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PFAS Regulation is Coming… Are You Ready?
A lawyer's view of the evolving regulatory landscape of perfluoroalkyl substances (PFAS)

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Agenda

1. PFAS is Everywhere
2. History & Regulation
3. What's Happening Now & What's Coming
4. Litigation Overview
5. What can we do to Prepare?

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Where PFAS is Found

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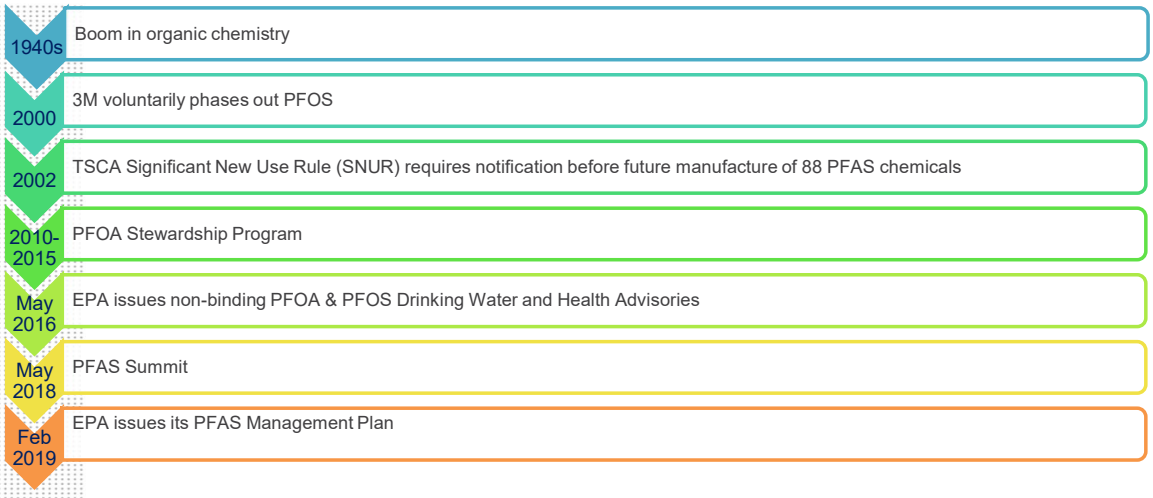
Federal Timeline - History



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PFAS Phase Out and Replacement

PFOA and PFOS

- Most studied PFAS chemicals
- Voluntarily phased out by industry but still persistent in the environment

Gen X Chemicals and PFBS

- Replacement chemicals for PFOA and PFOS
- Very few scientific studies on these new PFAS

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What we know…and don't know

"EPA's draft assessments for GenX chemicals and PFBS focus solely on the human effects associated with oral exposure to each chemical; they do not consider potential cumulative (mixture) effects of GenX chemicals and PFBS, or their possible interactions with other PFAS and/or other chemicals."

EPA 2018 Fact Sheet: Draft Toxicity Assessments for GenX Chemicals and PFBS

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Federal PFAS Regulatory Authority

Safe Drinking Water Act:

- Currently no maximum contaminant levels (MCLs) established for PFAS chemicals

Toxic Substances Control Act:

- Industry must report chemicals manufactured or processed in the U.S. over the last 10 years
  - Meant to help EPA prioritize chemicals for risk evaluation
- EPA must review new chemicals before they can commercialize
- EPA must undertake a 9-12 month prioritization process to designate a chemical High-Priority or Low-Priority
  - If high priority, risk evaluation must commence immediately

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Federal PFAS Regulatory Authority (cont.)

CERCLA

- PFAS not listed as CERCLA hazardous substances but could trigger CERCLA in some circumstances
- Does not contain any chemical-specific cleanup standards

Clean Air Act

- Dual-phase regulation – set "technology-based" standards in 1st phase; assess remaining health risk in 2nd phase (within 8 years of setting technology standards)

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EPA's PFAS Action Plan – 5 Priority Actions

EPA Action(s)	Timeframe
1. Propose a national drinking water regulatory determination for PFOA and PFOS.	By end of 2019
2. Initiate the regulatory development process for listing PFOA and PFOS as CERCLA hazardous substances.	Ongoing Started in 2018
3. Develop interim cleanup recommendations to address groundwater contaminated with PFOA and PFOS.	Anticipated 2019
4. Finalize draft toxicity assessments for GenX chemicals and PFBS; develop additional PFAS toxicity values.	2019/2020 (by chemical)
5. Use new statutory requirements added by the Lautenberg Act to review new PFAS and issue supplemental proposed SNUR on PFAS.	Ongoing Started in 2016

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EPA Action = SDWA Process

Safe Drinking Water Act – Maximum Contamination Level (MCL)	Timeframe
1. EPA periodically publishes Contaminant Candidate List or CCL: EPA decides whether to regulate at least five or more contaminants on the list for ("Regulatory Determination").	2007 – CCL3 2018 – CCL4
2. Regulatory Determination Process: Requires findings: (a) may have an adverse effect on the health of persons; (b) contaminant in public water systems at levels of public health concern; (c) regulation presents a meaningful opportunity for health risk reductions for persons served by public water systems. Very time/analysis intensive process; with public notice/comment.	TBD
3. Regulatory Determination Outcomes = RD; no RD; health advisory;	
4. Rulemaking: Develop national primary drinking water regulation (NPDWR), including FR notice and comment; review of health effects; maximum contaminant level goal (MCLG); then establish "MCL" or treatment standard	
5. Appeals: Not uncommon	

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EPA Action = SDWA Process - ACTIONS

Safe Drinking Water Act – Maximum Contamination Level (MCL)	Timeframe
1. November 07, 2019 – EPA announces: "The Agency is moving forward with the drinking water standard setting process outlined in the Safe Drinking Water Act (SDWA) for PFOA and PFOS….	2007 – CCL3 2018 – CCL4
2. Regulatory Determination Process: "As a next step, EPA will propose a regulatory determination for PFOA and PFOS by the end of this year…"	TBD
3. Additional PFAS Chemicals…. The Agency also gathering and evaluating information to determine if regulation is appropriate for other chemicals in the PFAS family." (via 45 day IRIS public comment process for 5 additional chemicals: PFDA, PFNA, PFHxA, PFHxS and PFBA). 4. Monitoring… EPA will propose nationwide drinking water monitoring for PFAS under the next Unregulated Contaminant Monitoring Rule cycle.	Public Comment Ends: 12/23/19

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EPA Action = CERCLA Process

	Timeframe
1. EPA issues Proposed Rule listing in Federal Register: EPA identifies need for rule; solicits public notice and comments;	Pending
2. EPA considers comments and issues Final Rule: EPA reviews comments and revises Proposed Rule (as appropriate) and issues Final Rule;	
3. Final Rule: codified in Code of Federal Regulations;	
4. Appeals: Not uncommon	
UPDATE: - June 10, 2019, EPA concluded public comment on the *draft Interim Recommendations for Addressing Groundwater Contaminated with PFOA and PFOS*, when finalized it will provide cleanup guidance for federal cleanup programs (e.g., CERCLA and RCRA). - EPA is initiating the regulatory development process for listing certain PFAS as hazardous substances under CERCLA.	

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EPA Action = TSCA

	Timeframe
1. Advanced notice of proposed rulemaking - would allow the public to provide input on adding PFOA and PFOS to the Toxics Release Inventory toxic chemical list. EPA Supplemental Proposal to ensure that certain persistent long-chain PFAS chemicals cannot be manufactured in or imported into the United States without notification and review under the TSCA.	11/25/19
2. EPA will need to proceed through Final Rule: EPA's ANPR is a good indicator of where EPA is going with TRI under final RM process and may provide guidance;	TBD
3. Final Rule: codified in Code of Federal Regulations;	TBD
4. Appeals: Not uncommon	TBD

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2019 US Congressional Action on PFAS

- Scope/Research: Funding for surveys/studies/and health impacts of PFAS (pending);
- Regulatory: Classify PFAS as "hazardous substances" under CERCLA; Set MCL under SDWA for PFAS chemicals (pending);
- States/Cities: provide $ for regulation, research and cleanup (pending);
- Military Bases: Studies and cleanup of PFAS (pending);

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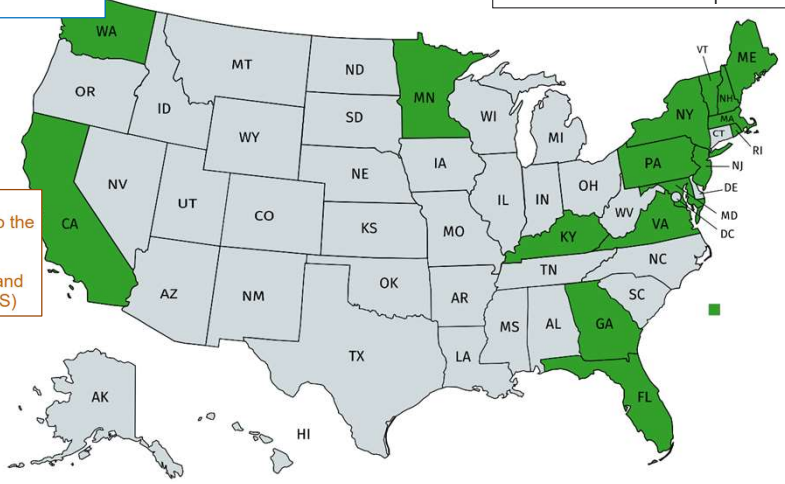
States lead the charge.

Washington State will ban PFAS in food packaging
In 2018, the Washington State legislature passed a new law that prohibits all per- and polyfluorinated substances (PFAS) in paper food packaging.

NJ Makes Regulatory History; Safe Drinking Water Standard for PFNA Adopted

Chemicals Listed Effective November 10, 2017 as Known to the State of California to Cause Reproductive Toxicity: Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS)



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Litigation Landscape – Who is Suing Whom?

Nature of claims:

- Personal injury/class action; property damage; public/private nuisance and trespass from contamination; state statutory claims

Potential litigants:

- Plaintiffs: individuals/class action; state and local governments affected by PFAS contamination; local water system owners;
- Defendants: chemical manufacturers; product manufacturers; landfill owners & operators; public and private drinking water system owners; DOD; airports; fire departments; local governments;

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Representative Cases

West Virginia dairy farmers sued product manufacturer

- 3,550 personal injury claims arising from a leak at local plant that allegedly contaminated local water supplies
- Settled for $671 million

State of New York v. six firefighting foam manufacturers

- Rooted in theories of nuisance, strict products liability, and failure to warn
- Alleged contamination of soil, fish and water by PFOS and PFOA in firefighting foam used at military and civilian airports
- State seeking to recoup $38 million in cleanup costs

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Representative Cases

West Morgan East Lawrence Water and Sewer Authority (AL)

- The water authority had sued manufacturer to pay for a new water filtration system to remove PFAS discharged from manufacturer facility on the Tennessee River in Decatur.
- Manufacturer will pay the West Morgan East Lawrence Water and Sewer Authority $35 million in lawsuit settlement.

Washington landowners Sue DOD and USAF for historic PFAS

- Three land owners in Airway Heights and Medical Lake are suing the United States, the Department of Defense and the Air Force over groundwater contaminated by firefighting foam pollutants since the 1970s from Fairchild Air Force Base.
- Alleged contamination of soil, fish and water by PFOS and PFOA in firefighting foam used at military and civilian airports.
- Seeking diminution in value for cropland and residential properties due to PFAS contaminated groundwater.

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Take-aways

1. PFAS: (Not) gone and (not) forgotten;
2. EPA closer to establishing a legal “standard of care” and statutory limits (SDWA & CERCLA);
3. US Congress moving toward action, *and there is bipartisan support!*
4. US States are in the lead (for now);
5. Regulation and litigation should expand;

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How to Prepare Your Company for PFAS Regulation/Litigation

Procurement	Due Diligence	Worker Health & Safety
• Be aware of PFAS in your supply chain • Include provisions addressing PFAS contamination/prohibitions in contract and lease language • Evaluate PFAS alternatives	• Understand what environmental surveys have been completed in your local area and whether local soil/groundwater has been impacted by PFAS • Consider including PFAS survey in Phase I/Phase II when seeking to acquire property, but PFAS is currently *not* a REC under CERCLA; • Follow changes to state and federal PFAS rules and regulations • Environmental Audits re: PFAS	• Implement measures designed to protect workers from exposure to PFAS • Sample private drinking water wells (under privilege) • Evaluate voluntary steps to reduce, eliminate or use alternatives to PFAS chemicals

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Questions

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