



THE CUBICAL

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WHAT IS A PFAS FORMULATOR?

The tentacles associated with the issue of per- and polyfluoroalkyl substances (PFAS) have become many and varied these days. On the regulatory front, one of the key threshold questions is how far and wide will PFAS regulatory regimes extend? PFAS manufacturers have been under considerable regulatory pressure for some time now, and continue to feel such pressure from all directions. But, how far beyond the universe of PFAS manufacturers will PFAS regulatory regimes extend? The answer to such a question is likely to vary depending on the medium and specific regulatory program in question.

One area where answers to this question are beginning to emerge is in EPA's Clean Water Act (CWA) regulatory regime. On March 17, 2021, EPA issued an Advance Notice of Proposed Rulemaking (ANPR) to announce its intention to engage in continued data collection and analysis to support the development of a rule regarding PFAS-related wastewater effluent limitations for the Organic Chemicals, Plastics and Synthetic Fibers (OCPSF) point source category. (To access the ANPR, click [here](#).) In the ANPR, EPA notes that one of its main purposes is to "[i]dentify industrial sources that may warrant further study for potential regulation..."

The ANPR focuses on "manufacturers" and "formulators" of PFAS. In the ANPR, EPA identifies the relatively small universe of PFAS manufacturers that would be covered by a future rule. However, EPA was more circumspect about the term "formulator."

So then, what is a "formulator"? At first blush, one might be inclined to think of a formulator as one who engages in blending or mixing operations. And in fact, the Merriam-Webster website sets forth a definition that is along these lines.

Care must be exercised to avoid falling into this trap. EPA concedes that it has not yet settled on a definition for "formulator." However, it seems clear that EPA sees this term as something akin to "user." The types of users that will fall within this definition still remain to be seen. Members of the regulated community should continue to monitor developments with respect to the ANPR with an eye towards the following:

- Will my facility receive requests for information from EPA regarding the possible presence of PFAS in the facility's wastewater discharges?
- Will my facility ultimately be impacted by future regulatory activity with respect to PFAS in wastewater effluent (e.g., monitor and report requirements; enforceable effluent limits, etc.)?
- How might this regulatory activity impact EPA activity with respect to other programs and media?

The comment period for the ANPR closes May 17, 2021.

OSHA SHARPENS ITS COVID-19 ENFORCEMENT FOCUS WITH NEW GUIDANCE

As the percentage of vaccinated individuals in the U.S. continues to rise, OSHA continues to sharpen its focus on enforcement for violations related to exposure to the virus that causes the COVID-19 disease. On March 12, 2021, OSHA announced the initiation of its National Emphasis Program (NEP) -- Coronavirus Disease 2019 (COVID-19). To access the NEP, click [here](#). Under the NEP, inspections of facilities where there have been incidences of COVID-19 fatalities, or employee complaints about measures taken to protect against exposure to the virus will continue to be a priority. Follow-up inspections of facilities where there have been such incidences will also continue to be a priority in order to ensure that such facilities have put proper abatement measures in place. Inspections that are not prompted by any such event or incidence -- so-called "programmatic inspections" -- will have a lower priority but will be undertaken as necessary to meet the goals of the NEP for a particular region or local area.

Importantly, the NEP emphasizes the need for employees to be protected from retaliation under existing statutory and regulatory whistleblower protections. The NEP notes that the Presidential Executive Order on Protecting Worker Health and Safety -- issued the day after President Biden assumed office -- directs OSHA to address claims of retaliation as part of its focus on COVID-19 enforcement efforts. The NEP explicitly states that ensuring such protections will be a significant part of OSHA's COVID-19 enforcement focus.

On the same day, OSHA issued its Updated Interim Enforcement Plan for Coronavirus Disease 2019 (COVID-19). To access this plan, click [here](#). This plan was originally issued on April 13, 2020, and then updated on May 19, 2020. This most recent update was issued -- at least in part -- to incorporate new guidance contained in the NEP. Beyond that, the updated response plan appears to be an effort to maintain continuity with previous enforcement efforts and guidance, while at the same time stressing the new tone and differing priorities of the new administration.

These actions continue the trend of OSHA COVID-19 enforcement activity moving

beyond "hot spot" industries such as health care and food processing. Under the NEP, industries such as wood processing, paper, and chemicals will also be impacted. In addition, whistleblower protection will continue to be a significant area of emphasis for OSHA under the new administration. Thus, while many industries may now be focusing more on returning something approaching normal business operations, these same industries need to be prepared to react and respond to COVID-related occupational safety and health inspections.

GERMAN HIGH COURT DELIVERS VICTORY TO NGOs ON CLIMATE CHANGE

Last week, Germany's high court (*Bundesverfassungsgericht*, or Federal Constitutional Court) delivered a partial but significant victory to NGOs in litigation relating to climate change. I am not an expert on German law and jurisprudence, so it is not my intention to address the intricate detail surrounding the ruling. However, there is one aspect of the ruling that may significantly influence how companies with operations in Germany conduct business in the U.S. EHS managers, operations managers, and executives of such companies should thus be aware of this ruling and its potential ramifications.

In the ruling, the Constitutional Court required the federal legislature to provide more details on how post-2030 greenhouse gas emission (GHG) targets will be met. According to the Court, such additional detail is necessary to ascertain whether the burden for achieving the climate change-related goals driving these targets is properly allocated among generations. Implicit in this rationale is the view that a GHG emissions control regime wherein control strategies for the first ten years or so are fairly explicit but then get fuzzy afterwards may result in an inordinate burden for such controls falling on future generations.

At first glance, it should not be too difficult to understand the hesitancy towards establishing detailed plans and strategies to achieve goals for timeframes well into the future. After all, the future is difficult to predict. For this reason, articulation of such long-range goals is often long on aspiration and short on detail. Having said that though, there has been very little pushback to the sweep of this ruling. On the contrary, most factions along the political spectrum in Germany seem to have received this ruling with varying degrees of enthusiasm. On the surface at least, there seems to be little - if any - concern about the difficulties associated with trying to predict the future.

As I have noted in previous editions of *The Cubical*, companies of all shapes and sizes are under increasing pressure to establish goals related to environmental, social, and governmental (ESG) metrics. These companies are also under just as much pressure to explain how they intend to meet such goals, and then to deliver on their promises. Where I see this ruling coming into play is that it may drive companies with German operations to provide greater detail with respect to the "how" part of these efforts for timeframes that extend considerably further out into the future.

If this happens, how should personnel charged with the responsibility of establishing such detailed long-range goals tackle the challenges associated with trying to predict the future? Unfortunately, there is no magic bullet. However, one can start by developing a solid understanding of the present. In my *New Administration*

Readiness Check-up article entitled *Finding Balance*, I discussed how managers can prepare themselves for the challenges associated with climate change and other ESG issues by developing a sound understanding of the material and energy balances of systems that influence - and are influenced by - their respective businesses. Such an understanding can be of particular use when called upon to "model" the future.

It may not be perfect, but often the best place to start when trying to predict the future is with a solid understanding of the present.

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