

# Cos. Must Brace For New PFAS Regulations And Litigation

By **Paul LaFata, Marina Schwarz and Michael Fazio** (December 11, 2024)

Historically, per- and polyfluoroalkyl substances have been known for their water-resistant and stain-resistant properties, as well as their stability.[1]

These compounds have been used across numerous industries in the production of a wide range of products. Some notable examples include apparel, upholstery, wire insulation, surface coatings, and personal care products, including cosmetics and shampoos.

More recently, PFAS have continued to garner attention from federal, state and local regulators, as well as in various kinds of litigation across the country. The environmental persistence and ubiquity of many of these substances, and allegations about exposure-based health risks, have spurred much of the regulatory and litigation focus.

Although there have been efforts across many industries to phase out reliance on certain PFAS in place of others, public scrutiny has persisted. Originally, a select number of PFAS, notably perfluorooctanoic acid, or PFOA, and perfluorooctanesulfonic acid, or PFOS, were the main subject of attention.

But the focus has expanded to include a set of six compounds known as PFAS6 — and now, to potentially hundreds of other PFAS. For example, in October, the U.S. Environmental Protection Agency announced a proposal to add over 100 PFAS to the Toxic Release Inventory, or TRI — a list of chemicals subject to federal reporting requirements.[2]

While the change in presidential administration will likely lead to a shift in priorities for the EPA, it is unlikely that the national interest in PFAS will subside. Their scrutiny has already cut across different administrations, with substantial public pressure to expand regulations.

Moreover, the focus on PFAS at the state and local level will undoubtedly remain — stimulated by regular media attention.

In this article, we summarize several PFAS-related updates from the EPA, and state legislatures and regulators. We then highlight notable activity across litigation, including the trend of heightened focus on a broader set of PFAS, and new categories of defendants. We conclude with a discussion of some practical strategies for companies to consider.

## Notable Federal Regulatory Updates

In October, the EPA issued a proposed rule that would add over 100 PFAS compounds to the TRI.[3] While the TRI already included many PFAS, this proposal significantly expands the list of compounds that commercial entities must evaluate and consider.



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A facility must report to the EPA if it manufactures, processes or uses more than 100 pounds of any compound included on the TRI.[4] In line with its approach to other PFAS already on the list, the EPA intends to designate the additional PFAS as "chemicals of special concern."[5]

This classification would mean that the TRI's de minimis exemption is inapplicable.[6] That exemption would otherwise allow the disregard of very small concentrations of compounds in mixtures.[7]

But the EPA has stated that this exemption "is inconsistent with a concern for small quantities of PFAS."[8] Public comments on the proposed rule were closed on Dec. 9.[9]

Earlier, in May, the EPA finalized its rule designating PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA — also known as the Superfund law.[10] Relying on Section 102(a) of CERCLA for the first time in making such a designation, the agency determined that releases of PFOA and PFOS may present substantial danger to the public health or welfare, or the environment.[11]

This designation means that entities that release PFOA or PFOS in amounts greater than one pound within a 24-hour period must report to the EPA.[12] The agency can also use CERCLA's cost-shifting mechanism to direct potentially responsible parties — including current and former owners of affected sites — to investigate and remediate.[13]

The EPA intends to designate additional PFAS as hazardous substances under CERCLA, an approach that would be consistent with that under a similar law.[14] In April, the agency proposed to designate nine PFAS compounds — including PFOA, PFOS, HFPO dimer acid, perfluorobutanesulfonic acid and perfluorononanoic acid — as hazardous constituents under the Resource Conservation and Recovery Act.[15]

A finalized rule, which is expected in July 2025, could give the EPA the capability to deem solid waste containing PFAS as a constituent to be "hazardous waste."[16] Additionally, as with a CERCLA designation, a Resource Conservation and Recovery Act designation could generate separate litigation related to compliance and remediation.

The EPA has also been active in other areas, such as its April finalized regulations for PFAS in drinking water.[17] This is the first federal rule of its kind, and sets maximum contaminant levels for six PFAS — including PFOA, PFOS and HFPO dimer acid.[18]

Within five years, public water systems must comply with the maximum contaminant levels — for example, 4 parts per trillion for PFOA.[19]

Other areas of federal oversight may be forthcoming, with the potential to target additional industries. As explained further below, more scrutiny is being directed at the presence of PFAS in biosolids, which are the main byproduct of wastewater treatment processes and are often used as fertilizers.

Currently, there are no federal standards in this area, and the EPA has recommended that states monitor biosolids for PFAS.[20] But by the end of this year, the EPA is expected to complete an agricultural risk assessment, which it says will serve as the basis for determining whether regulation of PFAS in biosolids is appropriate.[21]

Notably, many stakeholders have been already calling for the EPA to take action with

respect to biosolids. In June, farmers in Texas sued the agency, alleging that it must propose regulations promptly.[22] A group of farmers in Maine subsequently joined the lawsuit.[23]

### **Continued Focus Among State Legislatures and Regulators**

State regulations regarding PFAS have become increasingly more common and sweeping in scope. While state governments have followed the federal government's lead in certain respects, states have taken independent action and assumed their own aggressive postures toward PFAS.

Beyond regulations limiting the levels of PFAS in drinking water, groundwater, surface water and soil, many state legislatures and regulatory agencies have proposed or issued bans and announced reporting requirements.[24] These rules already reach a vast number of industries, with the potential to reach others.

In 2023 alone, states introduced approximately 200 new bills attempting to regulate or restrict PFAS use, with many others announced over the past year.

For example, in a new law going into effect at the beginning of 2025, Minnesota has banned the manufacture or sale of everyday products that contain intentionally added PFAS.[25] Affected products run the gamut from cookware and cleaning products, to personal hygiene products like cosmetics and dental floss, to others that cut across multiple business sectors.[26]

Similarly, Maine has committed to phase out PFAS in all consumer products by 2032, except where the use is "unavoidable." [27] Regulations in other states, such as California, Connecticut and Maryland, add to this dynamic patchwork of state regulations on PFAS in consumer products.[28]

PFAS regulatory activity is reaching further into new sectors, such as agriculture. Beyond the federal regulatory attention to the presence of PFAS in biosolids, this subject has gotten significant attention among the states.

After the discovery of PFAS in biosolids, or on land where biosolids were spread, many states became active in regulating PFAS in biosolids. Colorado, Massachusetts, Michigan and other states have issued guidance or rules requiring sampling of biosolids for PFAS.[29]

And in 2022, Maine became the first state to ban the use of biosolids for fertilizer, following the discovery of PFAS in biosolids at various locations in the state.[30]

### **Notable Litigation Trends**

PFAS litigation has been steadily expanding, with some of the newer types of litigation being notably different than that which dominated the arena two decades ago.

For years, most of the litigation targeted manufacturing facilities, with allegations that certain PFAS — notably PFOA and PFOS — were being released into the environment. Common legal claims in these cases include medical monitoring and personal injury, based on exposure to these compounds that reached drinking water; diminished property values from the presence of PFAS in soil and water wells; and the costs of remediation.

But litigation targets now include a broader set of entities, further down the supply chain.

For example, environmental tort and personal injury claims have been brought against processors and composting facilities.[31]

Furthermore, much of this new era of environmental and personal injury litigation involves not just PFOA and PFOS, but many other PFAS, or the class of chemicals writ large. That expansion coincides with regulators' focus on additional PFAS besides the few that were originally in the limelight.

While the defenses in these litigations will be case-specific, certain trends continue to appear. Because of the ubiquity of PFAS and the common use of these compounds across a variety of industries, identifying and assessing alternate sources of PFAS remain a critical part of any defense strategy.

Additionally, while the EPA, state health agencies and other scientific organizations are still evaluating the potential health effects of a variety of PFAS, there continues to be a lack of consistent conclusions across the studies. Not only can defendants rely on these findings to rebut certain allegations, but they can also rely on the differences among PFAS compounds.

While there is sometimes a tendency to group together all PFAS, many compounds that are now the subject of litigation have garnered relatively less attention from the scientific community. Thus, it may be important for defendants to emphasize the distinctions between compounds at issue.

Another developing area of PFAS litigation has targeted everyday consumer products across many industries, including clothing,[32] beverages[33] and personal hygiene.[34] These consumer class actions often rely on claims of fraudulent advertising and violations of consumer protection laws.

Plaintiffs typically allege that a company's product was falsely or misleadingly marketed — for example, as safe, natural or environmentally friendly. In many instances, these lawsuits follow after media coverage of product testing reports.[35]

One defense that is commonly asserted in these cases relies on the insufficiencies of product testing. Plaintiffs have often relied on tests for fluorine — one of the chemical elements in PFAS — to attempt to show that PFAS is present in the product at issue. But courts have rejected these tests as an impermissible proxy for PFAS, recognizing that fluorine can come from natural sources or from non-PFAS compounds.[36]

Another frequently asserted defense is that the advertising in question could not mislead a reasonable consumer. In some instances, defendants have relied on the ubiquity of PFAS and the publicity over the historical use of these compounds in certain industries to show that consumers would not expect PFAS-free products.

For example, in the U.S. District Court for the Northern District of Illinois' April decision in *Garland v. Children's Place Inc.*, the court referred to widely published information about the use of PFAS in the clothing industry to conclude that a consumer would not plausibly interpret the advertising at issue — which did not mention PFAS — as suggesting that the product being advertised was PFAS-free.[37]

But these kinds of arguments have had mixed results. For example, in a September decision from the U.S. District Court for the Southern District of New York in *Hicks v. L'Oreal USA Inc.*, the court held that the argument that "no reasonable consumer could have expected" cosmetics products to not contain PFAS "is not persuasive in light of the alleged serious

health risks." [38]

## **Takeaways**

Over the past several years, the regulatory and litigation landscape surrounding PFAS has dramatically changed. Around a decade ago, there were no enforceable federal regulations, with just a handful of state regulations that dealt mostly with PFOA and PFOS.

Now, the list of chemicals of potential concern is regularly expanding, with more state and federal regulations across many fronts. With increasing public awareness and concern regarding these compounds, amplified by substantial media attention, this scrutiny will likely persist. [39]

Because regulators and tort lawyers have directed their focus toward entities further down the supply chain, one advisable step is for companies to evaluate whether their processes have used PFAS compounds in any capacity. That assessment may include communications with suppliers, as the PFAS compounds in certain raw materials may not have been disclosed if they made up a very small portion of the materials.

With continuing technological advancements to detect and quantify PFAS in smaller amounts, companies should be cautious in assuming that their materials do not include PFAS — particularly given the wide range of applications that these compounds have had across decades.

Assessments may also involve relying on internal resources, like conversations with current and former employees about relevant products and operations, as well as environmental practices like the handling and disposal of PFAS-containing waste. Companies should consider collaborating with external experts to evaluate additional technical issues in their particular industries, and their risk profiles.

With increasing regulatory attention, and the tort bar attempting new strategies to target additional companies in supply chains, stakeholders should think critically about these issues and identify relevant information about their own supply chains.

Although this work is potentially time-consuming and may present challenges, it may ultimately prove significant in managing potential litigation risk and establishing adequate compliance.

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[1] Gluge et al., An Overview of the uses of per- and polyfluoroalkyl substances (PFAS) (2020), *Environ. Sci.: Processes*, 22:2345, 2349.

[2] Addition of Certain Per- and Polyfluoroalkyl Substances (PFAS) to the Toxics Release Inventory (TRI), 89 Fed. Reg. 81776 (proposed Oct. 8, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-10-08/pdf/2024-22966.pdf>.

[3] Id.

[4] Id.

[5] Id.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39124 (May 8, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-05-08/pdf/2024-08547.pdf>.

[11] See 42 U.S.C. § 9602(a).

[12] See 87 Fed. Reg. 54415, 54416 and 42 U.S.C. §9603(a), The federal Emergency Planning and Community Right-to-Know Act imposes related reporting requirements. See 42 U.S.C. §11004.

[13] See 42 U.S.C. §§ 9604, 9606, 9607.

[14] EPA, EPA Takes Important Step to Advance PFAS Strategic Roadmap, Requests Public Input and Data to Inform Potential Future Regulations under CERCLA (April 13, 2023), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=2050-AH09>.

[15] Listing of Specific PFAS as Hazardous Constituents, 89 Fed. Reg. 8606 (proposed Feb. 8, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-02-08/pdf/2024-02324.pdf>.

[16] 40 C.F.R. § 261.11.

[17] PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32532 (April 26, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-04-26/pdf/2024-07773.pdf>.

[18] Id.

[19] Id.

[20] EPA, Per- and Polyfluoroalkyl Substances (PFAS) in Biosolids (Oct. 10, 2024), <https://www.epa.gov/biosolids/and-polyfluoroalkyl-substances-pfas-biosolids>; see also USDA, Per- and Polyfluoroalkyl Substances FAQ, <https://www.farmers.gov/protection-recovery/pfas/faq#:~:text=EPA%20has%20not%20established%20standards,to%20be%20completed%20by%202024>.

[21] EPA, PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024, at 16 (Aug. 2022), [https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap\\_final-508.pdf](https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf).

[22] Compl., Farmer v. EPA, No. 1:24-cv-1654 (D.D.C. June 6, 2024), ECF 1; see also Second Am. Compl., Farmer v. EPA, No. 1:24-cv-1654 (D.D.C. Aug. 14, 2024), ECF 12.

[23] Public Employees for Environmental Responsibility, Lawsuit to Prevent PFAS In Biosolid Fertilizer Expands (July 23, 2024), <https://peer.org/lawsuit-to-prevent-pfas-in-biosolid-fertilizer-expands/>; see also Second Am. Compl., Farmer v. EPA, No. 1:24-cv-1654 (D.D.C. Aug. 14, 2024), ECF 12.

[24] See, e.g., 310 Mass. Code Regs. 22.07G; 16-3 Vt. Code R. § 500:6.12; 25 Pa. Code 250 App'x A; N.Y. Comp. Codes R. & Regs. tit. 6, § 597.3.

[25] Minn. Stat. Ann. § 116.943.

[26] Id.; see also Minn. Pollution Control Agency, 2025 PFAS Prohibitions, <https://www.pca.state.mn.us/air-water-land-climate/2025-pfas-prohibitions>.

[27] Me. Rev. Stat. Ann. tit. 38, § 1614; see also Me. Dep't of Env't'l Protection, PFAS in Products (Oct. 4, 2024), <https://www.maine.gov/dep/spills/topics/pfas/PFAS-products/>.

[28] Cal. AB-1817 (Product Safety: textile articles: perfluoroalkyl and polyfluoroalkyl substances) (2022), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202120220AB1817](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1817); Cal. AB-2771 (Cosmetic products: safety) (2022), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220AB2771](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2771); Conn. Public Act No. 24-59 (An act concerning the use of PFAS in certain products); ACT/PA/PDF/2024PA-00059-R00SB-00292-PA.PDF" rel="noopener noreferrer" target="\_blank"><https://www.cga.ct.gov/2024/ACT/PA/PDF/2024PA-00059-R00SB-00292-PA.PDF>; Md. HB-275 (PFAS Chemicals – Prohibitions and Requirements), <https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/hb0275?ys=2022rs>.

[29] Colo. Dep't of Public Health & Env., Colorado Biosolids-PFAS Interim Strategy (Dec. 7, 2023), <https://drive.google.com/file/d/1nFz7jMSRdGcI4gj6UZZPQCKnJglh43Qg/view>; Mass. Dep't of Env't'l Protection, PFAS in Residuals, <https://www.mass.gov/info-details/pfas-in-residuals>; Mich. Dep't of Env., Great Lakes, and Energy, Interim Strategy – Land Application of Biosolids Containing PFAS (2024), <https://www.michigan.gov/egle/about/organization/water-resources/biosolids/pfas-related>.

[30] Me. Rev. Stat. Ann. tit. 38, § 1306.

[31] E.g., Ryan v. Greif Inc., 708 F. Supp. 3d 148 (D. Mass. 2023).

[32] Garland v. Children's Place Inc., 2024 WL 1376353 (N.D. Ill. April 1, 2024).

[33] Second Am. Compl., Hernandez v. The Wonderful Co., No. 1:23-cv-1242 (S.D.N.Y. Jan. 24, 2024), ECF 36; Second Am. Compl., Lurenz v. Coca-Cola Co., No. 7:22-cv-10941 (S.D.N.Y. July 10, 2024), ECF 42.

[34] Am. Compl, Bounthon v. Proctor & Gamble Co., 3:23-cv-765 (N.D. Cal. Nov. 5, 2024),

ECF 80.

[35] See, e.g., Entvt'l Health News, Evidence of PFAS Found in Popular Bandage Brands Including Band-Aid (April 3, 2024), <https://www.ehn.org/pfas-bandages-2667623874.html>.

[36] Bounthon v. Procter & Gamble Co., 2024 WL 4495501, at \*2 (N.D. Cal. Oct. 15, 2024); Lowe v. Edgewell Pers. Care Co., 711 F. Supp. 3d 1097, 1105 (N.D. Cal. 2024).

[37] Garland v. Children's Place Inc., 2024 WL 1376353, at \*7 (N.D. Ill. April 1, 2024).

[38] Hicks v. L'Oreal U.S.A. Inc., 2024 WL 4252498, at \*17 (S.D.N.Y. Sept. 19, 2024).

[39] See, e.g., Pandora Dewan, Map Reveals 20% of Americans at Risk of "Forever Chemicals" in Drinking Water, Newsweek (Oct. 25, 2024), <https://www.newsweek.com/map-americans-risk-forever-chemicals-pfas-drinking-water-1974872>; Katherin Bourzac, 61 Unexpected 'Forever Chemicals' Found in Food Packaging, Sci. Am. (March 19, 2024), <https://www.scientificamerican.com/article/61-unexpected-pfas-forever-chemicals-found-in-food-packaging/>.