‘Forever Chemicals’ and the Law

Broadening PFAS Regulations and Legislation

By Dawn Monsen Lamparello, B. David Naidu, and Emily M. Poniatowski

Federal and state efforts to regulate per- and polyfluoroalkyl substances (PFAS) have been at the forefront of environmental legal issues in recent years. PFAS are synthetic chemicals found in thousands of industrial and consumer products, such as nonstick cookware, fire-resistant foams, coatings, food packaging, and clothing. PFAS are commonly referred to as “forever chemicals” as they do not break down easily and build up in the environment over time.

Numerous statutes authorize the EPA to regulate contaminants, including PFAS, under multiple regulatory schemes. These include the Safe Drinking Water Act (SDWA); Emergency Planning and Community Right-to-Know Act (EPCRA); Toxic Substances Control Act (TSCA); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and Clean Water Act.

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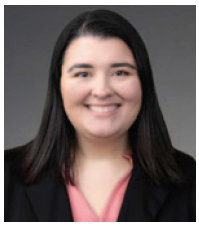

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Public concern over PFAS began in the 1990s, but state and federal PFAS regulation and legislation have since expanded significantly in recent years. While scientific understanding of PFAS toxicity continues to evolve, U.S. Environmental Protection Agency (EPA) research suggests that exposure to certain PFAS may cause adverse health effects, such as decreased fertility, developmental delays, or increased risk of certain cancers.[1] The Biden administration made a specific commitment to target PFAS in the EPA's "PFAS Strategic Roadmap."[2] Under the roadmap, federal PFAS regulation increased significantly in 2023, with few signs of slowing down this year.

Existing Notable Regulations and Legislation

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SDWA: Drinking Water Health Advisories

The SDWA requires the EPA to establish and enforce drinking water standards for public water systems. In 2009, the EPA published a provisional Drinking Water Health Advisory for perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA), two of the most common PFAS, under the SDWA. Health Advisories provide information on a contaminant's potential effects on human health, as well as analytical methodologies and treatment technologies for drinking water system operators. After several years of monitoring, the EPA issued Lifetime Drinking Water Health Advisories[3] for PFOS and PFOA in 2016. The advisories, while not enforceable standards, suggest a combined concentration level of no more than 70 parts per trillion (ppt), as the EPA determined that concentrations at this level (or lower) offer a lifetime margin of protection from adverse health effects for all individuals exposed to PFOS and PFOA in drinking water. This led many states to test for PFAS in public water systems, and in 2018, New Jersey became the first state to establish enforceable maximum contaminant levels (MCLs) for the presence of contaminants in drinking water for PFOA and PFOS, at 14 ppt and 13 ppt respectively. Over 20 states now have MCLs for certain PFAS, many set at levels far below 70 ppt. In December 2021, the EPA finalized a rule under the SDWA requiring data collection of concentrations of 29 different PFAS in

public water systems and issued interim Drinking Water Health Advisories for PFOA and PFOS in 2022, pending final national primary drinking water standards for certain PFAS.[4]

EPCRA: Revised Toxics Release Inventory Reporting and Supplier Notification Requirements

The EPA's Toxics Release Inventory (TRI), established under Section 313 of EPCRA, requires businesses to submit annual reports of releases of certain chemicals that may pose a threat to human health and the environment. The National Defense Authorization Act for Fiscal Year 2020 added 172 PFAS to the TRI. The EPA initially set a reporting limit for PFAS at 100 pounds per year and provided a *de minimis* exemption for small concentrations of certain chemicals. The EPA expanded the TRI list to contain 196 PFAS for reporting year 2024.[5]

In October 2023, the EPA issued a final rule modifying TRI reporting requirements for PFAS. The rule designates all PFAS on the TRI as "chemicals of special concern" (CSCs) as of 2024. By reclassifying PFAS as CSCs, the EPA eliminated the *de minimis* reporting exemption for TRI-listed PFAS. All concentrations of PFAS, no matter how small, are reportable when making TRI threshold determinations and release calculations. This is significant, since many PFAS exist in very low concentrations in mixtures and may not have been reported under the prior exemption. The rule also eliminates simplified reporting options for PFAS and requires a full accounting of releases, waste management pathways, and individual reports for each chemical. Additionally, facilities must report the precise amount of PFAS released per pathway on their reports rather than using estimated range codes. Lastly, the rule significantly modifies EPCRA supplier notification requirements. Impacted suppliers must now disclose TRI-regulated PFAS at any and all concentrations in their products to downstream purchasers. Suppliers have 30 days to provide or correct supplier notifications once they become aware of a TRI-regulated chemical in a product previously sold to a TRI-regulated customer. Similar to the revised TSCA reporting requirements, the amended TRI reporting rules will likely generate significant compliance costs for a wide range of entities.

TSCA New Chemicals Program: Revised Framework and Reporting Requirements

Under TSCA, the EPA evaluates and sets reporting, testing, and recordkeeping requirements for new and existing chemical substances and mixtures. In June 2023, the EPA released a new framework for conducting risk assessments for new PFAS or new uses of PFAS under the TSCA New Chemicals Program. Under the framework, the EPA will review and take appropriate action for new PFAS or significant new uses of existing PFAS through pre-manufacture notices and significant new use notices. The framework is a two-step process. In step one, the EPA must determine if the substance under review falls within the chemical definition of PFAS. If so, the EPA will review all reasonably available data to determine if the PFAS is a persistent, bioaccumulative, and toxic (PBT) chemical. In step two, if the EPA determines the substance is a PBT PFAS, it then analyzes the chemical's potential environmental and human health risks and acts based on the anticipated level of risk associated with the new chemical or significant new use. Prescribed courses of action range from no use restrictions whatsoever to prohibitions on any manufacture or use of the chemical. Though the framework is not "enforceable" per se, as it is not an official EPA regulation authorizing penalties or other enforcement measures, it could have significant implications for manufacturers who use PBT PFAS in their products due to these heightened levels of administrative review.

In October 2023, the EPA finalized extensive reporting and recordkeeping requirements for PFAS under TSCA, as authorized by Congress in the National Defense Authorization Act for Fiscal Year 2020. The rule requires certain individuals or entities to submit reports to the EPA for each year from 2011 to present in which they manufactured or imported PFAS for a commercial purpose. This includes the coincidental manufacture of PFAS as byproducts or impurities, as well as manufacture for use in product research and development. Entities that only process, distribute, use, or dispose of PFAS received domestically do not need to report under the rule, so long as they have not manufactured (or imported) PFAS for a commercial purpose. The rule defines PFAS broadly, using a structural definition rather than a list of covered substances, and will likely generate large compliance costs for impacted manufacturers and importers. The EPA directs impacted entities to report all PFAS-related information that is "known to or reasonably ascertainable by" them, which is further defined as "all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control or know."[6] The Rule vastly expands the number of manufacturers subject to TSCA reporting requirements, with very few exemptions. Notably, manufacturers or importers of products that contain PFAS must now report under the rule. Additionally, the rule does not set a *de minimis* reporting threshold; any amount of PFAS manufactured or imported during the relevant timeframe is reportable. Reporting is on a per chemical per year basis and reports generally will be due to the EPA in May 2025.

Other federal agencies have taken initiative against PFAS, too. In 2020, the Food and Drug Administration (FDA), in collaboration with several manufacturers, announced a voluntary phase-out of certain PFAS that can be found in food

To date, about a dozen states, including New Jersey, have enacted or are actively considering PFAS-related legislation, and several states have mandated various PFAS product bans. While each state law is somewhat unique, these laws generally have two common elements: (1) broad bans of commonly used household products that contain PFAS; and (2) notification requirements for products with intentionally added PFAS, accompanied by scheduled market phase-outs, unless the product is specifically excluded by regulation.

packaging.[7] The FDA also tests and reports on PFAS levels detected in certain foods.

Legislation

Congress has also been focused on PFAS management. The Bipartisan Infrastructure Investment and Jobs Act of 2021[8] allocated $10 billion in new government funding toward addressing PFAS and other emerging contaminants via improved drinking water, updated wastewater and storm water infrastructure, and upgraded drinking water treatment systems. The Preventing Firefighters from Adverse Substances Act (or the PFAS Act) of 2022[9] requires the Department of Homeland Security to develop guidance for firefighters and other emergency response personnel to follow regarding training, education, and best practices to protect themselves from PFAS exposure from firefighting foams and to prevent the further release of PFAS into the environment.

The National Defense Authorization Act for Fiscal Year 2023[10] requires the Department of Defense (DOD) to phase out personal protective firefighting equipment containing intentionally added PFAS by fiscal year 2027 and provides over a billion dollars dedicated to cleaning up contaminated military facilities and conducting PFAS-related research. Most recently, the National Defense Authorization Act for Fiscal Year 2024[11] requires the DOD to provide separate budget justification documents for department activities related to PFAS and directs the Government Accountability Office to submit reports on the DOD's ongoing testing and remediation of current or former military installations that have PFAS contamination. Earlier versions of the National Defense Authorization Act for Fiscal Year 2024 contained more significant provisions, including a proposed prohibition on DOD procurement of PFAS-containing products, but these were left on the cutting room floor.

Recent and Anticipated Actions

The EPA plans to continue regulating PFAS in 2024 and beyond, and recently finalized long-awaited national drinking water standards for six PFAS under the SDWA. MCLs are set at 4.0 ppt for PFOA and PFOS and at 10 ppt for PFHxS, PFNA, and HFPO-DA (also known as GenX chemicals). A unitless Hazard Index of 1.0 applies to mixtures containing two or more of PFHxS, PFNA, PFBS, or GenX chemicals.[12] The Hazard Index is calculated using a sum of fractions and compares the level of each PFAS measured in the water to the highest level below which there is no risk of adverse health effects. The EPA also recently issued a final rule[13] designating two PFAS (PFOA and PFOS) as hazardous substances under CERCLA, though members of Congress have proposed amendments[14] to CERCLA to create industry-based exemptions for PFAS liability as well as a proposed exemption for certain water systems that dispose PFAS.[15] The EPA also plans to start the rulemaking process to codify PFAS testing methods under the Clean Water Act. In February 2024, the EPA published two proposed rules under the Resource Conservation and Recovery Act (RCRA). The first rule would designate certain PFAS (including PFOA and PFOS) as "hazardous constituents" under RCRA, while the second rule would expand the wastes currently subject to corrective action requirements under RCRA's definition of "hazardous waste" to include qualifying releases of PFAS.

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ed by regulation. Maine was one of the first states to enact PFAS legislation in 2019, and many other states have enacted or hope to enact "copycat" laws. These laws and their regulations, while seemingly simple, will have widely felt implications, including in New Jersey.

The New Jersey League of Conservation Voters recently announced its "Common Agenda for the Environment" for the current legislative session.[16] One portion of this five-part plan involves prioritizing safer drinking water throughout the state, via the elimination of PFAS and microplastics. The group estimates that New Jersey's water infrastructure requires at least $30 billion in investments over the next 30 years to replace lead pipes and remove PFAS from drinking water. A bill pending in the New Jersey Legislature, titled the "Protecting Against Forever Chemicals Act,"[17] proposes to phase out the sale of cosmetics, carpets, cookware, fabric treatments, and clothing containing intentionally added PFAS. The bill also proposes to increase labeling transparency for PFAS-containing products.

Early this year, the New Jersey Legislature passed a bill[18] requiring the New Jersey Department of Environmental Protection (NJDEP) to consult with the Drinking Water Quality Institute and conduct a study on the current regulation of PFAS in drinking water. This study will also include an assessment of the feasibility of setting an MCL applicable to all PFAS, or to certain subclasses of PFAS, rather than separate MCLs for each individual PFAS. Gov. Phil Murphy also signed a bill[19] into law that will prohibit the use of PFAS-containing firefighting foams throughout the state, following a two-year grace period. The law allocates $250,000 to the NJDEP to create a grant program to assist small fire departments with disposing of these foams.

Conclusion

Last year was an active year for PFAS regulation across the country, with more to come in 2024. Public entities and businesses across many industries may now find themselves subject to updated regulatory requirements designed to minimize PFAS, and compliance will likely be costly. As public attention on PFAS increases and scientific understanding further develops, the EPA is likely to propose even more stringent PFAS regulations and environmentally active states like New Jersey are likely to follow suit. ■

Endnotes

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