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HOW TO PREPARE
NEW PFAS RULES COMING IN 2020

Growing Concerns and Legal Challenges

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The management of PFAS CHEMICALS (THE "FOREVER CHEMICALS") is one of the biggest issues in environmental risk management today.

The United States and Canada are both ramping up their strategies to deal with PFOS and PFOA with probable high penalties for non-compliance. This article explains the recent history and the current and expected regulatory situation.

Throughout 2020 Americans and Canadians will encounter new regulatory compliance requirements for the PFAS class of fluorine chemicals about which we've written before.

Developers, environmental consultants, lenders and insurers all need to stay abreast of these developments. Penalties for non-compliance run high for regulated stakeholders, and the rollout of complex new statutes is confusing.

Massive Law Suits and Health Concerns

Around 7,866 per- and polyfluoroalkyl chemicals are classified in the PFAS category. Though useful in making everything from no-stick fry pans to microwave popcorn bags, they're linked with suspected health problems, including a possible elevated cancer risk. Public awareness increased last September with the release of the film *Dark Waters* the screenplay for which was based on a 2016 *New York Times* article about corporate lawyer Rob Bilott's legal battle with chemical giant DuPont.

Federal and state or provincial governments are moving forward with statutes and guidelines, and lawsuits are gaining traction. US apparel manufacturer Wolverine settled a lawsuit tentatively on December 10, 2019 for $69.5 million. Managing PFAS liabilities cost the chemical's manufacturer 3M Co. around $214 million during the fourth quarter of 2019 alone.

Hundreds of Chemicals? Or Thousands?

Internationally, the management of PFAS is governed by technical guidelines published by the United Nations Environmental Program that cover all persistent organic pollutants (POP). About 600 PFAS chemicals are in commercial use in the United States according to the US EPA. The OECD has identified thousands more. Despite PFAS identification as "emerging contaminants" the EPA approved 272 new PFAS since 2006 under the expedited "low volume exemption" process. During that time, the agency approved another 148 new PFAS using standard new chemical review procedures.

Now the EPA is moving forward with a national action plan for PFAS. The plan's components include cleanup, enforcement, research and monitoring. The agency has suggested drinking water advisories and is developing maximum safe contaminant levels. To understand concentrations in the system, the EPA will propose

adding PFAS chemicals to the next five-year national drinking water monitoring cycle. This could lead to draft mandatory national regulations, for which a public comment period is expected this year.

Although there are currently no actionable federal standards for PFAS in the US, EPA has established drinking water health advisory levels of 70 parts per trillion for two of the most prominent PFAS, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), yet some states are calling for much lower limits. These could be prohibitively expensive to chase, as they're already the background level in many places.

Standards currently differ widely:
CANADA'S DRINKING WATER LIMIT
is 200 ppt for PFOA and 600 ppt for PFOS, whereas New Hampshire recently regulated them at 12 and 15 ppt.

Congress Struggles with Legal & Financial Implications

Last year, Congress attempted to further legislate PFAS with provisions attached to the 2020 *National Defense Authorization Act* (NDAA). Two provisions didn't make it into the final bill. The first would have designated all PFAS as hazardous substances under the *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA). The second would have required the EPA to set a maximum contaminant level under the *Safe Drinking Water Act* (SDWA), which could have imposed huge costs on municipal treatment plants.

In the dying days of 2019 the House and Senate agreed to a compromise over PFAS-related provisions. PFAS requirements in the final NDAA require the DOD to phase out all such chemicals in firefighting foam by October 1, 2024 and clean up past contamination related to DOD actions. EPA was directed to add several PFAS compounds to the Toxic Release Inventory (TRI), issue guidance on how to destroy and dispose of PFAS materials, and increase drinking water monitoring.

The more controversial elements omitted from the final NDAA are being brought back in 2020, as they enjoy strong Congressional support. In February, under the NDAA, the EPA added 160 PFAS substances to the *Emergency Planning and Community Right-to-Know Act* (EPCRA). Industries subject to the legislation must start collecting data on the listed contaminants as of January 1, 2020, with the first TRI report due on July 1, 2021. Statutory penalties for noncompliance exceed $57,000 per day, per violation. The agency is expected to also regulate PFOA and PFOS under the *Solid Waste Disposal Act (SWDA).*

Sanders Bill Spurs Action

Earlier in January the House passed a resolution (the *PFAS Action Act* of 2019 or H.R. 535) on which the Senate will vote later this year. On January 29, Vermont Senator Bernie Sanders sponsored a bill alongside Senators Jeff Merkley (D-Ore.) and Ed Markey (D-Mass.) entitled the *Preventing Future American Sickness (PFAS) Act*. With its clever acronym highlighting the danger PFAS chemicals pose, the bill would classify PFAS as hazardous substances and make it easier to force manufacturers to pay for cleanup. It would also allow the EPA to issue cleanup grants for water treatment plants.

Guidance for Groundwater Remediation

The 2020 NDAA became law on December 20, 2019 — the same day the EPA released its "Interim Recommendations for Addressing Groundwater Contaminated with PFOA and PFOS." The recommendations offer guidance for remediation of contaminated sites under CERCLA and the *Resource Conservation and Recovery Act* (RCRA). Recommendations include screening for 40 ppt to assess whether PFOA or PFOS are present at a site and deserve further investigation; the EPA set a preliminary remediation goal of 70 ppt for contaminated groundwater that may be used as drinking water.

US State Actions

States and water utilities are on the frontlines of PFAS concerns and costs, and have asked the EPA to help gather information about companies and sites that generate them. Michigan alone has identified 76 sites with PFAS in amounts above the EPA's advisory level.

At least seven states and water utilities have spent over $150 million addressing PFAS contamination in drinking water, landfills, and other circumstances of potential public exposure, according to environment coalition Safer States.

New Hampshire, Vermont, Connecticut, New York, and California are poised to introduce PFAS legislation and about a dozen states are bringing in controls or BANS FOR AFFF FIREFIGHTING FOAM.

A national "Products Liability Multi-District Litigation Panel" has already been established for the material. Under a new California law (Assembly Bill 756), if a water system exceeds the response levels for these carcinogens, the system is required to take the water source out of service or provide public notification within 30 days.

California's current action-triggering response level for combined PFOA and PFOS is 70 ppt (consistent with the federal health advisory level). In February the state proposed lowering the limit for PFOA to 10 ppt and 40 ppt for PFOS.

Local & Regional PFAS Bans Growing

Efforts have cropped up at the local level, too. In 2018, a San Francisco ordinance (that took effect this January) restricted PFAS compounds in food-ware. PFAS are used in some of the compostable dinnerware that was supposed to be a healthy alternative to plastic. Biodegradable Products Institute, Inc. will no longer certify products with fluorinated chemicals under a standard that took effect on January 1, 2020. Last year, Maine banned PFAS in food packaging.

Canadian Regulatory Situation

Canada first addressed PFAS, PFOS and PFOA in a report and risk management strategy in 2006. The compounds were included in the Prohibition of Certain Toxic Chemicals regulations in 2012. Under the Chemicals Management Plan (CHP), Environment and Climate Change Canada's (ECCC) chemicals management division assessed a number of PFAS substances, with PFOS, PFOA, and LC [long chain]—PFCA found to be toxic and subsequently prohibited for manufacture and use (with a few exceptions).

Canada Weighs More Stringent Standards

Health Canada set the aforementioned 200 and 600 ppt screening values for PFOA and PFOS (respectively) in drinking water in 2012. Canada plans further restrictions to help protect the southern resident killer whale and the Saint Lawrence Estuary beluga whale. Canada may set more stringent standards in future to harmonize with the American rules currently in development, likely through the auspices of the International Joint Commission (IJC).

A Binational Strategy in the Works

Canada and the United States started drafting a binational strategy to deal with PFOS and PFOA a few years ago. Under the 2012 Great Lakes Water Quality Agreement, the two countries agreed to develop a list of Chemicals of Mutual Concern and plans to address them. PFAS and PFOS were among the first chemicals added by both nations in 2016.

Canada has federal guidelines that govern PFAS. Only one province — British Columbia — has its own standard. The federal government is developing new, more stringent guidelines that it expects to release in late 2020. Other provinces may adopt PFAS standards like those of BC, especially after the stricter federal guideline is passed.

It may be decades before we imagine a future without these "forever chemicals"; these actions and others comprise the start of an effort to better protect the public and our environment from their harmful effects.

ERIS will continue to update clients about important developments on this matter, and has compiled and highlighted PFAS records in its US Database Reports.