

EPA PFAS Plan – Companies Must Prepare Now

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On Monday, the EPA rolled out what it dubbed a “sweeping proposal” for its approach to tackling PFAS issues. The EPA PFAS plan is a broad scale proposal to tackle PFAS issues on many levels, from testing requirements placed on industry, drinking water contamination issues, Superfund remediation powers, to Clean Air Act considerations. At the very least, companies involved in the chemical, manufacturing and industrial sectors must take heed of the changes that are coming, make appropriate changes to business practices, and ensure that a thorough compliance check is completed as soon as possible. Failing to do so will place companies at serious financial risk and the window to avoid serious business interruption issues related to PFAS is quickly closing.

EPA PFAS Plan

The primary focus of the EPA PFAS plan introduced yesterday is to ensure that companies that the EPA believes are PFAS polluters be held accountable for the costs associated with remediating the PFAS contamination. In developing its accountability system, the EPA PFAS plan starts at the beginning by substantially increasing requirements for chemical manufacturers to disclose and test for health and environmental effects from numerous PFAS. In fact, yesterday’s EPA PFAS plan is the farthest EPA statement to date in terms of how many PFAS it is looking to collect data from and whether it is considering regulations by classes of PFAS types as opposed to one PFAS at a time. The EPA PFAS plan requires chemical manufacturers to provide data on over 2,000 individual PFAS, which will be grouped into 20 different categories based on similarities in chemical composition. The EPA indicated that “The Agency is focused on improving its ability to address multiple chemicals at once, thereby accelerating the effectiveness of regulations, enforcement actions, and the tools and technologies needed to remove PFAS from air, land, and water.” This is the first time that the EPA has clearly signaled an intent to consider regulating PFAS by categories or classes, as opposed to individual PFAS. The implications are enormous to businesses, even beyond chemical manufacturers, as increasing regulations on increasing numbers of PFAS will directly impact future enforcement action liabilities by significant numbers of companies. The EPA indicated that it intends to issue testing requirements by the fall of 2021.

Additionally, the EPA for the first time publicly put a timetable on issuing drinking water standards under the Safe Drinking Water Act for PFOA and PFOS. The EPA PFAS plan states that the EPA intends to issue its proposed final rule in the fall of 2022, with enactment of the final rule by the fall of 2023. Similarly, the EPA PFAS plan indicates that the EPA seeks to designate some PFAS as

hazardous substances under CERCLA by spring 2022, with a final designation by summer 2023. Also detailed in the EPA PFAS plan are deadlines for laying the foundation and framework for the EPA to further regulate, or begin to regulate, PFAS in effluent, air emissions, and improve current technology to test for and measure PFAS in various mediums.

Impact On Businesses

Many companies assume that any regulation under the Safe Drinking Water Act, CERCLA, or the other laws mentioned in the EPA PFAS plan will not impact them. However, this belief provides a false sense of security that must immediately be dispelled. The EPA is signaling an intent to take regulatory action related to PFAS with respect to drinking water contamination, industrial effluent discharge, air pollution, and land-based environmental pollution. Further, the plan seeks to go well beyond the traditional PFOA and PFOS types of PFAS that are most commonly regulated, and instead sets up regulation by classes within the PFAS family as a very real possibility. While very few companies in the United States are still using PFOA and PFOS in any capacity, thousands of businesses are using other PFAS compounds in products or manufacturing processes.

Direct industry effluent discharges into water sources (which may not be drinking water sources, but may feed into drinking water sources) will be the low-hanging fruit target for local environmental agencies at the state level when the EPA passes an enforceable drinking water limit. Companies must ensure that they have all permitting in order, and it is advisable that the permitting specifically encompasses PFAS. Failing to do so will cause issues down the line when local environmental regulatory bodies look to determine, even retroactively, who PFAS water polluters are or were, as those agencies seek to hold businesses responsible for the costs associated with cleaning up PFAS in drinking water.

Waste management companies and businesses that send their industrial waste to landfills are also well advised to do a full compliance check. While many companies do not use PFAS directly in their own manufacturing processes, do the parts or other raw materials used in the manufacturing process have PFAS contamination issues? Are landfills doing due diligence to determine if they are accepting PFAS waste? A company could unknowingly send PFAS-laden industrial waste products to landfills, and so these are questions that companies must get answers to. Over time, it is possible that the PFAS may leach out of the landfill and find their way into local water sources. Environmental regulatory agencies will look to these sites, the owners of the sites, and potentially companies sending waste to the sites as responsible parties for PFAS contamination in waterways.

Finally, even businesses having nothing to do with PFAS or manufacturing from which PFAS could be a contaminant need to follow news regarding PFAS regulations. For example, has the property on which your business sits ever had fires that have required a local fire department to extinguish flames using foam (historically, a PFAS containing product)? What did the owner of the site prior to you use the site for? Were there possible PFAS contamination issues stemming from that prior business? Did your due diligence reports and tests when purchasing the property take PFAS into consideration? If PFAS were a contaminant on the land on which your business now operates, local environmental agencies will pursue cleanup costs from any such business regardless of knowledge or intent, and regardless of whether the PFAS issues were the result of a prior company on the site. These investigations and remediations can be extremely expensive and disruptive to businesses.

Conclusion

Now more than ever, the EPA is clearly on a path to regulate PFAS contamination in the country's

water, land and air. The EPA has also for the first time publicly stated when they expect such regulations to be enacted. These regulations will require states to act, as well (and some states may still enact stronger regulations than the EPA). Both the federal and the state level regulations will impact businesses and industries of many kinds, even if their contribution to drinking water contamination issues may seem on the surface to be de minimus. In states that already have PFAS drinking water standards enacted, businesses and property owners have already seen local environmental agencies scrutinize possible sources of PFAS pollution much more closely than ever before, which has resulted in unexpected costs. Beyond drinking water, though, the EPA PFAS plan shows the EPA's desire to take regulatory action well beyond just drinking water, and companies absolutely must begin preparing now for regulatory actions that will have significant financial impacts down the road.

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