

LEGAL ALERTS | AUG 09, 2019

PFAS Concerns Trigger Regulatory and Legal Responses

Federal and State Governments and Courts Concerned About Toxicity and Water Contamination



Concerns about rising health risks from a group of chemicals called PFAS in water supplies are spurring responses from both federal and state lawmakers, regulators and courts. Some of these actions will impact local governments and water agencies.

About PFAS

PFOA and PFOS are the most common synthetic organic chemicals that are part of a group of elements referred to as per- and poly-fluoroalkyl substances, or PFASs. These substances are known for their nonstick, waterproof, heat- and stain-resistant properties. They are used widely in consumer and industrial products, such as fabrics, carpets, firefighting foams, food packaging, and nonstick cookware. Exposure to PFAS through drinking water is of significant concern due to its propensity to accrue in groundwater.

Groundwater contaminated with PFAS is often concentrated near a facility where the chemicals were used or manufactured. High PFAS concentrations are often detected near airports and military bases that use it in firefighting foams for training exercises, emergency response and equipment testing. Manufacturing waste containing PFAS has been discharged directly into local sanitary sewers. Bio-solids containing the chemicals were dumped in landfills or utilized as fertilizers, and the contaminants leached into groundwater over time. In the absence of regulations, PFAS has not typically been detected or treated.

Potential Impacts on Local Governments and Water Agencies

PFAS concerns and the state and federal responses present several potential issues for local governments and water agencies. First, they may be subject to water testing requirements. There are only eight accredited testing labs in California employing the latest testing methods, and seven in the rest of the

People



Lowry A. Crook

PARTNER

(202) 370-5328



Shawn D. Hagerty

PARTNER

(619) 525-1327



Andre Monette

PARTNER

(619) 525-1374



Rebecca Andrews

PARTNER

(619) 525-1392



Benjamin Bodell

ASSOCIATE

United States.

Second, where PFAS is detected, there may be guidelines or requirements to issue public notices or remove contaminated water sources. Public notice will raise questions about the safety of local drinking water and may pose challenges where water sources are scarce or expensive.

Third, the presence of PFAS may result in costly compliance measures even though water agencies did not cause the contamination. Various state and federal proposals may impose onerous monitoring requirements, discharge limitations, cleanup responsibilities or liability for wastewater and biosolids from the treatment process. Removing PFAS from water requires advanced treatment methods that are cost-prohibitive for the volume of water handled by water utilities. Researchers are still working to develop validated methods for testing or removing PFAS from bio-solids.

Finally, impacted communities and agencies will need to decide whether and how to pursue compensation or other remedies against companies and entities that generated or released the PFAS contamination. Below are the latest federal and state developments that raise these concerns.

EPA

In 2016, the U.S. Environmental Protection Agency issued an advisory for PFOA and PFOS contamination in drinking water. The EPA recommended that municipalities notify customers when PFOA and PFOS levels combined exceed 70 parts per trillion in a drinking water supply. The EPA warned that excessive PFAS exposure might result in certain types of cancer, liver tissue damage, immuno-toxicity, thyroid risks and developmental threats to fetuses during pregnancy or to breastfed infants. It also listed PFOA and PFOS as Contaminant Candidates, and the agency is assessing whether to make a regulatory determination and developing a national primary drinking water regulation for PFOA and PFOS.

In addition, EPA said it has begun the regulatory development process to list PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act known as CERCLA. The EPA has not indicated that it plans actions to address additional, less common PFAS substances that have raised concerns among health officials because of their similarities with PFOA or PFOS (primarily PFHxS, PFNA, PFHpA, and PFDA). The EPA's current drinking water testing method tests for 18 PFAS substances out of nearly 5,000 in the PFAS class.

Centers for Disease Control

In June 2018, the U.S. Centers for Disease Control's Agency for Toxic Substances and Disease Registry released a draft report that proposed

(925) 977-3337



Ana D. Schwab

DEPUTY DIRECTOR OF
GOVERNMENTAL AFFAIRS*

(202) 370-5311

Related Practices

[Environmental Law & Natural Resources](#)

[Environmental Litigation](#)

[Water](#)

[Water Quality](#)

Related Industries

[Agri-Business](#)

[Municipal](#)

[Special Districts](#)

Our Perspective

[Water](#)

Minimum Risk Levels for drinking water for children that equate to 21 parts per trillion for PFOA, 14 parts per trillion for PFOS, 140 parts per trillion for PFHxS and 21 parts per trillion for PFNA. Although these MRLs are designed to communicate the level of exposure that does not have an appreciable health impact risks, and they are not designed to support regulation, the ATSDR's lower levels have prompted some states and stakeholders to criticize the EPA's 70 part per trillion threshold as too high.

Congress

In the U.S. Congress, differing versions of the National Defense Authorization Act legislation that recently passed the House and Senate contain several provisions that address PFAS with direction to the EPA and Department of Defense. The Senate bill has bipartisan compromise language that directs the EPA to issue a national primary drinking water regulation for PFAS within 2 years, and to require PFAS monitoring at water systems serving more than 10,000 people. The House bill, which the Trump administration has threatened to veto, would not require regulation under the Safe Drinking Water Act, but it would require the EPA to add PFAS to the list of toxic pollutants regulated under the Clean Water Act, and to designate PFAS as a hazardous substance regulated under CERCLA. The House and Senate will work to iron out differences in these bills in a conference committee in August and September.

In addition, several freestanding bills were introduced in Congress that would require PFAS regulation or disclosure of PFAS contamination or releases under various statutes. One of those bills, S. 1507, which would include certain PFAS substances in the Toxics Release Inventory, was reported favorably out of the Senate Environment and Public Works Committee on June 19.

The Courts

As the body of research and public awareness of PFAS toxicity have grown, litigation targeting chemical manufacturers is also on the rise. A federal proposed class action lawsuit filed in Ohio in October seeks to encompass U.S. residents who have a detectable level of PFAS in their blood serum with injuries from PFAS exposure. The suit names companies such as 3M, Daikin, Dyneon and DuPont as defendants.

Multiple lawsuits filed by states and local governments are also targeting companies that produced and distributed materials containing PFAS. Many of the claims include allegations that manufacturers possessed knowledge of the dangers of PFAS chemicals, but continued to make and sell the product without warning the public of their health risks. The suits ask the chemical companies to pay for treatment, remediation, disposal and other costs associated with the response and management of PFAS in the environment. More than 75 of these cases that seek damages from contamination from firefighting foam were consolidated in the U.S. District Court for South Carolina.

New State Laws and Regulations

Lawmakers and regulators in at least 10 states have taken steps to address PFAS concerns with standards or requirements that go beyond EPA's. The latest development came last week when California enacted a new law requiring water systems to report *any* detected level of PFAS in their consumer confidence reports, and to remove water sources from use or provide extensive public notifications where detected PFAS levels exceed 70 parts per trillion.

[Click here to see a list of these states and what actions they are doing, from new maximum contaminant levels to new testing requirements.](#)

For more information about PFAS and its potential impacts on your agency, contact one of the authors of this Legal Alert listed at the right in the firm's [Environment Law & Natural Resources](#) and [Municipal Law](#) practice groups or your [BB&K attorney](#).

Please feel free to share this Legal Alert or subscribe by [clicking here](#). Follow us on Facebook [@BestBestKrieger](#) and on Twitter [@BBKlaw](#).

Disclaimer: BB&K Legal Alerts are not intended as legal advice. Additional facts or future developments may affect subjects contained herein. Seek the advice of an attorney before acting or relying upon any information in this communiqué.