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EPA Takes Several Actions Towards Further Regulation of PFAS

Legal Update

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EPA recently doubled down on the commitment it made in the 2021-2024 PFAS Strategic Roadmap. PFAS (Per- and Poly-fluoroalkyl substances) are a large group of chemicals historically used in consumer products and industrial processes. EPA has targeted PFAS due to their accumulation and persistence in the environment and the associated risks of human and animal health problems. Recent EPA activity includes the following:

Guidance on Addressing PFAS in NPDES Permits: On December 6, 2022, EPA issued a guidance memo for state environmental agencies that issue wastewater and stormwater discharge permits under the Clean Water Act's ("CWA") National Pollutant Discharge Elimination System ("NPDES") and manage CWA pretreatment programs. Memorandum from Radhika Fox, EPA Ass. Administrator, to EPA Regional Water Division Directors, Regions 1-10, "Addressing PFAS Discharges in NPDES Permits and Through the Pretreatment Program and Monitoring Programs" (Dec. 5, 2022). The memo advises use of the most current sampling and analysis methods to identify sources of PFAS. The memo also identifies various means under NPDES permitting program to regulate PFAS discharges from Publicly Owned Treatment Works (POTWs), industrial facilities, and stormwater discharges, e.g., by imposing technology-based effluent limits or establishing PFAS best management practices in an NPDES permit.

TSCA Significant New Use Rule for Inactive PFAS: On January 26, 2023, EPA published in the Federal Register a significant new use rule (SNUR) under the Toxic Substances Control Act (TSCA) for those per- and poly-fluoroalkyl substances (PFAS) that have not been manufactured (including imported) or processed for many years and are consequently designated as inactive on the TSCA Chemical Substance Inventory. 88 Fed. Reg. 4937 (Jan. 26, 2023). Persons subject to the SNUR would be required to notify EPA at least 90 days before commencing any manufacture (including import) or processing of the chemical substance for a significant new use. Once EPA receives a notification, EPA would require a demonstration that the proposed use does not pose an unreasonable risk to human health and the environment. The public comment period for this rule extends through March 27,

2023.

Updated CERCLA AAI Standard Referencing PFAS: In addition to this proposed rule, EPA published a final rule relating to PFAS. This rule affects the ability to seek liability protection under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") by conducting "all appropriate inquiries" into the environmental condition of a property prior to purchase. 87 Fed. Reg. 76578 (Dec. 15, 2022). (The rule adopts the updated American Society for Testing and Materials ("ASTM") International's "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." The new standard (E1527-21) replaces the old standard (E1527-13) that has been used since 2013.

EPA's new all appropriate inquiries rule recognizes that emerging contaminants such as PFAS may be addressed in a Phase I. For now, PFAS are not required to be considered under the ASTM standard but may be included in a Phase I report as a "non-scope consideration." Once EPA classifies one of the PFAS as a hazardous substance under CERCLA, it will become subject to review in Phase I assessments. It is expected that EPA will classify certain PFAS (PFOA and PFOS) as hazardous substances later this year when a rule proposed on August 25, 2022, is finalized.

PFAS Proposed as EPA Enforcement & Compliance Initiative: Finally, EPA proposed addressing PFAS contamination as one of the National Enforcement and Compliance Initiatives ("NECI") for the 2024-2027 cycle. 88 Fed. Reg. 2093 (Jan. 12, 2023). NECI are selected every four years to determine where to focus EPA's resources. With PFAS as a NECI, EPA would focus on identifying the extent of existing PFAS contamination in the environment. When the need for cleanup is identified, EPA would use its enforcement authority to hold companies responsible for the costs. In particular, EPA identified an intent to pursue liability under CERCLA for PFAS manufacturers. EPA is seeking comments on this proposal until March 13, 2023.