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## Proactive PFAS Strategies: Top 3 List

22 February 2021

Client Updates

With thousands of per- and polyfluoroalkyl substances (collectively "PFAS") manufactured since the 1940s, hundreds in commerce today, new sources of PFAS contamination being identified, and PFAS found in the environment as far away as the Arctic, it is important for companies to take stock of their connection to these chemicals. No matter how an entity comes into the PFAS conversation - having used PFAS in a product, or manufactured PFAS as a chemical commodity, or used PFAS containing firefighting foams, or otherwise - implementing the following three proactive strategies will be well worth the investment of time and resources.

### 1. Stay Current with Legal, Regulatory, and Policy Developments Across Relevant Governmental Levels.

Given the constant changes in PFAS requirements, it is essential to remain up to date on legal, regulatory, and policy developments at the federal, state, and local levels relevant to historic or current operations. Some companies may also need to track global developments regarding PFAS based on operations. An important upcoming federal requirement for companies not eligible for the de minimis exemption is the July 1 reporting deadline for the first time for 175 PFAS compounds under the Toxics Release Inventory ("EPCRA"), with a reporting threshold of 100 pounds for the 2020 reporting year.

The federal PFAS regulatory landscape is shifting and evolving quickly as the new administration evaluates several regulatory and science actions before the U.S. Environmental Protection Agency ("EPA"). On February 22, the administration announced it would move ahead with two key drinking water PFAS actions. EPA will issue the final regulatory determination that will set in motion the process of proposing national drinking water standards, Maximum Contaminant Levels, for perfluorooctanesulfonic acid ("PFOS") and Perfluorooctanoic acid ("PFOA"), and EPA will collect new PFAS data under the fifth Unregulated Contaminant Monitoring Rule. EPA is also determining whether to:

- list PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") or as hazardous wastes under the Resource Conservation and Recovery Act ("RCRA");
- regulate PFAS as a class of compounds or to continue a chemical by chemical basis;
- further advance an interim strategy to address PFAS in federally issued Clean Water Act discharge permits;
- publish an advance notice regarding soliciting data and information regarding manufacturers of PFAS and the presence and treatment of PFAS in discharges from the Organic Chemicals, Plastic, and Synthetic Fibers point source category.
- maintain the May 2016 lifetime health advisories ("LHAs") for PFOS and PFOA in drinking water as non-enforceable and non-regulatory values at a combined limit of 70 parts per trillion (ppt), as various states adopt lower limits;
- address interim recommendations for addressing PFOA and PFOS contaminated groundwater under federal cleanup programs using a screening level of 40 ppt to determine if PFOA/PFOS is present at a site and may require further attention, with the 70 ppt LHA used as the preliminary remediation goal where no state/tribal or other applicable or relevant and appropriate requirements ("ARARs") are available or sufficiently protective;
- develop PFAS destruction guidance; and
- finalize toxicity assessments for perfluorobutanesulfonic acid ("PFBS") and Gen-X, while continuing other research activities.

When it comes to state regulatory actions, the landscape is varied and volatile, and requires vigilant tracking of new developments. Some states already have enforceable limits for certain PFAS in water, soil, or air, while others have non-regulatory screening levels or advisories. The Environmental Council of the States regularly publishes an [inventory](#) of state activities, as does the [Interstate Technology and Regulatory Council](#), and the National Council of State Legislatures tracks [PFAS legislation](#) introduced in statehouses. Keeping tabs on these resources is very helpful, but it is also important to ensure that your teams are also closely following the actions in the states most relevant to your operations.

### 2. Evaluate the Corporate PFAS Risk Profile.

Comprehensive PFAS due diligence is essential to obtaining a full understanding of PFAS risks facing your company. Appropriate diligence activities may include, among others: investigating PFAS content in current and past company products, formulations, and purchased goods (including oil-, stain- and water-repellent materials, lubricants, coatings, etc.); identifying past handling and use of fluorinated fire-fighting foams (both in training and any emergency incidents); reviewing off-site disposal of PFAS-containing wastes; and evaluating possible liability protections under contracts with suppliers of PFAS-containing materials. Related to due diligence is developing and implementing a program of PFAS governance with appropriate structure, content, and shared management understanding. Corporate information sharing; monitoring and reporting; managing PFAS stockpiles and PFAS disposal; protocols for any litigation holds resulting from PFAS concerns or claims; and approaches to Securities and Exchange Commission ("SEC") disclosures are just a few of the issues worth exploring. Also key is ensuring updated policies and practices related to external engagement.

### 3. Be Aware of PFAS Enforcement Trends.

PFAS enforcement is increasing at the federal and state level. EPA took 16 enforcement actions in recent years related to PFAS, ranging from administrative orders under CERCLA to complete removal actions abating health or environmental threats, to information requests under the Toxic Substances Control Act, CERCLA, and RCRA, to increased inspections. EPA also used its Safe Drinking

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rather than an unknown, which is the better position. A proactive PFAS regulatory, compliance, and litigation strategy now will likely pay dividends later.

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