

EPA and developing PFAS science: impacts on litigation

By Miles Scully, Esq., Brian Ledger, Esq., and Christopher Johnson, Esq., Gordon Rees Scully Mansukhani LLP

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The Environmental Protection Agency (EPA) has been moving forward on its pledge to regulate per- and polyfluoroalkyl substances (PFAS). PFAS are a family of more than 9,000 synthetic chemicals that became increasingly prevalent in consumer goods because of resistance to heat, water, and oil.

In 2022, the EPA issued an Advance Notice of Proposed Rulemaking (88 FR 22399) asking the public for comments on the proposed rule to designate PFAS known as perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) as hazardous substances under CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act), also known as Superfund. PFOA and PFOS, a subset of PFAS known as perfluorinated alkyl acids, are two of the oldest and most widely studied PFAS that became increasingly prevalent in U.S. consumer goods such as waterproof clothing, non-stick pans, stain-resistant carpets, cosmetics, food packaging, and more.

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In 2023, the EPA announced its proposed rule setting the first-ever national drinking water standard to regulate six types of PFAS ("Biden-Harris Administration Proposes First-Ever National Standard to Protect Communities from PFAS in Drinking Water," press release, EPA, Mar 14, 2023). The EPA expects to finalize the regulations in early 2024 (88 FR 18638).

Also, the EPA announced its national enforcement and compliance initiatives (NECI) to cover the next three years. One of the three priorities is PFAS. The EPA's goals are to achieve site characterization, control ongoing releases, and ensure compliance with permits to address PFAS contamination, and imminent and substantial endangerments to communities. Most recently, in December 2023, the EPA issued its Second Annual Progress Report for its PFAS Strategic Roadmap: <https://bit.ly/47FOU9a>.

EPA indicated it will direct its enforcement efforts towards both manufacturers and users of manufactured PFAS, as well as other industrial parties involved with PFAS. The requirements could also lead to the designation of more sites where PFAS have been released as Superfund sites or drinking water aquifers requiring remediation. In turn, inevitable litigation would result over funding for the remediation of Superfund sites and drinking water aquifers, and personal injury/product liability claims against manufacturers, suppliers, distributors, and retailers of products containing PFAS.

PFOA and PFOS as hazardous substances under CERCLA

The designation of PFOA and PFOS as hazardous substances under CERCLA would immediately require reporting releases of PFOA and PFOS, due to strict notification requirements (87 FR 54416). The EPA lists five broad categories of entities that may be affected by the designation of PFOA and PFOS as hazardous substances: (1) direct manufacturers, including importers; (2) processors; (3) manufacturers of products containing PFOA and/or PFOS; (4) downstream product manufacturers and users; and (5) waste management and wastewater treatment facilities (<https://bit.ly/4aZOihz>). Essentially, CERCLA would reach any operation where PFAS are used, handled, and subsequently released into the environment.

Should the EPA finalize the designation of PFOA and PFOS as hazardous substances, it could open a floodgate of litigation. Under CERCLA, when the EPA designates a Superfund site, it has the authority to pursue anyone that contributed to the release of the hazardous substances for untold millions of dollars in remediation costs.

The impact of an enforceable national drinking water standard

The EPA has proposed reducing the maximum contaminant level ("MCL") of PFOA and PFOS to the lowest level at which the substances can be accurately detected in water through recognized laboratory testing methods, currently 4 parts per trillion (ppt). One ppt is like one drop of water in 20 Olympic-size swimming pools.

The proposed MCL is substantially lower than any state regulation currently in place. Michigan has the lowest enforceable MCL of

PFOA at 8 ppt, twice as high as the levels proposed by the EPA, although a recent court decision ruled that the state did not follow proper procedure in setting that MCL. Illinois has established an advisory level of 2 ppt. Other states have MCLs as high as 70 ppt.

The United States Geology Survey conducted a research study and concluded that PFAS may contaminate at least 45% of the nation's tap water. Notably, they detected PFOA at approximately 15% of the sample sites, which if designated as a hazardous chemical, could lead to many additional Superfund sites. The EPA and private well owners alike will be looking for responsible parties to either perform or reimburse the requisite remediation.

In 1999, the first PFAS lawsuit was filed against DuPont by a West Virginia farmer, Wilber Tennant, who claimed injuries to his cattle. Although the case was settled for an undisclosed amount, this case was the tip of the iceberg. Today, over 6,000 lawsuits are pending in the U.S. District Court in South Carolina, ranging from private litigants, states, and municipalities seeking damages in connection with PFAS water contamination to personal injury/ product liability claims for alleged exposure to PFAS. The cases have been consolidated into multidistrict litigation (MDL) in an attempt to streamline the mass amount of cases already pouring into the court system.

The rise of PFAS litigation has been compared to the big tobacco settlements in the 1990s due to the massive settlement amounts, but it is more likely to look like asbestos litigation on a broader scale. PFAS contamination has reached a much wider plaintiff pool than both tobacco and asbestos, so expect regular filing of cases to continue, with a likely increase in class-action lawsuits as PFAS litigation gains momentum.

Scientific agency developments and impacts on litigation

As the body of PFAS regulation continues to grow, PFAS litigation will likely grow with it. The regulation of drinking water will lead to an increase in eligible plaintiffs. Although the government plans to allocate billions of dollars for remediation efforts, costs will likely exceed any allocation, given the nationwide scope of contamination. In 2023, Chemours, DuPont, and Corteva created a \$1.18 billion settlement fund, and 3M has already agreed to settle the first wave of drinking water lawsuits at a whopping \$13 billion. Many more manufacturers may follow suit. Still, there are pending objections that the settlements are not enough.

There has also been an increase in lawsuits regarding Aqueous Film Forming Foam ("AFFF"), against local fire departments and AFFF manufacturers for PFAS contamination from use of AFFF to extinguish fires. For example, a plaintiff in New Jersey filed suit against multiple fire agencies, as well as the manufacturer (National Foam), alleging joint and several liability under the New Jersey Spill Act for cleanup costs from the use of AFFF to fight a fire. The plaintiff also claimed design defect, failure to warn, negligence, nuisance, trespass, and other theories. The case is currently pending in the South Carolina MDL. *Insurance Auto Auctions, Inc. v. Carteret Fire Dept., et al.*, Docket No. MID-001809-21 (Sup. Ct. of N.J., Middlesex County, filed Mar. 24, 2022).

In addition to remediation cost claims, there is a real potential for future dramatic increases in personal injury claims. Such claims could increase with more definitive statements from authoritative scientific organizations that certain types of PFAS are linked to adverse health effects. The biggest hurdle for individual plaintiffs is establishing a causal link between PFAS exposure and particular diseases.

The current state of the toxicological evidence largely concludes that PFAS may potentially be a human carcinogen, but the scientific literature is not strong enough to make that connection. EPA and The Agency for Toxic Substances and Disease Registry (ATSDR) determined the research *suggests* evidence of the carcinogenic potential of human exposure to PFOA and PFOS but is not sufficient to assess human carcinogenic potential.

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In December 2023, the International Agency for Research on Cancer (IARC) concluded that PFOA is carcinogenic to humans (testicular cancer and kidney cancer), while PFOS is possibly carcinogenic to humans. These findings by a respected organization will likely be used by the EPA to support further regulations, and will likely be used by plaintiffs for attempted support in personal injury claims.

However, there is scientific literature on both sides of the issue. A panel of epidemiologists (the "C8 Health Project"), created as part of a 2005 class-action settlement with Dupont, found evidence suggestive of associations with health effects, but not strong enough to be statistically significant. (The C8 Health Project: Design, Methods, and Participants, "Environmental Health Perspectives," Volume 117, Issue 12, July 13, 2009). In 2018, the Australian Expert Health Panel concluded that the scientific evidence of adverse health effects from PFAS exposure in humans is limited, and generally within normal ranges for the whole population. (Expert Health Panel's independent PFAS advice, Australian Government, Media Release, May 7, 2018.)

But if researchers publish more literature concluding that regulated chemicals negatively affect human health, there will be a rise in personal injury lawsuits alleging PFAS exposure. These personal injury lawsuits will not be limited to PFAS manufacturers. Downstream users of PFAS in manufacturing and products will become litigation targets.

Tips for companies to minimize PFAS liability

- (1) Determine whether PFAS are in your products, supply chain, or water discharge, specifically PFOS or PFOA.
- (2) Review supplier and customer contracts for specification requirements and indemnity agreements related to PFAS or contaminants.

- (3) Consider PFAS alternatives such as non-fluorinated chemistries (e.g., <https://bit.ly/3HpXzLq>; <https://bit.ly/3vH6uMS>).
- (4) Set up your liability and defense strategy now.

Miles Scully is a regular contributing columnist on mass tort litigation for Reuters Legal News and Westlaw Today.

About the authors



Miles Scully (L) is a named partner of **Gordon Rees Scully Mansukhani LLP** and has served as first chair for dozens of trials and highly publicized verdicts. He represents public and private companies in litigation and regularly advises senior executives, boards of directors, and other clients on risk-mitigation strategies. Based in the firm's Southern California offices, he can be reached at mscully@grsm.com.

Brian Ledger (C) is a partner at the firm in its Southern California offices. He is a leader in the practice of environmental and toxic tort

law and previously worked as an environmental and toxicological/industrial hygiene consultant in public and private settings. He can be reached at bledger@grsm.com. **Christopher Johnson (R)** is a senior counsel at the firm in its San Diego office. His practice centers on environmental compliance, regulation, and litigation, with emphasis on hazardous and toxic substances, air quality regulation, and groundwater contamination. He can be reached at ctjohnson@grsm.com.

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