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PFAS Forecast: New regulations lead to new Liabilities for businesses and carriers

What Are PFAS

Per-and-Poly Fluoroalkyl Substances (PFAS) are a broad class of manmade, highly stable chemicals. PFAS exhibit both grease repelling (lipophobic) and water repelling (hydrophobic) properties due to their unique chemical structure. These unique properties have contributed to the use of PFAS in a number of consumer and industrial products including common construction materials.

Common uses of PFAS include:

- Roofing materials
- Weather proofing membranes
- Metal coatings
- Paints
- Wood stains and lacquers
- As additives in carpet and flooring materials to impart stain resistance
- Other fabric materials
- Caulk and other adhesives
- Cables and wires
- Solar panels
- Artificial Turf

This list is non-exhaustive, as PFAS compounds are ubiquitous in many consumer and industrial products. The widespread use and overall chemical stability of PFAS lead to increasing accumulation of compounds in the environment. However, PFAS are now associated with a host of negative health effects, leading to efforts to regulate PFAS under the major federal environmental statutes, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

In April 2021, the House of Representatives passed, with bipartisan support, the PFAS Action Act 2021, the most comprehensive piece of PFAS legislation to date. The legislation calls for broad regulatory actions related to PFAS under all major environmental statutes including:

- Requiring the EPA to set drinking water standards for two PFAS compounds – PFOA and PFOS – within two years;
- Designate PFOA as a “hazardous substance” under CERCLA within one year;
- Require the EPA to determine if all PFAS should be classified as “hazardous substances” under CERCLA within five years;
- Require the EPA to issue drinking water standards under the Safe Drinking Water Act for at least PFOA and PFOA, as well as including standards for other PFAS compounds.
- Require the EPA to designate PFOA and PFOS as “hazardous air pollutants” under the Clean Air Act within six months; and
- Create effluent regulations under the Water Pollution Control Act.

While the Bill is pending in the Senate, the Environmental Protection Agency (EPA) has already taken steps to implement many of the bill’s mandates. The EPA has started rule making processes to designate certain, common PFAS compounds as hazardous waste under RCRA and CERCLA. In addition, several states, like California, have also begun regulatory efforts alongside federal efforts.

Environmental Remediation

CERCLA imposes a strict, cradle-to-grave liability standard for environmental remediation costs. By imposing this standard, CERCLA achieves its broad policy goal: holding parties responsible for past environmental contamination. To be held liable to any other party under CERCLA, a business must first fit the criteria of being a Potentially Responsible Party (PRP). CERCLA § 107(a) lists four broad categories of persons as PRPs. 42 U.S. Code § 9607. These are: Current Owners/Operator, Past Owner/Operator, Arrangers and Transporters. These categories can be summarized as:

- (a) the present owner of a facility from which there has been a release of a hazardous substance;
- (b) the present operator of a facility;
- (c) the owner of the facility at the time of disposal or release;
- (d) the operator of the facility at the time of disposal or release;
- (e) anyone who arranges for the disposal or treatment of hazardous substances or who arranges with a transporter for disposal of hazardous substances;

- (f) any transporter of hazardous substances; and
- (g) an owner of a facility with knowledge of a spill or release of hazardous substances who sells or transfers without disclosing.

RCRA Corrective Action Program requires facilities that treat, store, or dispose of hazardous wastes to investigate and clean up contaminated soil, groundwater, and surface water. The Corrective Action Program is not a rigid regulatory framework. EPA has developed guidance and policy documents to assist facilities conducting cleanups. Facilities are generally brought into the Corrective Action process when (1) there is an identified release of hazardous waste or hazardous constituents, or (2) when EPA is considering whether to issue a RCRA operating permit for a treatment, storage, and disposal facility.

PFAS compounds have been the subject of increased scrutiny at the Federal and State level. Recent regulatory activity has focused on imposing liability for environmental contamination for specific PFAS compounds, with the goal of imposing liability for the entire class. These efforts are likely to result in listing at least some PFAS compounds as “hazardous substances” under CERCLA and RCRA. Businesses face potential liability as an operator of a facility at the time of disposal of PFAS containing materials, an arranger for disposal of PFAS containing materials, or a transporter of PFAS containing materials to and from construction sites.

Businesses should watch PFAS regulation closely and consult with their suppliers to identify construction materials that could subject them to liability under CERCLA.

Ongoing Environmental Compliance

Clean Water Act

2022 marks the 50th Anniversary of the passage of the 1972 amendments to the Federal Water Pollution Control Act. The 1972 amendments are now what we commonly refer to as the Clean Water Act. For the past fifty years the extent of the legislation’s jurisdiction has continued to evolve. In 2021, the Biden administration rolled back the NWPR and issued an executive order requiring the EPA and Army Corps of Engineers to create a new definition of WOTUS. The Biden administration adds the next chapter in the ebbs and flows of WOTUS and the CWA.

The Agencies’ current proposed rule, and would define “waters of the United States” as follows:

- “Traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands;
- most impoundments of ‘waters of the United States’;
- tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard;

- wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard;
- and ‘other waters’ that meet either the relatively *permanent standard* or the *significant nexus standard*.

The proposed rule would in effect return to the 1986 definition of WOTUS and the agency application of the *Rapanos* decision. The EPA and Army Corps of Engineers are conducting ‘roundtable’ talks with interested stakeholders to discuss the proposed rule and respond to public comments this spring and summer. A final rule will likely be promulgated sometime after the roundtable talks – likely in early 2023.

The regulated community should take note of the changing definition of WOTUS. Streams and other bodies of water that were not covered under the NWPR may now fall into the CWA’s jurisdiction. Accidental PFAS discharges into protected waters will lead to increased liability under the NPDES program.

Clean Air Act

On June 30, 2022, the Supreme Court issued its opinion in *West Virginia v. EPA*, invalidating the 2015 Clean Power Plan (CPP). Chief Justice John Roberts delivered the opinion of the court, holding that Section 111(d) of the Clean Air Act does not authorize EPA to devise emissions caps based on “generation shifting”—the approach EPA took in the CPP wherein power plants would be required to transition from higher-emitting (e.g., coal) to lower-emitting (e.g., natural-gas) to then even lower-emitting (e.g., wind and solar) electricity production.

The majority opinion defined the issue before it as “whether restructuring the Nation’s overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the ‘best system of emission reduction’ within the meaning of Section 111.” The Court decided that this was one of the “extraordinary cases” that required application of the major questions doctrine, which it describes as “an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.” The doctrine applies in cases “in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’” In major questions cases “something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.”

The decision will have a lasting impact on the EPA’s ability to promulgate sweeping environmental regulation on persistent environmental pollutants as Courts will now have to ask whether PFAS is a “major question.”

Safe Drinking Water Act

In spring 2022, the EPA updated health advisories for PFAS under the Safe Drinking Water Act. The EPA health advisories are for contaminants that are not subject to National Primary Drinking Water Regulation (NPDWR) under the Safe Drinking Water Act. Health advisories serve as information to drinking water systems and officials responsible for protecting public health when emergency spills or other contamination situations occur. They help Tribes, states, and local governments inform the public and determine whether local actions are needed to address public health impacts in affected communities but are not binding regulations.

In 2016, the EPA issued health advisories for PFOA and PFOS with the lifetime exposure level at 70 parts per trillion. The new updated health advisory sets a combined lifetime exposure level for PFOA and PFOS at near zero (.004 parts per trillion for PFOA and .02 parts per trillion for PFOS) In addition, the EPA also issues health advisories for GenX and PFBS, the PFAS compounds that replaced PFOA and PFOS. The EPA's health advisory for lifetime exposure to GenX is 10 parts per trillion and 2000 parts per trillion for PFBS.

The EPA stated that these new health advisories would remain in effect until the agency develops a NPDWR for PFAS compounds in Fall of 2022. The health advisories the EPA issued for PFOA and PFOS portend an equally strict federal regulation that will create significant new liabilities for water utilities and other companies who may discharge PFAS into drinking water systems. In addition, many states may look to revise their own PFAS drinking water standards that were previously based on the 2016 health advisories.

More broadly, the PFAS health advisories have sweeping implications for future Federal regulations. The current administration is rapidly taking action to strictly regulate PFAS under major environmental statutes such as CERCLA, RCRA, the Clean Water Act and the Safe Drinking Water Act. PFAS regulation under some or all these statutes will create major liabilities for businesses and the insurance carriers that provide those business coverage

Insurance Coverage for PFAS

In a declaratory judgment action against two separate carriers a New York trial court agreed that two different pollution exclusions barred Tonoga's claim that the carriers had to defend the private lawsuits. The New York Appellate Division affirmed under both exclusions:

- One limited coverage to damages arising from a discharge or release of a pollutant was "sudden or accidental." The appellate division held that while the private complaints against Tonoga alleged "improper dumping" and "spilling" of solutions containing PFAS down the drains of its plant, those allegations were not sufficient to establish that any discharge or release was sudden or accidental. The court also rejected Tonoga's argument that the coverage decision should await discovery in the underlying case, which might reveal a sudden or accidental discharge.

- Another excluded claim for damages arising out of actual discharge or release of pollutants at or from premises owned, rented or occupied by the insured.

While the New York decision is believed to be the first reported state court decision applying pollution exclusions to PFAS claims, we expect to see increasing numbers of cases throughout all jurisdictions involving PFAS claims. PFAS chemicals are common and bioaccumulative, meaning they can build up and persist in the environment. State and federal governments are ramping up efforts to regulate PFAS chemicals and bringing litigation against facilities they alleged contaminated the environment and in particular, groundwater. Personal injury claims are not far behind.