

The Potential of the PFAS Action Act of 2019

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On January 10th 2020, the United States House of Representatives passed H.R. 535, entitled the PFAS Action Act of 2019 (“bill”), to amend several existing statutes in order to require regulation of per- or polyfluoroalkyl substances (“PFAS”). PFAS are a group of nearly 5,000 chemicals that have been used—due to their resistance to grease, stains and water and their ability to reduce friction—in a panoply of materials and products. PFAS may be found in household items including cookware, sofas, carpets, clothing, and food packaging, and have been used in a variety of industries from aerospace to paper production. Unfortunately, due to their strength and stability, PFAS are also difficult to break down, persist in the environment, and bioaccumulate. While some manufacturers have argued that bioaccumulation only occurs with the older, so-called “long-chain” PFAS, not “short-chain” PFAS, both are equally toxic. PFAS have been linked to heightened cholesterol, cancer, low infant birth weights, immunological effects, and thyroid hormone disruption.

To date EPA has not regulated PFAS, although it has established an unenforceable drinking water health advisory level of 70 parts per trillion for the combination of two of the most notable and studied PFAS variants, perfluorooctanoic acid (“PFOA”) and perfluorooctanesulfonic acid (“PFOS”). Some States, however, have taken the lead. For example, in addition to already having set a drinking water maximum contaminant level (“MCL”) for perfluorononanoic acid (“PFNA”) at 13 ppt, New Jersey has initiated the process of promulgating drinking water standards for PFOA and PFOS, to set their limits at 13 and 14 ppt respectively. As a result of the proposed standards, an interim standard of 10 ppt applicable to both groundwater and drinking water sources was established. In Pennsylvania, Governor Wolf signed an executive order calling for a “PFAS Action Team” to address PFAS contamination and establish a cleanup plan. Sampling results in early December of this last year found that only one of the 96 sites sampled had a PFAS level higher than the EPA advisory level. Pennsylvania has also committed to the process of setting its own drinking water MCL for PFAS.

The bill passed by the House attempts to remedy the lack of federal regulation of PFAS by amending the following statutes:

The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”):

The bill would afford the EPA one year to designate PFOA and PFOS as hazardous substances under CERCLA, and five years determine if the entire PFAS group of chemicals should be designated hazardous substances under CERCLA. If enacted, the bill would extend CERCLA’s reach to sites that had not been previously covered and also cause the reevaluation both of sites where the cleanup had been completed and sites where the cleanup is on-going.

The Toxic Substances Control Act (“TSCA”):

This bill would remove EPA discretion in regard to testing PFAS by compelling EPA to promulgate a rule requiring comprehensive toxicity testing on all PFAS. In addition, the bill would establish a period of five years during which new PFAS would be considered to pose an unreasonable risk of injury to health or the environment and require EPA to prohibit the manufacture, processing and distribution in commerce of new PFAS that have not yet been included in EPA’s inventory of chemical substances. This order would expire after five years unless EPA determines that new PFAS pose an unreasonable risk.

The Safe Drinking Water Act (“SDWA”):

The SDWA provides that a primary drinking water regulation for a contaminant must include an MCL. The bill passed by the House would require EPA to promulgate a primary drinking water regulation establishing standards for PFOA and PFOS. Thus, this bill would require EPA to provide MCLs for both of them. The bill also allows EPA to extrapolate reasoned conclusions about the health risks of entire classes of PFAS from information about single substances within the class. This would potentially enable EPA to avoid the burden of separately evaluating each of the nearly 5,000 compounds categorized as PFAS. In addition, the bill would require the primary drinking water regulation to be protective of the health of subpopulations at greater risk, such as infants, the elderly, and pregnant women among others.

The Clean Air Act (“CAA”):

The CAA requires EPA to maintain an updated list of hazardous air pollutants. Once a pollutant is added to this list, EPA must then identify all categories of major or area sources of the pollutants on the list and establish emissions standards for each category. These standards must require the maximum degree of reduction in emissions that EPA determines is achievable, taking several factors—including cost—into account. The bill would amend the CAA to require EPA to include PFOA and PFOS in the list of hazardous air pollutants and promulgate potentially stringent emissions standards for major or area emissions sources of PFOA and PFOS.

The Clean Water Act (“CWA”):

The bill would also amend the Clean Water Act (“CWA”) by adding a requirement that, for each class of PFAS, EPA complete plans that provide for reviews of the discharge of PFAS from point sources that are not publicly owned treatment works. These reviews would include determinations of whether to add each PFAS to the CWA’s Toxic Pollutants list and whether to establish effluent limitations or pretreatment standards for each PFAS. Unlike its approach to CERCLA, where the bill would require EPA to list PFOA and PFOS as hazardous substances, here the bill would allow the agency discretion to determine whether classes of PFAS should be included in the Toxic Pollutants list and whether their discharge should be controlled by effluent limitations or pretreatment standards. The bill would also require EPA to issue human health water quality criteria within two years for measurable PFAS.

Among other things, this bill would also: amend the Solid Waste Disposal Act to require the incineration of materials containing PFAS in a manner that would eliminate PFAS while minimizing emission of PFAS into the air, authorize EPA to either approve or develop a label that would identify products that do not contain PFAS, and require EPA to coordinate with the U.S. Fire Administration and the Federal Aviation Commission to provide guidance on minimizing the use of, or contact with, firefighting foam and other related equipment containing PFAS without jeopardizing firefighting efforts. Concurrently, EPA would also be compelled to search for viable alternatives for firefighting materials that do not contain PFAS.

With the enactment of this bill, PFAS would go from being nearly unregulated at the federal level to being covered by a number of the most prominent federal environmental protection statutes. However, the Trump administration has promised to veto the bill should it pass the Senate. While Congress continues to consider the appropriate statutory response to the risks from PFAS, the public must rely on States such as Pennsylvania and New Jersey which are developing their own PFAS standards.

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