EPA to Consider PFAS in Next Round of National Enforcement and Compliance Initiatives

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On January 12, 2023, the US Environmental Protection Agency (EPA) issued a notice to solicit public comments and recommendations on its National Enforcement and Compliance Initiatives (NECI) set to be implemented during its 2024–2027 fiscal years. NECIs are a set of national program initiatives the EPA develops and implements every four years to focus its efforts on what it considers the most serious environmental violations to improve compliance with our nation's environmental laws. The primary objective of these initiatives is to "protect human health and the environment by holding polluters accountable and compelling regulated entities to return to compliance." Of particular import this year is that in its notice, the EPA specifically invited public comments on a new initiative addressing per- and polyfluoroalkyl substance (PFAS) contamination.

PFAS are a group of man-made chemicals that have been widely used in a variety of consumer products due to their desirable chemical properties. PFAS resist degradation and have been found in soil and groundwater, which has created concern regarding its environmental and human health impact. In recent years, federal agencies, including the EPA, as well as numerous state governments have set guidelines and enacted legislation to limit the use of, and exposure to, PFAS.

The new PFAS NECI would focus on "implementing the commitments to action made in EPA's 2021–2024 PFAS Strategic Roadmap," in which the EPA affirmed its commitment to holding PFAS manufacturers, PFAS polluters and other responsible parties accountable for their actions, ensuring that they assume responsibility for remediation efforts and prevent future releases of PFAS. In the notice, the EPA asserted that exposure to PFAS can lead to adverse human health effects and pledged that a new PFAS NECI would focus on identifying the extent to which such exposures pose a threat to human health and the environment, and would also focus on the pursuit of responsible parties for those exposures.

In implementing the PFAS initiative, the EPA intends to focus its enforcement efforts on "PFAS manufacturers whose actions result in the release of significant amounts of PFAS into the environment, and on federal facilities that may be a significant source of PFAS contamination." In enforcing the initiative, the EPA would work in conjunction with states, where appropriate, to supplement PFAS enforcement efforts already performed by state entities across the country. Further, where PFAS cleanup efforts arise under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the EPA will develop a CERCLA-specific "enforcement discretion and contribution protection settlement policy regarding PFAS contamination." While CERCLA provides the EPA with broad enforcement authority, the notice states that "the EPA does not intend to pursue entities where equitable factors do not support assigning CERCLA responsibility."

If implemented, the PFAS enforcement initiatives could pose considerable consequences to companies that previously or currently manufacture, use or dispose of PFAS and/or PFAS-containing materials. It is recommended that these companies implement measures to reduce or eliminate their PFAS output, particularly in those areas the EPA has deemed environmental justice communities. Additionally, given the EPA's stated intent to forego pursuit of entities where equitable factors do not support action, it is also recommended that companies evaluate and pursue equitable defenses in anticipation of potential EPA enforcement actions. Public comment on the proposed NECI plan is open until March 13, 2023.

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