

PUBLICATION

Forever Chemicals, Forever a Problem? PFAS Impact Business Considerations Through State and Federal Regulations

Authors: Katriel Chaim Statman

April 20, 2023

In August 2022, the Environmental Protection Agency (EPA) proposed in the Federal Register to designate two per- and poly-fluoroalkyl substances (collectively PFAS) as hazardous substances (the Proposed Rule) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). While those impacted await final EPA guidance and rulemaking on the designation of PFAS as a hazardous substance, numerous states have taken initiative in considering the Proposed Rule to protect health and regulate compliance of PFAS in both consumer products and environmental statutory adherence.

Effect on Businesses and State Examples of the Problem

The Interstate Technology & Regulatory Council identified eighteen industries and applications which commonly use PFAS including aviation and aerospace, automotive, building and construction, cosmetics, firefighting and safety, food processing, household products, medical products, oil production, and paper and packaging. The increase in litigation related to PFAS since 2005 involves more than 6,400 lawsuits filed against companies involved in each stage of manufacturing or use of products with PFAS. These claims have included personal injury claims, water provider claims by utilities required to remediate PFAS in public drinking water, property damage claims, state government claims for natural resource damages, and medical monitoring cases. It is imperative for businesses that fall into these categories to be aware of the risks of potential state liability and – upon approval of the Proposed Rule – federal liability.

A. Products

States have taken affirmative action in response to the Proposed Rule by banning the use of PFAS within certain products through statutory action. For example, North Carolina has a pending bill intending to ban the manufacture, use, distribution, and export of PFAS and PFA-containing products within its state – imposing civil penalties of up to \$25,000. Additionally, the EPA's Proposed Rule would require businesses that have manufactured, imported, or processed PFAS to submit a comprehensive report detailing PFAS usage. Compliance with both operative state statutes and federal regulations will pose a significant burden on businesses that operate within industries which interact with PFAS.

B. Environment

Further, many states have pursued measures to address remediation and cleanup efforts relating to PFAS – some of which hold landowners strictly liable for the presence of PFAS on their land and in their groundwater. One of the primary concerns state and federal regulators cite regarding PFAS arises from the potential contamination of drinking water (as the EPA has noted in its March 14, 2023, published regulations for new drinking water standards under the Safe Drinking Water Act as examined in detail [here](#)). New Hampshire, for example, recently introduced a bill that would require the disclosure of PFAS and groundwater contamination before the sale of real estate. Similarly, CERCLA liability will hold landowners and buyers of commercial real estate strictly liable as a Potentially Responsible Party (PRP). As environmental concerns promulgate

commercial real estate transactions, it is important to understand the consequences of business actions or inactions within industries that deal with PFAS.

For example, once PFAS are designated as a CERCLA hazardous substance, the EPA can require businesses it determines to be PRPs to clean up the PFA contaminated site or reimburse the EPA for remediation of such site. Not only does this designation hold PRPs strictly liable for these remediation costs, but it will also trigger significant reporting requirements for businesses. Thus, companies that have used PFAS at any stage of the manufacturing process and discharged such chemicals into the environment – through the landfill or otherwise – will be at risk for liability.

Key Takeaways

As state-based PFA statutes and regulations continue to be implemented and subject to everchanging federal administration views, guidelines, and rules, businesses must ensure compliance and adjust their practices accordingly. Businesses that utilize PFAS should seek guidance and strategize their plans in preparation for the eventual implementation of the EPA's Proposed Rules and the anticipated state regulatory responses.

If you have any questions regarding PFAS' impact on business considerations through state and federal regulations, please reach out to [Matthew Kim](#) or [Kat Statman](#), or any member of Baker Donelson's [Environmental Group](#).

Emma Perez McKellar, a summer associate at the Firm, contributed to this article.