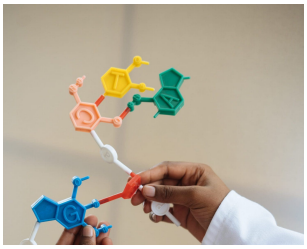

Working in a PFAS world: What you need to know

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Per-and polyfluoroalkyl substances (PFAS) are a group of close to 9,000 manmade chemicals with unique heat, oil, stain, grease and water-resistant properties, widely used in a variety of industrial and consumer products since first created in the 1940s. These properties made them an ideal ingredient for firefighting foams used to put out oil- and fuel-based fires around the world for many decades.

PFAS are almost ubiquitous in our environment, contained in such everyday items as food packaging, nonstick cookware, furniture coatings, carpeting, apparel, paints, soaps and personal care products. Due to their stability and resistance to degradation, PFAS are widely referred to as "forever chemicals" in the news media.

History of PFAS

Several members of the PFAS chemical family are extremely toxic. In 2022, the United States Environmental Protection Agency designated one of the most widely-used PFAS as a probable human carcinogen and issued drinking water-based health advisory levels for it and another widely-used PFAS in the subpart per trillion level. For comparison, one part per trillion is equivalent to one drop of water in 20 Olympic-sized swimming pools. The agency also proposed to list the two as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act, which is the most significant federal statute that creates notification and potential cleanup liability for releases to the environment. If that listing goes final, it will also make PFAS a required aspect of investigations under ASTM's Phase I site assessment guidelines for real estate transactions. The agency also added PFAS to its list of chemicals subject to right-to-know reporting by industry and announced plans to issue stringent proposed drinking water standards in 2023.

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Beyond environmental issues

Legal issues related to PFAS have expanded far outside the realm of environmental law. What began as contamination of water supplies surrounding a few military bases and chemical plants now includes a broad spectrum of mostly state-driven reporting obligations and use and labeling restrictions, and thousands of new product liability and tort class actions filed across the country. PFAS liability considerations extend beyond just manufacturers and include utilities, local governments, lenders, insurers, restaurants, real estate developers and even farmers on whose land PFAS-containing fertilizers were applied.

While U.S. EPA's regulatory actions have so far been limited, more than two dozen states have moved ahead, enacting statutes and/or adopting rules regulating PFAS in some way. Most issued advisory or notification levels for drinking water, but several adopted standards for drinking water, soil, biosolids and surface water discharges. Several others require PFAS labeling or prohibit the manufacturing or selling of products containing PFAS. Roughly 124 state bills are currently pending across the U.S., aimed at addressing some aspect of PFAS.

Indiana PFAS regulation

Here in Indiana, four PFAS bills have been introduced in the General Assembly this session. Two bills, Senate Bill 482 and House Bill 1219, would fund biomonitoring pilot programs to analyze blood samples from firefighters, with a goal to evaluate potential health implications associated with PFAS exposure. A separate bill, House Bill 1341, would prohibit fire departments from purchasing PFAS containing firefighter gear. A fourth, House Bill 1530, would require the Department of Health to adopt maximum contaminant levels for PFAS in drinking water from public water systems no less stringent than U.S. EPA's health advisory levels.

Enforcing PFAS laws

Enforcement initiatives for PFAS at the federal level are also picking up speed. Last month, U.S. EPA proposed to move PFAS

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contamination to its list of highest national priorities under its National Enforcement and Compliance Initiatives. In the notice, the agency invited public comment on a new initiative "holding polluters and other responsible parties accountable for their actions, ensuring that they assume responsibility for characterization and remediation efforts and prevent future releases of PFAS," and "focus[ing] enforcement efforts on … manufacturers whose actions result in the release of significant amounts of PFAS into the environment, and on federal facilities that may be a significant source of PFAS contamination." Public Comment on EPA's NECI for Fiscal Years 2024-2027, 88 Fed. Reg. 2096 (Jan. 12, 2023).

And with respect to PFAS in wastewater, the agency issued detailed guidance in December urging state and local governments (1) to impose PFAS monitoring requirements in permits for treatment plants receiving influent from customers with operations known or suspected of using PFAS-containing materials, and (2) to require sewer customers to answer surveys about potential presence of PFAS and take steps to eliminate sources of PFAS entering wastewater.

In many respects, the hard work on PFAS is just beginning. The impacts are certain to be far-reaching, and the "downhill effects" of regulation and litigation extremely broad in scope. Constant monitoring of new and proposed developments at the national, state and even local levels will be necessary to be able to counsel clients effectively as they face a "PFAS world." And not every question will have a clear "black and white" answer, as the PFAS landscape continues to evolve at all levels.

For more information, contact any attorney with Frost Brown Todd's Environmental practice group.

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