ELI Summer School
Law and Policy of Products Regulation

July 20, 2021
PFAS are Used and Found Everywhere
Responding to PFAS

- Thousands of PFAS substances produced since 1940s, over 600 in commerce today
- Focus on Perfluorooctane Sulfonate (PFOS) & Perfluorooctanoic Acid (PFOA)
  - Prevalent and commonly used for decades; production ended in early 2000s
  - Aqueous Film Fighting Foam (AFFF) (firefighting foam) can contain both
- Varying federal and state action values, policy approaches, and data collection efforts
  - Only Federal Level is a 70 PPT lifetime drinking water exposure level, over which there is concern
- Research focus on replacements and new chemistries
Varying Levels for Response, Notification, Regulation

**Minnesota**
- Health Risk Limit:
  - 35 ppt—PFOA
  - 15 ppt—PFOS
  - 47 ppt—PFHxS
- Health Based Values**
  - 6.5 ppt—PFOS (Notification level)
  - 5.1 ppt—PFOA (Notification level)

**Michigan**
- Drinking Water Screening Levels:
  - 9 ppt—PFOA
  - 8 ppt—PFOS
  - 9 ppt—PFNA
- Recommended Drinking Water Standard:
  - 84 ppt—PFHxS
  - 1,000 ppt—PFBS

**New York**
- Recommended Drinking Water Standard:
  - 10 ppt—PFOA, PFOS (expected to be finalized in 2020)

**Vermont**
- Health Advisory:
  - 20 ppt—PFHxS + PFHpA + PFOA + PFNA + PFOS

**NH DES**
- Ambient Groundwater Standard:
  - 12 ppt—PFOA
  - 18 ppt—PFHxS
  - 15 ppt—PFOS
  - 11 ppt—PFNA

**Massachusetts**
- Proposed MCL:
  - 20 ppt (could take effect in 2020) — PFOA, PFOS, PFNA, PFHxS, PFHpA, PFDA

**New Jersey**
- Drinking Water MCL:
  - 13 ppt—PFNA
  - 14 ppt—PFOA
  - 13 ppt—PFOS

---

*Health Risk Limit:* the concentration of groundwater contaminants that can be consumed with little or no risk to health and which has been promulgated under rule.

*Health Based Value:* Derived using same algorithm as health risk limits, but they have not been promulgated and have not undergone peer review.

PFAS Contamination Snapshot

Environmental Working Group and SSEHRI at Northeastern University, *PFAS Contamination in the U.S.*, https://www.ewg.org/interactive-maps/pfas_contamination/map/ (last updated Jan. 6, 2021)
PFAS Contamination Snapshot:
By Industrial Source/Activity that Used PFAS

State Regulation Snapshot

96 current policies in 30 states
49 adopted policies in 19 states

PFAS in the News

- 7/1: California regulations designating carpets containing PFAS as “Priority Products” go into effect
- 6/28: EPA releases proposed rule to collect, by 2024, data on 1,364 PFAS manufactured in any year since 2011 – including volume, exposures, health, disposal, byproducts – from manufacturers, including importers
- 6/23: New Mexico Governor petitions EPA to designate PFAS as “hazardous waste”
- 6/21: Maine Governor signs law setting PFAS maximum contaminant levels (MCLs) as 20 ppt
- 6/15: Sens. Collins and Blumenthal introduce No PFAS in Cosmetics Act
- 6/10: EPA withdraws PFAS Significant New Use Rule (SNUR) guidance, reinforcing concern with import of articles containing PFAS in “surface coatings”
- 6/3: Environmental and public health groups petition FDA to ban PFAS from food packaging
PFAS in the News

7/20  House voting on PFAS legislation, deadlines, H.R. 2467 PFAS Action Act of 2021

7/19  EPA publishes CCL 5 to collect PFAS in drinking water information, uses "class" approach

7/15  Maine to Ban PFAS Containing Products by 2030

7/14  EPA announces PFAS Testing Order Plans & Voluntary Program for Companies to Give up "LVEs" – both under TSCA

7/13  PFAS Manufacturers settle with Delaware for $50M

6/30  EPA calls for experts for SAB PFAS panel
## Federal Regulation Examples

<table>
<thead>
<tr>
<th>Safe Drinking Water Act (SDWA)</th>
<th>Toxic Substances Control Act (TSCA)</th>
<th>Resource Conservation and Recovery Act (RCRA)</th>
<th>Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authorizes EPA to set national health-based standards for drinking water to protect against both naturally-occurring and man-made contaminants</td>
<td>Authorizes EPA to regulate chemical substances and mixtures</td>
<td>Authorizes EPA to regulate hazardous waste</td>
<td>Authorizes EPA to clean up hazardous waste sites</td>
</tr>
<tr>
<td>Proposed Fifth Unregulated Contaminant Monitoring Rule (UCMR 5): requires sampling for 29 PFAS</td>
<td>EPA requires notice and review before the use of long-chain PFAS that had been phased-out can begin again; certain PFAS-containing imports must be reviewed and approved; proposed “Data Call” rule out for comment now</td>
<td>Petition to designate PFAS as hazardous waste from NGOs &amp; NM EPA also considering on own</td>
<td>Proposed bill to designate PFOA and PFOS as hazardous substances EPA considering on own</td>
</tr>
</tbody>
</table>
State Regulation Examples

**Drinking Water Standards**
- Setting Maximum Contaminant Limits (MCLs), Notification and Response Levels, or other Drinking Water Guidance
  - New Hampshire, New Jersey, Michigan, Maine – MCLs
  - California – Notification and Response Levels
  - Minnesota – Guidance

**“Hazardous” Designation**
- Designating PFAS as “hazardous” substances subject to additional remediation criteria
  - Massachusetts – PFAS are “hazardous material” subject to the notification, assessment and cleanup requirements of the Massachusetts Waste Cleanup Program
  - Minnesota – SF 1852 would designate perfluorochemicals as hazardous substances under Minnesota Environmental Response and Liability Act

**Food Packaging**
- Prohibiting added PFAS in food packaging or banning packaging containing PFAS if alternatives are identified
  - New York, Washington, Vermont, and Maine

**Consumer Products**
- Requiring manufacturers to consider alternatives – state can place restrictions on use of PFAS or manufacture can use alternative, remove PFAS, or withdraw the product
  - Maine: Ban set for 2030
  - California – listed carpets and rugs containing PFAS as priority product
  - May 2021 Vermont ban includes ski wax, carpets
Claims Against PFAS Manufacturers and PFAS Users

Manufacturers

• Defective Product
• Property Damage
• Groundwater / Soil Contamination
• Nuisance
• Injury
• Medical Monitoring
• Cleanup

Users

• Property Damage
• Groundwater / Soil Contamination
• Nuisance
• Injury
• Medical Monitoring
• Cleanup

This Photo by Unknown Author is licensed under CC BY-SA
# AFFF Multi-District Litigation

*In re Aqueous Film-Forming Foam Prods. Liab. Litig.*, MDL No. 18-02873 (D.S.C., filed Dec. 7, 2018): 13,000 PFAS Cases Combined

<table>
<thead>
<tr>
<th>Case Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Water Providers</td>
<td>93</td>
</tr>
<tr>
<td>States</td>
<td>9</td>
</tr>
<tr>
<td>Medical Monitoring</td>
<td>7,174</td>
</tr>
<tr>
<td>Personal Injury</td>
<td>2,416</td>
</tr>
<tr>
<td>Property Damage</td>
<td>3,740</td>
</tr>
<tr>
<td>Medical Monitoring and Personal Injury</td>
<td>36</td>
</tr>
<tr>
<td>Medical Monitoring and Property Damage</td>
<td>268</td>
</tr>
<tr>
<td>Medical Monitoring and Personal Injury and Property Damage</td>
<td>55</td>
</tr>
<tr>
<td>Personal Injury and Property Damage</td>
<td>81</td>
</tr>
<tr>
<td>Class Actions</td>
<td>6</td>
</tr>
</tbody>
</table>

*Medical Monitoring* - 36

-Medical Monitoring

*Regulating PFAS*
PFAS in a Pesticide Product – A Case Study

• September 1, 2020, Public Employees for Environmental Responsibility (PEER) contacted Massachusetts regulators claiming that there were unspecified PFAS in a pesticide used for mosquito control.

• December 2020, rinsates of containers used to store and transport the pesticide product yielded results supporting the source of contamination is associated with fluorinated HDPE containers.

• January 13, 2021, EPA asked states with existing stock of the mosquito product distributed in fluorinated HDPE containers to discontinue use and hold.

• January 14, 2021, EPA issued TSCA subpoena to the fluorination company.

• March 5, 20201, EPA confirms it has detected eight different PFAS from the fluorinated HDPE containers, with levels ranging from 20-50 parts per billion.

Toxic ‘forever chemicals’ found in pesticide used on millions of Mass. acres when spraying for mosquitoes

By David Abel Globe Staff, Updated December 1, 2020, 8:27 a.m.
Business Responses to PFAS Concerns

- Track Legal, Regulatory & Policy Developments (Federal and State)
- Evaluate Corporate PFAS Compliance Policies & Procedures
  - PFAS Program Governance, Structure & Content
  - Internal Due Diligence
  - Corporate Information Sharing
  - Monitoring & Reporting
  - Management of PFAS Stockpiles / Disposal of PFAS
  - Develop Corporate Risk Profile
  - Policies and Practices Related to Community and Media/External Engagement
  - Benchmarking
- Evaluate Legal Claims & Litigation Holds
- Manage and Respond to State Requests for Data and Information
- Assess Contamination Issues in Transactions