EPA and States Target Widely Used PFAS

U.S. environmental authorities, concerned about the prevalence of per- and polyfluoroalkyl substances, or PFAS, are considering and taking steps to restrict usage, potentially affecting a wide variety of products and processes, and to require owners and operators of properties that have the potential to be contaminated with PFAS to investigate and, if necessary, perform remediation. Businesses and consultants are encouraged to be alert to these developments, which could give rise to litigation risks, supply chain disruptions, and a reconsideration of remedial strategies and objectives at sites with PFAS contamination.

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TAKEAWAYS

- EPA has begun an extensive evaluation process to establish regulatory limits for PFAS chemicals in drinking water and groundwater.
- EPA plans to use its authority under the Toxic Substances Control Act to place restrictions on the introduction and use of PFAS in domestic commerce.
- Some states already mandate very low PFAS levels and/or seek to restrict PFAS sources in the environment. State investigation orders, labeling requirements or outright bans on certain PFAS are possible, as well as litigation risk.

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Per- and polyfluoroalkyl substances, or PFAS, are the subject of heightened scrutiny by federal and state governments as concerns rise about the tenacious chemicals’ impact on human health. PFAS are a group of several thousand synthetic chemical compounds resistant to heat, water, and oil that have become
ubiquitous in modern life. The chemicals have been used since the 1940s to add water and stain repellency to fabric and carpet, to provide non-stick properties to food paper wrappings, and to make fire-fighting foams. They also are used in certain industrial operations, such as electroplating. While PFAS are useful for these and other purposes due to their hydrophobic and lipophobic properties, federal and state agencies have been scrutinizing the persistence of the chemical compounds, particularly in water sources.

I. EPA’s PFAS Action Plan

The United States Environmental Protection Agency (EPA) released a PFAS Action Plan in February 2019 that specified several actions the agency is considering to mitigate the environmental and health risks associated with PFAS. Notable measures will include:

- Establishing Maximum Contaminant Levels (MCLs) under the Safe Drinking Water Act for the two most-studied PFAS chemicals—perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS). EPA currently states that the health advisory level for PFOA and PFOS in water is 70 parts per trillion (ppt). However, this health advisory level lacks the force of law. Once the final MCLs for PFOA and PFOS are promulgated, owners and operators of regulated drinking water systems will be required to sample for these chemicals and will face potential enforcement in the event of exceedances. EPA currently expects to issue the proposed MCLs in July 2019.

- Adding PFOA and PFOS to the inventory of CERCLA “hazardous substances.” This measure, which is not expected to occur for another few years, will have several ramifications. First, it will require owners and operators of facilities at which unauthorized discharges occur to provide emergency notice to the National Response Center. Second, designation of PFOA and PFOS as CERCLA “hazardous substances” will require parties responsible for unauthorized releases to perform or pay for the costs of remediation, subject to Superfund enforcement.

- Exercising its authority under TSCA to restrict the distribution and use of PFAS in domestic commerce. EPA has used TSCA to impose restrictions on the manufacture, importation and industrial use of hundreds of PFAS substances, including PFOA and PFOS, since 2000. However, the 2016 Amendments to TSCA make it easier for the agency to impose further restrictions. Besides declaring it “likely” that it will subject certain PFAS chemicals to prioritized risk evaluations to assess the adequacy of existing restrictions, EPA has stated that it will seek to expand the scope of commercial and industrial activities that constitute “significant new uses” of PFAS. Once EPA does so, any company planning to engage in a significant new use must provide the agency with advance notice, supplemented with health and safety data, to demonstrate that the proposed activity will not present a significant risk of injury to human health or the environment.

Because many of EPA’s proposed actions with respect to PFAS will involve rulemakings, stakeholders will have the opportunity to comment on proposed rules.

II. State Initiatives
As EPA gathers more information and works to implement its PFAS Action Plan, several states have taken independent action on PFAS regulation. The range of state actions broadly falls into four categories: (1) developing drinking water and groundwater cleanup standards; (2) regulating PFAS-containing products; (3) evaluating PFAS at remediation sites and businesses; and (4) litigating against companies alleged to have caused PFAS contamination.

(1) Drinking Water and Groundwater Cleanup Standards

To date, fourteen states have issued drinking water or groundwater standards for PFAS. These standards span a wide range of numerical limits, which reflects the fast-developing state of information and diversity of opinion regarding the consequences of PFAS exposure.

States including Alaska, Minnesota, New Hampshire, New Jersey, New York, and Vermont have policies or have indicated that they are pursuing policies stricter than the 70 ppt EPA advisory limit for PFOA and PFOS. New York anticipates implementing a state maximum contaminant level for PFOS and PFOA at 10 ppt, while the New Jersey has codified MCLs for PFOA and PFOS at 14 and 13 ppt, respectively. Massachusetts and Vermont each have a health advisory level of 20 ppt for any combination of five PFAS, which are PFOA, PFOS, PFHxS, PFHpA, and PFNA. Beginning in July 2019, California will ban discharges of PFOA and PFOS to drinking water resources. We have compiled this table of these standards:
### State Groundwater Standards/Guidelines

<table>
<thead>
<tr>
<th>State</th>
<th>PFOA</th>
<th>PFOS</th>
<th>PFNA</th>
<th>Authority</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>70 pp</td>
<td></td>
<td></td>
<td>Guidance</td>
<td>Drinking Water Action Level; Includes sum of PFOA and PFOS</td>
</tr>
<tr>
<td>California</td>
<td>14 pp</td>
<td>13 pp</td>
<td></td>
<td>Guidance</td>
<td>Drinking Water Notification Level; Combined drinking water response level is 70 pp</td>
</tr>
<tr>
<td>Colorado</td>
<td>70 pp</td>
<td></td>
<td></td>
<td>Guidance</td>
<td>Site-Specific Groundwater Quality Standard for Sum of PFOA and PFOS</td>
</tr>
<tr>
<td>Connecticut</td>
<td>70 pp</td>
<td></td>
<td></td>
<td>Guidance</td>
<td>Drinking Water Standard; Includes sum of 5 forms of PFAS</td>
</tr>
<tr>
<td>Maine</td>
<td>70 pp</td>
<td></td>
<td></td>
<td>Remedial Action Guidelines</td>
<td>Groundwater that may be used for human consumption; Includes sum of PFOA and PFOS</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>70 pp</td>
<td></td>
<td></td>
<td>Guidance</td>
<td>Drinking Water Standard; Includes sum of 5 forms of PFAS</td>
</tr>
<tr>
<td>Minnesota</td>
<td>35 pp</td>
<td>15 pp</td>
<td></td>
<td>Guidance</td>
<td>Human Health-Based Drinking Water Standard</td>
</tr>
<tr>
<td>New Jersey</td>
<td>14 pp</td>
<td>13 pp</td>
<td>13 pp</td>
<td>Guidance for PFOA and PFOS; N.J. Admin. Code § 7.9C Appendix 1; § 7:10-5.2 for PFNA</td>
<td>Drinking Water MCLs for PFOA and PFOS; Groundwater Quality Standard and Drinking Water MCL of 13 ppt for PFNA</td>
</tr>
<tr>
<td>Vermont</td>
<td>20 pp</td>
<td></td>
<td></td>
<td>Vt. Code. Regs. § 16-3-502</td>
<td>Drinking Water Health Advisory Level; Includes sum of 5 forms of PFAS</td>
</tr>
<tr>
<td>West Virginia</td>
<td>70 pp</td>
<td></td>
<td></td>
<td>Guidance</td>
<td>Drinking Water Health Advisory Level; Includes sum of PFOA and PFOS</td>
</tr>
</tbody>
</table>

1 California has also added PFOA and PFOS to the list of chemicals governed by Proposition 65. As of November 10, 2018, companies doing business in California are required to provide a clear and reasonable warning under Proposition 65 before exposing anyone to the chemicals. As of July 2019, California businesses will also be prohibited from releasing PFOA or PFOS into sources of drinking water.

(2) Commercial Regulation of PFAS-Containing Products

Some states are taking a different route and have decided to regulate products containing PFAS. For example, the State of Washington has added PFAS to its list of chemicals that cannot intentionally be used in food packaging. The ban does not go into effect until 2022, but if state regulators can find safer alternatives before...
then, the ban may start sooner. Washington also has banned the use of PFAS in the manufacture of firefighting foam.

California regulates the incorporation of PFAS into consumer products. On November 10, 2017 the California Office of Environmental Health Hazard Assessment (OEHHHA) added PFOA and PFOS to the list of chemicals known to the state to cause reproductive toxicity for purposes of California’s Proposition 65. Businesses with ten or more employees are now required to provide a clear and reasonable warning before exposing consumers to either chemical, which means that companies may be more willing to reformulate their products rather than append the ominous label—a measure that could disrupt product supply chains.

(3) Evaluation of PFAS at Remediation Sites and Businesses

Another state approach is to require businesses and responsible parties at remediation sites to evaluate the potential for PFAS contamination near drinking water resources through research into past and present property uses, as well as environmental sampling. The California State Water Resources Control Board is initiating the PFAS Phased Investigation Plan to obtain data on PFAS in effluent and drinking water. Phase I will investigate PFAS incidence in airports, landfills, and drinking water wells across the state, while Phase II will cover refineries, bulk terminals, non-airport fire training areas, and urban fire areas. Phase III will cover secondary manufacturers, waste water treatment plants and domestic wells. Each phase of investigation will entail the issuance of orders by the Water Board requiring the submittal of technical or monitoring reports providing information about volumes of chemical discharged from a facility through storm water and industrial process water discharges. Phase I orders were sent out on April 18, 2019. Order recipients will have 30 days to respond with information on historical PFAS usage and, if PFAS usage is found to have occurred, 60 days to submit PFAS sampling plans.

Similar initiatives are underway in New York and New Jersey. In 2017, New York passed the $2.5 billion Clean Water Infrastructure Act, which requires the New York State Department of Environmental Conservation (NYSDEC) to evaluate the potential for PFAS impacts to drinking water sources from over 1,750 remediation sites. To carry out this mandate, NYSDEC has issued directives, requiring responsible parties at remediation sites to sample for PFAS and report the results.

Similarly, in March 2019, the New Jersey Department of Environmental Protection (NJDEP) solicited information on chemical handling practices from several alleged users or manufacturers of PFAS. This information may serve as the basis for cost recovery efforts at remediation sites currently known to have PFAS contamination.

Concurrently with this effort, NJDEP is requiring all active remediation sites and remediation sites that have received closure pursuant to a Response Action Outcome predicated on institutional or engineering controls to evaluate the potential of PFAS contamination based on historical operations and, if such potential is found to exist, to develop a sampling and investigation plan.
Besides increasing the litigation risk to businesses identified as having used PFAS, these initiatives stand to influence the manner in which companies approach remediation projects. For example, given NJDEP’s apparent willingness to “re-open” cleanup sites that have been “closed out” subject to controls, parties performing remediation will have to weigh the costs of achieving conditional closure on a shorter time frame and at lesser cost versus taking more time and incurring greater cost to achieve unconditional closure.

(4) State Litigation Initiatives

As interest in PFAS has increased, so has the litigation risk. Private parties, water utilities, and several states have brought actions against businesses allegedly responsible for causing PFAS contamination. States such as Minnesota and New Jersey have filed lawsuits against primary manufacturers of PFAS products, with Minnesota achieving an $850 million settlement with 3M for groundwater contamination in February 2018. Other states have filed suit against processors and end-users of products containing PFAS. For example, in January 2018, the State of Michigan sued Wolverine World Wide (the parent company for Stride Rite, Hush Puppies shoes and other products that incorporate 3M’s PFAS-containing Scotchgard). In March 2019, New Mexico filed a lawsuit against the United States Department of Defense based on PFOS and PFOA contamination originating at Cannon and Holloman Air Force bases from use of firefighting foam.

The risk of litigation will likely increase as EPA and the states move toward establishing enforceable standards for PFAS and gather information from businesses and properties suspected of contaminating drinking water sources with PFAS.

III. Looking Forward

Pillsbury is monitoring state and federal activity on PFAS regulation and risk assessment. We urge clients to take a close look at chemical substances in their processes and product life cycle, to determine whether EPA is likely to consider them for risk assessment, and to determine whether contingency plans may be appropriate. If you believe your company may have made or discharged PFAS, do not hesitate to contact Pillsbury for guidance.

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