

Will 2021 Be Remembered for a PFAS Sea Change?

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Growing awareness of the potential dangers of such chemicals, supplemented by initial (and still developing) research, suggests they may be capable of causing certain cancers, liver and kidney issues, and other health problems – has led to public and regulatory scrutiny.

Despite having been around for decades, PFAS – per and poly-fluoroalkyl substances used in a bevy of everyday products – appear poised to face a new wave of litigation this year. That’s because the companies that use PFAS in their products will likely experience the same kind of lawsuits as those that actually *produce* the so-called “forever chemicals.”

The sea change, which might have already begun based on lawsuits in Wisconsin and Texas, are a result of converging regulatory, legal, political and even social pressures. The problem is incredibly complex, as the same reason PFAS has such utility – its durability – means it can persist in the ground, in water supplies, the air we breathe and even human bloodstreams. The sheer ubiquity of PFAS has also made it extremely difficult to ascertain how much, in what contexts, can cause health issues.

No matter the case, for companies that use PFAS in their products – indeed, for companies that might have even used them in their products years or decades ago – now is the time to be on high alert, to understand the forces that led to this moment and most importantly, to prepare.

Converging Public and Regulatory Winds

Like so many discoveries, the first PFAS were developed by accident. This was in the 1930s, when chemists at 3M and DuPont were researching carbon-based chemical reactions. During one experiment, an unusual coating remained in the testing chamber – and eventually proved to be totally resistant to any efforts designed to break its atoms apart. After World World II, the product developed from this chemical came to be known as “Teflon.” 3M’s own PFAS chemical (“Scotchguard”) soon followed suit. Now, various PFAS chemicals are used in thousands of products, ranging from firefighting foam to carpeting to food packaging.

HOW TO PREPARE

- Know What You're Dealing With By Collecting Data – Now
- Advocate For Yourself
- Start Learning How To Treat And Remove PFAS
- Review Insurance Plans For Pfas Exclusions
- Fully Assess What You May Be Held Responsible
(Versus What Might Have Been Caused By Other Factors)

But growing awareness of the potential dangers of such chemicals, supplemented by initial (and still developing) research, suggests they may be capable of causing certain cancers, liver and kidney issues, and other health problems – has led to public and regulatory scrutiny.

Some states have acted on PFAS on their own in recent years – six states, for instance, have developed their own drinking water standards – while others are waiting on more direction from the federal government. Importantly, and in contrast to some other environmental matters in recent years, movement on PFAS that began under President Barack Obama largely continued under President Donald Trump – with the notable exception of a last-minute change to an EPA assessment, which replaced a “reference dose” (i.e., the single number describing the chemical’s toxicity) with a range of values.

Other steps, however, included an announcement on November 30 to address [PFAS in wastewater](#) and advanced notice of [proposed rulemaking from](#) the Environmental Protection Agency (EPA) on January 14, less than a week before the inauguration of Joe Biden as the nation’s 46th president. The fact that PFAS regulation advanced under Trump has set up Biden to move quickly on something he prioritized in his campaign. Biden not only pledged to designate PFAS a hazardous substance but he picked a North Carolina official [known for leading](#) one of the most aggressive responses to PFAS in the country to run the EPA.

Perhaps sensing the changing tides, more and more states have or are now planning to introduce legislation to limit PFAS – be it in food packaging (11 states); medical monitoring, strict liability, and/or an extension of statute of limitations for PFAS lawsuits (at least 5 states); or PFAS in biosolids used as fertilizer (at least 5 states).

The public, too, is increasingly aware of PFAS given warnings about eating [deer and fish](#) from some areas and even reports that PFAS could affect COVID-19 symptoms and vaccine effectiveness.

PFAS Litigation Heating Up

On January 22, DuPont de Nemours Inc. and its spinoff Chemours Co., [agreed to](#) a \$4 billion settlement regarding PFAS contamination depicted in the 2019 movie “Dark Waters.” But for manufacturers and other companies that use PFAS – as opposed to companies like DuPont who produce the chemicals – another



January settlement might be more significant.

On January 7, Tyco Fire Products, a subsidiary of Johnson Controls, settled a class action lawsuit with 200 households in northern Wisconsin who allege their drinking water was contaminated by a nearby site that tests firefighting foam (which is often cited as a source of PFAS). The \$17.5 million settlement obviously pales in comparison to the billions involved in the DuPont matter – but it’s an early sign that the plaintiffs’ bar is expanding their targets when it comes to PFAS.

The same law firm that represented Peshtigo, Wisc., filed a class action lawsuit for contamination of groundwater relied upon by private well owners in Lubbock, Texas, less than two weeks later. The firm

alleges contamination related to “decades of use, storage, and disposal of” Aqueous Film-Forming Foams at the nearby Reese Air Force Base.

Textiles manufacturers are already feeling increased heat by way of subpoenas from plaintiffs’ bar, while food packaging and cosmetics – PFAS is used in many products, including sunscreen – could be next. The Biden administration’s ultimate move to designate PFAS a hazardous substance will only accelerate the pace of lawsuits – yet there is some question about how long it might take for that to happen.

Eva Gartner, managing attorney for the toxic exposure and health program at Earthjustice, a nonprofit that litigates environmental issues, [told MarketWatch](#) early this year that she expects the process for imposing regulations to take years – *unless* the EPA moves to act on an expedited basis. Despite an uncertain timeline, it’s really only a matter of when, not if, PFAS will be declared a hazardous substance.

How to Prepare

These social, regulatory, and litigious headwinds mean companies facing potential liability – including those that might have used PFAS in their products years or decades ago – need to get their houses in order. Here’s how to get started.

1. *Know what you’re dealing with by collecting data – now.* When the EPA designates PFAS as a hazardous substance, any number of companies are going to have to sample for PFAS in such things as soil, groundwater and eventually even the air. There’s no reason not to start doing so now.

That, however, can be easier said than done. Even many regulators don’t have a clearly defined sense of how, exactly, to reliably test for PFAS – and it can be difficult to decide among the burgeoning crop of testing organizations which are reliable. This means it’s critical that you work with a consultant who knows the science behind PFAS, and who can guide you through the sampling process.

2. *Advocate for yourself.* The wave of coming PFAS-related regulation – and the sheer newness of it – will give companies who may be liable the chance to weigh in. This can go beyond public comment periods and lobbying efforts: for instance, companies can advocate to set some boundaries with regulators outlining what exactly they’re testing for, whom they’re testing and where, and what the minimum parameters are for doing so successfully.
3. *Start learning how to treat and remove PFAS.* At the moment, there’s no one way to get rid of PFAS: some argue for burning it, others argue for deep-well injection, and numerous pilot studies are ongoing. Business leaders and their counsel need to stay abreast of this developing body of research, as well as new guidance from regulators, such as an [interim guidance document](#) on the disposal of PFAS from the EPA.
4. *Review insurance plans for PFAS exclusions.* As PFAS tort cases and regulation heat up, there will likely be a related influx of insurance litigation revolving around whether PFAS-related issues are covered. Particularly ahead of the EPA designating PFAS substances as hazardous, organizations should look at their coverage and leverage their brokers to negotiate and avoid exclusions during their annual review periods. Evaluate whether a pollution liability policy is necessary and cost-effective based on the information available about PFAS contamination and regulation in your area.

5. *Fully assess what you may be held responsible (versus what might have been caused by other factors).* Today's world is filled with contaminants – and it's this ubiquity (as well as PFAS') that can make it difficult to parse out whether the cause of a potential health issue might stem from your company or a range of other behavioral and environmental factors. This only gets more complex when you consider that PFAS has been around for nearly 80 years.

A key facet of defending against PFAS litigation, then, is understanding all the potential and/or alternative causes – be it an individual's medical history, upbringing, other environmental factors, etc. – that might have contributed to a given issue.

The wave of PFAS regulation and litigation is just beginning and won't slow down with a new presidential administration. Business leaders and their counsel should start preparing for this eventuality – today.

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