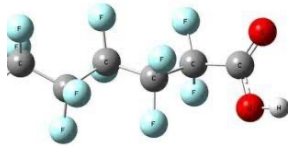


Environmental Law Update: What **PFAS Developments** You Missed This Summer When You Were Up at the Cabin (or planning for the State Fair)



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Federal PFAS Developments



EPA Follows its PFAS Strategic Roadmap

- **May 18, 2022.** Added five PFAS (HDPO-DA, PFOA, PFOS, PFNA, and PFHxS) to a list of risk-based values for site cleanups (Regional Screening Levels and Regional Remedial Management Levels). Based on ATSDR MRLs.
- **June 6, 2022.** Issued the first test order under EPA's National TSCA PFAS Testing Strategy for 6:2 fluorotelomer sulfonamide betaine, a chemical used in AFFF.
- **June 15, 2022.** Issued first time health advisories for GenX and PFBS and lowered existing health advisories for PFOA and PFOS.
- **July 18, 2022.** Codified the addition of five PFAS to the EPCRA section 313 list of reportable chemicals - Toxics Release Inventory (TRI).
- **August 26, 2022.** August 26, 2022. EPA announced proposed designation of PFOS and PFOA as CERCLA hazardous substances. Published September 6, 2022

PFOA and PFOS Interim Revised Health Advisories

How do you regulate at part per quadrillion?

- EPA said issued “in light of newly available science and in accordance with EPA’s responsibility to protect public health” - but issued before completion of EPA Science Advisory Board review. Opposed by OMB, DOD.
- Health advisories are “non-enforceable guidance” but ...
- Based on studies on suppression of vaccine response in children in the Faroe Islands - but no adverse clinical effect (decreased serum antibody concentration, but no increased infection) and confounding factors.
- Seems premature given ongoing national drinking water regulation rulemaking.
- Impacts on federal/state cleanups, existing drinking water treatment, and other unintended consequences?
- July 30, 2022. American Chemistry Council filed petition in DC Circuit challenging the health advisories.



	PFOA	PFOS
2009 Provisional health advisory (ppt)	400	200
2016 Lifetime health advisory (ppt)	70	70
2022 Interim health advisory (ppt)	0.004	0.02
Typical routine detection limit (ppt)	2	2
Reduction factor from 2016 and 2022	17,000 times lower	3,000 times lower



Proposed Designation of PFOS and PFOA as CERCLA 102(a) Hazardous Substance

ENVIRONMENTAL PROTECTION
AGENCY
40 CFR Part 302
[EPA-HQ-OLEM-2019-0341; FRL-7204-
02-OLEM]
RIN 2050-AH09
Designation of Perfluorooctanoic Acid
(PFOA) and Perfluorooctanesulfonic
Acid (PFOS) as CERCLA Hazardous
Substances
AGENCY: Environmental Protection
Agency (EPA).
ACTION: Proposed rule.

Direct Results of Designation

- EPA response to PFOA/PFOS releases without making an imminent and substantial danger finding
- EPA section 106 orders requiring PRPs to address PFOA/PFOS releases that pose an imminent and substantial endangerment
- EPA and state cost recovery actions against PRPs for PFOA/PFOS response costs.
- Private party cost recovery or contribution actions for PFOA/PFOS.
- PFOS/PFOA releases subject to CERCLA and EPCRA release reporting (1# RQ).

Other Impacts of Designation

- Reopen closed sites and settlements (check your reopener clauses)?
- No liability exceptions beyond existing CERCLA exemptions; liability for water and wastewater systems?
- PFOS/PFOA become hazardous substances under state mini-CERCLA statutes (see PA), but NOT MERLA.
- Source attribution and apportionment battles? Whose PFOS/PFOA? Precursor liability? Other PFAS?
- Manufacturer liability unlikely based on current CERCLA arranger liability case law.





PFAS Actions in the States

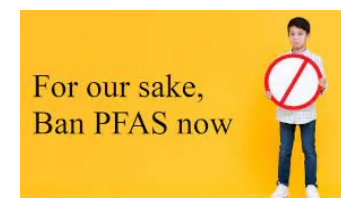


Regulatory Actions and Trends

- Mainstreaming of PFAS into regulatory and cleanup schemes such as PFAS identification and investigations efforts, MCL or cleanup limit development.
- MPCA MN: PFAS Monitoring Plan rollout

Legislative Actions

- Hawaii and Ohio pass restrictions on class B PFAS fire fighting foam - 24 states restrict use
- Five states pass restrictions on products containing PFAS (others tried)
 - CO: food packaging; rugs/carpets; apparel; juvenile/personal products; cookware; notice/labels
 - HI: food packaging
 - MD: food packaging; rugs/carpets
 - RI: food packaging
 - WA: consumer products
 - Previous product restrictions passed in CA, CT, ME, MD, MN, NY, VT and WA.
- Three states pass bills addressing limits of PFAS in soil, water, air or wastewater: FL, RI, VA
- IL passes PFAS incineration ban (again); MD bans landfilling and incineration of AFFF.
- Minnesota: Dozen plus PFAS bills died.





PFAS Litigation



"See? I told you sharks don't attack lawyers. It's a respect thing."

- **AFFF MDL** (in D. SC - MDL 2873) grows to more than 2700 active cases.
 - Claims for: (i) property damage - water providers, (ii) property damage - property owners, (iii) bodily injury, and (iv) medical monitoring for potential future injury.
 - Typical cause of actions: (1) public nuisance (2) private nuisance (3) trespass (4) negligence (5) strict liability for failure to warn and (6) strict liability for design defect
 - September 16, 2022. Defendants motion for sj on government contractor defense denied.
 - September 22, 2022. Case management order selecting first bellwether case – City of Stuart, Florida v. 3M et al. Trial to begin in June 2023.
- **Notable Settlement:** 3M and Wolverine \$54M Michigan property damage class action settlement.
- **Massachusetts** and **Wisconsin** join Alaska, Guam, Marana Islands, Michigan, Mississippi, North Carolina, New Hampshire, New Jersey, New Mexico, New York, Ohio and Vermont in suing PFAS manufacturers over contaminated water/NRD
- **Cities and counties** continued to join the PFAS litigation wave over the summer.
- **Consumer class actions** against restaurant chains, food packaging manufacturers and the cosmetics industry alleging the presence of PFAS in their products makes their product claims or labels false and misleading (e.g., compostable, sustainable, safe).
- **How will CERCLA Designation affect the litigation landscape?**