

States Continue to Dominate PFAS Regulation, Despite Some Federal Efforts

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States continue to lead the way on the regulation of per- and polyfluoroalkyl substances (referred to collectively as “PFAS”), though targeted federal efforts to regulate the chemicals are ongoing, and more efforts are expected in the new year.

PFAS are a class of human-made “forever chemicals” valued for their strength, nonstick, and water-resistant properties. They are present in many consumer products, like waterproof clothing and kitchenware, and a host of other products, including in firefighting foams (such as aqueous film-forming foam or “AFFF”) long used by the military and required for use at airports nationwide under current FAA regulations and guidance. Releases of PFAS can lead to groundwater contamination and PFAS chemicals are readily absorbed but not readily eliminated from the human body. Studies link exposure to unsafe levels of PFAS to adverse health impacts, including development problems, cancer, liver effects, immune system problems, thyroid effects, and more. While the Environmental Protection Agency (EPA) has considered PFAS regulation in the past few years (see February 14, 2019 KKR Brownfields Law Alert, “EPA Announces PFAS Action Plan”) and has set a non-binding lifetime health advisory for two PFAS chemicals, PFOA and PFOS, in drinking water at 70 parts per trillion (ppt), so far both Congress and the EPA have largely declined to take federal action on PFAS.

That all seemed about to change in early December 2019 as federal lawmakers appeared close to a deal on a provision in the National Defense Authorization Act (NDAA) reauthorization for fiscal year 2020 that would have regulated PFAS at the federal level in two significant ways. First, the proposal would have amended the federal Superfund law to include PFAS in the definition of “hazardous substance,” a designation that would trigger Superfund liability for parties found to be liable for releases of PFAS, and would have led to a dramatic increase in PFAS cleanup efforts and PFAS cost recovery litigation under Superfund. Second, the proposal would have compelled the EPA to establish a federal regulatory maximum contaminant level (MCL) for PFAS in drinking water, a move the agency has been considering for the past few years. Negotiations failed at the end of the first week of December, with some Senators claiming the proposed MCL for PFAS was too high to be sufficiently protective of human health while others expressed it would be too restrictive. In mid-December, negotiators tried for a more limited deal on just the drinking water component, pushing to add language to an appropriations bill that would ensure any federal drinking water standard set for PFAS was at least as stringent as EPA’s current lifetime health advisory for the chemicals PFOA and PFOS (70 ppt). Again, negotiations unraveled at the eleventh hour and the provision was struck from the bill the evening of December 15, 2019.

The current version of the NDAA, passed by Congress on December 17, 2019, and expected to be signed swiftly by President Trump, does still address PFAS – it will require the Department of Defense to phase out the use of military firefighting foam with PFAS by 2024, increase national PFAS monitoring requirements, provide funding for human health studies, and require blood testing for PFAS during annual physicals for military firefighters. More significant action on PFAS at the federal level could happen in the future. In January 2020, the full House plans to hear the PFAS Action Act (H.R. 535 / S. 638), a bill with bipartisan support that would compel the EPA to list PFAS as hazardous substance under Superfund. Federal lawmakers are also pursuing other avenues for federal PFAS regulation – over twenty measures have been proposed in this Congress alone that would promote enhanced detection and research, mandate new regulations, and provide cleanup assistance and special attention to exposure at military sites.

In the absence of a federal MCL or inclusion of PFAS as a Superfund “hazardous substance,” states have taken action to regulate PFAS. A number of states have established regulatory standards addressing



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PFAS in firefighting foam, food packaging, children's products, and furniture. States have added PFAS to their own lists of hazardous substances for state Superfund regulation. Delaware includes PFOS and PFOA on such a list under their Hazardous Substances Cleanup Act, and similar legislation is pending in Maine and Pennsylvania. Additionally, several states have established their own regulatory MCLs: Vermont has set a 20 ppt limit for a suite of five PFAS combined, and New Jersey has limits of 10 ppt each for PFOS and PFOA, and 13 ppt for PFNA. Seven other states, including Michigan, New Hampshire, and Washington, have pending legislation that, if passed, would establish state-wide MCLs.

California has been especially active on PFAS regulation in 2019 and looks to continue that trend in 2020. The State Water Resources Control Board (SWRCB), on the recommendation of the Office of Environmental Health Hazard Assessment (OEHHA), has set drinking water notification levels (NLs) (i.e., health-based advisory levels for chemicals that lack MCLs) for PFOS and PFOA at 6.5 ppt and 5.1 ppt, respectively – the lowest NLs in the nation, and the lowest levels at which these chemicals can be reliably detected in drinking water using currently available and appropriate technologies. In March 2019, the SWRCB began a state-wide assessment to determine the scope of PFAS contamination in water systems and groundwater and has issued investigatory orders to require some airports and landfills to sample soil and groundwater for PFAS. On July 31, 2019, the Governor signed A.B. 756, a law that authorizes the SWRCB to order public water systems to monitor for PFAS and report detections, starting on January 1, 2020. In October 2019, the SWRCB issued orders to hundreds of chrome plating facilities requiring investigation of potential releases of various PFAS. Additionally, the SWRCB has requested that OEHHA develop “public health goals” for both PFOA and PFOS – levels of the contaminants in drinking water that the state has determined do not pose a significant health risk – signaling California has begun the process of establishing binding MCLs for these two PFAS chemicals. The SWRCB indicated it may consider other PFAS chemicals later on, as data permits. Given these actions, public water systems, airports, and landfills in California can expect continued increased scrutiny under state PFAS regulations even absent federal developments.

Any entities that may have owned or operated properties where PFAS chemicals were released or caused such releases themselves should take steps to understand the extent of PFAS contamination and act to minimize liability by identifying and stopping any ongoing or future releases of PFAS. Further, any entities that use AFFF should stay tuned to current regulatory developments and continuously evaluate whether Class B firefighting foams are necessary, ensure that any AFFF testing occurs in areas that have adequate containment, and carefully document AFFF usage.

Kaplan Kirsch & Rockwell regularly advises clients nationwide on PFAS matters. If you have questions regarding PFAS regulations or how to manage your potential PFAS liability, please contact Tom Bloomfield, Polly Jessen, Sara Mogharabi, or Nick Clabbers.