

Preparing For PFAS Scrutiny: Part 1

By **William Tarantino and Megan Ault** (May 2, 2019, 3:15 PM EDT)

They are all around us — and may be inside virtually everyone you know. But not everyone has heard of them, and not everyone is prepared for their regulation.

PFAS — or per- and polyfluoroalkyl substances — have been detected just about everywhere, from airports to paper mills. Scientists have reported finding PFAS in nearly 99% of all participants in a representative study based on the U.S. population.

Though once a common constituent of everything from medical devices to fast-food containers, PFAS are increasingly gaining the attention of state and federal regulators — and plaintiffs lawyers. That could spell big changes (or a big headache) for businesses across the country.

PFAS — Friend or Foe?

Right now, there is a good chance a PFAS-containing product is within arm's reach. PFAS have long been used in everyday objects, including carpets, nonstick pans and pizza boxes. The chemicals show up across industries and geographies, having been used at military bases and textile mills across the country.

Of the 4,000 or so PFAS varieties, the best known might be perfluorooctanesulfonic acid, or PFOS, for its presence in Scotchgard, and perfluorooctanoic acid, or PFOA, for its use in Teflon. Though PFOS and PFOA have previously been phased out of those iconic products, various PFAS remain widely used in thousands of other products.

In addition, because the molecular bonds found in PFAS are among the strongest and most stable known to scientists, even based on their previous historic uses, PFAS chemicals are expected to persist in the environment for years. PFAS came to be used in so many consumer products and industrial applications because of the chemicals' resistance to heat, oil and water.

Firefighting foam has become one of the more widely known — and more intensely scrutinized — uses of PFAS, largely due to perceived risks of groundwater contamination. But PFAS may be found in items much closer to home, including in stain-resistant fabrics, outdoor gear, shoes and microwave popcorn bags, as well as personal care products like certain sunscreens, shampoos and cosmetics.



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Though PFAS assuredly are ubiquitous, debate remains about their environmental and health effects. Animal studies suggest that PFAS disrupt cellular communication, and research on human health effects has raised questions about links to cancer, lowered fertility and high cholesterol, among other conditions.

At the same time, chemical and product manufacturers have tried to distinguish between older, “long-chain” PFAS and the newer, “short-chain” PFAS intended to replace them, largely because evaluations have tended to show that short-chain PFAS have a reduced risk of bioaccumulation.

On the whole, uncertainty about health effects from PFAS has led to a patchwork of regulatory responses across the country, with state and federal agencies continuing to develop their own analyses of risks and possible harms. An overarching federal policy is potentially in the works, but, in the interim, states have been leading the charge to control the uses and releases of PFAS.

Beyond such near- and longer-term regulation, a significant threat of litigation and costly settlements looms on the horizon. We provide more detail below.

Federal Focus

In the first quarter of 2019, several U.S. senators revealed their plans for potential legislation meant to address PFAS in drinking water. This proposed legislative action is just the latest in a surge of heightened scrutiny at the federal level aimed at PFAS. PFAS are also commanding new attention in terms of the following previously enacted federal statutes.

Safe Drinking Water Act

In May 2016, the U.S. Environmental Protection Agency set a lifetime health advisory, or LHA, level for PFOA and PFOS in drinking water at 70 parts per trillion. This action was taken by the EPA under the authority provided under the federal Safe Drinking Water Act, or SDWA.

The 70 ppt LHA is not directly enforceable, but was established to educate the public and its most sensitive members on an appropriate level of protection for a lifetime of exposure to the identified chemicals. As such, it could easily result in state regulation or potential litigated claims.

Still, in a Senate Appropriations Committee hearing on April 3, 2019, EPA administrator Andrew Wheeler touted that the agency has been “enforcing” the 70 ppt health advisory in eight enforcement actions in cooperation with states. Several states have used this 70 ppt level to guide investigations and enforcement actions under their authorities.

The SDWA also requires the EPA to publish a “contaminant candidate list” for chemicals that may require regulation, and are known or expected to occur in public water systems. The EPA included PFOA and PFOS on its contaminant candidate list in 2016.

Under SDWA regulations, the EPA has also collected data for six PFAS (PFOS, PFOA, PFNA, PFHxS, PFHpA and PFBS) by analyzing drinking water samples from nearly 5,000 public water systems across the country. About 4% of the water systems monitored had detectable levels of PFAS; in several of water systems, the levels detected exceeded the LHA.

In response, the EPA has used its emergency authority under the SDWA to issue administrative orders to

address the PFAS contamination. The EPA also plans to use its monitoring data going forward to inform future PFAS regulation under the SDWA, potentially including the establishment of maximum contaminant levels, or MCLs.

Toxic Substances Control Act

Even before taking action under the SDWA, the EPA had worked with 3M Co. to implement a voluntary phase-out of PFOS production and application. Since first collaborating with 3M, the EPA has also engaged with eight PFOA manufacturers to eliminate their use of this other well-known PFAS.

Each of these phase-outs were pursued under the Toxic Substances Control Act, or TSCA, which authorizes the EPA to regulate chemical testing and use, including the issuance of significant new use rules, or SNURs, that require companies to give notice to the EPA before starting or renewing use of a chemical.

To date, the EPA has applied SNURs to over 250 PFAS; these actions have greatly limited applications of PFAS to existing uses. The EPA is currently considering public comments on a proposed PFAS SNUR from 2015, and is planning to issue a supplemental SNUR for certain long-chain PFAS chemicals.

Comprehensive Environmental Response, Compensation and Liability Act

The Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA — sometimes referred to as the Superfund law — authorizes EPA investigations to determine whether and where hazardous substances, pollutants or contaminants have been or may be released at a given site. If releases are identified, the EPA can order cleanup by responsible parties, or require them to foot the bill for the costs of addressing releases.

PFOA and PFOS are “pollutants” or “contaminants” under CERCLA, giving the EPA the potential authority to mandate their cleanup. In addition, the EPA has recently initiated the process to have PFOA and PFOS listed as CERCLA “hazardous substances.” If this listing occurs, in addition to becoming more likely to be evaluated in site investigations and the subject of cleanup orders, legacy uses of PFOA and PFOS will become even more likely to become the focus of litigation.

By contrast, PFAS are not currently regulated as listed hazardous wastes under the Resource Conservation and Recovery Act. RCRA allows citizen suits to be initiated in situations of knowing and substantial endangerment, which most courts have defined extremely liberally. The designation of PFAS as RCRA hazardous waste, either due to listing or on characteristic grounds, could result in EPA corrective action orders and other forms of regulation under RCRA, its state equivalents and other statutes.

Emergency Planning and Community Right-to-Know Act

The Emergency Planning and Community Right-to-Know Act, or EPCRA, established the Toxic Release Inventory, or TRI, program for tracking releases of particular chemicals and imposing reporting requirements on businesses using those chemicals. A “release” for TRI purposes is an emission to air or water, or placement of a chemical in land disposal.

Facilities are required to report how much of a given chemical is released annually and/or managed through recycling, recovery and treatment. Currently, there are no PFAS chemicals on the list for TRI

reporting, but a designation of PFAS as a CERCLA hazardous substance would make this automatic, and the EPA is otherwise considering whether to add them as TRI-specific requirements.

Additional Congressional Action

In the 2018 Federal Aviation Administration Reauthorization Act passed last October, Congress directed the FAA to allow airports to use PFAS-free firefighting foam. FAA regulations historically have required airports to use foams meeting certain standards that effectively required the use of foams containing PFAS.

Section 332 of the Reauthorization Act gives the FAA three years from the law's enactment to update the agency's regulations to not require the use of fluorinated chemicals to meet performance standards. The FAA will have until October 2021 to promulgate the necessary regulations, and has not yet issued a draft.

In late April 2019, the Senate Governmental Affairs Committee requested that the Government Accountability Office investigate the possible cleanup liabilities of federal agencies related to PFAS contamination. The GAO's 2019 "High Risk List" identifies the U.S. government's environmental liability as a key concern for GAO to better understand, with particular concern about the responsibilities of the U.S. Department of Energy and U.S. Department of Defense. Senators asked the GAO to examine potential PFAS-associated liabilities, emphasizing that the Department of Defense alone has identified 401 active or closed military installations with known or suspected releases of PFOA and PFOS.

Next Steps

Many of the EPA's contemplated actions are set forth in the agency's PFAS action plan unveiled in February 2019.

Among many other items, the action plan notes that the EPA initiated the process for listing PFOA and PFOS as CERCLA hazardous substances. As discussed above, this process, begun in 2018, raises the prospect of new liability at sites where cleanup was previously considered complete.

In the action plan, the EPA also highlighted a plan to develop interim cleanup recommendations for PFOA and PFOS in groundwater. On April 25, 2019, the EPA issued its draft interim guidance for these cleanups. The guidance recommends screening levels to be used in determining whether further investigation at a site is warranted, and preliminary remediation goals, or PRGs, to serve as initial cleanup targets.

The EPA has proposed a 40 ppt screening level each for PFOA and PFAS, and a 70 ppt PRG for either chemical or the chemicals in combination. States can continue to enforce their own more stringent standards, but the guidance recommends use of the 70 ppt PRG where a state has not yet set cleanup goals.

The draft interim guidance on groundwater cleanup will be available for public comment until June 10, 2019. Industry leaders, environmental organizations and state agencies can all be expected to weigh in, as the EPA's recommendations could eventually be used in CERCLA cleanups, RCRA corrective action programs and state-run investigations.

Additionally, the EPA used its action plan to set a timeframe for finalized toxicity assessments for two

next-generation PFAS (GenX and PFBS) for 2019, and articulated the goal of preparing toxicity values for five additional PFAS (PFBA, PFHxA, PFHxS, PFNA and PFDA) in 2020. These assessments will help experts characterize public health risks from exposure to these particular chemicals.

The action plan also discussed the EPA's intention to propose a national drinking water regulatory standard for PFOA and PFOS. Environmental advocates have been long pushing for the EPA to set MCLs for these chemicals under the SDWA. The first step to establishing an MCL involves an SDWA regulatory determination, which the action plan called for by the end of this year.

Setting an MCL for drinking water could prove to be controversial. A 2018 study by the U.S. Agency for Toxic Substances and Disease Registry, or ATSDR, has found health effects from PFOA and PFOS at levels seven to 10 times lower than the LHA. From this research, some experts have concluded that the 70 parts per trillion (ppt) federal LHA should be lowered to 11 ppt for PFOA and 7 ppt for PFOS.

Despite the EPA's recent commitment to addressing PFAS, frustrations with the agency's pace have triggered legislative action in both bodies of Congress and on both sides of the aisle. In the past year, bipartisan groups of House and Senate lawmakers have introduced bills aimed at getting the EPA to list different PFAS as "hazardous substances" under CERCLA, an action the agency currently says it is undertaking for PFAS and PFAO.

The most recent legislative proposal, highlighted at a March 28 hearing of the Senate Environment and Public Works Committee, promises to target PFAS in drinking water. During the hearing, bill proponents Sens. Kirsten Gillibrand and Shelley Moore Capito each expressed concerns about the perceived risks yet unaddressed by the EPA. Other legislative proposals have focused on contamination of U.S. Department of Defense properties and empowerment of the U.S. Geological Survey to conduct additional testing for PFAS pollution.

The second part of this article will examine state-level regulatory action on PFAS, and consider trends in PFAS litigation.

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