

Environmental Law & Litigation

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States Petition the USEPA To List Certain PFAS Compounds as Clean Air Act Hazardous Air PollutantsBy [Kegan A. Brown](#), [Mark S. Heinzelmann](#), [Zachary L. Berliner](#), and [Taylor R. West](#)

In another step toward broader regulation of per- and polyfluoroalkyl substances (PFAS), on August 29, 2024, New Jersey, New Mexico, and North Carolina (the States) submitted a [petition](#) (Petition) urging the United States Environmental Protection Agency (USEPA) to list perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), perfluorononanoic acid (PFNA), and hexafluoropropylene oxide dimer acid (GenX or HFPO-DA)—all PFAS compounds—as hazardous air pollutants (HAPs) under Section 112 of the Clean Air Act (CAA), 42 U.S.C. § 7412.

According to the States, the USEPA should list those PFAS compounds as HAPs because (1) they are air pollutants and (2) they cause or are reasonably anticipated to cause adverse effects on human health and the environment.¹ The States cite emissions from “major stationary sources” (i.e., manufacturing operations) and emissions as a byproduct of PFAS remediation as the primary sources of PFAS in air.² Indeed, as acknowledged by the States, the [USEPA’s interim guidance](#) on PFAS destruction and disposal contemplates thermal destruction (i.e., incineration) of PFAS as a potentially acceptable method, which may result in additional PFAS releases through aerial deposition.³

Although the Petition is limited to PFOA, PFOS, PFNA, and GenX, the States also urge the USEPA to evaluate other PFAS compounds that might warrant designation as HAPs,⁴ which is consistent with the USEPA’s ongoing efforts to holistically regulate PFAS. The States further “encourage” the USEPA to explore additional emissions control options by “identifying categories and subcategories of PFAS sources” and “establishing technology-based emission controls under” the CAA. In an apparent recognition of the analytical method challenges of testing for PFAS at extremely low part per trillion concentrations (or lower), the States suggest using proxies, such as total organic fluorine, to “account for PFAS transformation products” and “demonstrate[e] compliance with PFAS emission standards.”⁵

Implications

The Petition is the latest in a series of [efforts to increase regulation](#), at both the state and federal levels, on the use and disposal of PFAS compounds and PFAS-containing products. Earlier this year, the USEPA added [PFOA and PFOS to the list of “hazardous substances”](#) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Our article on that issue can be accessed [here](#).

But despite new PFAS regulations under CERCLA, the federal [Safe Drinking Water Act](#), the federal Resource Conservation and Recovery Act, and the federal Toxic Substances Control Act, there is no federal program regulating PFAS air emissions. Through the Petition, the States seek to fill that gap.

Should the USEPA grant the Petition, the USEPA would then be required to move forward with promulgating emission limits for the PFAS HAPs.⁶ Once those emission limits are in place, there likely will be a deluge of PFAS litigation under the CAA citizen suit provision, which allows plaintiffs to recover reasonable attorneys’ and experts’ fees.⁷ In addition, with promulgated emission limits, entities emitting PFOA, PFOS, PFNA, and GenX may need to install additional air control technologies to comply with those USEPA emission limits.

Further, upon the mere listing of any PFAS as HAPs under the CAA, PFAS CERCLA litigation will expand in scope, as any PFAS designated as HAPs fall within CERCLA’s definition of a hazardous substance.⁸

Next Steps

Companies that may be using or remediating PFOA, PFOS, PFNA, or GenX should begin evaluating their potential air emissions and developing a better understanding of (i) how those emissions can be reduced and/or otherwise controlled in a cost-effective manner and (ii) where those PFAS air emissions may come to be located, with particular attention to environmental justice communities that may be affected.

Regardless of the USEPA's decision on the Petition, it is anticipated that air emission limits for certain PFAS will continue to become more stringent over time, and litigation relating to PFAS air emissions, including under CERCLA, will increase. Entities with historic or current PFAS air emissions should evaluate proactive steps that can be taken to mitigate these longer-term, albeit very costly, risks.

For more information on PFAS, the CAA, and HAPs, please contact the authors of this article.

¹ Petition at § IV.

² *Id.* at § I, II.

³ *Id.* at § II.

⁴ *Id.* at § IV.

⁵ *Id.* at § V.

⁶ 42 U.S.C. § 7612(d).

⁷ 42 U.S.C. § 7604.

⁸ 42 U.S.C. § 9601(14)(E).

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

KEGAN A. BROWN

Partner

T: 212.419.5866

kbrown@lowenstein.com

ZACHARY L. BERLINER

Associate

T: 973.422.6434

zberliner@lowenstein.com

MARK S. HEINZELMANN

Counsel

T: 973.422.2946

mheinzelmann@lowenstein.com

TAYLOR R. WEST

Associate

T: 212.204.8691

twest@lowenstein.com

NEW YORK

PALO ALTO

NEW JERSEY

UTAH

WASHINGTON, D.C

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