

PFAS LEGAL LIABILITY RISKS: WHAT THE TEXTILE SECTOR NEEDS TO KNOW

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OVERVIEW

- **PFAS – Why It Matters**
- **Regulatory Risks & Trends**
- **Litigation Risks & Trends**
- **Other Potential Risks & Trends**
- **Best Practices to Mitigate Risks**
- **What's Ahead?**

PFAS – WHY IT MATTERS?



PFAS – WHY IT MATTERS



- **Per- and polyfluoroalkyl substances (PFAS)** are a top environmental priority for the Biden administration and for many state environmental regulatory agencies.
- **Ubiquitous** – includes over 6000 chemical substances
- Scientific studies are showing that exposure to some PFAS may be **linked to adverse health effects** in humans and animals
- **Bioaccumulation & environmental persistence** - considered “forever” chemicals
- **Heightened awareness & confusion** – Greater focus in media, regulatory enforcement and litigation

PFAS REGULATORY RISKS & TRENDS



FEDERAL PFAS STRATEGIC ROADMAP (2021)

ATA

- Announced **October 2021**
- Strategic Approach
 - Consider PFAS' lifecycle
 - Hold dischargers accountable for their actions
 - Ensure science-based decision-making
 - Protect disadvantaged communities
- Includes 31 specific actions from 2021-2024 across the EPA's various offices



**PFAS Strategic Roadmap:
EPA's Commitments to Action
2021-2024**

EPA ACTIONS TO REGULATE PFAS

- [May 18, 2022](#) - EPA added five **PFAS to Regional Screening Levels (RSLs) and Regional Management Removal Levels (RMLs)** for soil screening for groundwater protection.
- [Aug. 25, 2022](#) - EPA released proposed rule to **designate PFOA and PFOS as hazardous substances under CERCLA.**
 - More than 2800 sites known to have PFAS.
- [Mar. 14, 2023](#) - EPA announced **draft Maximum Contaminant Levels (MCLs)** for PFOA, PFOS, PFNA, PFHxS, PFBS, and Gen X.
 - Final rules expected by end of 2023.

PFAS DISCHARGES UNDER NPDES PERMITS



- [December 2022](#) - EPA issued guidance to states on how to use NPDES permit requirements to restrict PFAS discharges
 - Notices of Violation have already been issued in some states (e.g., Michigan)
- [January 2023](#) - EPA announced the Effluent Guidelines Program Plan 15 for industrial facilities
 - **Requires PFAS data collection for other industries, including** electrical and electronic components, **textile mills**, landfills, leather tanning and finishing, plastics molding and forming, and paint formulating.



CERCLA PFAS ENFORCEMENT DISCRETION



- March 2023- EPA held several public listening sessions on PFAS under CERCLA.
- EPA intends to **focus on manufacturers, federal facilities and other industrial parties**
- EPA **may choose not to take CERCLA enforcement** action against certain entities (water providers/ utilities, public landfills, certain local or tribal airports, POTWs, farms that apply biosolids, tribal or local fire departments).
- EPA may settle and provide CERCLA **contribution protection** to some parties.
- Retains ability to address imminent and substantial endangerment

EPA'S FINAL TSCA PFAS RULE



- **September 2023-** The final rule imposes certain **reporting and recordkeeping requirements for PFAS under TSCA section 8(a) (40 CFR Part 705)**.
- Expands the definition of PFAS previously included
- **Any entities, including small entities, that have manufactured (including imported) PFAS in any year since 2011 will have 18 months** following the effective date of this Rule to report PFAS data to EPA.
- **Small manufacturers (as defined at 40 CFR 704.3) whose reporting obligations are exclusively from article imports will have 24 months** from the effective date of this rule to report PFAS to EPA.

FEDERAL REGULATORY TRENDS



EPA has increased enforcement actions related to PFAS in recent years:

- January 2023 – EPA proposes to add environmental justice, climate change and **PFAS to National Enforcement and Compliance Initiatives for FY 2024-2027.**
- April 2023 - EPA took the **first-ever federal CWA enforcement action to address PFAS** in stormwater and effluent discharges at the Chemours Washington Works facility near Parkersburg, W. Va.
- August 2023 – EPA plans to ***“hold responsible those who manufactured PFAS and/or used PFAS in the manufacturing process, federal facilities that released PFAS, and other industrial parties who significantly contributed to the release of PFAS into the environment.”***

WHAT TO EXPECT – FEDERAL TRENDS

What We Should Expect – Likely Federal Regulations:

- **Superfund/CERCLA** - List certain PFAS as hazardous substances, thus imposing strict, joint and several liability for clean-ups – lead to re-openers in CERCLA
- **RCRA** – List certain PFAS as hazardous or toxic waste
- **Clean Water Act** - Include PFAS limits in water discharge permits
- **Safe Drinking Water** - Expand testing of drinking water supplies for PFAS and development of health advisories

STATE REGULATORY RISKS & TRENDS



Pending State Regulations - <https://www.saferstates.org/bill-tracker/>

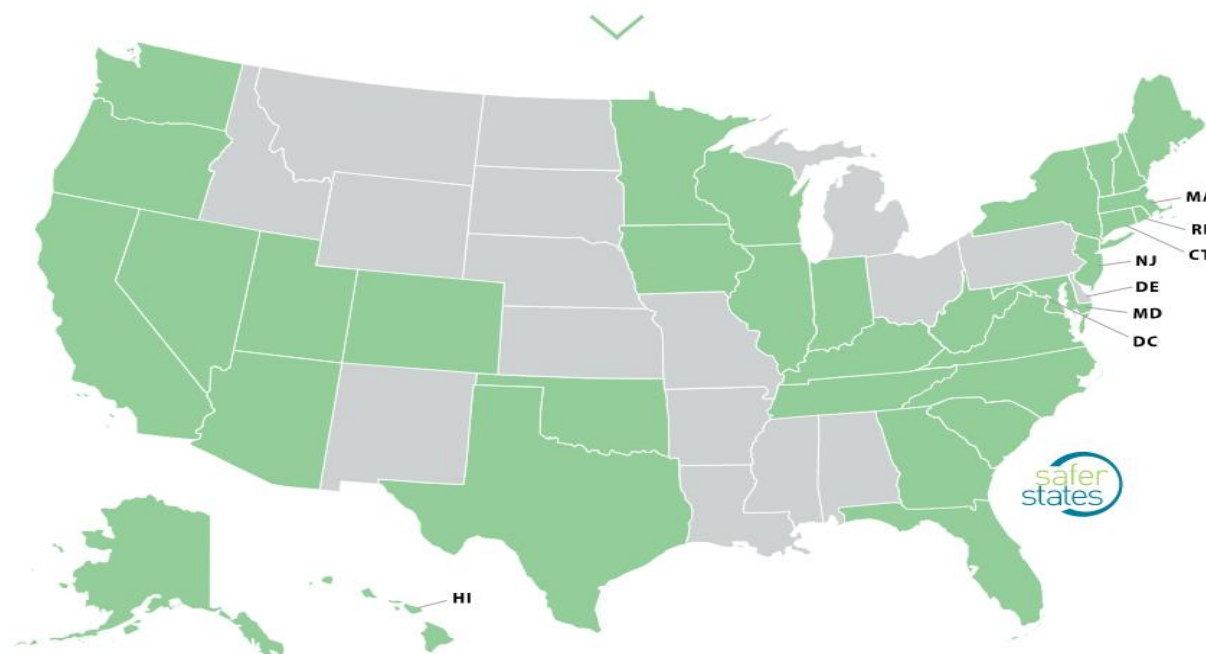


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OUR VISION STATES IN THE LEAD TOXIC CHEMICALS **BILL TRACKER** SOLUTIONS NEWS TAKE ACTION

PFAS

186 Current Policies in 33 States



Toxic/Issue: PFAS

STATE REGULATORY RISKS & TRENDS



- **Primary Categories:**
 - **Banning PFAS Use, Sale and Distribution.**
 - Focus on certain consumer goods
 - **Disclosure or Reporting Requirements for PFAS in Products (textiles, children, food)**
 - **PFAS Remediation Requirements**
 - **Studies and Research of PFAS – Look at effect on people, animals and environment**

CALIFORNIA – ENACTED LEGISLATION

- **Prop 65 warnings**
 - PFOA, PFOS chemicals in textiles
- **Effective January 1, 2025 - Ban on PFAS in new textile articles (AB 1817)**
 - “regulated PFAS” broadly defined
 - Treatments exempt from PFAS ban since they are covered elsewhere



CALIFORNIA – ENACTED LEGISLATION

- **California Department of Toxic Substances Control (DTSC), April 2022**
 - Treatment for converted textiles must submit a Priority Product Notification (PPN)
 - “Converted Textiles” – textiles used in consumer products like furniture
- **PFAS Reporting Proposal (AB 2247) – Vetoed by Governor Newsome**



COLORADO – ENACTED LEGISLATION

- **PFAS Consumer Protection Act**
 - Intentionally added PFAS prohibited after January 1, 2025 for indoor furniture
January 1, 2027 for outdoor furniture



MAINE – ENACTED LEGISLATION

- **PFAS Ban and Reporting Requirements -** Effective **January 1, 2023**, new carpets, rugs, and fabric treatments may not be sold in the state, and the presence of PFAS chemicals in any products must be reported to Maine DEQ
- Prohibits “intentionally added” PFAS **in all consumer products by January 1, 2030** (except in case of unavoidable use)



MICHIGAN – PROPOSED LEGISLATION

- Proposal to require labeling of consumer products containing PFAS substances



MINNESOTA – ENACTED LEGISLATION

- **PFAS Phase-out** - Ban PFAS in any product by January 1, 2032
 - Includes upholstered furniture
- Proposed – written notice of PFAS in any product



NEVADA – PROPOSED LEGISLATION

- Restricted the use, manufacture, distribution and sale of children's products, residential upholstered furniture, residential textiles, business textiles or mattresses containing intentionally added PFAS
- Required labeling PFAS products
- Carried criminal liability for violations
- **Vetoed by Governor in June 2023**



VERMONT – ENACTED LEGISLATION

- **PFAS Phase-out** - Ban on PFAS in all consumer products starting January 1, 2030



State Enforcement Trends:

- **Some states are already beginning to require active and closed Superfund and brownfield sites to sample for PFAS, which increases enforcement and remediation risks.**
 - NY, NJ: Require all *active remediation* sites to sample for certain PFAS.
 - CA, MA: Requires investigation of sites with *potential PFAS* contamination
 - NC: In certain cases, PFAS remediation *may be covered under state's Brownfields program.*
- **January 2023** – Landmark Michigan settlement for PFAS with Asahi Kasei Plastics North America (\$3.2M)

PFAS LITIGATION RISKS & TRENDS



Leach v. Dupont (& related cases) – “Dark Waters” movie (2019)

- Initial PFAS cases filed in late 1980s against DuPont related to a PFOA by-product used to make Teflon
- In 2004, reached settlement of \$405 million
- DuPont agreed to fund study and medical monitoring
- As result of study, over 3,500 personal injury claims brought resulting in \$670.7 million in settlements in Feb. 2017.

FIRST WAVE OF PFAS CASES



State of Minnesota v. 3M Case:

- Settled in 2018 for **\$850 million**

DuPont, Corteva and Chemours Settlement:

- Dupont, Chemours settle over 3500+ PFOA lawsuits for **\$671 million** in 2017.
- **Reached a \$4 billion cost-sharing agreement** in 2021 to settle a dispute over liabilities associated with historic use of PFAS.

Tennessee Riverkeeper v 3M Case:

- **\$98 million settlement** between 3M, the city of Decatur, Morgan County, and Decatur utilities; case closed in Dec. 2021.

GENERAL PFAS LITIGATION TRENDS



- Primarily focused on *private personal injury* litigation against primary and secondary manufacturers.
- *Product liability* theories are expanding to include *downstream users of PFAS* that incorporated PFAS (even as raw material) into their products.
- Possible *expansion through regulatory enforcement actions* under major environmental statutes, e.g. CWA (discharge limits), SDWA (drinking water standards), CERCLA or RCRA (remediation actions), TSCA (marketing, labeling), citizen suits.

Consumer Fraud Claims Expanding:

- **Food Packaging Litigation**
 - McDonalds and Burger King suits (IL and CA)
- **Cosmetics Litigation**
 - L'Oreal – Burt's Bees - Cover Girl - Almay
- **Textiles**
 - Consumer goods and clothing
- **Beverages**
 - Coca-Cola suit in New York

Manufacturers of consumer products which applied soil and stain resistant chemicals to products may see environmental and personal injury claims for decisions made decades ago.



Michigan Dept. Of Env't Quality v. Wolverine World Wide, Inc.,
Case No. 1:18-cv-00039 (W.D. Mich. filed Jan. 2018) – \$113
million dollar settlement for allegations that a footwear
company's weatherproofing waste containing PFAS
contaminated private water wells.

TRENDS AFFECTING THE TEXTILE INDUSTRY



- ***Water Works & Sewer Board of the City of Gadsden v. 3M Company, et al.***; Circuit Court of Etowah County, AL; Case No. CV-2016-900676.00
- ***Water Works & Sewer Board of the City of Centre v. 3M Company, et al.***; Circuit Court of Cherokee County, AL; Case No. 13-CV-2017-900049.00
- ***City of Rome, Georgia v. 3M Company, et al.***; Superior Court of Floyd County, Georgia; Case No. 19CV02405
- ***Jarrod Johnson v. 3M Company, et al.***; United States District Court, Northern District of Georgia; Case No. 4:20-cv-0008-AT

REI PFAS CONSUMER FRAUD CLASS ACTION



Krakauer v. Recreational Equipment, Inc. (REI), Case No. 3:22-cv-05830 (W.D. Wash.)

- **October 28, 2022** - A consumer fraud class action lawsuit filed against REI over PFAS content in its waterproof clothing; also attacked the company’s “sustainable” and “all natural” claims.
- Plaintiffs’ claims included **violation of state consumer protection laws and the federal Magnuson-Moss Warranty Act, breach of warranty (implied and express), fraud (actual and constructive), and negligent misrepresentation**
- In February 2023, **REI announced that it will phase out PFAS** in all its products beginning in fall of 2024.

- Increase in PFAS claims **added to traditional toxic tort cases**
 - Cases against Monsanto, Roundup are examples
- **Post-Leach allows more expansive injury claims**
 - Many claims allege non-specific injuries
 - Known health effects continue to be studied
 - Medical monitoring permitted
- **Challenges in PFAS are similar to asbestos litigation cases**
 - Laden with causation challenges
 - Which PFAS?
 - How exposed? Where?
 - Dosage? How much?
 - Health effects?

OTHER RISKS & TRENDS – INSURANCE



- **Type of policies affected**
 - CGL/Excess/Umbrella Policies
 - SEIL (Site Environmental Impairment Liability)
 - CPL (Contractors Pollution Liability)
- **Common challenges:**
 - Pollution Exclusion (total, absolute, named peril)
 - Are there “covered operations”?
 - Allocation issues & priority of coverage
 - Is there liability to third parties?
 - Contractual liability Exclusions
 - Coverage for reopeners and relation back

- Heightened diligence items in transactions and any potential or known liability is likely to impact deal terms.
- On December 15, 2022, EPA adopted the **ASTM E 1527-21 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process”** in its direct final rule, which includes a reference to PFAS.
 - **Rule becomes effective on December 15, 2023**
- Parties should ensure that environmental consultants on deals are actively looking into PFAS liabilities.

BEST PRACTICES TO MITIGATE RISKS



WHAT CAN WE DO NOW?

- ✓ Monitor **state & federal legislation & regulations** as well as pending legislation
- ✓ Identify your **operational risks** related to PFAS (remediation, compliance, insurance, M&A, PR, health and safety, etc.)
- ✓ Review available **permits**
- ✓ Create **decision matrix/flow-chart** for consistency across facilities and programs
- ✓ Identify **timelines for response and compliance**

WHAT CAN WE DO NOW?

- ✓ Develop **questionnaire/survey** for **suppliers, vendors**
- ✓ Require **certifications** from **vendors and suppliers** that materials or products do not contain PFAS
- ✓ Require **disclosures of PFAS** in **agreements** with vendors and/or suppliers
- ✓ Review **insurance policies** (D&O coverage, exclusions, etc.)
- ✓ **Due diligence** of PFAS in all M&A and real estate transactions

WHAT'S NEXT?



What's Next & Final Thoughts

- **Regulatory liability will increase** as states continue to restrict and prohibit PFAS in certain consumer products
- **Record-keeping and reporting burdens** will increase & will provide a road-map to liability, esp. in certain states (i.e., ME, CA, NY)
- **ESG claims** based on PFAS exposure, including environmental justice claims
- False representation, greenwashing (or greenhushing) and similar “**marketing**” **claims** increase due to public perception of harm

What's Next & Final Thoughts



- PFAS litigation will continue to have **challenges related to causation** (data gaps)
- **Class action cases** will continue to increase, esp. with public and media focus (e.g., cosmetics, contact lenses)
- **Insurance coverage** is needed - likely lead to an increase in insurance coverage litigation.
- Heightened PFAS considerations in **real estate and commercial transactions**

QUESTIONS?



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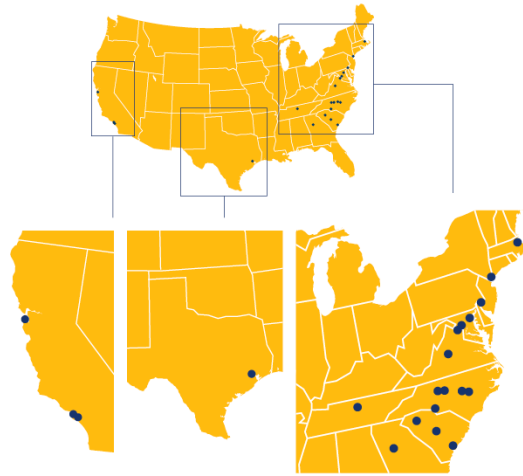


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Womble Bond Dickinson at a glance

 **28** Locations
across the US and UK



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Greenville
Houston
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Nashville
New York
Raleigh
Research Triangle Park
Silicon Valley
Tysons
Washington, D.C.
Wilmington
Winston-Salem



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Representing more than

600

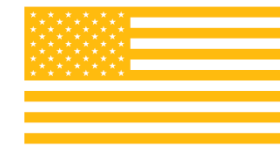
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+150
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UK Top 20 Law firm



AmLaw 82 ranked firm



Global Top 100 Law firm by revenue

