

# PUBLICATION

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## A PFAS Landscape Update

August 14, 2019

**Perfluoroalkyl and polyfluoroalkyl substances (PFAS) are a group of synthetic chemicals whose ubiquitous use in industry and resistance to degradation has led to increasing media scrutiny, litigation, and regulation. The PFAS legal landscape is in its relative infancy, so close monitoring of federal and state regulatory/legislative action and national litigation trends can help companies anticipate potential PFAS issues.**

Until recently, the federal government, through the Environmental Protection Agency (EPA), has provided little guidance on PFAS regulation. "Health advisories" related to PFAS have been in effect since 2009; however, these advisories are for informational purposes only and, thus, non-enforceable and non-regulatory. While the federal "Safe Drinking Water Act," 42 U.S.C. § 300f et seq., allows the EPA to set enforceable Maximum Contaminant Levels (MCLs) for specific chemicals, there is currently no federal MCL for PFAS chemicals. On February 14, 2019, however, the EPA released a "PFAS Action Plan," which outlines multi-pronged short- and long-term goals.<sup>1</sup> Of specific note are the following objectives: (1) evaluating the need for setting MCLs of certain PFAS chemicals; (2) developing PFAS clean-up recommendations; and (3) initiating action to designate certain PFAS chemicals as "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Currently, PFAS are designated as "pollutants or contaminants" under CERCLA. The later goal would, among other things, require reporting related to PFAS use and provide the EPA authority to require certain entities to carry out and/or pay for response actions.

In accordance with the action plan, on April 25, 2019, the EPA released Draft Interim Recommendations for Addressing Groundwater Contaminated with PFAS. This report provides recommendations on screening levels to determine whether identified contamination warrants further investigation and preliminary remediation goals to inform site-specific cleanups that are based on the U.S. EPA's Health Advisory.<sup>2</sup> The draft remediation goals would be trumped where state or tribal drinking water standards exist. The EPA expects to make a decision on federal PFAS regulations by the end of 2019, which could potentially go into effect as early as December 2020.<sup>3</sup> Until then, however, the EPA has no real enforcement power with respect to PFAS contamination. Meanwhile, Congress has introduced dozens of bills addressing PFAS monitoring, prohibitions, and remediation.<sup>4</sup>

Unlike the federal government, states have enacted more concrete legislation and regulation over PFAS. These laws include required monitoring and testing for PFAS contamination (*see, e.g.*, CA, CO, MA, MI, MN, NJ, VT); complete or partial ban of PFAS use in items such as plastics and firefighting foam (*see, e.g.*, AZ, CO, GA, KY, MN, VA); and classification of PFAS as a chemical contaminate which requires, among other things, entity remediation (*see, e.g.*, NY, VT).

The most immediate concern related to PFAS is that of litigation. After a bellwether case filed against PFAS manufacturer DuPont in 1999, PFAS litigation has been on a consistent rise. Cases have come in multiple forms including class actions,<sup>5</sup> suits by attorneys general,<sup>6</sup> and multidistrict litigation.<sup>7</sup> Some PFAS cases have reached trial verdicts ranging from \$1 million to \$10.5 million including punitive damages. However, the recent trend for large PFAS suits, such as ones filed in Alabama, Minnesota, New York, North Carolina, Ohio, and West Virginia, is out-of-court settlement.

Because the majority of PFAS litigation is relatively recent, the success of specific legal theories is unclear. Cases are typically filed as individual or class product liability and negligence cases. Among other things, these theories require a showing that the PFAS *caused* injury, a significant hurdle for claimants. Another unique legal theory of recovery prevalent in PFAS litigation is that of "medical monitoring." Though not accepted in all states, medical monitoring claims request payment for future care and examinations related to potential illness. Proof of causation, among other elements, is necessary for such claims. Where a state or local government files suit, the requested remedy is often economic restoration or cleanup, which can be a complicated remedy to craft.

At this point, it appears likely that for the foreseeable future PFAS regulation will continue to be implemented; PFAS legislation will continue to be introduced; and PFAS lawsuits will continue to be filed. Clients with business lines that have touched manufacturing and use of PFAS should stay current on the rapidly evolving legal landscape and give due consideration to transactions potentially involving PFAS risk.

Baker Donelson continues to monitor the development of PFAS litigation, legislation, and regulation. If you have questions or want to discuss strategies related to PFAS issues, please contact a member of the Firm's [Environmental](#) and/or [Product Liability and Mass Tort](#) Groups.

<sup>1</sup> [https://www.epa.gov/sites/production/files/2019-02/documents/pfas\\_action\\_plan\\_021319\\_508compliant\\_1.pdf](https://www.epa.gov/sites/production/files/2019-02/documents/pfas_action_plan_021319_508compliant_1.pdf)

<sup>2</sup> [https://www.epa.gov/sites/production/files/2019-04/documents/draft\\_interim\\_recommendations\\_for\\_addressing\\_groundwater\\_contaminated\\_with\\_pfoa\\_and\\_pfos\\_public\\_comment\\_draft\\_4-24-19.508post.pdf](https://www.epa.gov/sites/production/files/2019-04/documents/draft_interim_recommendations_for_addressing_groundwater_contaminated_with_pfoa_and_pfos_public_comment_draft_4-24-19.508post.pdf)

<sup>3</sup> <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2040-AF93>

<sup>4</sup> See, e.g., (S. 638 and H.R. 535) (listing PFAS as CERCLA hazardous substances); (S. 950 and H.R. 1976) (calling for nationwide survey of PFAS contamination in water and soils; (S. 1507) (Including PFAS in the Toxics Release Inventory program).

<sup>5</sup> See, e.g., *Heavy & General Laborers, et al. v. 3M Co.*, 2:19-cv-15982 (D. N.J. 2019); *Bell v. The 3M Co., et al.*, 344 F. Supp. 3d 1207 (D. Colo. 2018); *Dykehouse v. 3M Co., et al.*, 1:18-cv-01225 (W.D. Mich. 2018); *Hardwick v. 3M Co., et al.*, 2:18-cv-1185 (S.D. Ohio 2018) (nationwide class action).

<sup>6</sup> *City of Fairbanks v. 3M Co., et al.*, 4:19-cv-00013 (April 26, 2019); *State of N.H. v. 3M Co., et al.*, Case No. 216-2019-CV-446 (May 29, 2019); *Ridgewood Water v. 3M Co., et al.*, BER-L-001447-19 (2019).

<sup>7</sup> *In RE: Aqueous Film-Forming Foams Products Liability Litigation*, MDL No. 2873.