

# Now Is the Time to Prepare for PFAS Regulation

## Environment & Natural Resources



Pressure is mounting on the federal government to address environmental contamination by a family of chemicals referred to as per- and polyfluoroalkyl substances (PFAS).

A combination of circumstances—increasing discoveries of PFAS in groundwater, growing activism by states to deal with the problem themselves, and several high-value lawsuits and settlements—has spurred a sense of urgency both in Congress and at the Environmental Protection Agency. With Congress unlikely to pass legislation in an election year, however, the EPA has taken the regulatory reins and appears intent on moving forward.

This should ring alarm bells at companies whose operations involve (or previously involved) PFAS, says [Peter Gray](#), a partner in Crowell & Moring's [Environment & Natural Resources Group](#). "Whether you manufacture, process, transport, or use PFAS—even if you haven't done so for a long time—you should anticipate regulatory scrutiny at some point," he cautions. "And as public awareness of the issue grows, so does the probability of investigations, fines, and litigation. We're encouraging companies to assess their PFAS exposure now and start mapping out a legal strategy."

### The EPA Throws Down the Gauntlet

In early 2019, the EPA seized the initiative by issuing its PFAS Action Plan, which laid out a road map for how the agency intended to regulate PFAS. Two of the plan's priorities are especially noteworthy because they seek to close regulatory gaps that have made enforcement difficult.

First, PFAS are not classified as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), limiting the EPA's authority to hold parties liable for releasing them into the environment.

Second, there isn't an enforceable federal standard for PFAS presence in drinking water. The EPA has proposed a standard of 70 parts per trillion in a person's lifetime as a nonbinding "health advisory," but Gray expects the agency to set an enforceable standard when the relevant science is more conclusive.

The EPA reiterated its commitment to address these and its other PFAS regulatory priorities late in 2019 in its section of the federal Fall 2019 Unified Agenda and Regulatory Plan. "It's full speed ahead for the EPA," observes [Amy Symonds](#), a counsel in Crowell & Moring's Environment & Natural Resources Group. "The agency is trying to assert itself as a primary regulator of PFAS. Its current actions are likely just the tip of the iceberg."

Worth mentioning is the disconnect between the EPA's pro-regulatory stance on PFAS and its efforts under President Trump to reduce environmental regulation. Longtime EPA watchers such as Gray aren't surprised. He notes that the EPA's current anti-regulatory push has concentrated on climate change regulations, but the agency continues to emphasize cleanup programs such as CERCLA.

### States Are Being Aggressive, Too

States have been aggressive in taking action both to regulate PFAS and to clean them up—though few have been as aggressive as California. In March 2019, the California State Water Resources Control Board announced a three-phase plan to conduct preliminary investigations of possible PFAS contamination at more than 1,000 sites statewide. The plan has targeted sites as follows:

- Phase I: Airports, municipal landfills, 1,000-plus nearby wells and other sources of drinking water. (Note: a PFAS-based firefighting foam known as aqueous film-forming foam, or AFFF, is used at airports throughout the U.S. and extensively by the U.S. military.)



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## Why Are PFAS Attracting So Much Attention?

Since the 1940s, a family of chemicals referred to as PFAS (per- and polyfluoroalkyl substances) has enabled some important, life-improving products. Many stain- and water-resistant fabrics, carpeting, firefighting foam, cleaning products, paints, cookware, and food packaging wouldn't be possible without them.

Yet the same durability that has made PFAS so useful may cause them to persist in the environment.

Among the nearly 5,000 PFAS, perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA) draw the lion's share of attention from regulators and environmentalists. They're also the most studied of the PFAS chemicals in terms of their effects on human health because they're the most frequently occurring PFAS in water—which has received much of the focus to date.

- Phase II: Primary manufacturing facilities, refineries, bulk terminals, non-airport fire training areas, urban wildfire areas.
- Phase III: Secondary manufacturing facilities, wastewater treatment and pre-treatment plants, domestic wells.

Perhaps the largest state-level threat to companies with PFAS exposure is litigation. In the past few years, major manufacturers have reached huge settlements with states. 3M Co., for instance, paid Minnesota \$850 million in 2018 to settle a \$5 billion lawsuit that charged the company with causing environmental damage by leaking PFAS into groundwater.

More recently, more than 100 suits brought by local authorities and private parties in multiple states claimed that the use of AFFF released PFAS into drinking water. These suits were consolidated into one multidistrict litigation to be heard in South Carolina. New York and New Hampshire have filed *parens patriae* actions on behalf of citizens whose natural resources were allegedly damaged by PFAS contamination.

## Sizing Up the Damage

Sooner or later, what all of this—an engaged EPA, state-level laws and enforcement, cleanup costs, investigations, and litigation—comes down to is financial and legal liability.

On the financial side, it's currently impossible to quantify the total presence and/or potential remediation costs of PFAS in the U.S. “The bottom line here is there are still a lot of unknowns,” notes Gray. “With the prospect of federal, state, and private investigations and litigation open-ended as well, it may be hard for organizations to come up with exact calculations of their potential liabilities.”

Nonetheless, Gray and Symonds are urging organizations with PFAS exposure—not only PFAS manufacturers but also users such as oil refineries, chemical manufacturing facilities, airports, landfills, and state and municipal entities such as water and power authorities—to think big picture and get ahead of the curve.

“PFAS will be the subject of legal and regulatory attention well into the future,” says Gray, “and the momentum to address it will only get stronger. For the many companies that aren't yet aware of the potential legal ramifications of their current or past PFAS exposure, it's time to get up to speed and take measures to mitigate risk.”

For organizations that have used PFAS-bearing products and decide to investigate their property for contamination, Gray and Symonds recommend these steps:

- Use an attorney to oversee the investigation so that communications and work product will be covered by attorney-client privilege and the work product doctrine, respectively.
- Form an interdisciplinary team to manage the investigation and evaluate potential risks. The team should consist of professionals from these areas: environment, health, and safety; government relations; legal (both in-house and outside counsel); and site management.
- Evaluate the possibility that other entities may have contributed to the contamination, and determine if it's possible to distinguish your source from others.
- Determine if insurance covers any portion of current or future remediation, and give appropriate notice to insurers.