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PFAS UPDATE: 2024 LOOK-AHEAD

RECENT EPA INITIATIVES

Feb 20, 2024

SUMMARY

As discussed in more detail in [BCLP's 2023 federal recap client alert](#), per- and polyfluoroalkyl substances ("PFAS") were a major focus for the United States Environmental Protection Agency ("EPA") in 2023, and 2024 will likely mark even more significant activity in the federal regulation of these compounds. While we expect a variety of actions at the federal level, this alert highlights five developments that we anticipate in 2024 will have substantial economic impacts across a wide range of industries.

PFOA AND PFOS ARE EXPECTED TO BE DESIGNATED AS CERCLA HAZARDOUS SUBSTANCES

PFOA and PFOS are expected to be designated as "Hazardous Substances" under CERCLA in 2024. This is important because current and former owners and operators may be held strictly, jointly, and severally liable for the presence on their properties of CERCLA "Hazardous Substances" which will soon include these two PFAS compounds.

In September of 2022, EPA [proposed listing](#) PFOA and PFOS as "Hazardous Substances" under CERCLA. The final rule has been delayed in large part due to a significant number of public comments submitted (reportedly over 64,000 in total) during the rule's public comment period.

EPA has indicated this designation will occur in [March of 2024](#), although that target date is subject to change. On [December 6, 2023](#), the United States Office of Management and Budget ("OMB") initiated interagency review (an administrative review process) of EPA's proposed rule. Interagency review usually takes about 90 days, but complex or contested rules can take longer. Therefore, the proposed designation is on track to occur in 2024.

Additionally, EPA issued an [advance notice of proposed rulemaking](#) last year to designate seven additional PFAS compounds (in addition to PFOA and PFOS) as "Hazardous Substances" under

CERCLA. The notice also raised the possibility of listing precursors to PFOA, PFOS, and the seven listed PFAS compounds, as well as certain “categories of PFAS,” either of which could introduce many other PFAS substances into the “Hazardous Substances” designation. At this time, it is unclear which, if any, of the listed PFAS compounds or categories of compounds from the 2023 notice will be included in the eventual Hazardous Substances designation.

Any listing of additional PFAS compounds will cause significant changes in many areas, including remediation, release notification, and due diligence (both real estate and M&A). For additional information as to how this designation will impact potential remediation liabilities and real estate transactions, please review [BCLP’s Client Alert](#).

UPDATED ASTM PHASE I STANDARD

The newest version of the ASTM standard (ASTM E1527-21) became effective as of February 13, 2024, and is now the required ASTM standard for demonstrating [All Appropriate Inquiry](#) (“AAI”) in real estate transactions.

On February 13, 2024, EPA required ASTM to formally retire the previous standard (ASTM E1527-13). Moving forward, ASTM E1527-21 will be the only standard available to satisfy AAI. This means that any Phase I Environmental Site Assessment (“Phase I ESA”) report used to satisfy AAI in connection with any transaction which closes on or after February 13, 2024, must follow the updated standard set forth in ASTM E1527-21.

Phase I ESA reports will be required to review emerging contaminants, such as PFOA and PFOS, when those constituents become “Hazardous Substances” under CERCLA. Until PFOA and PFOS become CERCLA “Hazardous Substances,” they will remain “non-scope” considerations under ASTM E1527-21, meaning a report user can request that they be added to the scope of the Phase I ESA report. For additional information, please review [BCLP’s client alert](#) that addresses this development in further detail.

DRINKING WATER LIMITS ESTABLISHED

Federal drinking water standards are expected to be finalized for at least six PFAS compounds in 2024. Once final, all regulated public water systems (“PWS”) will be required to treat drinking water to these standards.

On March 14, 2023, EPA issued its [proposed Maximum Contaminant Levels](#) (“MCLs”) and [Maximum Contaminant Level Goals](#) (“MCLGs”) for [six PFAS compounds](#). More information on the specifics of the proposed MCLs is available in [BCLP’s client alert](#). The proposed MCLs and MCLGs are as follows:

- PFOA: MCL 4.0 parts per trillion (“ppt”) and MCLG zero;

- PFOS: MCL 4.0 ppt and MCLG zero; and
- PFNA, PFHxS, PFBS, and HFPO-DA (or GenX Chemicals): MCL and MCLG 1.0 on the Hazard Index (unitless).

The concentration limits in the MCLs are extremely low, and the MCLGs are even lower. EPA has suggested that it will continue to lower the MCLs over time as test methods improve to try to reach the MCLGs.

On [December 15, 2023](#), the OMB initiated interagency review of EPA's proposed rule. As discussed above, interagency review usually takes about 90 days, but certain rules that are more complex can take longer. Therefore, this proposed designation is currently on track to be finalized [later in 2024](#).

COLLECTION OF SIGNIFICANT INFORMATION ABOUT PFAS IN COMMERCE

Expansive TSCA reporting under Rule 8(a)(7), or the TSCA PFAS Reporting Rule, will begin in 2024, with the reporting window opening in mid-November 2024.

As discussed in [BCLP's client alert](#), under EPA's [final rule](#), manufacturers, including importers, are required to report all regulated PFAS compounds that they manufactured within the United States or imported into the United States between **January 1, 2011**, and **December 31, 2022**.

Moreover, the rule requires reporting of PFAS substances present in certain mixtures, byproducts, impurities, and articles which were imported into the United States between **January 1, 2011**, and **December 31, 2022**. The reporting window begins on **November 12, 2024**, and the obligation concludes on **May 8, 2025** (except for small businesses; see [§ 705.20](#) of the rule).

The [information required to be submitted](#) is very extensive, and the requirements are nuanced. For example, the definition of "PFAS" under the Rule relies on three structural family groups, and while EPA has issued a [non-exhaustive list of compounds](#) that fall within those definitions, businesses will need to engage in a technical review to evaluate whether they have manufactured or imported "PFAS" that meet the rule's definition. For additional information, please refer to a [BCLP Client Alert](#) explaining this issue. EPA has issued a [guidance document](#) discussing the rule. BCLP strongly encourages your business to consider if this TSCA reporting rule applies and start to develop a strategy for compliance now in order to ensure the company has sufficient time to collect and assess the necessary information and file the required reports.

PFAS ENFORCEMENT INITIATIVES

EPA included "Addressing Exposure to PFAS" as one of its six [National Enforcement Compliance Initiatives](#) for 2024-2027. [According to EPA](#), this initiative will "hold responsible those who manufactured PFAS and/or used PFAS in the manufacturing process, federal facilities that released

PFAS, and other industrial parties who significantly contributed to the release of PFAS into the environment.”

Although EPA has not stated how it will prioritize investigation, remediation, and enforcement, some rules (e.g., the CERCLA listing) will enhance EPA’s authority to require the investigation and remediation of sites that have been impacted by certain PFAS substances. Other rules, such as the TSCA PFAS Reporting Rule, will create more reportable data that could be used in these efforts and will also create enforcement rights against regulated entities that fail to comply.

While the timing of future enforcement actions by EPA and other federal agencies is unclear at this point, and it will inherently depend in part on the final promulgation of some of the rules and limits discussed above, EPA has clearly signaled that enforcement and site investigation will both be significant tools at the agency’s disposal going forward.

CONCLUSION

As demonstrated by these five anticipated actions alone, 2024 is poised to be a momentous year for the federal regulation of PFAS, with a number of EPA’s commitments in its [PFAS Strategic Roadmap](#) from 2021 coming to fruition.

For more information on PFAS chemicals, related regulatory requirements and the transactional and liability risks that they pose, please visit our [PFAS webpage](#). If you have a question about how to manage PFAS risk at the federal level or in any specific state jurisdiction, please contact Tom Lee, Bryan Keyt, Erin Brooks, Nora Faris or any other member of our PFAS team at BCLP.

RELATED PRACTICE AREAS

- PFAS Team

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