

Environment & Energy Report

# INSIGHT: Tactics to Navigate Increasing PFAS Litigation and Regulation

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Tremendous uncertainty exists over what levels of PFAS are safe and what the government will require. That uncertainty is not stopping a broad variety of plaintiffs from filing lawsuits or state regulators from requesting information from manufacturers. Parker Poe attorneys say proactive preparation for potential inspections and lawsuits is essential.

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Manufacturers and other businesses are facing intensifying scrutiny related to per- and polyfluoroalkyl substances (PFAS). It's important they take a proactive approach to managing these pressures.

Hundreds of lawsuits have now been filed over that family of widely used chemicals, including class actions. State regulators are increasingly asking businesses about their PFAS use. In addition, Congress is stepping up pressure on the Environmental Protection Agency to declare some types of PFAS "hazardous substances" under the Superfund law (CERCLA), which would create significant compliance hurdles and could even lead to criminal prosecution for certain violations.

Reviewing what role PFAS plays in your business can be a complex, technical process—you do not want to rush to make critical decisions regarding PFAS under the pressure of litigation or an information request from regulators.

## First Step: What's Causing PFAS at Your Facility?

The first step is to take a holistic look at what potentially could cause the presence of these chemicals at your facility. Important questions to ask include:

- Are you directly producing or using PFAS?
- Are the chemicals in the raw materials you receive and use?
- Are PFAS a byproduct of your manufacturing operations?
- Have your water sources been tested for the chemicals?
- Have you reviewed your facility's Safety Data Sheets (SDSs) for potential PFAS sources, especially the firefighting foams?
- Have you considered whether employees or contractors wearing Gore-Tex or other water-resistant fabrics that contain PFAS could be affecting analytical results?

## Partner With Outside Counsel

Manufacturers can find it especially valuable to partner with outside legal counsel to perform a thorough audit of how PFAS fits into their operations and what alternatives could make business sense.

By using outside counsel, manufacturers can assert that communications related to the audit are confidential under attorney-client privilege. If sued, companies may still be required to share certain data (sampling results for example) that the audit uncovers, but not the audit findings themselves, or what their internal team and external counsel discussed about it.

This legal privilege is critical in empowering leadership teams to talk frankly about audit findings. What control options are available? How much would they cost? How can usage change in a practical way? Is a change technically feasible? If we switch to a replacement chemical, would we eventually face the same issues?

The audit process is both a technical and legal evaluation, and it is important to be candid and detailed in fleshing out your options and evaluating weaknesses in different approaches—with less concern that those statements will come out in a damaging context later. The last thing a company wants is a gut reaction from a plant manager—“There’s no way we’re paying for that!”—to be emphasized in a courtroom because the communications were not privileged.

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To protect certain audit communications under privilege, consider bringing counsel in early to direct the audit and route all communications through them, including having counsel hire consultants and manage laboratory testing.

In addition, a thorough audit can enable manufacturers to engage meaningfully in the standard-setting process. It is clear at this point that new regulatory standards for PFAS are coming—the question is not if, but when. Knowledgeable manufacturers have an opportunity to provide an informed perspective on how various proposals would impact their industries.

## Develop a Communications Strategy

That type of informed perspective also is essential in developing a communications strategy, which is another proactive step manufacturers can take. For many companies, PFAS may very well be their most important public relations issue in the coming years.

It is critical to be deliberate and consistent about the way you portray your usage and interactions with these chemicals. Inconsistency and delay can lead to accusations of a cover-up, increasing the risk of both enforcement action and litigation.

## Plan for Inspections and Lawsuits

Furthermore, manufacturers should consider and plan the immediate steps they would take if faced with an agency inspection or enforcement action, negative press coverage, or a lawsuit.

For example, state regulators are increasingly testing facilities' wastewater for PFAS. Because these chemicals are ubiquitous and the test methods are incredibly sensitive, there is a high risk of cross-contamination of the samples and misleading analytical results. To protect against that risk, manufacturers should take split samples (a process by which the company takes its own samples at the same time the regulators take theirs). That way, if PFAS are detected, the company has its own baseline to compare with a regulator's samples.

Additionally, if regulators request to sample water discharged from the facility, manufacturers should consider collecting inlet water flow streams as well to determine if the facility's incoming water already is impacted with PFAS.

As for preparing for a lawsuit, one of the simplest things manufacturers can do is have a clear record retention and data management policy. Such a policy will make it easier to institute a litigation hold to prevent the loss of any relevant documents.

In addition, manufacturers should review their insurance policies to see if they are covered for potential defense costs or costs related to PFAS contamination. If not, it is worth reviewing the cost of policies that do provide that coverage.

*This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.*

#### **Author Information**

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