

The EPA's Action Plan On PFAS, One Year Later

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At an event in Philadelphia in February 2019, in response to bipartisan calls to address drinking water contamination across the country, acting U.S. Environmental Protection Agency administrator Andrew Wheeler announced "the most comprehensive cross-agency plan to address an emerging chemical of concern ever undertaken by EPA" in launching the Per- and Polyfluoroalkyl Substances Action Plan.[1]

PFAS are a group of man-made chemicals that contains nearly 5,000 different compounds. Perfluorooctanoic acid, or PFOA, and perfluorooctane sulfonate, or PFOS, are two extensively studied emerging PFAS contaminants that have been discovered in hundreds of drinking water systems across the country.[2]

PFAS are ubiquitous, and can be found in industrial manufacturing, consumer products and aqueous film-forming foam.[3] The EPA has warned that exposure to some PFAS "can lead to adverse health outcomes in humans." [4]

The EPA's action plan promised to address current PFAS contamination and prevent future contamination.[5] Several actions related to PFOA and PFOS were highlighted, including evaluating the need for maximum contaminant levels, or MCLs; taking steps to designate these chemicals as hazardous substances; developing groundwater cleanup recommendations; promulgating significant new use rules, or SNURs, that require EPA notification; and using enforcement mechanisms to manage the risk of PFAS.[6]

The action plan recently turned one year old, and Wheeler described the EPA's efforts over the previous year as "nothing short of unprecedented." [7] To highlight its efforts, the agency released its PFAS Action Plan program update.[8]

The EPA recognized several actions, ranging from groundwater cleanup guidance, to new testing methods, to updates to the Toxics Release Inventory, or TRI, to progress on updating drinking water standards.[9] Despite incremental progress, many criticize the agency for not yet deciding whether to set an MCL for PFAS, or whether to list these chemicals as hazardous substances under the Comprehensive Environmental Response, Compensation,



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and Liability Act, or CERCLA, also known as the Superfund law.[10]

Given the consequences associated with regulating PFAS and impending battles in Congress, it is important to review what progress the EPA has made on PFAS, in order to anticipate the agency's likely future course of conduct. The agency's PFAS Action Plan program update provides the outline for this review.

Update on Drinking Water Actions

The EPA characterized its preliminary proposal to regulate PFOA and PFOS in drinking water as a critical step in its efforts to protect drinking water and public health.[11] On March 10, the agency published a notice in the Federal Register of its preliminary regulatory determinations for contaminants on the fourth drinking water contaminant candidate list, which announced its preliminary determination to regulate PFOA and PFOS under the Safe Drinking Water Act, or SDWA.[12]

But the EPA's notice of its preliminary determination is the "beginning of [EPA's] regulatory development process, not the end." [13] The notice seeks comments on:

- The preliminary determination to regulate PFOA and PFOS;
- The other PFAS substances and potential regulatory approaches; and
- The processes and analyses used for the regulatory determinations, supporting information, additional studies or sources of information it should consider, and the rationale it used to make these preliminary decisions.[14]

The comment period for this proposal ends on June 10.[15] After the comment period ends, and the EPA considers the comments, it will decide whether to regulate PFOA and PFOS.[16]

If the agency decides to do so, it will begin the long process of establishing a MCL for PFOA and PFOS in the nation's drinking water.[17] The process can take three and a half years, if not longer.[18]

The EPA recognized EPA Method 533, which provides a new method for testing PFAS in drinking water.[19] This new method focuses on PFAS with carbon chain lengths of 4 to 12, and complements EPA Method 537.1.[20]

Together, these methods can measure 29 different PFAS chemicals, including:

- PFOA;
- PFOS;
- Perfluorononanoic acid, or PFNA;
- Perfluorohexanesulfonic acid, or PFHxS;
- Perfluoroheptanoic acid, or PFHpA;
- Perfluorobutanesulfonic acid, or PFBS; and
- Perfluorobutanoic acid, or PFBA.[21]

The agency announced it would, consistent with the 2019 National Defense Authorization Act, or NDAA, continue to monitor PFAS in the next round of monitoring under the Unregulated Contaminant

Monitoring Rule.[22] The EPA also explained actions on PFOA and PFOS it was considering taking to address water quality standards, propose human health and aquatic life criteria, understand health and ecological risks of land-applied biosolids, and examine industrial discharge sources that may need to be regulated.[23]

Update on PFAS Cleanups

The EPA highlighted its interim recommendations to address groundwater contaminated with PFOA and PFOS.[24] The nonbinding recommendations, issued in December 2019, provide guidance for federal cleanup programs and are intended to "help protect drinking water resources in communities across the country."[25]

The EPA recommended the following:

- A 40 parts per trillion, or ppt, screening level — which is set at a hazard quotient of 0.1 for PFOA and/or PFOS individually — should be used to "determine if PFOA and/or PFOS is present at a site and may warrant further attention." [26] The screening levels are risk-based values to be used to determine if the level of contamination warrants further investigation.[27]
- The agency's PFOA and PFOS lifetime drinking water health advisory level of 70 ppt (individually or combined) should be used as the preliminary remediation goal "for contaminated groundwater that is a current or potential source of drinking water, where no state or tribal MCL or other applicable or relevant and appropriate requirements ... are available or sufficiently protective." [28] The preliminary remediation goal is an initial target for cleanup, which can be adjusted "on a site-specific basis as more information becomes available." [29]

The EPA explained that it expects responsible parties will address levels of PFOA and/or PFOS over 70 ppt where groundwater is currently being used for drinking water.[30] The guidance recognizes that cleanup actions under CERCLA and the Resource Conservation and Recovery Act, or RCRA, may ultimately result from the information collected and the final cleanup levels once they are set.[31]

The agency also noted other actions taken to address cleanup of PFAS, including continuing the process to propose designating PFOA and PFOS as hazardous substances under CERCLA.[32]

With regard to this designation, DuPont de Nemours Inc., a company whose predecessor manufactured and utilized PFOA and other PFAS for decades, told Congress that PFOA and PFOS should be listed as hazardous substances under CERCLA.[33] Other manufacturers, like 3M Co. and Chemours Co., a former DuPont subsidiary that DuPont spun off with the PFAS business lines and obligations, reject the designation.[34] The EPA has yet to decide.

Update on PFAS in Commerce

The EPA highlighted its November 2019 decision to potentially add certain PFAS to the list of chemicals that companies are required to report to the agency as a part of the TRI.[35] The TRI program "provides the public with information about chemical releases and pollution prevention activities" of industrial and federal facilities.[36]

TRI requires U.S. facilities in different industry sectors to "report annually how much of each chemical is released to the environment and/or managed through recycling, energy recovery, and treatment." [37]

The TRI advance notice of proposed rulemaking on the addition of certain PFAS and community right-to-know toxic chemical release reporting was published on Dec. 4, 2019.[38] The possible addition of certain PFAS to the TRI, the EPA explained, will provide information to the public on these chemicals for the first time.[39]

In the advance notice, the EPA said it was reviewing which of the 600 PFAS currently in commerce in the U.S. it should consider evaluating for potential addition to the TRI — and whether to list PFAS as individual chemicals, as a single category, as multiple categories, or as a combination of individual listings and category listings.[40]

On Dec. 31, 2019, the EPA notified current TRI reporters that their facilities need to start tracking and collecting PFAS data during 2020. In February, the agency provided a list of 172 PFAS subject to the TRI reporting requirement.

The 172 PFAS were added to the TRI by Congress in the NDAA.[41] These include PFOA, PFOS, GenX, PFNA and PFHxS; certain salts and other compounds associated with these PFAS; and other PFAS listed under other statutes and regulations.[42]

The NDAA also amended the Emergency Planning and Community Right-to-Know Act, by establishing a reporting threshold for these PFAS of 100 pounds.[43] Recently, the EPA announced it was publishing a final rule to officially incorporate these requirements into the Code of Federal Regulations for TRI.[44] Reporters must provide their report on PFAS to the agency by July 1, 2021.

The EPA recognized its February 2020 proposal to supplement its proposed 2015 SNUR for long-chain PFAS.[45] On March 3, the agency published the supplemental proposed rule, titled "Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances; Significant New Use Rule; Supplemental Proposal," which drew criticisms from a member of Congress, environmental groups and state attorneys general as a backroom deal favoring PFAS manufacturers.[46]

The 2015 rulemaking had proposed to amend a SNUR for certain PFAS, including PFOA and PFOS, to require manufacturers and importers to notify the EPA at least 90 days prior to starting or resuming the manufacture, importation or processing of PFAS for new uses in any product.[47]

Given that uses of the chemicals had been phased out, the 2015 proposed rule would have amounted to a de facto ban on the PFAS targeted, as well as a de facto ban on the resumption of all abandoned uses of certain long-chain PFAS substances that previously had been allowed. The Trump administration never adopted the rule, leading Congress, in the NDAA, to direct the EPA to complete the rulemaking by June 22 of this year.[48]

Although the EPA claimed its 2020 supplemental proposed rule would close a loophole that allowed the import of banned PFAS products, the supplemental proposed rule actually narrows the class of chemicals that would have been subject to the 2015 rule, establishes a "safe harbor" for certain violations of the SNUR, and exempts certain new uses from exposure data reporting requirements.[49]

The supplemental has drawn criticism from states and private parties — and has garnered support from several regulated industries.[50]

Update on Research

The EPA explained that the "science needed to protect public health and the environment from PFAS exposure cuts across many applications and disciplines." [51] Two applications and disciplines bear noting. First, the agency established a working group to model PFAS in contaminated dairy cows, and continued to support remediation in rural America. [52]

Second, the EPA explained that it continues to research the "human health effects of seven of the most common PFAS." [53] This effort, the agency noted, was furthered in 2019 when the EPA sought input on draft toxicity assessments for GenX chemicals and PFBS. [54]

Additionally, the agency is in the process of conducting an Integrated Risk Information System assessment on perfluorodecanoic acid, or PFDA; perfluorohexanoic acid, or PFHxA; PFBA; PFNA; and PFHxS. [55]

The assessment seeks to identify the "potential human health effects from exposure to each assessed PFAS" and to "develop toxicity values, as supported by the available evidence." [56] The EPA hopes to produce both documents in 2020. [57]

Update on Enforcement

The EPA cited to past and current enforcement actions to address PFAS contamination, largely relying on actions taken before the action plan was issued. [58] The agency cites two specific post-action plan enforcement actions.

In 2019, the EPA took action against Chemours facilities in West Virginia and North Carolina for violating Toxic Substances Control Act requirements in the manufacture of certain PFAS chemicals. [59] Also in 2019, the EPA — in conjunction with the Michigan Department of Environment, Great Lakes and Energy — issued a CERCLA administrative consent order to Wolverine World Wide Inc. to require it to complete removal action work at its Michigan facility to address hazardous substance and PFAS contamination. [60]

Notable actions that commenced prior to the action plan include issuing Clean Water Act, Toxic Substances Control Act, CERCLA and RCRA information requests; carrying out inspections at several PFAS manufacturing or processing facilities; and criminally investigating PFAS-related pollution. [61]

Update on PFAS Funding

Over the last year, the EPA has provided funding to universities and states to study issues ranging from the human and ecological exposure of PFAS in the environment to the environmental risks posed by PFAS in waste streams. [62]

Importantly, the agency highlighted its Drinking Water State Revolving Fund, where it "provide[s] financial assistance to publicly-owned and privately-owned community water systems, as well as non-profit non-community water systems, for drinking water infrastructure projects." [63]

Projects to address PFAS contamination are eligible, and can include funding for upgrading treatment technologies to add PFAS removal capability. [64]

Key Takeaways from the Action Plan's First Year

Another year's delay in the development of federal regulatory standards will maintain the status quo for the time being. Yet, two takeaways can be gleaned from the actions highlighted in the update.

First, PFOA and PFOS will likely be regulated under the SDWA at some point. But regulation from EPA is not likely within the next year, given that Wheeler told Congress that he does not "believe that the agency can set an MCL on their own, following the Safe Drinking Water Act, within a year." [65]

Despite, or perhaps because of, EPA inaction, the U.S. Senate has spun into action. Senate Transportation and Infrastructure subcommittee chairwoman Sen. Shelley Moore Capito, R-W.Va., has extensively encouraged the EPA to set an MCL standard for PFAS. [66]

Absent such action, in early May, her subcommittee reported out of committee a bill that would require the EPA to set an MCL for certain PFAS. [67] The bill, titled the Drinking Water Infrastructure Act of 2020, requires the EPA to set, within 2 years of its passage, an MCL level for PFOA and PFOS. [68]

The bill also provides funding for resources and technical assistance for drinking water infrastructure, including funding for communities to construct filtration systems. [69] The bill represented an important move for Republicans on the subcommittee, given that last year it was largely the Republican majority which opposed various efforts by Democrats to regulate PFAS.

Second, PFOA and PFOS will likely be designated hazardous substances under CERCLA at some point, although they are unlikely to be so designated by the end of the year.

Two pieces of information previously discussed signal the likelihood of the designation: (1) the EPA's interim recommendations to address groundwater contaminated with PFOA and PFOS, which sets a preliminary remediation goal and recognizes that CERCLA actions may flow from PFOA and PFOS contamination; and (2) the update's recognition that the EPA continues the "regulatory process for proposing to designate PFOA and PFOS as hazardous substances under CERCLA." [70]

All stakeholders — the federal government, states, municipalities, water providers and treatment facilities, and business and industrial users of products that contained PFOA and PFOS — must now assess how their interests, liabilities and potential causes of action will shift when PFOA and PFOS have a nationally established MCL, or are listed as hazardous substances under CERCLA.

On the latter point, it is important to identify the potentially responsible parties under CERCLA — i.e., the current and former owners and operators of facilities contaminated with PFOA and PFOS, the entities that arranged for the chemicals to be disposed of at the facilities, and the transporters who put them there.

There is no doubt that such designation will lead to a significant shift of liability from the manufacturers of PFOA and PFOS and products containing these chemicals onto the CERCLA-liable parties — which the product manufacturers are not — and significantly more litigation of various types across the country.

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[1] Press Release, EPA Acting Administrator Announces First-Ever Comprehensive Nationwide PFAS Action Plan (Feb. 14, 2019), <https://www.epa.gov/newsreleases/epa-acting-administrator-announces-first-ever-comprehensive-nationwide-pfas-action-plan> (last visited 5/13/20); EPA, EPA's Per- and Polyfluoroalkyl Substances (PFAS) Action Plan (Feb. 14, 2019), <https://www.epa.gov/pfas/epas-pfas-action-plan> (last visited 5/13/20).

[2] Sydney Evans et al., PFAS Contamination of Drinking Water Far More Prevalent Than Previously Reported, EWG (Jan. 22, 2020), <https://www.ewg.org/research/national-pfas-testing/> (last visited 5/15/20).

[3] EPA, Basic Information on PFAS, <https://www.epa.gov/pfas/basic-information-pfas> (last visited 5/13/2020).

[4] *Id.*

[5] EPA, EPA's Per- and Polyfluoroalkyl Substances (PFAS) Action Plan (Feb. 14, 2019), <https://www.epa.gov/pfas/epas-pfas-action-plan> (last visited 5/13/20).

[6] Press Release, EPA Acting Administrator Announces First-Ever Comprehensive Nationwide PFAS Action Plan (Feb. 14, 2019), <https://www.epa.gov/newsreleases/epa-acting-administrator-announces-first-ever-comprehensive-nationwide-pfas-action-plan> (last visited 5/13/20); EPA, EPA's Per- and Polyfluoroalkyl Substances (PFAS) Action Plan (Feb. 14, 2019), <https://www.epa.gov/pfas/epas-pfas-action-plan> (last visited 5/13/20).

[7] Press Release, EPA Acting Administrator Announces First-Ever Comprehensive Nationwide PFAS Action Plan (Feb. 14, 2019), <https://www.epa.gov/newsreleases/epa-acting-administrator-announces-first-ever-comprehensive-nationwide-pfas-action-plan> (last visited 5/13/20).

[8] EPA, EPA PFAS Action Plan: Program Update at 4 (Feb. 2020), https://www.epa.gov/sites/production/files/2020-01/documents/pfas_action_plan_feb2020.pdf (last visited 4/22/2020) (hereafter, "Update").

[9] *Id.*

[10] See Press Release, EWG, Under Pressure, EPA Moves Forward with Drinking Water Standards for PFOA and PFOS (Feb. 20, 2020).

[11] *Id.* at 7.

[12] 85 Fed. Reg. 14,098 (March 10, 2020).

[13] *Id.* at 14,100.

[14] *Id.* at 14,100.

[15] *Id.*; EPA, Announcement of Preliminary Regulatory Determinations for Contaminants on the Fourth

Drinking Water Contaminant Candidate List; Extension of Comment Period (April 17, 2020), <https://www.epa.gov/ccl/pre-publication-notice-comment-extension-preliminary-regulatory-determinations-fourth-drinking> (last visited 4/30/20).

[16] EPA, Background on Drinking Water Standards in the Safe Drinking Water Act (SDWA), <https://www.epa.gov/sdwa/background-drinking-water-standards-safe-drinking-water-act-sdwa> (last visited 5/13/20).

[17] Id.; Update at 7.

[18] EPA, Background on Drinking Water Standards in the Safe Drinking Water Act (SDWA), <https://www.epa.gov/sdwa/background-drinking-water-standards-safe-drinking-water-act-sdwa> (last visited 5/13/20).

[19] Update at 5.

[20] Id.

[21] Id.

[22] Id. at 7.

[23] Id.

[24] Id.; EPA's Interim Recommendations for Addressing Groundwater Contaminated with PFOA and PFOS, https://www.epa.gov/sites/production/files/2019-12/documents/epas_interim_recomendations_for_addressing_groundwater_contaminated_with_pfoa_and_pfos_dec_2019.pdf (last visited 4/6/2020) (hereafter, "IRAGC").

[25] Update at 8.

[26] Id; IRAGC at 2. "A hazard quotient is considered by EPA to be the ratio of the potential substance exposure to the level at which no adverse non-cancer effects are expected, i.e. a reference dose (RfD), for a similar exposure period." IRAGC at 2 n.4.

[27] Update at 8.

[28] Id.; IRAGC at 2. Preliminary remediation goals are "concentrations of contaminants for each exposure route that are believed to provide adequate protection of human health and the environment based on preliminary site information." IRAGC at 2 (quoting NCP; 55 Fed. Reg. 8712 (March 8, 1990)).

[29] Update at 8.

[30] IRAGC at 2.

[31] Id.

[32] Update at 9.

[33] Britany Patterson, Congress Hears Testimony From Chemical Company Executives On PFAS Contamination, Ohio Valley ReSource (Sept. 11, 2019), <https://wfpl.org/congress-hears-testimony-from-chemical-company-executives-on-pfas-contamination/> (last visited 5/13/20); see also Committee on Oversight and Reform, The Devil They Knew: PFAS Contamination and the Need for Corporate Accountability, Part II (Sept. 10, 2019), <https://oversight.house.gov/legislation/hearings/the-devil-they-knew-pfas-contamination-and-the-need-for-corporate-0> (last visited 5/13/20).

[34] Id.; Jef Feely et al., Chemours Calls DuPont Clean-Up Estimates 'Spectacularly' Off, Bloomberg (June 28, 2019), <https://www.bloomberg.com/news/articles/2019-06-28/chemours-says-dupont-s-liability-estimates-spectacularly-wrong> (last visited 5/15/20).

[35] Update at 10.

[36] Id.

[37] Update

[38] 84 Fed. Reg. 66,369 (Dec. 4, 2019).

[39] Update at 10.

[40] 84 Fed. Reg. at 66373.

[41] Pub. Law 116-92 (Dec. 20, 2019).

[42] NDAA § 7321(b)(1).

[43] Id. § 7321(b)(2).

[44] EPA, Implementing Statutory Addition of Certain Per- and Polyfluoroalkyl Substances to the TRI Chemical List, <https://www.epa.gov/toxics-release-inventory-tri-program/implementing-statutory-addition-certain-and-polyfluoroalkyl> (last visited 5/18/20).

[45] Update at 10.

[46] 85 Fed. Reg. 12,479 (March 3, 2020).

[47] Update at 10; see 80 Fed. Reg. 2,885 (Jan. 21, 2015).

[48] NDAA § 7352.

[49] EPA Press Release, EPA Continues to Act on PFAS, Proposes to Close Import Loophole and Protect American Consumers (Feb. 20, 2020), <https://www.epa.gov/newsreleases/epa-continues-act-pfas-proposes-close-import-loophole-and-protect-american-consumers> (last visited 5/13/20); 85 Fed. Reg. 12,479, 12481–82 (March 3, 2020).

[50] Comments to 85 Fed. Reg. 12,479 (March 3, 2020).

[51] Update at 11.

[52] Id.

[53] Id.

[54] Id.

[55] Id.

[56] Id. The assessment "will evaluate both cancer and noncancer effects, including potential effects on the endocrine, hepatic, urinary, immune, developmental, and reproductive systems." Id.

[57] Id.

[58] Id. at 13.

[59] Update at 13.

[60] Id.

[61] Id.

[62] Id. at 14–15.

[63] Id. at 16.

[64] Id.

[65] Sylvia Carignan, PFAS Limits in Drinking Water to Take More Than a Year, EPA Says, Bloomberg (May 20, 2020), <https://news.bloomberglaw.com/environment-and-energy/pfas-limits-in-drinking-water-to-take-more-than-a-year-epa-says> (last visited 5/21/20).

[66] Press Release, Capito Secures West Virginia Priorities in Water Infrastructure Bill (May 6, 2020), <https://www.capito.senate.gov/news/press-releases/capito-secures-west-virginia-priorities-in-water-infrastructure-bill-> (last visited 5/21/20).

[67] Dean Scott, Senate Panel Moves Major Water Bills, Adding PFAS Actions (2), Bloomberg (May 6, 2020), <https://news.bloomberglaw.com/environment-and-energy/senate-panel-tweaks-then-moves-major-water-infrastructure-bills> (last visited 5/21/20).

[68] S. 3590, 116th Cong. § 16 (2020).

[69] Id. §§ 3–4, 6, 8–9, 14–15.

[70] Update at 9.