

EPA issues PFAS Strategic Roadmap swiftly followed by other key PFAS announcements

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On October 18, 2021, the U.S. Environmental Protection Agency launched its *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024* ("Roadmap")¹ setting forth its "whole-of-agency" approach to address per- and polyfluoroalkyl substances (PFAS).

EPA's implementation of the Roadmap will affect a broad spectrum of industry sectors and facilities throughout the PFAS lifecycle who may face new and expanded regulatory requirements and obligations.

The Roadmap sets forth timeframes for EPA actions to address PFAS across environmental media and under various statutory authorities including the Toxic Substances Control Act (TSCA), Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Safe Drinking Water Act (SDWA), Clean Water Act (CWA) and Clean Air Act (CAA).

As such, EPA's implementation of the Roadmap, including key initiatives rolled out in the days following its release, will affect a broad spectrum of industry sectors and facilities throughout the PFAS lifecycle who may face new and expanded regulatory requirements and obligations.

The Roadmap describes EPA's approach as centered on the following strategies: (i) consideration of the full lifecycle of PFAS; (ii) a focus on prevention of PFAS entering the environment as a "foundational step" to reducing potential risks; (iii) investment in scientific research to ensure science-based decision-making; (iv) holding polluters accountable; and (v) prioritizing protection of disadvantaged communities.

Key regulatory actions, some of which are currently underway² and some of which reflect "bolder new policies," are assigned to specific EPA program offices for implementation with expected timeframes ranging from 2021 to 2024.

Notably, on the heels of the Roadmap's release, EPA has swiftly moved forward with the following:

- On the same date that the Roadmap was released, EPA issued the National PFAS Testing Strategy: Identification of Candidate Per- and Poly-fluoroalkyl Substances (PFAS) for Testing ("Testing Strategy"),³ intended to identify PFAS for which EPA will require testing by companies under its TSCA Section 4 authority. The Testing Strategy is based on an approach that groups PFAS into categories and is intended to be implemented in phases. Appendix A to the Testing Strategy includes a list of 24 "candidates" for testing. The first round of test orders is expected to be issued by EPA by the end of 2021.
- On October 25, 2021, EPA released the final toxicity assessment for GenX chemicals (hexafluoropropylene oxide (HFPO) dimer acid and its ammonium salt). For these chemicals, EPA has set a safe level for ingestion that is 10 fold more stringent than PFOA (perfluorooctanoic acid) and PFOS (perfluorooctane sulfonate), two of the most studied PFAS compounds. EPA intends to use this new GenX value to inform a national drinking water health advisory for GenX chemicals. EPA has also noted that it is currently reevaluating the toxicity information for PFOA and PFOS. Relevant toxicity values are set forth in the table below.

PFAS Compound	Chronic RfD (mg/kg-day)
PFOA (2016)	0.00002
PFOS (2016)	0.00002
PFBS (2021)	0.0003
PFBA (Proposed 2021)	0.001
GenX (2021)	0.000003

- On October 26, 2021, and in response to a petition from the Governor of New Mexico requesting that the EPA list PFAS — as a class or individually — under RCRA,⁴ EPA announced its plans

to partially grant the petition and to initiate two rulemakings.⁵ The first rulemaking will propose the addition of PFOA, PFOS, GenX and PFBS as RCRA hazardous constituents under 40 CFR Part 261 Appendix VIII by “evaluating the existing data for these chemicals and establishing a record to support such a proposed rule.” The second rulemaking would be intended to clarify that emerging contaminants such as PFAS can be addressed through RCRA’s Corrective Action Program.

Other EPA initiatives planned for release by the end of 2021 include:

- The Fifth Unregulated Contaminant Monitoring Rule (UCMR 5) providing for drinking water systems to monitor for 29 PFAS nationwide and proposed in March of this year is scheduled to be finalized in the Fall of 2021.
- Identification of PFAS categories to help EPA identify gaps in coverage for both hazard assessment and removal technology development is assigned a completion timeframe of the Winter of 2021 and ongoing thereafter.

The Roadmap expressly provides that EPA “will seek to hold polluters and other responsible parties accountable for their actions and for PFAS remediation efforts.”

A host of other EPA actions will continue, or be initiated, next year and beyond under various regulatory programs consistent with EPA’s stated objective to “leverage the full range of statutory authorities to confront the human health and ecological risks of PFAS.” A number of these actions have significant implications and will undoubtedly be the subject of continuing and vigorous debate among stakeholders.

These include:

- Under its TSCA authority, EPA plans to finalize, by the Winter of 2022, an expansive data-gathering rule proposed in June of this year to collect information on uses, volumes, disposal, exposures and hazards of any PFAS manufactured and imported, including imported products containing PFAS, in any year since 2011. As we previously reported, this unprecedented rule would affect many non-traditional TSCA stakeholders and present significant regulatory burdens to ensure compliance.⁶
- Under its CERCLA authority, EPA plans to issue a long-anticipated proposed rule to designate PFOA and PFOS, as hazardous substances for public comment in the Spring of 2022 that is expected to be finalized in the Summer of 2023. EPA indicates that it will also be seeking public input on similarly designating other PFAS. These designations would allow EPA and other agencies to require cleanups and recover response costs, allow private parties to file claims for cost recovery and contribution and impose new reporting obligations for PFAS releases increasing compliance and litigation risks for a broad spectrum of industry sectors. Among

other things, hazardous substance listings could result in new sites being added to the National Priorities List, amendments to EPA selected remedies, and triggering the reopening of previously closed Superfund sites.

- Under its SDWA authority, EPA plans to move forward with a national primary drinking water regulation for PFOA and PFOS with a proposed rule planned in the Fall of 2022 that is expected to be finalized by the Fall of 2023. EPA notes that it is also evaluating additional PFAS and is considering actions to address groups of PFAS. Moving forward with an enforceable national primary drinking water standard at the federal level will undoubtedly be a complex undertaking in light of the patchwork of state standards currently in place, the lack of scientific information on the health effects for the majority of PFAS, the inadequacy of testing and treatment methodologies, and the impacts to groundwater cleanup standards.⁷

Noteworthy cross-programmatic themes in the Roadmap include its emphasis on research and information-gathering, reinforcement of strategies that would break the large diverse class of PFAS into smaller categories (an approach that many have argued is necessary due to the diverse structures of PFAS compounds), focus on protection of disadvantaged communities and commitment to use enforcement tools to identify and address PFAS releases. The Roadmap expressly provides that EPA “will seek to hold polluters and other responsible parties accountable for their actions and for PFAS remediation efforts.”

The Roadmap was announced as part of the Biden Administration’s over-arching government-wide plan to address PFAS and includes activities to be undertaken by various agencies.

As part of its stakeholder engagement efforts on the Roadmap, EPA is holding two national webinars open to the public.⁸ The nature, scope and timing of EPA’s implementation of the Roadmap will likely be shaped by public input, the extent to which funding is made available for implementation, and measures that are currently being considered in Congress.⁹

It is also important to note that federal agencies in addition to EPA are also undertaking PFAS activities. The Roadmap was announced as part of the Biden Administration’s over-arching government-wide plan to address PFAS and includes activities to be undertaken by various agencies including the Department of Defense, the Food and Drug Administration, the Department of Agriculture, the Department of Homeland Security, the Department of Health and Human Services.¹⁰

Meanwhile, a growing number of states continue to press ahead with novel and broad PFAS regulations, in some instances years ahead of the federal government. The accelerating pace of PFAS

initiatives and shifting regulatory landscape will make it essential for those affected to focus on necessary and effective compliance strategies.

Notes

¹ See *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024* available at <https://bit.ly/3C410dP>.

² The Roadmap builds upon the PFAS Action Plan issued by EPA in 2019 available at <https://bit.ly/3F95ws5>.

³ See *National PFAS Testing Strategy: Identification of Candidate Per- and Polyfluoroalkyl Substances (PFAS) for Testing* (October 2021) available at <https://bit.ly/3HgJGc8>.

⁴ See *Letter from Governor Michelle Lujan Grisham to EPA Administrator Michael S. Regan* (June 23, 2021) ("Petition") available at <https://bit.ly/3c5ARzi>. The Petition

notes challenges faced by the State of New Mexico in addressing PFAS contamination from "federal facilities who refuse to act quickly to remediate PFAS contamination."

⁵ See *Letter from EPA Administrator Michael S. Regan to Governor Michelle Lujan Grisham* (October 26, 2021) available at <https://bit.ly/3Fbdsca>.

⁶ See *EPA Proposes Expansive and Retroactive Reporting Rule for PFAS* (July 7, 2021) available at <https://bit.ly/3kvzJtr>.

⁷ See *Heading Down Different Paths: An Update on PFAS Regulatory Developments in Northeastern States and at the Federal Level* (October 19, 2020) available at <https://bit.ly/3ktTQYS>.

⁸ Registration is available to the public and may be accessed at <https://bit.ly/30bT7o3>.

⁹ See *Congress Presses Forward on PFAS Measures* (August 20, 2021) available at <https://bit.ly/3F9d7XO>.

¹⁰ See *The White House, FACT SHEET: Biden-Harris Administration Launches Plan to Combat PFAS Pollution* available at <https://bit.ly/3DaC30b>.

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