

Preparing For PFAS Scrutiny: Part 2

By **William Tarantino and Megan Ault** (May 3, 2019, 3:25 PM EDT)

PFAS — or per- and polyfluoroalkyl substances — have been detected just about everywhere, and may be inside virtually everyone you know. But not everyone has heard of them, and not everyone is prepared for their regulation.

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. The first part of this article discussed heightened PFAS standards now being developed by Congress and federal agencies. This installment examines state-level regulatory action on PFAS, and considers trends in PFAS litigation.



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State of the States

State officials have been critical of perceived inaction on PFAS by federal regulators. States have been particularly focused on expressing concern about the failure to set a maximum contaminant level, or MCL, to date.

In the absence of an enforceable federal standard, many states have stepped up to establish MCLs of their own, and have otherwise increased regulatory capacity to address PFAS in drinking water, groundwater and other possible areas of contamination.



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California

Well known for leading the field on environmental regulation, California is among the states that have been most actively regulating PFAS.

Proposition 65: In November 2017, PFOA and PFOS were added as developmental toxicants to the governor's list of chemicals subject to Proposition 65. Proposition 65 imposes warning requirements and a prohibition of discharges to sources of drinking water for chemicals identified by the state as being known to cause cancer and/or reproductive harm (inclusive of fetal developmental toxicity), including based on studies on laboratory animals.

As a result of the listing process, since Nov. 10, 2018, Proposition 65 has required businesses to provide

California consumers and employees with “clear and reasonable warnings” before exposing them to PFOA and PFOS, or to be willing to prove in contested litigation that the extent of such exposures is less than one-one thousandth of the no-observable-effect level.

In addition, beginning in July 2019, PFOA and PFOS will become subject to Proposition 65’s discharge prohibition. As a result, there is significant potential for lawsuits concerning PFOA and PFOS, including citizen suits, to be brought under Proposition 65 in the near future.

Often, when chemicals are listed under Proposition 65, the state’s Office of Environmental Health Hazard Assessment, or OEHHA, will promulgate “safe harbor” standards for the level of chemical exposure considered to necessitate a warning. To date, OEHHA has set no such standard for PFOA or PFOS. OEHHA says that it is in the process of developing such safe harbor levels, but, for the time being, companies have to make their own calculations to defend a decision not to provide Proposition 65 warnings for these two chemicals.

Water Systems: Aside from Proposition 65, OEHHA has recommended notification levels for PFOA and PFOS to the State Water Board’s Division of Drinking Water, or DDW, with respect to regulation of drinking water systems in California.

Using OEHHA’s recommendations and its own independent review, DDW set notification levels at 14 parts per trillion for PFOA and 13 ppt for PFOS respectively. Drinking water systems with contaminants exceeding notification levels are subject to certain regulatory requirements and recommendations under the state’s Health and Safety Code.

DDW has also set a response level for PFOA and PFOS that parallels the federal LHA of 70 ppt. When drinking water systems have contamination exceeding notification levels, DDW recommends treating the water source or removing the source from service where possible. Where the water system contains PFOA and PFOS exceeding the response level, DDW recommends removing the source from service altogether.

In early March 2019, the State Water Board presented an informational panel on PFAS and discussed its phased investigation plan for testing of drinking water systems for PFAS contamination. Later in the month, the board released general sampling guidelines for PFAS. Regulators across the state have begun testing drinking water sources for these chemicals, and compliance orders and/or Proposition 65 lawsuits could follow close behind.

Green Chemistry: California’s Department of Toxic Substances Control, or DTSC, has identified all PFAS as candidate chemicals under its Safer Consumer Products Program. SCP regulations control “priority products” containing candidate chemicals, and require manufacturers to assess possible safer alternatives to those product/chemical combinations.

DTSC is currently evaluating the following categories of products for possible PFAS content that would trigger listing as “priority products”: (1) household, school and workplace furnishings and décor; (2) building products and materials used in construction and renovation; (3) beauty, personal care and hygiene products; (4) cleaning products; (5) consumable office, school and business supplies; (6) food packaging; and (7) lead-acid batteries.

In early 2018, DTSC proposed designating carpets and rugs containing PFAS as “priority products.” A

product-chemical profile was developed for these items in February 2018, but formal action has yet to occur. Public comment on this proposal was closed on April 16, 2018.

New York

Another state stepping up its PFAS enforcement is New York, which was the first in the nation to regulate PFOA as a hazardous substance in January 2016. The state quickly followed with regulation of PFOS as a hazardous substance in April of the same year. In addition to these regulations, New York has continued to make significant investments in investigation and cleanup of PFAS in a number of areas.

Hazardous Substances Regulation: New York's final hazardous substances rule on PFOA and PFOS went into effect on March 3, 2017. New York State law now regulates storage and release of these chemicals, and empowers state investigators to use state Superfund resources to target PFOA and PFOS.

Industry representatives fear that this broad regulatory approach could be mirrored at the federal level, should PFAS receive a "hazardous substance" designation under CERCLA or hazardous waste listing under RCRA from the EPA.

Water Systems: Gov. Andrew Cuomo has set up a water quality rapid response team to investigate and take corrective action on PFAS contamination in drinking water throughout the state. The Clean Water Infrastructure Act of 2017 set aside funding to assist communities with upgrading their drinking and wastewater systems, and directs the state's Department of Environmental Conservation, or DEC, to evaluate over 1,700 inactive solid waste sites for possible drinking water impacts from PFAS and/or other contaminants of concern.

Statewide Survey: The New York DEC has already undertaken a statewide survey of certain businesses, firefighting facilities, airports and U.S. Department of Defense installations to determine whether PFOA and PFOS were used or stored onsite. This investigation is aimed at identifying and investigating additional areas for PFAS water contamination, and DEC followup may include well sampling and cleanup orders.

Recent Developments in Other States

A number of other states have begun formally regulating PFAS. Some of the more recent developments are described below.

Maine: This state's Department of Environmental Protection has released Remedial Action Guidelines for PFOA, PFOS and PFBS. These guidelines give cleanup targets for soil and groundwater, as well as set levels for fish tissue and other environmental indicators. A bill pending before the state legislature could also empower the agency to prohibit PFAS in food packaging.

Michigan: With national attention focused on the state's water treatment systems, Michigan has undertaken a statewide sampling program, and was one of the country's first to set a cleanup standard for PFAS. At the end of March 2019, Gov. Gretchen Whitmer directed the state's PFAS action response team to work with the Michigan Department of Environmental Quality to propose an MCL for PFAS no later than Oct. 1, 2019.

New Jersey: New Jersey's Department of Environmental Protection set the country's first MCL for the

PFAS chemical PFNA in September 2018, and recently established interim specific groundwater quality standards for PFOA and PFOS.

New Hampshire: New Hampshire has already proposed drinking water standards for four PFAS chemicals, and has even indicated possibly tightening those levels due to a recent assessment of risks applying to infant and child exposures.

The current proposal, released in January 2019, sets MCLs for the following: PFOA (38 ppt), PFOS (70 ppt), PFHxS (85 ppt) and PFNA (23 ppt). The state's environmental regulators have also proposed ambient groundwater standards for certain PFAS.

Pennsylvania: After expressing disappointment with the U.S. Environmental Protection Agency's PFAS action plan, Pennsylvania formally initiated its own plan to set a state-level MCL for PFOA and PFOS, starting with the hiring of a consulting toxicologist and setting up a monitoring plan for PFAS sampling in public water systems.

Washington: The state of Washington's ban on PFAS in food packaging goes into effect in January 2022. In a separate piece of legislation, Washington also barred use of PFAS-containing firefighting foams as of July 2018, and established a ban on manufacture, sale and distribution of such foams as of July 2020.

PFAS Litigation Trends

Just as PFAS have been targeted by regulators, these chemicals have also received increased attention from would-be plaintiffs and their counsel. Toxic tort cases are being pursued on a national scale, while other state-specific suits may be expected to ramp up with the corresponding increase in state regulation.

Who Is at Risk?

Across the country, companies in a variety of industries may find themselves hauled into court on PFAS-related claims.

In California, state law claims may target product manufacturers for failure to warn of PFOA and PFAS exposures under Proposition 65. Chemical companies nationwide are facing the threat of litigation over past and ongoing discharges into water systems.

Over 100 lawsuits have been filed against chemical companies, military authorities and others related to water supply contamination. Businesses may find themselves subject to cleanup orders and suits over environmental contamination, even where they may not have previously known that PFAS were ever used on their site.

Because PFAS have not been regulated under CERCLA, previous environmental site assessments may not have investigated the use or presence of those chemicals at a given facility, such that liabilities related to these chemicals could still be lurking.

Where Are Suits Occurring?

Class action suits can be found in many states, including Colorado, Michigan, New York, Ohio and Pennsylvania. In addition, at least a dozen state governments and utilities have filed suits seeking

cleanup costs for water supply remediation in Alabama, Arizona, Florida, Massachusetts, New Jersey, New York and Washington.

What Are the Outcomes?

Two of the most high-profile cases have resulted in settlements.

In February 2018, chemical manufacturer 3M Co. settled with the state of Minnesota for \$850 million in a suit over water pollution associated with the company's PFAS products. About \$720 million of that settlement is set to be invested in drinking water and environmental projects in the affected Twin Cities metropolitan area.

A year prior, DuPont Co. and its spin-off, Chemours Co., settled claims from 3,500 Ohio and West Virginia residents related to contamination from a chemical manufacturing facility in Parkersburg, West Virginia. The \$671 million settlement helped lead to the creation of an independent research panel to study PFAS health effects. The results of this panel's research have been used to support other suits against these defendants in subsequent cases.

What Are Some Suits to Watch?

An ongoing lawsuit led by the same attorney who represented the plaintiffs in DuPont's West Virginia case is a nationwide class action on behalf of anyone in the country with detectable PFAS levels in their blood. The suit, being heard in federal court in the Southern District of Ohio, targets the entire set of PFAS chemicals, both short- and long-chain, including so-called next-generation PFAS such as GenX.

Like the West Virginia class action before it, this ongoing suit seeks to require the defendants to establish an independent panel of scientists to research the health effects of PFAS. Defendants in this case include 3M, DuPont, Chemours and seven other chemical companies.

Arizona is home to one of the several suits involving municipalities seeking payment for water well cleanup costs. The city of Tucson and town of Marana are suing five chemical companies, including 3M, for unspecified damages related to firefighting foam used at Davis-Monthan Air Force Base until 2017. This case represents an analogue of the Minnesota suit that ended in settlement in 2018, and may be part of a wave of similar claims as utilities and communities face increasing costs from new regulatory requirements.

Though there have yet to be any big-name Proposition 65 suits since the PFOA and PFOS warning requirement became effective in California in November 2018, litigators expect this area to quickly attract the focus of plaintiffs firms and environmental advocacy groups, if not public prosecutors like the California attorney general or the state's more aggressive district attorneys. Just this month, the very first Proposition 65 60-day notices were issued for PFOA.

The Future of PFAS

Should the EPA carry out the objectives of its recent action plan, the United States will close out the year 2019 with a much more cohesive picture of the risks and expected standards relating to PFAS. As it stands, the best way for businesses to anticipate their potential liabilities will be to seek the advice of counsel and environmental consultants, to review if and how their properties and/or operations can be linked to PFAS.

If the flurry of developments in the last six months is any indication, new regulatory proposals and new lawsuits could be springing up on an almost weekly basis. Environmental advocacy groups are increasing their knowledge base in this area, with film screenings and legislation-tracking webpages.

Companies also need to stay abreast of the increasingly frequent and increasingly stringent policies being announced. Keeping current on PFAS, known for their persistence in the environment, will be essential, as these chemicals — and their regulation — are undoubtedly here to stay.

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