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PFAS and Beyond: Emerging Contaminants Regulation, Litigation, Recent Science, Risks, and Liabilities

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Holland & Knight

Regulatory Updates

1. CERCLA: PFAS as a “Hazardous Substance”
2. Toxics Release Inventory (TRI)
3. Toxic Substances Control Act (TSCA)
4. Drinking Water
5. Stormwater/Wastewater
6. Air Emissions
7. Biosolids
8. State Regulation
9. Food Specific Considerations
10. PFAS & Beyond

Big Picture Compliance Overview

- Consideration of both federal and state requirements
 - Many states are advanced in their PFAS regulatory schemes
- Evaluate operations and environmental media
 - Many different types of businesses & property uses implicate PFAS
- Air, Water (wastewater, stormwater, groundwater), Land (biosolids)
 - Each category of environmental media is implicated by PFAS use
- Evolving analytical methods
 - Limited EPA-validated analytical methods available (although EPA is working on it)
 - [Status of EPA Research and Development on PFAS | Safer Chemicals Research | US EPA](#) (Status of various test methods and timeline for validation, including non-potable water)
- Record-keeping & Reporting

CERCLA Refresher

- CERCLA and state analogs are retroactive – PFAS listing is likely
- [PFAS Action Act of 2021](#) was recently advanced in Congress in furtherance of this effort.
- [EPA's 2019 PFAS Action Plan](#) committed to listing PFOA and PFOS as “hazardous substances.”
- CERCLA requires remedial action when there is a release or substantial threat of release of any “pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare.”
 - EPA considers PFAS “pollutants or contaminants,” and has been using this concept to require PFAS remediation on a site-by-site basis using “applicable, relevant, and appropriate requirements.” CERCLA § 121(d) and NCP § 300.430(f)(1)(ii)(B).

Enforcement Trends

- Since 2002, EPA has initiated 12 enforcement actions related to PFAS, including four since 2017
- EPA also continuing to investigate PFAS releases, including issuing 20 information request letters and conducting 11 onsite inspections since July 2017, including joint inspections with states
- Some states are already beginning to require active and closed Superfund and brownfield sites to sample for PFAS, which increases enforcement and remediation risks.
 - New York and New Jersey require all active remediation sites to sample for certain PFAS.
 - New York requires owners or operators of sites that have already received regulatory closure to sample for PFAS.
 - New Jersey has expressed willingness to reopen closed sites to sample for PFAS.
 - California is requiring a phased investigation of PFAS at sites that are potential users of PFAS.
 - Massachusetts requires investigation of sites with potential PFAS contamination under its Massachusetts Contingency Plan.

Toxics Release Inventory (TRI) Reporting

- Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), [42 U.S.C. 11023](#)
- Based upon SIC and NAICS Codes, [40 C.F.R. 372.23](#)
- [National Defense Authorization Act FY 2020](#) (PUBLIC LAW 116–92—DEC. 20, 2019)
 - PFAS Act of 2019 (Sections 7301- 7362)
- Section 7321 added 172 PFAS compounds to TRI reporting requirement; compounds added continually
- Supplier Notification, [40 C.F.R. 372.45](#) (Safety Data Sheet)
- Guidance: [EPA TRI Guide with Updates NAICS Codes](#)
- Guidance: [EPA PFAS Reporting Guidance](#)
- June 3, 2021: 3 more PFAS added to TRI for July 1, 2022 reporting

Toxic Substances Control Act (TSCA)

- NDAA Section 7351: Amended Section 8 reporting requirements (EPA rule required by 1/1/2023)
- EPA [Proposed Rule](#) June 2021: Comments Due 9/27/2021
 - EPA proposes to require persons that manufacture (including import) or have manufactured these chemical substances in any year since January 1, 2011, to electronically report information regarding PFAS uses, production volumes, disposal, exposures, and hazards.
 - New regulations, 40 C.F.R. Part 705
 - Seeking manufacturing data from 2011 onward
 - Detailed reporting requirements will generate voluminous (largely) publicly available data
 - Roadmap to entities using PFAS

TSCA Proposed Rule – Key Issues

- Very broad inclusion of PFAS compounds
 - List is illustrative only
 - Defined by combination of carbon and fluorine atoms
 - More than 1,000 substances identified by EPA
- Very broad inclusion of entities subject to reporting
 - Manufacturers for any commercial purpose, including test marketing, R&D, etc.
 - Includes byproducts, impurities, chemical transformation during use or aging
 - Includes importers
 - Includes “articles” as well as chemical substances
 - No exemption for small businesses or de minimis quantities
- Very broad search of records and information required
 - “Known or reasonably ascertainable by” – all information in possession or control, plus a reasonable person what might be expected to possess, control or know

More TSCA Updates

- EPA [announces](#) elimination of Low Volume Exemptions (LVEs) for new PFAS compounds
 - EPA seeking voluntary withdrawal of previously issued LVEs
- [Significant New Use Rule \(July 2020\)](#)
 - prohibits companies from manufacturing, importing, processing, or using certain long-chain PFAS without prior EPA review and approval
 - Includes foreign articles which use/contain identified PFAS compounds (e.g., surface coatings)
 - Prior [Final Guidance Document](#) (Jan. 19, 2021) limiting the definition of surface coating has been withdrawn

Drinking Water

- [EPA Health Advisory](#) (May 2016)
- [EPA Preliminary Regulatory Determination](#) (March 2020) (PFOA & PFOS)
- [EPA Final Regulatory Determination](#) (March 2021) (PFOA & PFOS)
- [Fifth Unregulated Contaminant Monitoring Rule](#) (March 2021) (added 29 PFAS compounds to measure in public water systems broadly defined)
- Many states already regulating drinking water and PFAS contamination potentially impacting drinking water aquifers
 - [Massachusetts](#), [Michigan](#), [New Jersey](#), etc.
 - Updated lists can be found on the ITRC website
 - [PFAS Water and Soil Values Table Excel file](#)– (updated July 2021)

Stormwater/Wastewater Discharges

- National Pollutant Discharge Elimination System (NPDES):
- [Interim Strategy for Per- and Polyfluoroalkyl Substances in Federally Issued National Pollutant Discharge Elimination System Permits](#) (Nov. 30, 2020)
- [Multi-Sector General Permit \(MSGP\)](#) (March 1, 2021): stormwater management on industrial facilities
 - PFAS Monitoring not included (except New Mexico)
- [Preliminary Effluent Guidelines Program Plan | US EPA](#)
 - Announced September 8, 2021
 - Organic Chemicals, Plastics and Synthetic Fibers category to address per- and polyfluoroalkyl substances (PFAS) discharges from facilities manufacturing PFAS.
 - Metal Finishing category to address PFAS discharges from chromium electroplating facilities.

Evolving Analytical Issues

- [Status of EPA Research and Development on PFAS | Safer Chemicals Research | US EPA](#) (Status of various test methods and timeline for validation, including non-potable water)
- [PFAS Analytical Methods Development and Sampling Research | US EPA](#) (summary of research)
- [SW-846 Test Method 8327: Per-and Polyfluoroalkyl Substances \(PFAS\) by Liquid Chromatography/Tandem Mass Spectrometry \(LC/MS/MS\) | US EPA](#) (first EPA approved method beyond drinking water)
- [Frequent Questions about PFAS Methods for NPDES Permits | US EPA](#) (No Part 136 Method available, but lots of guidance and information for NPDES permittees and permit writers)

Air Emissions

- No federal regulation yet, but potential Clean Air Act jurisdiction if EPA acts
- Clean Air Act 111(b)(1)(A), [42 U.S.C. 7411](#), a compound that “contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare”
- Clean Air Act 112, [42 U.S.C. 7412](#), “Hazardous Air Pollutant” the compound provides a “threat of adverse human health effects” or other “adverse environmental effects.” (b)(2)
- EPA Office of Research and Development (ORD): [EPA PFAS Air Emission Measurements: Activities and Research | Science Inventory | US EPA](#) (June 2019) (ORD technical support to states in measuring emissions)
- [Other Test Method 45 \(OTM-45\) Measurement of Selected Per- and Polyfluorinated Alkyl Substances from Stationary Sources](#) (Rev 0 1/13/2021)
- [PFAS Action Act of 2021](#) (Section 8: mandates listing of PFAS as Hazardous Air Pollutants)
- [National Defense Authorization Act FY 2020](#) (PUBLIC LAW 116-92—DEC. 20, 2019)
 - Section 330-332: emission reductions from incinerators used for AFFF, data collection

Air Emissions: States

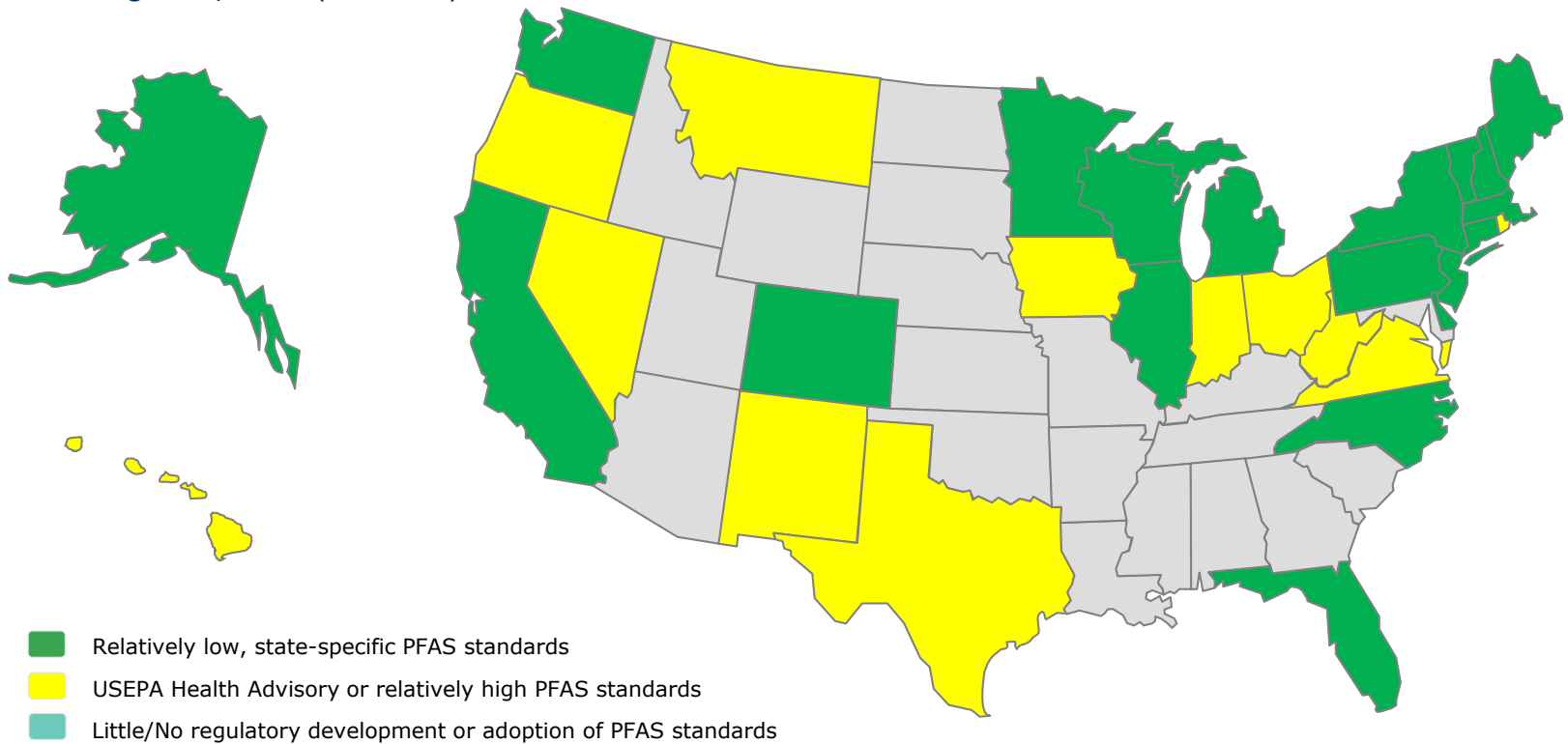
- States with PFAS air regulation in process:
 - [Michigan](#) (p. 36)
 - [New Hampshire](#) (p. 40)
 - [New York](#) (p. 64)
 - [Texas](#) (p. 14)
 - [California](#)
- [Assessment of Methods to Collect and Analyze Perfluoroalkyl and Polyfluoroalkyl Substances \(PFASs\) in Air, Dust and Soil](#) (February 2021) (California white paper)
- [Frequently Asked Questions on Air Quality Related Issues - Air Quality Workgroup, MPART \(michigan.gov\)](#) (Michigan Fact Sheet)

Biosolids

- Wastewater residual (sludge) used for land application (beneficial use)
- Regulated under Clean Water Act, Section 405, [33 U.S.C. 1345](#)
- [PowerPoint Presentation \(epa.gov\)](#) (PFAS Treatment in Biosolids – State of the Science, 9/23/20)
- [40 CFR 503](#) (PFAS not specified yet)
- [Biennial Reviews of Sewage Sludge Standards | Biosolids | US EPA](#) (EPA requirement to review & identify additional toxic pollutants that occur in biosolids and set regulatory standards)
- PFAS were newly-identified in the [Biennial Review No. 8](#) (Reporting Period 2018-2019)
- Further evaluation is an EPA priority
- [PFAS in Residuals | Mass.gov](#) (Massachusetts regulatory requirements for testing where permitted for reuse)

UNITED STATES PFAS REGULATORY STATUS

through July 2021 (Ramboll)



State by State Regulations & Guidance

- Despite the simplicity of the color-coded map, every state is different
- Enforceable regulations vs. advisory/guidance
- PFOA/PFOS vs. broader group (PFAS6, 20, Gen-X)
- What's being regulated?
 - Drinking water (public & private wells)
 - Groundwater (source of drinking water?)
 - Soil (Exposure & Protection of GW & DW)
 - Release notification
 - Remediation
- ITRC has the most up-to-date database (but the link can be hard to find)
 - [PFAS Water and Soil Values Table Excel file](#)– (updated July 2021)

PFAS Food Specific Considerations

- FDA Regulation: July 31, 2020 [Press Release](#) (Voluntary 3-year Phase-out of short-chain PFAS beginning January 2021, plus 18 months to exhaust stocks)
- Currently 15 Food Contact Notices by 4 manufacturers under the [Food Contact Substances Review Program](#)
- Replaced prior long-chain PFAS which were eliminated in 2011
- [Keep Food Containers Safe from PFAS Act](#) Proposed May 2019, would amend [21 U.S.C. 348](#) (h)(6) (food contact substance prohibition)
- State law prohibitions (PFAS use in food contact)
 - [New York](#) (December 2020)
 - [Washington](#) (2018)
 - [Maine](#) (June 2019)
 - [California](#) (pending March 2021)
 - [Vermont](#) (May 18, 2021)
- Example: Recent [study](#) of straws showed plant-based straws contained PFAS, including PFOA and PFOS

Evolving Theories of Liability

- Consumer Class Actions based on misrepresentation theories that food packaging is not biodegradable or compostable because PFAS is a “forever chemical”
 - *Digiacinto v. Albertsons Companies, Inc. et al.*, 3:20-CV-03382 (N.D. Cal. May 18, 2020)
 - *Ambrose v. Kroger Co.*, 3:20-cv-04009, (N.D. Cal. June 16, 2020)
 - *Nguyen v. Amazon.com, Inc.*, 4:20-cv-04042 (N.D. Cal. June 17, 2020)
- Damage to dairy operations because PFAS consumed by dairy cattle caused loss of Grade A permit for milk production
 - *Schaap v. 3M Co.*, No. 2:19-cv-00105 (D. N.M. Feb. 7, 2019)
- Environmental Groups [Petition](#) FDA (June 3, 2021)

PFAS and Beyond – Final Thoughts

- All emerging contaminants present regulatory and litigation risk
- Even non-binding governmental pronouncements can have cascading effects (like the ethylene oxide litigation craze)
- Litigation theories are just as emerging as the contaminants themselves
 - No longer traditional remediation claims (although those still exist)
 - Natural Resource Damages (NRD) claims likely to rise as science improves, including analytical methods & toxicology for compounds beyond PFOA/PFOS
 - Class actions will increase, even for plaintiffs who are never sickened
 - False representation and similar “marketing” claims will increase due to public perception of harm
 - Record-keeping burdens will increase & will provide a road-map to liability

Questions?

Thank you

Speaker Bio

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[Dianne R. Phillips](#) is an attorney in Holland & Knight's Boston office who concentrates her practice in litigation, regulatory, energy and environmental law. As former assistant general counsel for Suez LNG North America LLC and its wholly owned subsidiary, Distrigas of Massachusetts LLC, Ms. Phillips was involved in all aspects of regulatory compliance for the nation's oldest, continuously operating liquefied natural gas (LNG) import terminal located in Everett, Mass., including safety and security. Her LNG experience includes advising clients with respect to specialized regulatory compliance under 49 C.F.R. Part 193 and NFPA 59A.

Ms. Phillips' environmental practice focuses on brownfields redevelopment and remediation, including former military installations, former manufactured gas plants (MGPs) per- and polyfluoroalkyl substances (PFAS) sites, and vapor intrusion sites. She regularly advises developers, lenders and investors in real estate transactions involving contaminated property, enforcement defense, regulatory compliance, due diligence, and complex project development and permitting matters, including those under the National Environmental Policy Act (NEPA) and the National Pollutant Discharge Elimination System (NPDES), among others.

- Energy
- Environment/Environmental Advocacy
- Environmental Litigation
- Litigation and Dispute Resolution
- Land Use and Government
- Water Law
- Climate Change
- Pipelines

- Albany Law School, J.D.,
summa cum laude
- Cornell University, B.S.

- Massachusetts
- New York

Select PFAS Publications

- [EPA Finalizes 2021 Multi-Sector General Permit](#) (January 27, 2021)
- [EPA Memo Confirms Pending NPDES Plan to Monitor PFAS](#) (December 15, 2020)
- [MassDEP Seeks to Impose Its PFAS Monitoring Requirements in NPDES Permits](#) (July 15, 2020)
- [MassDEP Requests EPA Add PFAS to Monitoring Requirements Under the 2020 MSGP](#) (June 8, 2020)
- [Top 10 Things You Should Know About PFAS: Real Estate and Corporate Due Diligence](#) (May 29, 2020)
- [Environmental Protection Agency Extends PFOA/PFOS Comment Deadline to June 10, 2020](#) (April 28, 2020)

Select PFAS Publications

- [EPA Issues Draft Interim PFAS Guidelines for Public Comment](#) (April 29, 2019)
- [More Requirements and More Uncertainty - New York PFAS Update](#) (April 22, 2019)
- [More Congressional Scrutiny of the Federal Government's PFAS Efforts](#) (March 8, 2019)
- [Update on PFAS Toxicity Assessments](#) (March 5, 2019)
- [EPA Releases Anticipated PFAS Action Plan](#) (February 15, 2019)
- [MassDEP Issues Decision on PFAS Petition While Feds Reportedly Will Punt](#) (January 29, 2019)
- [MassDEP to Act on Petition to Regulate Entire Class of PFAS](#) (January 17, 2019)
- [MassDEP to Hold Public Meeting on Petition to Regulate Entire Class of PFAS Chemicals](#) (January 10, 2019)

Select PFAS Publications

- [EPA Seeks Comments on Latest PFAS Toxicity Study](#) (November 20, 2018)
- [House Committee to Review Latest PFAS Developments](#) (September 5, 2018)
- [EPA Extends Deadline for PFAS Comments to September 28, 2018](#) (August 30, 2018)
- [EPA Publishes Results of PFAS Treatability Study](#) (August 29, 2018)
- [Latest PFAS Developments](#) (June 25, 2018)
- [Massachusetts Targets Old Inventories of Firefighting Foam](#) (June 1, 2018)