



## PFAS DEVELOPMENTS UPDATE – AllenES

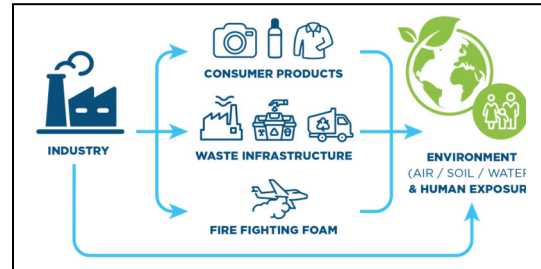
John Ryan, Principal

([jryan@allenes.com](mailto:jryan@allenes.com), 601-953-3313)

JUNE 2023

### 1. EPA Finalizes Rule Adding PFAS to Toxic Release Inventory

The EPA is issuing a final rule that formally incorporates nine PFAS into the Toxics Release Inventory (TRI) program, codifying additions the agency first announced in January while also signaling that those will be the only PFAS that the agency finds to meet statutory triggers for addition to the TRI in the current reporting year. The additions of the nine PFAS became effective January



1, 2023, meaning facilities that release any of those chemicals from that date on must report to the TRI. Submissions for the program's 2023 reporting year are due July 1, 2024. The EPA originally announced the additions in January but is only now finalizing the regulatory changes.

### 2. EPA Extends Comment Period on Plan to Add PFAS to CERCLA Designation

The EPA is giving stakeholders more time to provide input and data on whether the agency should consider regulating additional PFAS under CERCLA beyond the two most-studied ones, PFOA and PFOS, extending the comment period by 60 days to August 11, 2023. These include PFBS, PFHxS, PFNA, HFPO-DA, PFBA, PFHxA, and PFDA. The EPA published the advance notice of proposed rulemaking on April 13, 2023, and the public comment period ended on June 12, 2023. Designating these PFAS as CERCLA hazardous substances would trigger new release reporting requirements and give the EPA authority to require investigation and remediation of releases of these chemicals into the environment.

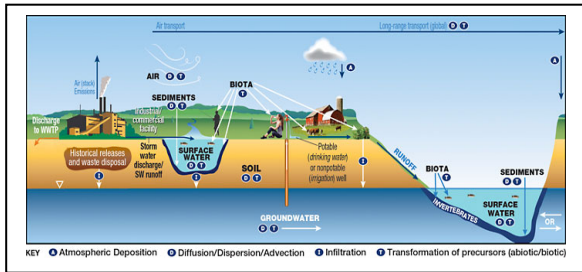
### 3. EPA Extends Internal Deadline to Finalize Rule to Designate PFAS Under CERCLA

The EPA extended its internal deadline, previously August 2023, until February 2024 to finalize a rule to designate PFOA and PFOS as "hazardous substances" under CERCLA. The agency's target for proposing the addition of PFAS to the TRI, as required by the fiscal year 2020 National Defense Authorization Act, has also been delayed by seven months, while the target to finalize additional PFAS has been delayed by nine months. The delay also gives Congress more time to respond to the proposed designation and offer statutory protections for water and wastewater utilities and other passive receivers like solid waste disposal facilities and composting facilities.



#### 4. **Senate EPW Leaders Introduce Bill Narrowing PFAS Definition**

The U.S. Senate is floating draft legislation seeking to narrow the definition of PFAS, excluding polymer chemicals and requiring at least two fluorinated carbon atoms. The draft legislation does not include any liability exemptions for passive receivers and certain other sectors from CERCLA liability—something water utilities, the waste sector, and others have pushed for because they can be held liable



under CERCLA as passive receivers of PFAS that do not contribute to contamination. The bill also makes clear that the EPA's proposed drinking water rule should include all six substances the EPA listed, rejecting pushes for the EPA to group four additional PFAS beyond PFOA and PFOS. The draft bill allows the EPA until September 2024 to finalize the drinking-water rule.

MAY 2023

#### 5. **OMB Reviewing Rule to Subject PFAS to RCRA**

On May 8, 2023, the White House Office of Management and Budget (OMB) began inter-agency review of proposed rules that would allow regulators to subject four PFAS to the Resource Conservation Recovery Act (RCRA) corrective program. The two proposed rules follow EPA Administrator Michael Regan's commitment to New Mexico Governor Michelle Lujan Grisham to write a rule to propose listing four PFAS as hazardous constituents, which would trigger "corrective action." While the rules would subject PFAS to RCRA corrective action for the first time, they do not list these PFAS compounds as hazardous wastes, which would create cradle-to-grave liability where companies become liable for how their waste is handled from generation to disposal.

#### 6. **Comment Period for SDWA Rule Ended May 30, 2023**

The EPA rejected requests from the public to extend the comment period on its proposed Safe Drinking Water Act (SDWA) national primary drinking water regulation to limit the amount of PFOA, PFOS, PFNA, PFHxS, PFHpS, and PFDA in drinking water. The comment period closed May 30, 2023. The rule proposes a maximum contaminant level (MCL) for PFOA and PFOS at 4 parts per trillion. The four other PFAS are regulated as a mixture using a novel "hazard index" approach that would establish an MCL at a unitless 1.0.

#### 7. **EPA Sends New PFAS Reporting Rule to OMB**

The EPA missed the statutory deadline of January 1, 2023 to promulgate its statutorily mandated data-gathering rule for PFAS manufacturing and importing and recently sent the rule to the OMB after the EPA raised its cost estimate from \$10.8 million to \$875 million. The increase is based largely on new calculations of burdens on small companies that make or import finished articles and will have to scrutinize their supply chains for PFAS. The EPA is drafting its rule under a policy rider in the fiscal year



2020 National Defense Authorization Act, which says the EPA must enact a rule requiring “each person” that manufactured or imported PFAS after January 1, 2011 to key data on use of the chemicals and possible exposures to workers, the general public, and the environment, using data-gathering authorities in the Toxic Substances Control Act.



## APRIL 2023

### **8. EPA Announces Intention to Create CERCLA Enforcement Discretion Policy for Certain PFAS**

The EPA announced its intention to draft a formal enforcement discretion policy that would shield certain PFAS polluters from federal enforcement actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). If adopted, the policy would focus federal enforcement actions under CERCLA on PFAS manufacturers, federal facilities, and other entities that presently or historically caused or contributed to significant levels of PFAS contamination in the environment. The EPA announced categories of regulated entities that it would not pursue under the proposed policy, including publicly owned and operated water utilities and publicly owned and operated municipal solid waste landfills.

### **9. EPA Issues Advance Notice of Proposed Rulemaking to Inform Potential Future CERCLA Regulations**

On April 13, 2023, the EPA issued an advance notice of proposed rulemaking asking for public input on potential future hazardous substance designations of PFAS under CERCLA. The notice requests public information and input about seven PFAS that the EPA is considering for potential designation as hazardous substances under CERCLA: PFBS, PFHxS, PFNA, HFPO-DA (also known as GenX), PFBA, PFHxA, and PFDA. This request follows the EPA’s September 2022 proposed rule to designate two PFAS—PFOA and PFOS, and their salts and structural isomers—as hazardous substances under CERCLA.