

# Incoming Impacts to Industry: EPA Announces PFAS Strategic Roadmap

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On October 18, 2021, the U.S. Environmental Protection Agency (“EPA”) released its [PFAS Strategic Roadmap: EPA’s Commitments to Action 2021-2024](#) (the “PFAS Roadmap”). This widely anticipated plan further expands EPA’s objectives to address the risks associated with per- and poly-fluoroalkyl substances (“PFAS”). Taking a page from the Resource Conservation and Recovery Act’s (“RCRA”) “cradle-to-grave” approach, the PFAS Roadmap is based on the three objectives of “research, restrict, and remediate.” These objectives contain broad goals aimed at protecting human health and ecological systems. Significantly, each objective contains express environmental justice considerations. While various industries can likely expect more targeted rulemakings and data collection efforts in the near future, the PFAS Roadmap already identifies specific industries and activities as particular targets for regulation, including: organic chemicals; biosolids; plastics/synthetic fibers; metal finishing/electroplating; electrical components; textile mills; landfills; leather tanning/finishing; plastics molding; paint formulating; pulp/paper/paperboard; and airports.

## What’s going to happen?

EPA has proposed an aggressive timeline to implement the PFAS Roadmap before the 2024 Presidential election. Most upcoming rules will rely on EPA’s authority under the Toxic Substances Control Act (“TSCA”). Specifically, TSCA Section 8(a)(7) provides authority for EPA to collect information on PFAS, and TSCA Section 4 grants EPA the authority to issue Test Orders to require PFAS manufacturers to pay for PFAS studies. As EPA progresses through the PFAS Roadmap, it anticipates relying on authority granted under other environmental statutes such as the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), although it is not clear in all cases whether EPA actually has the statutory authority upon which it relies. These proposed rules will be subject to notice and comment periods, and also subject to potential challenges as to whether the proposed rules fall within the scope of EPA’s authority. Significant expected rulemakings are emphasized in **bold** below.

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- *Happening Now*

- Review process for new PFAS under TSCA. In April 2021, EPA announced that it would generally expect to deny pending and future low-volume exemption submissions for PFAS. Moving forward, EPA will apply a rigorous pre-manufacture notice review process for new PFAS.
- Review previous decisions on PFAS under TSCA, including those reviewed prior to the 2016 TSCA amendments.
- Continue toxicity assessments for PFAS under Integrated Risk Information System (IRIS) Program.
- Continue to evaluate technologies to remove/reduce PFAS in the environment.
- **Develop and validate methods to detect/measure PFAS in the environment, including a “total PFAS” approach.**
- **Although not included in the PFAS Roadmap, on October 26, 2021, EPA announced the initiation of two rulemakings: (1) EPA will initiate the process to propose adding four PFAS chemicals (PFOS, PFOA, PFBS, and GenX) as RCRA Hazardous Constituents; and (2) EPA will clarify its regulations that the RCRA Corrective Action Program has the authority to require investigation and cleanup for wastes that meet the statutory definition of hazardous waste, as defined under RCRA Section 1004(5). This modification would clarify that emerging contaminants such as PFAS can be cleaned up through the RCRA corrective action process.**

- *Fall 2021*

- **Publish national PFAS testing strategy to require manufacturers to conduct and fund studies under TSCA.**
- **Undertake national monitoring for PFAS in drinking water.**
- Publish final toxicity assessment for GenX and five additional PFAS.
  - Note that on October 25, 2021, EPA published a final human health toxicity assessment for GenX chemicals. This is an important step in EPA’s PFAS Roadmap and rulemaking process, as policy makers can now use the GenX chemicals toxicity assessment along with exposure information and other important considerations to determine if, and when, it is appropriate to take action to reduce exposure to GenX chemicals.

- *Winter 2022*

- **Leverage National Pollutant Discharge Elimination System (“NPDES”) permitting to reduce discharges to waterways.**

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- Finalize new PFAS reporting under TSCA.
  - Publish final recommended ambient water quality criteria for PFAS.
  - *Spring 2022*
    - Enhance PFAS reporting under the Toxics Release Inventory (“TRI”).
      - Publish health advisories for GenX and Perfluorobutane sulfonic acid (“PFBS”).
      - **Proposal to designate Perfluorooctanoic acid (“PFOA”) and Perfluorooctane sulfonic acid (“PFOS”) as CERCLA hazardous substances.**
    - **Proposed rulemaking to seek public input on whether to designate additional PFAS under CERCLA.**
  - *Summer 2022*
    - Close door on “abandoned” PFAS under TSCA (*i.e.* strictly regulate resumption of PFAS uses that were previously abandoned uses by designating such uses “Significant New Uses”).
    - Monitor fish tissue for PFAS and evaluate human biomarkers related to consumption of fish from contaminated waterbodies.
  - *Fall 2022*
    - Establish national primary drinking water regulation for PFOA and PFOS.
    - Publish multi-laboratory validated analytical method for forty PFAS.
    - Build technical foundation to address PFAS air emissions.
    - **Restrict PFAS discharges from industrial sources through effluent limitation guidelines program.**
    - Develop protocols for measuring PFAS stack emissions and ambient air concentrations.
  - *Spring 2023*
    - Finalize list of PFAS for use in fish advisory programs.
    - Updated guidance on destroying and disposing certain PFAS.
  - *2024*
    - Publish updates to PFAS analytical methods to monitor drinking water.

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- **Finalize risk assessment for PFOA and PFOS in biosolids.**

## **How is this going to affect industry?**

Because the PFAS Roadmap is highly dependent upon Congressional and industry funding, it remains to be seen how much of the plan EPA will be able to implement. EPA stated that it intends to exercise its TSCA Section 4 authority to issue Test Orders requiring PFAS manufacturers to conduct and fund PFAS studies related to potential human health and ecological effects. EPA has only used this authority twice. Most recently, in January 2021, EPA used this authority to issue Test Orders related to chlorinated solvents and flame-retardants. Failure to respond to an EPA TSCA Test Order, or failure to otherwise comply with its requirements, is a violation of TSCA.

Additionally, the “remediate” objective focuses on maximizing responsible party performance and funding for investigations and cleanup of PFAS contamination; once again, it is not clear how EPA intends to do this without CERCLA authority.

The PFAS Roadmap identifies specific industries as particular targets for regulation, including: organic chemicals; biosolids; plastics/synthetic fibers; metal finishing/electroplating; electrical components; textile mills; landfills; leather tanning/finishing; plastics molding; paint formulating; pulp/paper/paperboard; and airports. However, the PFAS Roadmap is broad enough to encompass a variety of other industries as well. Accordingly, EPA’s planned rulemakings can be expected to have wide-ranging affects across industries, which will likely include more targeted rulemakings and data collection efforts in the near future.

## **What can we expect from Congress?**

While EPA is moving forward with the rulemaking process for various aspects of the PFAS Roadmap, there are still multiple opportunities for Congress to shape the process and how the EPA tackles PFAS issues.

EPA’s ambitious plan to conduct nationwide monitoring for PFAS in drinking water – which could greatly expand EPA’s knowledge of areas of PFAS contamination throughout the country – is highly dependent upon Congressional funding. In March 2021, EPA published the proposed Fifth Unregulated Contaminant Monitoring Rule (UCMR 5) which sets the framework for actions taken by the EPA to collect data to monitor and identify the prevalence and frequency in which PFAS are found nationwide. It is expected that a final rule will be published sometime in the Fall of 2021.

In the PFAS Roadmap, EPA proposes to sample all public water systems serving 3,300 or more people and 800 representative public water systems serving fewer than 3,300 during a 12-month period between January 2023 through December 2025. The data collected through this program will not only serve to inform EPA of the prevalence of PFAS, but also could identify “hot spots” where the agency may look to focus on enforcement and mitigation.

As discussed above, it is important to note that the EPA acknowledges that agency actions taken under this final rule will be subject to appropriations by Congress. Congress can either appropriate the full funding request by the EPA, not fund it at all (unlikely), or attach policy riders or report language to the federal funding to influence the data collection process.

Designating certain PFAS under CERCLA as hazardous substances has been a flashpoint of

contention in Congress in the debate over addressing PFAS at a federal level. It is anticipated that some members of Congress will look to pursue legislative actions specific to addressing or reforming how these designations are undertaken by EPA.

## What can you do?

**Participate in the rulemakings.** Contact Foley for information as to how the PFAS Roadmap is likely to affect your specific industry and how to submit comments to EPA in response to proposed rules applicable to you. As EPA's recent rulemaking under TSCA regarding the use of PIP 3:1 demonstrated, industry involvement is crucial during the comment period in order to provide EPA with all the information it needs to understand supply chain and industry impacts of proposed rules and the ability to meet proposed deadlines for compliance. In the PIP 3:1 rulemaking, EPA noted that the comments it initially received were "very general and did not identify specific uses or specific concerns with the March 8, 2021, compliance date." As a result, EPA issued a No Action Assurance extending the compliance date to March 8, 2022, and is currently seeking comment on a further extension. In order to ensure your interests are represented, you should be prepared to submit comments to EPA in response to potentially applicable PFAS rules.

**Meet with Decision Makers.** You can also contact your Congressional delegation (and relevant congressional committees) and discuss the potential impacts the proposed rules could have on your operations, and how these rules could shape business models – especially on the heels of the current supply chain disruptions.

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