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Practical Steps For Companies Facing PFAS Risks

By **Douglas Fleming, Marina Schwarz and Michael Fazio** (December 16, 2022, 5:45 PM EST)

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Per- and polyfluoroalkyl substances continue to remain in the regulatory and litigation limelight. PFAS are known for their water-resistant and stain-resistant properties, as well as their stability and persistence.

These properties make them a useful product across multiple industries, including the aerospace, apparel, biotechnology, construction, electronics and pharmaceutical fields.[1]

While much of the regulatory and litigation focus has been on a select few of these chemicals, more scrutiny is being placed on the broader set of PFAS, including those that have been used as replacements for the prior generation of PFAS.

With a complex, ever-expanding patchwork of state regulations and an increased level of federal regulatory activity — as well as the development of technological advancements to detect the presence of PFAS — companies that have used or relied on PFAS-containing materials would be wise to evaluate their potential litigation risks and regulatory compliance.

In this article, we summarize the recent scrutiny and attempted regulation of PFAS at federal, state and municipal levels, including the U.S. Environmental Protection Agency's proposed designation of two PFAS chemicals as hazardous substances, and its stated intention to designate other PFAS.

We also highlight recent activity on the litigation front, including newer areas of interest. Lastly, we discuss practical considerations and strategies for companies to implement now as they navigate this era of further regulatory, legislative and legal scrutiny.

Regulatory Landscape

Since the EPA released its PFAS road map in October 2021 that set timelines by which the agency plans to take specific ambitious actions,[2] it has already followed through on several key measures.

The agency issued its first guidance values for the presence of potassium perfluorobutane sulfonate, or PFBS, and hexafluoropropylene oxide dimer acid and its ammonium salt — together, referred to as GenX chemicals[3] — in drinking water, and also issued updated interim guidance for perfluorooctanoic acid, or PFOA, and perfluorooctanesulfonic acid, or PFOS.[4]

The new guidance for PFOA and PFOS — characterized as "interim guidance," because the input values to the EPA's calculation for a lifetime health advisory are currently in draft form — is a marked reduction from the agency's 2016 guidance.[5]

For example, its new lifetime advisory level for PFOA in drinking water is 0.004 parts per trillion — which is 17,000 times lower than the prior guidance value.[6] And the guidance levels for PFOA and PFOS are orders of magnitude lower than can be measured by current technology.[7]

As the EPA recognizes, "[t]his means that it is possible for PFOA or PFOS to be present in drinking water at levels that exceed health advisories even if testing indicates no level of these chemicals."[8]

The agency's notably low guidance levels are in contrast with recent findings from the World Health Organization that the "uncertainties" surrounding potential health effects following exposure to PFOA and PFOS "are too significant to derive" a health-based guidance value "with confidence."[9]

However, "[d]ue to the potential adverse health effects," the World Health Organization still recommended a guidance value of 100 parts per trillion for each of PFOA and PFOS, a value that is more than 20,000 times higher than in the EPA's recent guidance.[10]

The EPA's new proposals are likely to lead to a multiplication of geographic areas of interest for industry, regulators and the plaintiffs bar, as well as the continuation of exposure pathway research — some of which is funded by the EPA pursuant to its PFAS road map.[11]

The agency's proposed rule to designate PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA — commonly known as the Superfund law — also portends an increased focus on detecting these substances in the environment, and identifying any potentially responsible parties.[12]

This designation would significantly expand federal authority to investigate potential PFAS impacts, including requirements for immediate reporting of any releases of PFOA or PFOS of over one pound — permitting private parties engaged in remediation activities to recover PFOA and PFOS cleanup costs from any potentially responsible parties, and arguably in certain circumstances opening up further potential liability for parties that have already reached a settlement over a Superfund site.[13]

Furthermore, plaintiffs who bring personal injury claims against potentially responsible parties will attempt to utilize the CERCLA designation, as well as any interest by the EPA in particular parties, in an effort to bolster their allegations.

Public comment on the proposed role closed on Nov. 7,[14] with the EPA being expected to publish the final rule in August 2023.[15] The agency has already previewed that it expects to propose the same CERCLA designation for other PFAS chemicals in late 2022 or early 2023.[16]

While the list of PFAS for which the EPA will propose further regulations has not yet been specified, the agency has recently announced several PFAS to be included on its Contaminant Candidate List, a list of chemical compounds that are known or anticipated to occur in public water systems, which is used by EPA to identify priority contaminants for regulatory decision making.[17]

The inclusion on this list of several short-chain PFAS, such as PFBS, perfluorobutanoic acid, and perfluorohexanesulfonic acid, or PFHxS, is noteworthy,[18] as this category of chemicals has been used as replacements for long-chain PFAS, such as PFOA and PFOS, given that the shorter-chain alternatives were generally viewed as raising fewer concerns about persistence and potential toxicity. Companies that have relied on replacing one class of PFAS with another in their products or operations should remain vigilant, and stay tuned for potential future action from the EPA.

On the state regulatory front, state governments have been aggressively pursuing PFAS drinking water guidelines or limits for several years, targeting a broader suite of PFAS than federal regulators in many instances.[19]

For example, in October, the New York Department of Health proposed new maximum contaminant levels of 10 ppt for perfluorodecanoic acid, perfluoroheptanoic acid, PFHxS and perfluorononanoic acid, which would match the existing MCLs for PFOA and PFOS, as well as an MCL of 30 ppt for the combination of these six PFAS compounds.[20]

And the department also proposes setting notification levels, whereby water systems must notify their customers if the levels are exceeded, for a total of 23 PFAS that are listed in a proposed piece of legislation.[21] In addition to drinking water guidelines, some states have enacted soil remediation standards for various PFAS, with New Jersey enacting new standards just last month.[22]

Other state legislation would ban the inclusion of PFAS in certain consumer products. In September, California Gov. Gavin Newsom signed into law two bills that together ban the manufacture or sale of any apparel or cosmetic products that contain intentionally added PFAS by 2025, with limited exceptions.[23]

A similar bill was signed over the summer in Maine, requiring the reporting of any product containing intentionally added PFAS starting in January 2023, and prohibiting the sale of such products by 2030.[24] Yet another similar bill was recently introduced in New Jersey,[25] and the New York Legislature passed a bill that would ban the sale of any apparel containing intentionally added PFAS by the end of 2023.[26]

Some of these bills have been met with criticisms. For example, in New York, one group is requesting, among other things, a three-year extension to allow manufacturers time to develop alternative materials.[27]

Prohibitions on the use of products containing PFAS have also reached other areas. Earlier this year, a composting company was ordered by the state of Massachusetts to stop selling most of its product, after tests showed the presence of PFAS in compost and in the water of its customers.[28] The composting company, as well as the owner of the land where the composting company operated, were assigned responsibility, leading to an investigation into the source of PFAS in the compost.[29]

In September, the mayor of Boston declared that the city will not be installing artificial turf with PFAS moving forward, following pressure from advocacy groups.[30] Other localities have been debating this issue, frequently citing concerns about the turf trapping heat on sunny days and allegedly leaching PFAS into the ground and, eventually, the water.[31]

These disputes over the presence of a ubiquitous set of chemicals in common products are indicative of the battleground that is incoming for a host of other products and industries in the PFAS arena. It may be difficult to square regulatory and legislative activity with the omnipresent nature of PFAS and the utility that they have across a broad range of industrial and consumer applications.

Litigation Landscape

PFAS continue to be the subject of litigation across multiple industries. In September, opinions in two significant PFAS litigations were released.

First, in Hardwick v. 3M Co., the U.S. Court of Appeals for the Sixth Circuit granted interlocutory review of the U.S. District Court for the Southern District of Ohio's March decision to certify a class of every individual subject to the laws of Ohio who have at least 0.05 parts per trillion of PFOA and at least 0.05 parts per trillion of another PFAS in their blood serum.[32]

As the parties conceded, these amounts are too low to be detected with current technology and thus the class would comprise "nearly all 11.8 million residents of Ohio."[33]

The plaintiff and the class sought to establish a medical monitoring program and an independent science panel to study the potential effects of various PFAS on humans, both to be funded by the defendants who are a group of manufacturers of PFAS and fluoropolymers that contain PFAS.[34]

In addition to granting review, the Sixth Circuit substantively addressed numerous concerns with the district court's certification order.[35] The panel summarized its concerns by emphasizing that:

> [W]hen a district court certifies one of the largest class actions in history, predicated on a questionable theory of standing and a refusal to apply a cohesion requirement endorsed by seven courts of appeals, to authorize pursuit of an ill-defined remedy that sits uneasily with traditional constraints on the equity power and threatens massive liability, such a decision warrants further review.[36]

The second major development is from the firefighting foam multidistrict litigation in the U.S. District Court for the District of South Carolina. That docket was created in late 2018 to consolidate a variety of cases involving firefighting foam — a product that historically contained PFAS, and has been the subject of allegations involving groundwater contamination and individual exposure.

Because firefighting foam was frequently sold to the federal government for use at military bases, airports and training facilities, many of the defendant manufacturers moved for summary judgment on the basis of the government contractor defense.[37] In September, the court denied the manufacturers' motion, finding that the manufacturers failed to demonstrate that there was no dispute of material fact as to the government contractor defense.[38]

The court held, among other things, that there was a dispute of material fact as to whether the government was aware of certain potential risks of PFAS that were allegedly not initially disclosed by the manufacturers.[39]

The court's opinion has paved the way for bellwether trials to begin, the first of which involve claims by water providers alleging that PFAS-containing firefighting foam reached their water supply. The first bellwether trial has been set for June 2023, with Daubert and dispositive motions to be completed by February.[40]

While litigation against PFAS manufacturers is likely to continue, enterprising plaintiffs lawyers will likely pursue new companies in additional industries. In many instances, the targets of the plaintiffs bar follow regulatory interest, and thus companies in industries that touch PFAS should be particularly attentive to new developments. Personal injury and medical monitoring claims will likely continue, particularly if additional states affirmatively recognize medical monitoring as a remedy.

One new area of claims that are being adapted to PFAS specifically are so-called greenwashing suits. In these putative consumer fraud class actions, plaintiffs typically allege that a company's product was falsely marketed in an environmentally conscious or safe manner because of PFAS. Suits have been brought against a host of companies in a variety of industries, such as clothing,[41] feminine products,[42] cosmetics[43] and retail stores.[44]

In many instances, plaintiffs rely upon testing that purportedly shows the presence of certain PFAS in the products, which was not disclosed to them by the company.[45] And in at least one case, the defendant agreed to remove labeling and advertisements that represented a product containing PFAS to be compostable as part of a settlement.[46]

Litigation by states and municipalities has also continued to grow. On Nov. 10, the California attorney general announced a lawsuit against manufacturers of PFAS and certain PFAS-containing materials, seeking a variety of relief such as treatment of drinking water and funds to continue monitor and testing.[47]

On Nov. 4, the cities of Baltimore and Philadelphia each filed lawsuits against manufacturers of PFAS and certain PFAS-containing materials, seeking similar damages as in the California case.[48]

Strategies for Companies

The breadth of PFAS liability sought from companies is likely to continue to expand. Around a decade ago, a wave of litigation was just

beginning, with a focus mostly on PFOA and PFOS, with no enforceable federal regulations.

That environment has rapidly evolved, with the list of chemicals of potential concern expanding and the levels of those chemicals that may raise the interest of regulators and plaintiffs counsel ever decreasing. Add to that mix the developing patchwork of state and municipal regulations, and the complexity of considerations for companies grows.

While potentially time-consuming and not without challenges, companies should consider a wholesale risk analysis and assessment of relevant products, raw materials, operations and environmental practices that have the potential to create PFAS liability. One line of defense in anticipating litigation is for companies to understand their supply chain.

Further, given the ubiquitous use of these chemicals across many decades, even if a company believes it has phased out the use of a particular PFAS, or required their suppliers to do so, it should still evaluate whether the replacement material is a PFAS that may still pose potential liability. With thousands of types of PFAS, a significant step to mitigate risk is understanding where that risk may lie.

Moreover, with continuing technological advancements to detect and quantify PFAS in smaller amounts, companies should be cautious to assume that their materials or operations do not rely upon PFAS. Current PFAS use should be given careful consideration, including whether feasible replacement products, if any, are available and have been considered.

Similar inquiries should be made into environmental practices involving PFAS or PFAS-containing materials, to ensure they are properly handled and discarded, and accurately documented.

Finally, companies that only historically used PFAS also should focus on these issues. With the plaintiffs bar increasingly using more creative strategies to target broader industries and attempt to hold companies liable for past practices, stakeholders that previously used PFAS would be well served by conducting a similar risk assessment now to identify relevant information and data points.

A historical investigation may involve speaking with current and former employees about past practices, including details about raw material usage and historic operations that may have called for PFAS-containing products.

Given the fast-developing PFAS landscape, it is important for stakeholders to think critically about these issues, educate themselves about their supply chain, and work with internal and external resources to ensure adequate preparedness to meet these compliance challenges and mitigate litigation risks.

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