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Locke Lord QuickStudy: PFAS Are Ubiquitous and so Is PFAS ?Rule Making in 2023!?

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EPA's efforts to regulate per- and poly-fluoroalkyl substances, known as PFAS, are not ending ?with ?lowering PFAS drinking water standards under the Safe Drinking Water Act, which is ?headline news. Read more about those efforts in our previous QuickStudy.

Another regulatory mechanism by which EPA seeks to further regulate PFAS is the Toxic Substances Control Act ("TSCA"), pursuant to which EPA is seeking to tighten PFAS controls by, among others:

i. proposing in January 2023 a significant new use rule ("SNUR") for approximately 300 PFAS that are listed but inactive and not subject to an existing SNUR;
ii. proposing in December 2022 a SNUR for approximately 35 listed and active PFAS;
iii. proposing in December 2022 a rule which would expand the scope of chemicals reported pursuant to the Toxic Release Inventory ("TRI"); and
iv. proposing in November 2022 a substantial increase in fees for associated Agency reviews.

We also note that under TSCA, EPA is continuing its PFAS Low Volume Exemption ("LVE") Stewardship Program, announced in July 2021, to encourage LVE holders for PFAS to relinquish teir exemptions.

A third mechanism by which EPA seeks to regulate PFAS is by designating certain PFAS chemicals as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). These actions would bring this group of substances under CERCLA's umbrella of hazardous substances, and thus generally conferring associated cleanup liability upon traditional potentially responsible parties ("PRPs"). EPA has also recently announced its intention to create a formal enforcement discretion policy that would shield certain regulated entities from CERCLA liability.

This QuickStudy discusses the proposals and examines their impact on the regulated community. Each of these proposals has some chance of becoming finalized in FY 2023.

What are PFAS?

PFAS are a group of chemical substances including PFOA, PFOS, GenX, and others that have been used in industry and consumer products since the 1940s. These chemicals are found in an array of products, such as

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cleaners, textiles, leather goods, paper, paints, fire-fighting foams, and wire insulation. Many PFAS break down very slowly and are highly persistent, meaning they can accumulate and remain within the human body (and the environment) for long periods of time, which may lead to adverse health effects. The Biden-Harris Administration has enumerated its intention to bolster governmental response to these substances, and EPA outlined in the PFAS Strategic Roadmap its plan for pursuing such regulation.

January 2023: Inactive PFAS SNUR Proposal

In January 2023, EPA proposed a TSCA SNUR for approximately 300 PFAS listed on the TSCA inventory, but deemed "inactive," meaning they have not been actively manufactured (including imported) or processed in the U.S. since June 21, 2006. The proposed SNUR's comment period closed March 27, 2023. EPA's Regulatory Agenda predicts a final SNUR by December 2023.

Persons subject to the SNUR would be required to provide EPA a Significant New Use Notice ("SNUN") at least 90 days before manufacturing (including importing) or processing the chemical substance for a significant new use. SNUNs can be substantial undertakings, and may include submittal of studies and data. After EPA receives a SNUN, it will make a determination, and take such action as required by any such determination before the manufacture (including import) or processing for the significant new use can commence. Such a review will assess whether the use may present unreasonable risk to health or the environment and ensure that EPA can prevent future unsafe environmental releases of the PFAS subject to this SNUR.

December 2022: Active PFAS SNUR Proposal

Earlier, in December 2022, EPA proposed SNURs for 35 PFAS already subject to TSCA § 5(e) Orders, meaning PFAS approved by EPA. As with inactive PFAS, the propose SNURs for active PFAS would require persons who intend to manufacture or process a subject chemical for a significant new use to notify EPA at least 90 days before commencing that activity. Such notices would allow EPA to assess risks and impose additional requirements on the significant new use before it occurs, if appropriate. It is expected that this too will be finalized in FY 2023.

December 2022: Certain PFAS Listed as Chemicals of Special Concern Proposal

Also in December 2022, EPA proposed another rule that would, among other things, expand the scope of TRI PFAS reporting. If enacted, the rule would apply to PFAS subject to Emergency Planning and Community Right-to-Know Act ("EPCRA") and Pollution Prevention Act ("PPA") reporting and would add them to the list of Lower Thresholds for Chemicals of Special Concern.

By adding these PFAS to the list of Chemicals of Special Concern, the rule would eliminate the use of the *de minimis* exemption and the option for facilities to use reporting Form A, which generally has a lower data requirement, and would limit the use of range reporting for PFAS. EPA anticipates that removal of these exemptions and exceptions will substantially increase the volume of TRI data it receives for PFAS.

While EPA did not predict a final rule date, the PFAS Strategic Roadmap notes that EPA "plans to revisit past PFAS regulatory decisions and address those that are insufficiently protective. As part of this effort, the Agency could impose additional notice requirements to ensure it can review PFAS before they are used in new ways that

might present concerns."

November 2022: TSCA Filing Fee Increase Proposal

In November 2022, EPA proposed a supplemental rule to increase certain TSCA fees. The fee for a SNUN would increase from $19,020 to $45,000. Thus, EPA's proposal to increase the scope of chemicals subject to SNUNs can quickly become a matter of compounding costs for certain applicants.

The current Regulatory Agenda, posted in January 2023, predicts a final rule will be promulgated by September 2023. As FY 2023 ends on September 30, the new fee schedule likely will not take effect until the beginning of FY 2024 on October 1. If adopted as proposed, EPA expects to receive about $45 million in TSCA fees during each of FY 2023-2025, or about 25% of its projected $181 million annual TSCA program expenses.

March 2023: CERCLA PFAS Enforcement Discretion Policy Proposal

In March 2023, EPA announced its intent to draft a formal enforcement discretion policy that would shield certain regulated entities from CERCLA liability, including:

i. publicly owned and operated water utilities;
ii. publicly owned and operated municipal solid waste landfills;
iii. farmers who apply PFAS-containing biosolids to their land;
iv. state, tribal, or municipal airports; and
v. tribal or local fire departments.

If adopted, EPA's policy will focus federal enforcement efforts under CERCLA on PFAS manufacturers, federal facilities, and other regulated entities who presently or historically caused or contributed to "significant" levels of PFAS contamination, though EPA did not define how "significant" such contamination must be to trigger regulatory enforcement. That said, EPA expressed an interest in considering, on a case-by-case basis, several equitable factors when determining whether to initiate an enforcement action, including:

i. whether the regulated entity in question was a passive receiver of PFAS substances that made minor contributions to contamination;
ii. whether the regulated entity is a contractor acting in the shoes of a public entity;
iii. whether the regulated entity performs a public service.

We note CERCLA liability for PFAS could also attach to facility owners and operators under traditional CERCLA theories of liability.

EPA also advised that its enforcement discretion would be limited to CERCLA and would not affect EPA enforcement actions under other statutes. EPA also would retain the ability to address situations that present an imminent and substantial endangerment to public health or the environment. Finally, the enforcement discretion policy would be contingent upon the party's cooperation with EPA, such as by providing access to properties or responding to agency information requests.

April 2023: Potential Designations of Additional PFAS as Hazardous Substances under CERCLA

On April 13, 2023, EPA published an Advanced Notice of Proposed Rulemaking ("ANPRM") in the Federal Register requesting public input and data to assist in the potential designation of the following PFAS as hazardous substances under CERCLA:

i. perfluorobutane sulfonic acid ("PFBS");
ii. perfluorohexane sulfonic acid ("PFHxS");
iii. perfluorononanoic acid ("PFNA");
iv. hexafluoropropylene oxide dimer acid ("HFPO-DA"), sometimes referred to as GenX;
v. perfluorobutanoic acid ("PFBA");
vi. perfluorohexanoic acid ("PFHxA"); and
vii. perfluorodecanoic acid ("PFDA").

EPA is also considering whether to initiate a future action to designate precursors to these seven PFAS chemicals, as well as precursors to PFOA and PFOS, and whether to designate entire groups or categories of PFAS as CERCLA hazardous substances. Based upon this proposed rulemaking, CERCLA's list of hazardous substances would expand to include even more PFAS substances, thereby again heightening the potential for traditional CERCLA liability to attach to the four (4) traditional classes of CERCLA responsible parties.

Effect on Industry

EPA's heightened focus on PFAS is continuing across its many programs. The proposed drinking water standards under the SDWA will affect public and private suppliers of water service and also likely result in heightened transactional diligence and further cleanups. Through TSCA, the use, manufacture, and distribution of PFAS will lead to greater regulatory scrutiny and burdens on the regulated community. The expanded regulatory scope and coverage of those PFAS subject to TSCA, combined with substantially heightened application and review fees potentially open the door to increased costs for a swath of the regulated community. Finally, the potential inclusion of further CERCLA hazardous substances will heighten the potential for increased cleanup liability, and may expose a broader range of the regulated community to liability.

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