targeted components or products with potential oral or dermal exposure pathways for particular PFAS compounds.

For either facilities or products, after conducting an audit, it is important to maintain and update the audit with ongoing supply chain information about reformulated or new products. For those PFAS compounds found in an audit, it is important to monitor state and federal regulatory changes that could apply, as these will depend heavily on the industry.

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