

PFAS In The Spotlight After Georgia Runoff Elections

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Georgia's recent Senate runoff elections resulted in a Democrat controlled U.S. Senate. The impact of the Georgia election will play out over the next few years, with some predicting that the narrow majority that Democrats have in the Senate will not guarantee resistance-free passage into law of most Democrat or Biden-Harris proposed legislation, with others postulating that the result will be exactly that. Nevertheless, one issue that companies of all sizes and industry types must now pay extra attention to is PFAS. The results of the runoff elections in Georgia will have broad-sweeping impacts on PFAS compliance and litigation issues that companies simply cannot ignore.

What Are PFAS and Why Are They a Concern?

Per- and poly-fluoroalkyl substances ("PFAS") are a class of over 7,000 manmade compounds. Chemists at 3M and Dupont developed the initial PFAS chemicals by accident in the 1930s when researching carbon-based chemical reactions. During one such experiment, an unusual coating remained in the testing chamber, which upon further testing was completely resistant to any methods designed to break apart the atoms within the chemical. The material also had the incredible ability to repel oil and water. Dupont later called this substance PFOA (perfluorooctanoic acid), the first PFAS ever invented. After World War II, Dupont commercialized PFOA into the revolutionary product that the company branded "Teflon."

Only a short while later, 3M invented its own PFAS chemical – perfluorooctane sulfonate (PFOS), which they also commercialized and branded "Scotchgard." Within a short period of time, various PFAS chemicals were used in hundreds of products – today, it numbers in the thousands.

The same physical characteristics that make PFAS useful in a plethora of commercial applications, though, also make them highly persistent and mobile in the environment and the human body – hence the nickname, "forever chemicals." While the science is still developing regarding the extent of possible effects on human health, initial research has shown that PFOA and PFOS are capable of causing certain types of cancer, liver and kidney issues, immunological problems, and reproductive and developmental harm.

PFAS – "Hazardous Substance" Designation By the EPA

Much of the attention that has been given to PFAS in politics, media, and literature centers on the

potential risks of PFAS stemming from drinking water. This makes sense, as the most direct ingestion route of PFAS into the human body is through water. However, an issue that has thus far quietly made its way through political spheres is whether to designate PFAS as “hazardous substances” under the Comprehensive Environmental Response, Compensation and Liability ACT (CERCLA) – also known as the “Superfund law.” While debates have taken place on the issue among federal-level politicians, most of the population is likely unaware of this significant legal designation for PFAS that will have immense and costly implications for businesses of all types.

Under CERCLA, once a substance is classified as a “hazardous substance”, the EPA can force parties that it deems to be polluters to either cleanup the polluted site or reimburse the EPA for the full remediation of the contaminated site. Without such a designation, the EPA can merely attribute blame to parties that it feels contributed to the pollution, but it has no authority to force the parties to remediate or pay costs. The designation also triggers considerable reporting requirements for companies if they are known to or found to be discharging PFAS into the environment. Currently, those reporting requirements with respect to PFAS do not exist, but they would apply to industries well beyond just PFAS manufacturers.

How the Georgia Elections Impacted the PFAS “Hazardous Substance” Designation

The most crucial way that the Georgia runoff elections will impact the designation of PFAS as “hazardous substances” under CERCLA is through the PFAS Action Bill. The bill is a federal bill that calls for a requirement that the EPA designate PFAS as a “hazardous substance.” The PFAS Action Bill previously passed in Congress and was defeated in the Senate. It will surely be revived by Congress once the Biden-Harris administration is sworn in (several legislators have already signaled that they will in fact do so). With a majority now in both the House and Senate, Democrats may have a much easier pathway to have the legislation enacted than under the Trump administration. The bill would accelerate the EPA’s timeline considerably to decide the “hazardous substance” designation – something that, even under the Trump administration, it signaled several times in various filings that it considered a priority action item.

Even if the PFAS Action Bill does not pass in Congress, though, the Biden-Harris administration has another avenue through which to fulfill its campaign promise to get the EPA to designate PFAS as a “hazardous substance” – the EPA itself.

Recently, Biden announced his nomination of Michael Regan (North Carolina’s head of the Department of Environmental Quality) to lead the EPA after Biden is sworn in. Mr. Regan has demonstrated a history of tough action on PFAS issues, especially since there is a PFAS manufacturing facility in North Carolina that is under scrutiny for waterway contamination. It is likely that Mr. Regan will be supportive of the Biden-Harris desire to designate PFAS as “hazardous substances.” The result will be the elimination of one hurdle that made the designation all but impossible under the Trump administration – the approval of any EPA draft proposal by the President. If put before him, President-elect Biden will undoubtedly approve an EPA recommendation for a PFAS “hazardous substance” designation (he would be hard pressed not to, since he campaigned on the promise to pass the designation). While administrative hurdles will remain (public comment period, in particular), as the EPA will want its final rule to pass judicial review in the event of inevitable lawsuits, the synchronized interests with respect to PFAS of the Biden-Harris administration and the incoming head of the EPA will certainly accelerate the PFAS “hazardous substance” designation farther than ever before.

Why the PFAS Designation Matters To More Businesses Than You Think

A common misconception about the potential PFAS designation under CERCLA is that companies that are not directly discharging PFAS into riverways or managing a landfill in which PFAS are being discarded do not have to worry about the “hazardous substance” designation. This is a misconception that could cost some companies millions of dollars.

Consider the example of a plastics recycling facility. The company accepts recyclable plastics, runs them through its recycling process and machinery, and typically sends raw materials back to plastic manufacturers so that more plastic can be produced. On its surface, the recycling facility is not involved whatsoever with PFAS. Consider, though, that in the recycling process, large amounts of water are used. Is the company certain (or has it even tested) that the water coming into the facility is free of PFAS? Likely not, yet the effluent from the recycling process must be discarded, potentially into local waterways. A CERCLA designation will require companies discharging PFAS into waterways to report those discharges to the EPA if the discharges contain sufficient levels of PFAS. If violations are found, intent may matter in terms of the severity of a penalty, but it will not be an absolute defense. State level arms of the EPA that are under significant local pressure to clean up local drinking water PFAS contamination will not care that the company had nothing to do with the PFAS contamination in the water coming into its facility – it will simply see that the business is discharging PFAS chemicals into the environment (and possible drinking water sources). Violation notices could result, putting the company at risk for the costs of cleanup of downstream drinking water contamination or penalties.

Taking the example further, though, recycling facilities also generate solid waste – scrap from the products they buy that are either unusable or that simply become unusable during the recycling process. These byproducts must be discarded and are typically sent to landfills. But what if the products that are purchased by the company to recycle are already contaminated with PFAS? Or, if not, what if they become contaminated with PFAS by the water used in the recycling process? The company is sending PFAS-contaminated products to landfills that the EPA, having designated PFAS as a “hazardous substance”, will take a heightened interest in, as the site could potentially be deemed a Superfund site. If the landfill is owned by the company, then the EPA has an easy target for pursuit of legal / compliance / cleanup cost action, which can range from a few million dollars to tens of millions of dollars (in some cases, even hundreds of millions of dollars). If the landfill accepts refuse from multiple sources or industries, the EPA could potentially try to hold each party responsible that it believes may have in some way contributed to the PFAS contamination. Lengthy legal battles often ensue in these situations, as the parties argue about who is responsible for what share of the cleanup costs.

This example may seem farfetched, yet companies must recognize the fact that both the EPA and state-level arms of the EPA are under immense pressure to act on the issue of PFAS. Regulatory agencies will pursue any avenue possible to obtain costs from parties that are potentially responsible for costly cleanups. The reach of the regulatory agencies will extend well beyond simply PFAS manufacturers themselves.

Conclusion

The Georgia runoff election results will accelerate the timeline under which the EPA will make its final determination as to whether PFAS should be considered a “hazardous substance” under CERCLA. Companies need to invest now in planning, compliance, and strategic cleanup initiatives to save potentially millions of dollars in cleanup costs and possible violation penalties down the road. With the

prevalence of PFAS in the environment already, awareness is key and assumptions without investigation that PFAS are not a company concern could lead to unintended consequences that interrupt business.

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National Law Review, Volume XI, Number 8

Source URL: <https://natlawreview.com/article/pfas-spotlight-after-georgia-runoff-elections>