

Managing PFAS Liability Risk

21 August 2020

Federal and state legislative and regulatory initiatives targeting per- and polyfluoroalkyl substances (“PFAS”) are continuing to move forward notwithstanding the COVID-19 pandemic and could have significant consequences – particularly for the energy and infrastructure sector. The rapidly changing PFAS landscape impacts companies in the energy and infrastructure space specifically as potential PFAS “sources” and “receivers” (as discussed below), and understanding the current trends can help energy and infrastructure companies position themselves to manage PFAS liability risk going forward.

Background — What are PFAS?

PFAS, which have been dubbed “forever chemicals,” are a class of more than 5,000 human-made, persistent chemicals used in a range of industrial and consumer applications, such as firefighting foams and nonstick, stain resistant and grease resistant coatings. PFAS generally – and in particular the two most well-studied compounds, perfluorooctanoic acid (“PFOA”) and perfluorooctane sulfonate (“PFOS”), which are no longer manufactured in the U.S. – have allegedly been linked, primarily via ingestion in drinking water, to adverse health effects, including birth defects, liver damage and increased cancer risks. Additionally, the Centers for Disease Control and Agency for Toxic Substances and Disease Registry recently released a [statement](#) suggesting that exposure to high levels of PFAS could impact the immune system in ways that increase susceptibility to COVID-19, which is likely to increase the already intense legislative, regulatory and public scrutiny around PFAS.

Federal and State PFAS Trends

The U.S. Environmental Protection Agency (“EPA”) set a drinking water advisory of 70 parts per trillion for PFOA and PFOS in 2016, but federal regulation of PFAS largely stalled after that until, in response to growing congressional, state and public scrutiny of PFAS, EPA released a PFAS Action Plan in February 2019 (updated in February 2020) detailing its planned approach for studying and addressing PFAS.

Since then, there has been increased movement by both Congress and EPA with respect to PFAS.¹ Nonetheless, despite this recent activity at the federal level, many states remain concerned about the pace of federal action and are actively moving forward with PFAS legislation and regulation at the state level, including designating PFAS as “hazardous” under state cleanup laws, setting enforceable cleanup limits, and banning or restricting certain PFAS-containing products. Additionally, ongoing toxic tort litigation, most notably against manufacturers of PFAS and military installations that have used PFAS, continues to raise public awareness, further increasing the pressure on lawmakers and regulators. The result is a rapidly changing patchwork of varying laws, regulations and standards that is likely to continue for the foreseeable future.

Energy and Infrastructure Implications

Broadly speaking, energy and infrastructure operations can be divided into two categories: (1) potential “sources” of PFAS, such as terminals and upstream, midstream and downstream oil and gas operations; and (2) potential PFAS “receivers,” such as water systems, wastewater treatment systems and waste incinerators.

Potential PFAS Sources

PFAS contamination has been identified at a wide range of facilities, and at least 17 states have developed programs to monitor potential PFAS contamination sites. Energy and infrastructure sites, like military installations, most commonly end up as PFAS sources through the current or past use of PFAS-containing foams used to extinguish flammable and combustible liquid fires. At least 11 states, including Colorado, New York and Washington, have banned or restricted the use of PFAS-containing foams in at least some circumstances, most often for testing and training. Additionally, at least one state, Alaska, requires reporting of any discharge of PFAS-containing foam. Further, although there are not yet any federally enforceable limits for PFAS, approximately half the states have set drinking water standards for PFOA, PFOS and, in some cases, certain other PFAS, some of which are as low as 5–20 parts per trillion. Certain states, such as Texas, have also set standards for PFAS in soil

and/or groundwater. These state standards could trigger reporting and/or cleanup requirements in the event PFAS contamination is identified during an investigation.

Energy and infrastructure companies that use firefighting foams should carefully review the state regulations applicable to their sites, evaluate any PFAS-containing foams currently in use, consider whether there are alternatives, and ensure proper management and disposal procedures are in place, particularly for any testing or training exercises.

For sites with a risk of PFAS contamination (e.g., as a result of past fires that may have been discharged with foam), companies should understand any state PFAS investigation programs, including the results of any investigations of nearby sites; consider whether to test and if necessary address impacts to any drinking water wells; and evaluate any contractual protections (e.g., from former site owners or operators). Additionally, although many insurers are starting to impose PFAS exclusions under various insurance policies, in certain cases it may still be possible to obtain pollution coverage for contingent PFAS contamination risks.

Potential PFAS Receivers

Widespread commercial and industrial use of PFAS-containing products means that PFAS is often present in water, wastewater and waste.

Energy and infrastructure companies that operate drinking water systems should take care to stay abreast of applicable state regulations, including maximum contaminant levels and public notification requirements. Notably, some states, such as New Jersey, have testing and other regulations that apply even to private wells, so companies should not assume that regulations apply only to large utilities.

Wastewater treatment system operators currently have limited tools for treating PFAS in influent, meaning PFAS may be present in treated effluent and biosolids. A few states have developed surface water standards for PFAS (e.g., Michigan), while others have PFAS testing requirements for biosolids (e.g., Maine and Massachusetts) or are moving forward with setting limits for PFAS in biosolids (e.g., New York).

Similarly, there is an increasing amount of data showing that PFAS can be dispersed via air emissions that are difficult to control, which could pose challenges for waste incineration facilities. For example, this spring, news outlets reported that testing found PFAS in soil and surface water near an incineration facility in New York that processed PFAS-containing foam, which led to the Department of Defense cancelling

its contract with the facility and proposed state legislation banning incineration of PFAS-containing foam at the facility. Going forward, scrutiny of incineration facilities, including waste-to-energy plants, is likely to increase.

Water system operators, wastewater treatment system operators and incineration facilities should carefully review their sources of water, influent and waste, respectively, and consider participating in industry groups to track regulatory and technological developments and advocate for solutions that could reduce their regulatory burden and liability risk. Additionally, in certain cases, contractual or insurance protections may also be available.

Conclusion

The PFAS landscape is rapidly changing in ways that have substantial implications for energy and infrastructure companies, and the trend of increasing litigation, legislation and regulation could be accelerated in the event of a Biden administration and/or Democratic-controlled Congress. Energy and infrastructure companies should consider working with counsel to carefully evaluate potential PFAS liability risk and take steps to manage and mitigate that risk going forward.

Annie McGrath provided valuable research assistance in support of this post.

1. Congress introduced over 30 pieces of standalone PFAS legislation in 2019, and the 2020 National Defense Authorization Act, passed in December 2019, includes several actions related to PFAS, including adding 172 PFAS compounds to EPA's Toxic Release Inventory and requiring public water systems serving more than 10,000 people to monitor PFAS. Also in December 2019, EPA issued interim guidance for PFOA and PFOS in groundwater at federal cleanup sites, even though no PFAS compounds have been designated as a "hazardous waste" under the Resource Conservation and Recovery Act ("RCRA") or a "hazardous substance" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the federal cleanup statutes. More recently, in March 2020, EPA sought comments on a preliminary determination to regulate PFOA and PFOS under the Safe Drinking Water Act; the comment period ended in June. And PFAS legislation has continued to be introduced in Congress, including in connection with the 2021 National Defense Authorization Act.↪

-
- Read [all insights](#) from Kirkland's Energy & Infrastructure blog.
 - Read more [Environmental insights](#).
 - [Subscribe](#) to receive future updates.

Authors

Jennie Morawetz

Associate / Washington, D.C.

Paul D. Tanaka, P.C.

Partner / San Francisco / Houston

Related Services

Practices

- Transactional
- Energy & Infrastructure
- Environmental

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, portions of this publication may constitute Attorney Advertising.

This publication may cite to published materials from third parties that have already been placed on the public record. The citation to such previously published material, including by use of “hyperlinks,” is not, in any way, an endorsement or adoption of these third-party statements by Kirkland & Ellis LLP.