



*Jeffrey Karp is senior counsel and Edward Mahaffey is legal research and writing attorney at Sullivan & Worcester LLP. Mr Karp can be contacted on +1 (202) 370 3921 or by email: [jkarp@sullivanlaw.com](mailto:jkarp@sullivanlaw.com). Mr Mahaffey can be contacted by email: [emahaffey@sullivanlaw.com](mailto:emahaffey@sullivanlaw.com).*

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# States forge ahead in regulating PFAS while federal legislators continue to lag behind

BY JEFFREY KARP AND EDWARD MAHAFFEY

Despite increased efforts by federal legislators, comprehensive per- and polyfluoroalkyl substance (PFAS) legislation still has not been enacted by Congress, nor has the US Environmental Protection Agency (EPA) enacted regulations that directly address the health risks, such as increased cholesterol levels, cancer and thyroid hormone disruption, allegedly caused by perfluorooctanesulfonic acid (PFOS), perfluorooctanoic acid (PFOA) and other PFAS compounds.

Meanwhile, the Department of Defense's (DoD's) Office of the Inspector General has released a long-awaited report that criticises the DoD's slow response to the presence

of PFAS contamination identified at hundreds of bases and in many surrounding communities. Such contamination is primarily the result of PFAS-containing aqueous film forming foam (AFFF) used to fight petroleum fires. While the EPA (and the military) continues to apply 2016 guidelines for PFOS and PFOA that establish 70 parts per trillion (ppt) as the concentration level in drinking water above which there may be a risk to human health and the environment, state governments have set more restrictive drinking water standards, and also have begun to regulate PFAS-containing products to protect against the release of these chemicals into various environmental media.

## **Congressional action**

On 21 July 2021, the House of Representatives passed the PFAS Action Act of 2021, which would require the EPA to designate PFAS as hazardous substances under CERCLA and establish national drinking water standards for them. Specifically, PFOA and PFOS would be designated as hazardous substances within a year of enactment, while the EPA would decide whether to designate other PFAS substances within five years. Similarly, the bill would require the designation of PFAS as hazardous air pollutants under the Clean Air Act. It also would establish a new infrastructure grant programme for PFAS

treatment technologies and restrict the incineration of PFAS-containing AFFF.

The bill is unlikely to pass the Senate, however. It must overcome the Senate's 60-vote threshold and the opposition of organisations representing the water sector – which argue that “municipal drinking water and wastewater utility ratepayers could face staggering financial liability to clean up PFAS that was legally disposed of following the water treatment process” – to become law.

A more likely source of PFAS regulation via federal legislation is the National Defense Authorization Act (NDAA) for 2022. The NDAA, traditionally a ‘must-pass’ bill, has been a vehicle for provisions that might not pass as separate bills; it has been used to regulate PFAS in recent years, such as adding certain PFAS to the Toxics Release Inventory and requiring the DoD to phase out the use of PFAS-containing AFFF by 2024.

The Senate Armed Services Committee has approved PFAS clean-up provisions as an amendment to the 2022 NDAA that would set a 2023 deadline for the DoD to test for PFAS at military and National Guard facilities suspected of PFAS contamination and would require the DoD to develop a clean-up schedule where contamination is found. It would also require the DoD to report to Congress within 60 days regarding the status of PFAS remediation at 50 especially contaminated sites. A separate provision that has passed the Committee would extend funding for Centers for Disease Control and Prevention research on the health effects of PFAS.

### The US Environmental Protection Agency

Under the Biden administration, while the EPA has pledged to address PFAS contamination as a high priority matter, it has continued to implement the PFAS Action Plan, a regulatory approach that has been ongoing for several years with limited effect. On 3 March 2021, the EPA published a final determination to regulate PFOS and PFOA through a National Primary Drinking Water Regulation (NPDWR), under the Safe Drinking Water Act, within 24 months. On 11 March 2021, the EPA published the proposed fifth

Unregulated Contaminant Monitoring Rule (UCMR 5), which would require public water systems to collect data on 29 PFAS chemicals by analysing samples collected between 2023 and 2025.

### PFAS at military sites

The military's use of PFAS-containing AFFF for many years contaminated groundwater and potable water sources on and near numerous bases across the US. On 14 July 2021, the DoD hosted an online forum to discuss its plans for addressing contamination at the 698 military installations identified where PFAS may have been used or potentially released. Richard Kidd, the DoD official overseeing the PFAS response, stated that the DoD follows CERCLA, the federal ‘Superfund’ clean-up law, in conducting investigations and selecting remedial approaches. The EPA issued a memorandum to the agency's regional offices on 30 June 2021 confirming that the National Contingency Plan (NCP) regulations are to be applied in making CERCLA environmental clean-up decisions. It is well known that following the multiple steps required under the NCP takes several years before a site remedy is selected. Thus far, the DoD has completed 129 initial investigations at military sites. Not surprisingly, Mr Kidd informed forum participants that it may take years to fully define the PFAS clean-up requirements and possibly decades more to perform the necessary clean-ups, which were estimated by Mr Kidd's predecessor to cost upward of \$3bn.

The DoD is now facing further scrutiny due to a 23 July 2021 report released by its Office of Inspector General criticising the DoD's delay in responding to PFAS contamination at military installations. The report found that the DoD had failed to fulfil its obligations due to its insufficiently proactive and excessively narrowly focused approach to the problem. “As a result”, the report noted, “people and the environment may have been exposed to preventable risks from PFAS-containing AFFF”.

The DoD's failure to respond with alacrity to address PFAS contamination has led to the filing of more than 850 AFFF-related lawsuits. The federal court's multidistrict

litigation system has consolidated all AFFF cases in the US District Court for the District of South Carolina. In the words of the District Court's website, plaintiffs generally allege that AFFFs “contaminated groundwater near various military bases, airports, and other industrial sites where AFFFs were used to extinguish liquid fuel fires. The plaintiffs allege that they were caused personal injury, a need for medical monitoring, property damage or other economic losses”.

The defendants in these lawsuits are generally AFFF manufacturers and distributors; when sued, the DoD has argued that it is protected from liability by federal sovereign immunity. Earlier this year, one such lawsuit resulted in a \$17.5m settlement between Tyco Fire Products and 300 Wisconsin homeowners. The plaintiffs had alleged contamination of their private drinking-water wells by PFAS migrating from a nearby fire technology centre at which Tyco's predecessor designed and tested its AFFF product.

### State regulation

Close to 30 states have enacted drinking water standards for PFOA and PFOS. More recently, on 15 July 2021, Maine enacted a law that would ban the sale of new carpets or fabric treatments with intentionally added PFAS beginning 1 January 2023 and would require manufacturers of other PFAS-containing products to explain the amount and purpose of the PFAS. Beginning 1 January 2030, all products with intentionally added PFAS would be banned except those specifically permitted by the state's Department of Environmental Protection – the first such ban in the world.

Other states have passed similar but more limited bans. On 20 July 2021, Connecticut passed a law banning PFAS-containing firefighting foam effective 1 October 2021, and requiring that food packaging containing PFAS be phased out by 2023. Vermont, in a law passed 18 May 2021, banned certain PFAS products, including firefighting foam, food packaging, carpets, fabric treatments and ski wax, with certain exceptions.

### Conclusion

In the next several months, further developments in the PFAS arena are likely to occur, particularly in the states. More states are expected to promulgate drinking water standards in single digit parts per trillion, which include as many as 20 PFAS compounds. Currently, Michigan is the only state to set a PFAS groundwater clean-up standard. As more expansive PFAS test methods are developed and validated for various environmental media, additional states can be expected to enact standards

for groundwater, as well as for soil, air, solid waste, biosolids and wastewater. Also, the EPA and the Navy are developing a method for testing PFAS concentration levels in fish tissue. The results of such tests may lead to the issuance by states of fish alerts in various water bodies, such as areas of the Chesapeake Bay.

The new EPA Administrator created a Council on PFAS, tasked with developing a strategy for safeguarding the country's water, air and land during 2021 through 2025. The Council's initial report,

submitted in early August 2021, is under agency review. It remains to be seen what additional actions the EPA may take based on the report's recommendations.

New PFAS-related bills, especially ones directed at the DoD, likely will continue to be introduced in Congress. However, whether and when comprehensive laws regulating PFAS will be enacted and in what form remains uncertain. ■

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