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Update on PFAS Developments and Enforcement

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In recent months, EPA has taken significant regulatory steps to address per- and polyfluoroalkyl substances (PFAS), a large group of so-called "forever chemicals" used in consumer products and industrial processes that are resistant to heat, oils, stains, grease, and water, leading to their persistence in the environment. Among other regulatory actions, in May 2020, EPA published a final rule adding 172 PFAS chemicals to the Toxics Release Inventory (TRI) created by the Emergency Planning and Community Right-to-Know Act (EPCRA) and established threshold reporting requirements for those chemicals. EPA also finalized a \$1.3 million settlement with a manufacturer related to Toxic Substances Control Act (TSCA) notice and import certification violations for products containing PFAS. This alert provides a summary of recent PFAS developments and discusses the implications for companies that may be subject to new reporting requirements, test methods, and cleanup recommendations.

PFAS Action Plan Update

In February 2020, EPA released a program update for its PFAS Action Plan, highlighting recent developments including:

- Preliminary determinations to regulate two of the most extensively produced, pervasive, and studied PFAS (perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS)) in drinking water under the Safe Drinking Water Act (SDWA);
- Groundwater cleanup guidance for federal cleanup programs such as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) that state programs may follow, namely:
 - a screening level of 40 parts per trillion (ppt) to determine if PFOA or PFOS are present and warrant further attention; and
 - a PFOA and PFOS Lifetime Drinking Water Health Advisory level of 70 ppt as the preliminary remediation goal for contaminated groundwater that is a current or potential source of drinking water, where no state or tribal Maximum Contaminant Level or other Applicable or Relevant and Appropriate Requirements are available or sufficiently protective;
- A proposal to ensure that new uses of certain persistent long-chain PFAS chemicals in surface coatings cannot be manufactured or imported into the United States without notification and review under TSCA;
- Continuation of the regulatory process for proposing to designate PFOA and PFOS as hazardous substances under CERCLA;
- Interim guidance to be issued in Fiscal Year 2020 on the

- destruction and disposal of PFAS; and
- Publication of a new validated method to accurately test for a total of 29 PFAS in drinking water.

EPA's Fiscal Year 2021 budget proposal also requests an additional \$6 million to support its PFAS focus area, including the development of analytical methods, toxicity values, and treatment and remediation options.

Enforcement Update

EPA's February PFAS program update highlights that the agency has initiated 12 enforcement actions, including four since 2017. These include an action in 2019 against facilities in West Virginia and North Carolina for violating TSCA requirements while manufacturing PFAS chemicals, as well as issuing an administrative consent order under CERCLA to a Michigan company to complete remedial work related to a facility with both hazardous waste and PFAS contamination. Other enforcement-related actions include issuance of approximately 20 information requests under the Clean Water Act, TSCA, CERCLA, and RCRA; 11 inspections at eight PFAS manufacturing or processing facilities under the authority of TSCA, CWA, and/or RCRA; and multiple criminal investigations underway.

In addition, on May 20, 2020, EPA announced its finalization of an agreement with Swix Sport USA, a manufacturer and distributor of ski wax products, resolving TSCA violations of both the Premanufacturing Notice and Import Certification requirements for products containing PFAS. The Consent Agreement and Final Order before the Environmental Appeals Board specifies that Swix will develop and implement an outreach and training program to phase out and ultimately eliminate PFAS-containing waxes by September 2022, at a cost of \$1 million, and pay a \$375,625 civil penalty. We anticipate that similar settlements will be announced by EPA or the Department of Justice in the coming months.

New TRI Reporting Requirements

On May 18, 2020, EPA signed a final rule to be published in the Federal Register, officially incorporating 172 PFAS to the list of chemicals required to be reported to the TRI and establishing a 100-pound reporting threshold for these substances. The de minimis level for PFOA is 0.1%, while the other PFAS additions have a de minimis level of 1.0%. Significantly, EPA is requiring that reporting forms for these PFAS will be submitted by July 1, 2021 for calendar year 2020 data, just as reporting forms covering the 2019 calendar year are due by July 1, 2020, and the agency is expected to release raw data from calendar year 2020 information collected by July 31, 2021.

Recommendations for Companies

Given the increasing regulatory and public focus, it is critical that businesses follow the continually evolving state of PFAS action at the federal and state level to determine current regulatory requirements and guidance that may apply to their operations under TSCA, SDWA, CERCLA, EPCRA, RCRA, and other environmental and public health laws.

We recommend that facilities in TRI-covered industry sectors track and collect data on the 172 PFAS on the TRI list during 2020, and assume that all TRI reporting requirements, such as supplier notification, as well as any applicable exemptions, will apply to the newly-added PFAS. Companies should also prepare for information requests, inspections, and other enforcement mechanisms from EPA and state agencies with the help of experienced environmental counsel and consultants.