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# Introduction to PFAS Litigation, Its Future and Trends



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# Outline

- I. Introduction to PFAS
- II. Current Regulatory Landscape
- III. Litigation and Settlements
- IV. Looking to the Future –How to Prepare

# “Oil and Water Don’t Mix” ... or do they?



PFAS are synthetic chemicals added to products to make them resistant to:

- Oil / grease
- Heat
- Stains
- Wrinkles



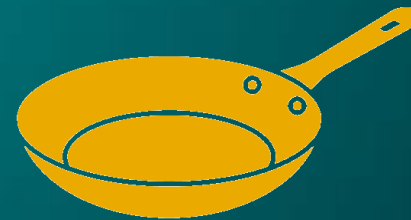
# The problems with **PFAS**

- Short for **per- and polyfluoroalkyl substances**, chemicals used in products such as non-stick cookware, food packaging, water-resistant clothing, and stain-resistant carpeting
- Also called **'forever chemicals,'** they can take **up to 1,000 years to break down** in nature

**THE DEVIL WE KNOW**

# Examples of products containing PFAS

- Carpet
- Chrome plating
- Cleaning products
- Clothing
- Cosmetics
- Drilling fluid
- Drinking water
- Engineered coatings
- Food packaging
- Fabrics
- Firefighting foams
- Furniture
- Insulation
- Lithium batteries
- Mattresses
- Microwave popcorn bags
- Nonstick cookware
- Outdoor gear
- Paper products
- Paints, varnishes, and sealants
- Personal care products
- Photovoltaic cells
- Plastic water bottles
- Plating Rugs
- Solvents
- Teflon
- Textiles
- Upholstery
- Waxes
- Zinc batteries



# Variety of PFAS

- ▶ PFAS is a class of almost 5,000 chemicals of varying toxicity.
- ▶ PFOA and PFOS are among the more well-known and have been used in firefighting foams, among other products.
- ▶ Generally, long-chain PFAS (including PFOA and PFOS) bioaccumulate more and present greater risks to human health and the environment than short-chain PFAS.

# Risks to Human Health

## ▶ PFOA and PFOS associated with:

- damage to liver function
- kidney and testicular cancer
- increased cardiovascular risks
- diminished antibody response to vaccines
- developmental toxicity/fetal mortality rates



▶ PFOA designated a “known carcinogen” under Prop 65 (California)

▶ More on this later...

## Federal – Legislative Activity

- ▶ The 2021 National Defense Authorization Act
  - ▶ DOD stop using firefighting foams
  - ▶ Only major PFAS federal law
- ▶ Dozens of bills have been introduced, including:
  - Designating PFAS as hazardous substances under CERCLA
  - Removing PFAS from food packaging





# Federal – Regulatory Activity

- ▶ Substantial EPA movement along multiple regulatory fronts, including:
  - **SDWA** – drinking water health advisories; possible MCL development
  - **CERCLA** – potential hazardous substance listings
  - **CWA** – limits incorporated into water discharge permits
  - **CAA** – potential hazardous air pollutant listings
  - **TSCA** – reporting and recordkeeping; testing parameters
  - **RCRA** – corrective action process as applied to PFAS
- ▶ See EPA’s “PFAS Action Plan”
  - ▶ first published in 2019 and periodically updated

# Illinois – Legislative and Regulatory Activity

- ▶ PFAS Reduction Act - Aug. 6, 2021
  - Limits the use of firefighting foams for testing or training
    - effective Jan. 1, 2022
  - Prohibits the manufacture, use, and sale of such foams
    - effective Jan. 1, 2025
  
- ▶ Variety of proposed Illinois laws and regulations are pending, including PFAS disposal requirements and groundwater quality standards.

# Illinois – Non-binding IEPA Guidance

## ▶ PFAS Statewide Health Advisories -Aug. 16, 2021

### ▶ Six statewide health advisories for PFAS in groundwater and drinking water (measured in parts per trillion).

- PFOA: 2
- PFOS: 14
- PFNA: 21
- PFHxS: 140
- PFBS: 2,100
- PFHxA: 560,000



### ▶ IEPA intends to use the advisories and data from its investigations to develop enforceable maximum contaminant levels (MCLs). IEPA completed water sampling for this purpose in March 2022.

# III. Litigation

## The Devil We Know/Dark Waters

DuPont Plant

Parkersburg, W.Virginia

Cattle died/tumors found

Agree to be bound by scientific panel's findings

Results took years, but eventually \$617 million settlement

# III. Litigation

- ▶ Virtual explosion of litigation
- ▶ More than 6,400 PFAS related federal suits since 2005
- ▶ DuPont 6,000 suits alone
- ▶ 3M sued on average of 3 times A DAY in 2021



# III. Litigation

## Firefighting Foam MDL

- Groundwater contamination at military bases, airports
- Damages and *medical monitoring*
- 1,235 PFAS lawsuits were filed in 2021
- 97% ended up in the AFFF MDL

# III. Litigation--Downstream

## ▶ California –REI outdoor apparel class action

- ▶ Example of a downstream consumer products issue – plaintiffs allege that waterproof coats sold by REI contain PFAS, and that REI failed to warn consumers under California statutory and common law.

## ▶ Maine –Paper Mill

- ▶ Residents of Fairfield allege paper mills discharged PFAS-containing process wastes into waters and that some of the mills' wastes were spread on farms as fertilizing sludge, thereby contaminating soils.



## ▶ Illinois –McDonald’s Big Mac wrappers class action

## ▶ California –Burger King

## ▶ New York / D.C. -cosmetics

## Corporate disputes -Trend

- ▶ \$4 billion settlement between DuPont, Chemours, and Corteva for potential future PFAS liabilities
  - Establishes among the companies a 20-year cost-sharing arrangement for future litigation related to legacy PFAS manufacture and use.
  - Created due to flood of PFAS lawsuits confronting all three of the companies.
- ▶ For M&A's generally, companies are increasingly scrutinizing PFAS exposure



# Government Enforcement



State EPA: \$850 million settlement between Minnesota and 3M

- 2018 Claim by Minnesota for damages to drinking water and natural resources.
- Settlement covers cleanup activities over a 150-square mile area near Twin Cities.

EPA: \$375,000 penalty and \$1 million educational program against Swix Sport

- ▶ Claim by EPA that Swix violated TSCA Premanufacturing Notice and Import Certification requirements for importation of ski wax products containing six types of PFAS.

## IV. Looking to the Future -Prepare Now

- ▶ The universe of defendants will continue to expand/analogy to asbestos?
- ▶ Become knowledgeable about the presence of PFAS in your products, processes, and supply chains.
- ▶ Companies will seek to manage liabilities through corporate maneuvers and deals
- ▶ Scrutinize PFAS risks in mergers and acquisitions.
- ▶ Risk Management: identification and insure and manage liabilities
- ▶ Assess indemnity issues and insurance coverage implicated by PFAS.
- ▶ Consider potential future CERCLA liability, ***which would not depend on the quantity of PFAS at issue – ANY amount could trigger substantial cleanup liability***

## Coming soon: listing of certain PFAS as CERCLA “hazardous substances”

- ▶ EPA very likely to do so with respect to certain PFAS (including PFOA and PFOS).
- ▶ The listing will **certainly** lead to substantial litigation, potentially ensnaring a wide range of entities allegedly liable under CERCLA for PFAS contamination.
- ▶ The four “potentially responsible party” categories under CERCLA:
  - 1) current owners of property at which a release or threatened release of a hazardous substance occurs
  - 2) prior owners of property at the time of **disposal** of a hazardous substance
  - 3) entities that **arranged** for disposal a hazardous substance
  - 4) entities that **transported** a hazardous substance for disposal

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## Q & A



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