New Legal Challenges

Pre-MECC: Remediation Workshop

What a law firm *should* be.

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What's on the Agenda?

- Supreme Court Updates
- Recent Changes Under the Endangered Species Act
- PFAS Related Rulemakings
- Other Considerations/Tips

Supreme Court Updates

Loper Bright and Sackett

Chevron Deference Background

- *Chevron* gave the EPA – and all agencies – significant latitude in their interpretation and promulgations of regulations.
  - The decision was based on the idea that Congress had delegated the power to make policy decisions to the agency when the meaning of law was ambiguous.
- The EPA could be confident that as long as its interpretation of a statute was reasonable, it was likely to be upheld.
- Therefore, the EPA could issue bolder interpretations – either more or less expansive– without being overturned.

Case Analysis: *Loper Bright Enterprises v. Raimondo (2024)*

- **Background**:
  - Loper Bright Enterprises challenged a rule from NMFS that required them to pay for the observer services used to monitor their fishing activities.
    - The rule mandated that fishing companies cover the costs of these observers, who are essential for enforcing regulations meant to protect marine life and ensure sustainable fishing practices.
- **Issue**:
  - Did the NMFS have the authority to impose the cost of the observer services on fishing companies under the Magnuson-Stevens Fishery Conservation and Management Act.
    - The company argued this rule was an overreach of regulatory authority and that the costs imposed were unfair.

Loper Bright Holding

- **Holding:**
  - SCOTUS ruled in favor of Loper Bright Enterprises, holding that the NMFS's cost-shifting rule was beyond the scope of authority granted to it under the Magnuson-Stevens Act
- **Analysis:**
  - SCOTUS emphasized that it is the courts' traditional role to "say what the law is" – i.e., courts must now exercise independent judgment in reviewing the agency's interpretation of a statute
  - SCOTUS disagreed with Chevron's presumption that statutory ambiguities are implicit delegations to agencies.
  - SCOTUS criticized Chevron, calling it an "inconsistent" and "unworkable" framework, noting that the "defining feature" of Chevron was to identify "statutory ambiguity" which in and of itself is an ambiguous term

Impacts of *Loper Bright* on EPA

- There will be an uptick in new lawsuits challenging agency regulations, especially in the environmental sector, and the hurdle to challenge agency interpretation is <u>significantly</u> lower
  - EPAs efforts to regulate GHGs under the CAA
  - Emerging contaminants
  - Indoor air standards
- More likelihood that stays of new rules will be issued during pendency of appeals
- It remains unclear how courts will apply *Loper* without specific guidance from SCOTUS, and there will likely be major circuit splits that SCOTUS will need to resolve

Loper Impacts, continued…

- SCOTUS did state that courts may still apply the standard set forth in *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944), which states that a court may uphold a regulation if it finds the agency's interpretation of the statute “persuasive.”
  - This provides some level of judicial deference as opposed to agency deference given in *Chevron*
- The case and its impacts will likely be related to prospective and pending rules, or those for which the SOL has not run.
  - *Loper* also held that the SOL for challenges to agency rulemakings is triggered when the plaintiff is injured, not when the rule is adopted
- Enforcement cases and remediation actions/orders should not be impacted unless/until successful appeals affecting these actions occur
- Agencies (like the EPA) will need to be more careful to craft rules more tailored to the statute
- It is MORE important now to be involved in the agency rulemaking process

Clean Water Act Background

- Section 404 of the CWA requires a permit before dredged or fill material may be discharged into Waters of the United States unless the activity is exempt.
  - There are two types of permits: General (Nationwide or Regional) or Individual
    - **Individual** → Required for activities that may significantly impact > ½-acre.
    - **General** → 57 types of Nationwide Permits, typically required for activities that will impact < ½-acre. If a project will impact more than 1/10-acre, a Pre-Construction Notice is required to be filed with USACE.
- The Clean Water Act is overseen by **both** the US EPA and USACE. In terms of Section 404:
  - EPA: Develops and interprets policy and guidance, reviews and comments on individual permit applications, and determines the scope of geographic jurisdictions of WOTUS.
  - USACE: Administers individual and general permitting decision and conducts and/or verifies jurisdictional determinations. Also enforces Section 404 permit provisions.

Background on the Issues in *Sackett v. EPA*

- **Timeline:**
  - 1) Sacketts purchase property near Priest Lake, Idaho. Begin clearing the lot and receive Compliance Order from EPA
  - 2) Sacketts could not obtain a hearing from EPA, file suit
  - 3) Suit makes it to SCOTUS which holds the Order is a "final agency action" and remands back to District of Idaho which holds the area is a wetland and required permitting under Section 404
  - 4) Sacketts litigate whether the wetlands qualify as "navigable waters" subject to the CWA.
  - 5) Case goes back to the Ninth Circuit which holds against the Sacketts
  - 6) Sacketts file a petition to SCOTUS asking the Court to determine whether the *Rapanos* decision should be revisited

Understanding the Final *Sackett* Decision

- On May 25, 2023, SCOTUS ruled in favor of the Sacketts introduced a new test – the “continuous surface connection test” -- to determine whether wetlands are subject to CWA regulation.
  - “The CWA extends only to wetlands that are as a practical matter indistinguishable from waters of the United States. This requires the party asserting jurisdiction to establish first, that the adjacent body of water constitutes ‘waters of the United States’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”
- **BOTTOM LINE:** Where the CWA previously included *adjacent* wetlands, this new, narrower interpretation only covers *adjoining* wetlands.
- **NOW WHAT?**: As discussed earlier, EPA was already promulgating a new definition of WOTUS in January 2023 to try and provide clarity on which wetlands and streams were subject to CWA permitting. This decision effectively eliminated several portions of that rule and forced EPA back to the drawing board to draft a new rule with this new test implemented.

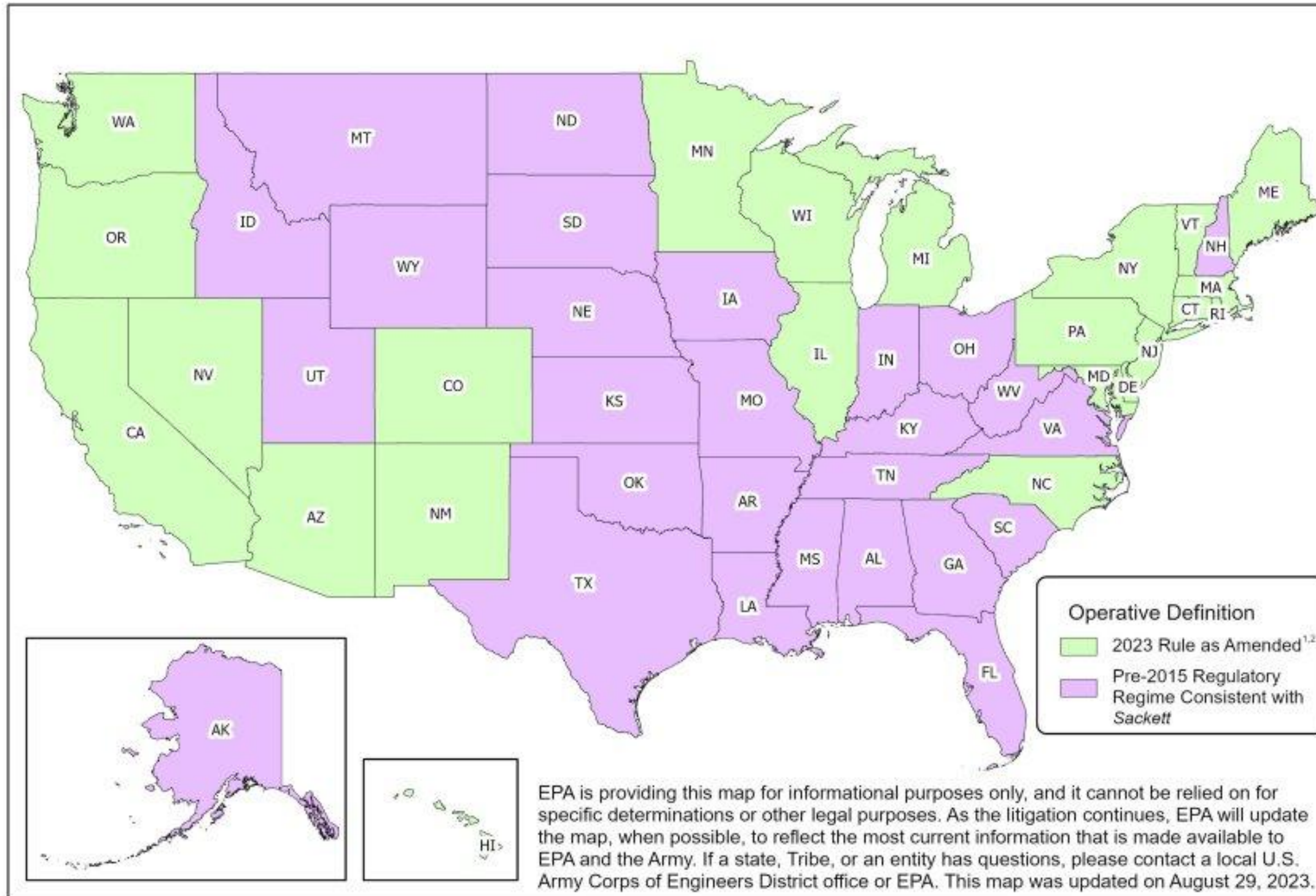
The “Continuous Surface Connection” Rule

- On August 29, 2023, US EPA and USACE released an updated and final rule amending the previous WOTUS definition it had promulgated in January to conform to the *Sackett* decision.
- The updated WOTUS rule implements the *Sackett* “continuous surface connection test” and clarifies that when identifying federally jurisdictional wetlands, “adjacent” shall mean “having a continuous surface connection,” indicating that the CWA no longer covers *adjacent* wetlands, only *adjoining* wetlands, for WOTUS purposes.
- The new rule also completely removes the significant nexus test and any language pertaining to the “relatively permanent” standard, further cementing how jurisdictional determinations will be made in the future.
- Wetlands are now only considered to be WOTUS, or jurisdictional, if they are “relatively permanent, standing or continuously flowing bodies of water,” and “have a continuous surface connection to those waters.”
- EPA states the rule will not impact the “longstanding activity-based permitting exemptions” provided to the agricultural community through the CWA

Who Will The Rule Impact?

- The impact of this decision is significant – many wetlands that were potentially covered under the CWA may no longer be covered, meaning those in the development, construction, mining, and energy industries who may have needed to acquire a Section 404 permit to impact federally protected wetlands may no longer need to do so.
- **Is the final rule effective?**
  - Yes, the rule was final upon publication in the Federal Register, bypassing the traditional public notice and comment period required under the Administrative Procedure Act for most rule-making activity.
    - EPA and USACE state they have "good cause" to do so, namely that the changes "do not involve the exercise of the agencies' discretion" or "impose any burdens on the regulated community." We expect this decision to be challenged.
- To make matters more complicated, due to ongoing litigation regarding the previous version of this rule the new rule **will only take effect in the 23 states** (plus Washington, D.C., and U.S. Territories) **that are not a party to current lawsuits** challenging the previous version of the rule.
- The other 27 states will continue to use the definition of WOTUS consistent with pre-2015 regulatory guidance *and* the *Sackett* decision while waiting for the resolution of their lawsuits.

Operative Definition of "Waters of the United States"



[1] Also operative in the U.S. territories and the District of Columbia

[2] The pre-2015 regulatory regime implemented consistent with *Sackett* is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in Kentucky Chamber of Commerce, et al. v. EPA (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce).

Recent Changes Under the Endangered Species Act

Section 4(d) and Endangered Bats

The Blanket 4(d) Rule

- On March 28, 2024, the U.S. Fish and Wildlife Service (USFWS) and the NMFS finalized a rule that increases ESA protections for **threatened** species under the 4(d)-blanket rule.

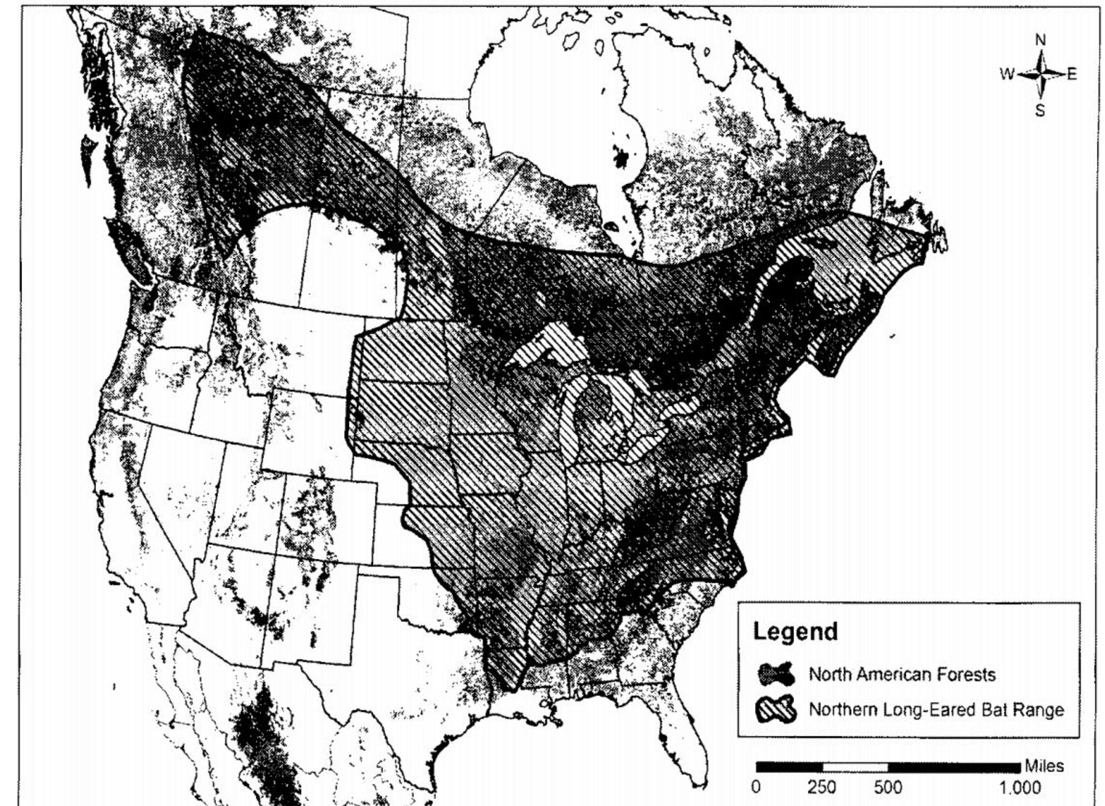
- ESA provides prohibitions for **endangered** species, but not **threatened** species

- Section 4(d): “necessary and advisable” regulations for threatened species, which can include same protections as for endangered species – the 4(d) rules

- The “blanket rule” extended the majority of endangered species protections to threatened species, with certain exceptions.

Next *Bat*-ter Up!: The Northern Long-Eared Bat

- Threat: White-Nose Syndrome
- November 30, 2022 - USFWS reclassified the Northern Long-Eared Bat from threatened to endangered under the ESA.
- The bat's range includes much of the eastern and north-central United States.
- Interim Conservation Framework for projects not completed by March 2024 that have a federal nexus and require Section 7 coordination with the USFWS:
  - Projects operating under this framework will continue to follow similar guidelines to the previous 4(d) rule for an additional year.
  - Projects that extend beyond March 2024 and may affect the species within its range, consultation with USFWS is recommended.



The Lead-Off *Bat*-ter: The Tri-Colored Bat

- Threat: White-Nose Syndrome
- The range of the Tri-Colored Bat is primarily the eastern 2/3 of the United States.
- USFWS proposed to list the Tri-Colored Bat as endangered in 2022, with a target date of September 2024 to finalize the listing.
- April 1, 2024 - USFWS issued a series of guidance documents for both the Tri-Colored Bat and the Northern Long-Eared Bat. The documents are:
  1) Rangewide Northern Long-Eared Bat and Tricolored Bat Determination Key;
  2) **Consultation Guidance for Development Projects;**
  3) Tricolored Bat Wind Guidance; and
  4) Sustainable Forest Management Guidance.

Consultation Guidance for Development Projects

- Applies both to federal agencies and nonfederal projects.
- Recommends the following for new development projects :
  - IPAC – If no NLEB or TCB, no further action necessary.
  - Use “Determination Key” to Evaluate Project Impacts
  - Coordinate with the USFWS field office for projects that receive an outcome of “may affect.”
  - For projects determined to be “likely to adversely affect” or where “take is reasonably certain to occur,” the Consultation Guidance recommends incorporating minimum conservation measures into the proposed action.

Consultation Guidance for Development Projects, pt. 2

- In areas where the Northern Long-Eared Bat and the Tri-Colored Bat are active year-round, the Consultation Guidance recommends the following between December 15 and February 15:
  - Avoid removing known and suitable roost trees within 1/4 miles of a known Northern Long-Eared Bat and/or Tri-Colored Bat roost
  - Avoiding removing suitable roost trees within 1.5 miles of a Northern Long-Eared Bat and/or Tri-Colored Bat capture and/or acoustic location
  - Avoiding removing suitable roost trees unless a presence/absence survey has been completed indicating probable absence
- Standard tree-clearing prohibitions are in effect between **April 1 and October 31** but varies by state (can be up to November 14!)
  - This may be applicable to other bat species as well, including the Indiana Bat and the Gray Bat

Things to Consider…

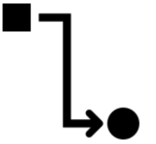
- Know what threatened/endangers species may be present (**not just bats**!)
- We recommend the following:
  - **IPaC**: Screening tool, or the start of consultation
  - **Surveys**: Confirm presence of protected species and develop strategies for avoidance/mitigation
  - **Consultation/Take Permit**: Informal or Formal Consultation to develop mitigation strategies; ITP if take is reasonably certain

PFAS Related Rulemakings

CERCLA

- **New 2024 PFAS Rule**: Designation of PFOA and PFOS as CERCLA Hazardous Substances, **effective July 8, 2024**.
  - The rulemaking includes both PFOA and PFOS salts and structural isomers
  - PFOA and PFOS have historically been used in a wide range of industrial processes and consumer products, including carpets, clothing, fabrics for furniture, packaging for food and cookware, and firefighting foam
- **Applicability**: The rulemaking lists seven (7) broad categories of entities that may potentially be affected by this action:
  - (1) PFOA and/or PFOS manufacturers (including importers and importers of articles that contain these substances);
  - (2) PFOA and/or PFOS processors;
  - (3) **manufacturers of products containing PFOA and/or PFOS**;
  - (4) **downstream users of PFOA and PFOS**;
  - (5) **downstream users of PFOA and/or PFOS products**;
  - (6) waste management facilities; and
  - (7) wastewater treatment facilities."

CERCLA



CERCLA PFAS RULE IMPACTS

- **Potential Impacts**
  - Makes PFOA and PFOS contamination subject to reporting, investigation, remediation, and monitoring requirements, **including at “closed” sites** where the remedy has been completed and/or under CERCLA’s five-year review process.
    - Under the new rule, EPA and other parties may assert a claim for recovery of costs for cleanups of a specific PFAS compounds.
    - Parties that have entered into consent decrees or other agreements with EPA for cleanups could be subject to new remedial requirements for PFOA or PFOS, depending on covenants not to sue and reopener provisions of such agreements.
- **EPA’s Enforcement Discretion Memorandum**
  - EPA is targeting parties with a significant role in releasing or exacerbating the spread of PFAS into the environment
    - i.e., those who have manufactured PFAS or used PFAS in the manufacturing process

EPCRA

- **EPCRA PFAS Reporting Rule**
  - Issued October 31, 2023, EPA designated PFAS subject to TRI reporting as "chemicals of special concern" subject to enhanced reporting requirements
    - Removal of the *de minimis* exemption to TRI reporting
    - Requirement that certain suppliers of mixtures and/or trade name chemical products disclose to customers the presence of any TRI-reportable substance in their products
  - There are 196 types of PFAS subject to TRI reporting as chemicals of special concern
    - Seven additional PFAS were just added in May 2024
- **Applicability:** Applies to any facility that
    - 1) Meets chemical activity threshold **(100 lbs)**, ***and***
    - 2) Is either
      - A covered industry sector that exceeds the employee threshold (10 or more full-time employee equivalents / a total of 20,000 hours or greater)
      - Has an SIC/NAICS code required to report under 40 CFR 372, Subpart B

- **Requirements**
  - Must submit Form R to EPA for each PFAS listed in TRI
- **Deadlines**
  - Applies to the reporting year beginning January 1, 2024, and reports are due July 1, 2025
  - Reports are due July 1 annually

EPCRA Reporting Applicability

Does product contain a substance on the TRI List of 196 PFAS substances?

Yes → Does facility use more than 100 lbs of PFAS annually?

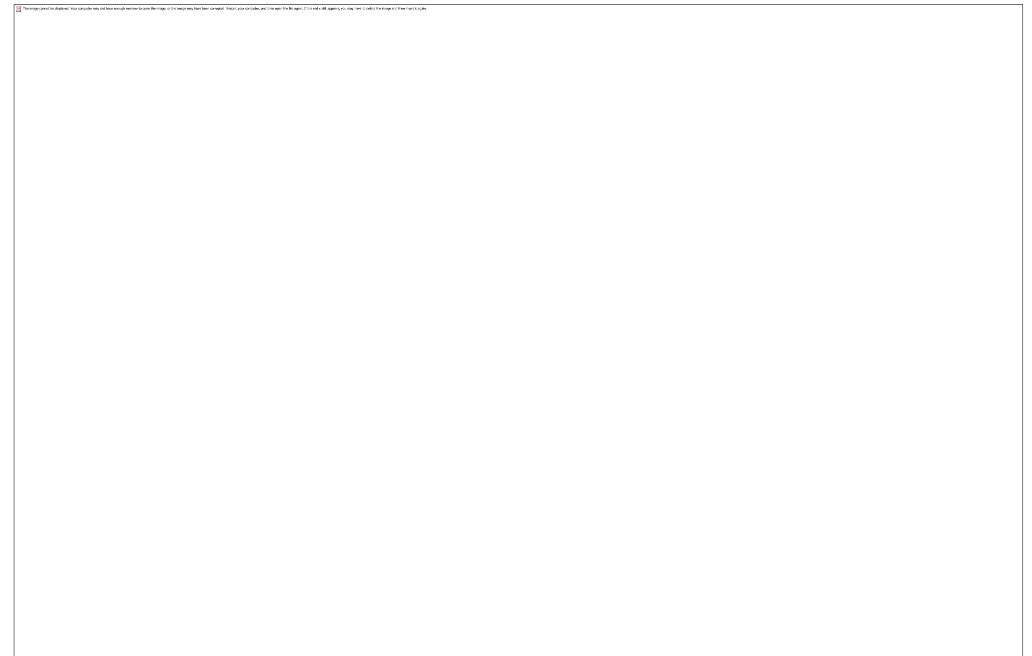
- Yes → Must report annually to EPA.
  - Yes → Must notify downstream users of presences of PFAS.
- No → No action required.

No → No action required.

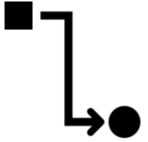
TSCA

TSCA OVERVIEW

- **October 2023 Rulemaking**
  - Under TSCA Section 8(a)(7), **any** person that has **manufactured (including imported)** a PFAS or a PFAS-containing article between January 1, 2011, and December 31, 2022, must report information related to the PFAS or PFAS-containing articles:
    - identity of the chemical
    - uses
    - volumes manufactured and processed
    - byproducts
    - environmental health effects
    - worker exposure
    - disposal



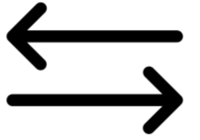
TSCA



TSCA PFAS RULE APPLICABILITY AND RELEVANT DEFINITIONS

- **Applicability:** TSCA section 8(f) limits the definition of "manufacturing" to entities "manufacturing for **a "commercial purpose**"
- **What is a "Commercial Purpose"?**
    - Includes the import, production, or manufacturing of a chemical substance or mixture containing a chemical substance with the purpose of obtaining an immediate or eventual commercial advantage for the manufacturer
    - Includes "coincidental manufacture of byproducts and impurities that are produced during the manufacture, processing, use, or disposal of another chemical substance or mixture"
- **What is an "Importer"?**
    - "Importer" is typically the direct importer of a chemical or an article that contains PFAS and is the entity primarily liable for payment of any duties on the merchandise.
        - The rulemaking provides that "simply *receiving* PFAS from domestic suppliers or other domestic sources is not, in itself, considered manufacturing PFAS for commercial purposes."

TSCA



TSCA OCTOBER PFAS RULE, CONTINUED…

- **What types of PFAS must be reported?**
  - The PFAS must meet one of three structural definitions to be considered a “chemical substance”:
    - R-(CF2)-CF(R’)R’’, where both the CF2 and CF moieties are saturated carbons;
    - R-CF2OCF2-R’, where R and R’ can either be F, O, or saturated carbons; and
    - CF3C(CF3)R’R’’, where R’ and R’’ can either be F or saturated carbons
  - *Practice Tip: Involve an expert to determine whether PFAS manufactured (including imported) meets any of these structural definitions!*
- **Reporting Requirements**
  - **One-time** electronic reporting requirement available through the Chemical Data Exchange Portal
    - Reporting standard: Must make a “**reasonable inquiry**” and report all “known or reasonably ascertainable” uses of covered PFAS
    - There is no “de minimis” exception, and there are no testing or labeling requirements

TSCA

REPORTING DEADLINES

- **Important Deadlines**
  - Manufacturers: Reporting window opens **November 12, 2024**, and closes **May 8, 2025**
  - Small Manufacturers: Reporting window opens **November 12, 2024**, and closes **November 13, 2025**
- **Manufacturer v. Small Manufacturer**
  - Manufacturer: a person who produces or manufactures a chemical substance, i.e., the entity that first makes or applies the PFAS to the component.
  - Small Manufacturer: a manufacturer (including importer) that meets either of the following standards:
    - (1): A manufacturer (including importer) of a substance that has total annual sales of less than $120 million, unless that entity has an annual production or importation volume at any site greater than 100,000 lbs and has sales over $12 million.
    - (2): A manufacturer (including importer) of a substance that has total annual sales, when combined with those of its parent company (if any), are less than $12 million, regardless of the quantity of substances produced or imported by that manufacturer (including importer). (40 CFR 704.3)

Things to Know

- **POTENTIAL FUTURE RULEMAKINGS TO KEEP ON YOUR RADAR:**
  - April 2023: EPA released an “advanced notice of proposed rulemaking” seeking public input on possible CERCLA “hazardous substance” designations for seven (7) additional PFAS:
    - PFBS; PFHxS, PFNA; GenX; PFBA; PFHxA; and PFDA
  - February 2024: EPA proposed a rule that would list nine (9) PFAS as “hazardous constituents” under the Resource Conservation and Recovery Act (“RCRA”), which could impact CERCLA requirements as a “hazardous constituent” listing under RCRA is a step towards a potential listing “hazardous waste” listing under RCRA. Should any of the nine PFAS be listed as a “hazardous waste” under RCRA, **they would automatically be regulated under CERCLA**.
    - PFOA, PFOS, PFBS, GenX, PFNA, PFHxS, PFDA, PFHxA, and PFBA
- **STATE REGULATIONS**
  - Watch out for state regulations! Many states (CA, CO, CT, HI, ME, MD, MN, NY, RI, VT and WA) have started regulating PFAS!
    - None in Region 7 that we’re aware of, but may be coming.

PROPRIETARY & CONFIDENTIAL

Other Considerations/Tips

Some Practical Considerations

Legal Counsel's Role in the Remediation Process

Post-COVID Landscape

Benefits/Drawbacks of State Cleanup Programs

Sequence Remediation with Construction for Efficiency

"Layering" of Other Protections (Environmental Insurance)

Start Early!

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