

PFAS: Not Your Typical Emerging Contaminants — Part 2

By Jeffrey Dintzer and Nathaniel Johnson (May 31, 2018, 12:24 PM EDT)

This article is part two in a two-part series addressing the growing risk posed by perfluoroalkyl or polyfluoroalkyl substances, or PFAS, regulation and litigation throughout the country. Part one analyzed the possible legal consequences for businesses that manufacture, sell or consume PFAS products, or did so in the past. Part two considers actions those businesses can take now to head off potentially significant legal liabilities.

The emerging contaminants known as PFAS have captured the attention of regulators and courts across the country. In part one, we considered the growing risk that PFAS regulations and litigation can pose to businesses in an incredible variety of industries. Today, we analyze how to best prepare your business for that risk.

As detailed in part one, the liabilities associated with PFAS contamination could be substantial, and the unsettled science portends difficult evidentiary issues to either avoid or establish liability as the causal source of PFAS contamination at any given site. The U.S. Environmental Protection Agency has set “health advisory” levels for two common kinds of PFAS, but its leadership in the arena of PFAS regulation has been called into question by recent reports that the EPA helped bury negative PFAS science. State regulators are aggressively filling the gaps in EPA oversight. Similarly, plaintiffs are not waiting for the EPA before bringing lawsuits that threaten millions (and even billions) in legal liability. For business owners and operators who have used PFAS — or are simply unsure whether they did — the present regulatory environment can be an ever-shifting minefield of potential liability.

Fortunately, there are immediate actions your business can take to stave off the consequences of the burgeoning interest in PFAS regulation and litigation. As a first step, you should hire qualified legal counsel to conduct a top-to-bottom investigation of your business and its relationship to PFAS. By hiring counsel, your investigation of how PFAS were used by your business can enjoy attorney-client privilege and attorney work product confidentiality. If regulators or litigants demand environmental data, reports and related information, that demand can probably be rebuffed by legal privilege and confidentiality. This will put your business at a significant informational advantage in any regulatory or legal proceeding.

Counsel can also help conduct the environmental investigation, from vetting and choosing an



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investigator to helping shape the investigation to account for recent legal and regulatory developments. Because of the uncertain science behind our present understanding of PFAS, it can be difficult to properly identify environmental consultants, toxicologists, epidemiologists or other medical professionals needed to help your company navigate your potential PFAS minefield. Your counsel should have experience handling emerging chemicals and know the qualified professionals to call upon to limit your exposure.

Moreover, the manufacture and use of PFAS touch an exceptionally broad swath of businesses and industries. Even if you are certain your business never manufactured its own products with PFAS, you must be equally certain that every product you bought and used as part of your business was also PFAS-free. Without absolute certainty, you need to conduct an audit that should identify anyone who has handled, used or encountered PFAS and assess both their level of exposure and role in the business or organization. You should review your relationships with PFAS suppliers and consumers, including any contracts or other transactional documents (including insurance policies) for assumptions of risk and other related protections. At the same time, you should consider instituting an organization-wide litigation hold to retain any and all records related to PFAS.

Meanwhile, counsel should be in constant contact with your independent environmental consultants and other scientific professionals to ensure proper evaluation of the risk posed by PFAS. The regulatory and litigation landscape for PFAS is constantly changing. Even the science is relatively undeveloped for an emerging contaminant subject to such legal scrutiny. Further complicating matters, there are hundreds of thousands of different kinds of PFAS. But not all PFAS are created equal. While regulators have currently set their sights on two of the most common kinds of PFAS — perfluorooctanoic acid, or PFOA, and perfluorooctane sulfonate, or PFOS — that focus could quickly change. The EPA is conducting ongoing research^[1] into the toxicity of up to 75 different PFAS compounds. State regulators are free to research an even greater variety of PFAS compounds. It will be essential that your team of professionals hired to address potential PFAS liability be apprised of legal developments related to PFAS so that the investigation of your business addresses the right issues in a timely manner.

Once you have a complete picture of the risk PFAS pose to your business, you can begin taking proactive and protective measures to protect your business. For example, you should, if at all possible, immediately transition to utilizing PFAS-free equipment and supplies at all levels of your business. You should receive warranties from your suppliers that they are providing PFAS-free products to you and that those products did not encounter PFAS anywhere in the supply chain. In addition, you should require your suppliers to substantiate their warranties by providing indemnity if their products are proven to contain PFAS. Given the ubiquity of PFAS, and the growing risk of regulatory enforcement and litigation, it is crucial that your suppliers provide not only warranties, but indemnity as well. Besides, with guarantees that your products are PFAS-free, your business can even go on a public relations offensive by touting the lack of PFAS in your products — much like plastics that now claim to be BPA-free.

Similarly, with comprehensive knowledge of whether your products contain PFAS, you will be better situated to decide how to handle the increasingly diverse set of state-level regulations for PFAS. In California, for example, the California Office of Environmental Health Hazard Assessment, or OEHHA, added PFOA and PFOS^[2] to “the list of chemicals known to the state to cause reproductive toxicity (developmental endpoint) for purposes of Proposition 65.” By November 2018, California businesses will need to decide whether to put a “clear and reasonable” warning that their products contain PFAS. Unfortunately, the OEHHA has offered little to no guidance on routes of exposure, maximum allowable dose levels or legacy requirements. Does a law firm that installed carpet in its office some years back

need to test that carpet and provide a Proposition 65 warning? At this point, the OEHHA has not provided an answer. The robust Proposition 65 plaintiffs bar is ready to prey on that uncertainty the moment the warning requirement becomes active in November. In just a few months your business may be faced with balancing the need for a warning requirement against the potential cost of Proposition 65 litigation.

Even if the environmental audit uncovers PFAS in your product supply chain, Proposition 65 does not necessarily require putting a warning label on your products or in your business. Instead, there are mechanisms to avoid warnings, but you must act quickly. For compounds such as PFOA and PFOS, which have been listed by the OEHHA without maximum allowable dose levels, businesses can conduct a “quantitative risk assessment” to determine that the level of exposure caused by their product “poses no significant risk.”^[3] If the level of exposure poses no significant risk based on that assessment, a warning is not required under Proposition 65. But even the OEHHA admits^[4] that “determining anticipated levels of exposure to listed chemicals can be very complex” because the process involves analysis of animal studies, epidemiologic data, risk analysis and much more. PFOA and PFOS will pose an even greater challenge given the regular presence of similar compounds in the natural environment. To take advantage of a risk assessment before November, you should begin preparing it as soon as possible.

Of course, even if you take all the necessary precautions against PFAS liability, it will not always be possible to avoid regulatory proceedings or litigation. By taking preventive actions now, your business will be ideally situated to challenge any PFAS regulatory enforcement actions or litigation head on. If you have any doubt that PFAS may be in your products, you may want to consider testing vulnerable portions of your supply chain to be certain your lack of warning will not subject you to penalties down the line.

Most obviously, you will have an informational advantage over regulators and opposing litigants, and that information will be cloaked in layers of privilege and confidentiality. On the one hand, your evaluation of your PFAS exposure will not be available to regulators or litigants through discovery or related procedural devices. On the other hand, you will be able to press regulators and litigants on the more difficult issues in PFAS science, especially related to proving that specific PFAS exposures caused particular alleged injuries. In this way, your business will be well-positioned to dismiss any regulatory proceeding or litigation early on before incurring significant expenses.

Furthermore, with your informational advantage, you can pursue other procedural case management options that put significant pressure on regulators or litigants to prove their claims or move on. If your business is confronted with an enforcement action or litigation, there are legal strategies you can employ to substantially minimize or, in some cases, even eliminate liability.

PFAS are ubiquitous and durable. In the next few years, there will likely be a whirlwind of activity related to PFAS contamination and remediation. Despite the risk posed by recent PFAS regulation and litigation, there are numerous actions your business can take to stay ahead of liability. The time to take those actions is now.

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[1] www.epa.gov/sciencematters/epa-toxicologists-focus-innovative-research-pfas-compounds

[2] oehha.ca.gov/media/downloads/crnrlistingnotice111017.pdf

[3] 27 Cal. Code Regs. § 25703.

[4] oehha.ca.gov/proposition-65/general-info/proposition-65-plain-language