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PFAS: State and Federal Update: Jan. 31, 2020

Earlier this month the House of Representatives passed the PFAS Action Plan of 2019, which, if enacted, would make significant changes to the way the federal government, and therefore states, regulate PFAS.

The House isn't the only arena in which ongoing discussions and actions surrounding PFAS, formally known as per-and polyfluroalkyl substances, are occurring.

Debate over how to properly respond to this fairly new environmental issue has increased significantly within the last year both in state legislatures, as well as Congress, the administration and the courts. But what are PFAS, and what exactly is at play?

Here is a deep dive into those questions and many more. For more information on federal actions, please contact NCSL's Kristen Hildreth, and for more information on what states are currently doing surrounding the issue, please contact NCSL's Doug Farquhar.

What are PFAS, and why are they suddenly in the spotlight?

PFAS are a group of man-made chemicals which includes perfluorooctanoic acid (PFOA), perflurooctanesulfonic acid (PFOS), GenX and many others. The set of chemicals have been manufactured and used since the 1940s and can most often be found in firefighting foam, nonstick products, and stain-and water-repellent fabrics.

Notably, PFOA and PFOS are no longer manufactured in the United States but are still produced internationally and can still be imported into the U.S. via consumer goods such as carpeting, paper and packaging, coatings, rubber and plastics.

PFAS are found in a wide range of products you use daily—from your cookware, to your rain jacket, to the pizza you ordered because you were running late and didn't want to use your cookware. In fact, most people have been exposed to PFAS at some point in their life—the problem is, the chemicals are persistent in the environment and in the human body, meaning they don't break down and can accumulate over time causing adverse health effects such as low infant birth weights, cancer and thyroid hormone disruptions. Additionally, according to the Environmental Protection Agency (EPA), studies indicate that PFOA and PFOS can cause reproductive and developmental, liver and kidney, and immunological effects in laboratory animals.

What is the Federal government doing about them?

Executive Branch

In 2006, EPA invited eight major chemical manufacturers to join in a global PFOA Stewardship Program in which manufacturers agreed to eliminate the use of PFOA and PFOA-related chemicals in both their products, and their emissions. A decade after that partnership, in May 2016, EPA published a health advisory on PFOA and PFOS establishing "safe" levels of the chemicals in drinking water at no more than 70 parts per trillion. In May 2018, EPA held a two-day National Leadership Summit on PFAS that brought more than 200 federal, state and local leaders together from across the nation to address the use of these chemicals. Following that summit, the agency hosted a series of visits in states most affected by PFAS.

As a direct result of feedback received at those meetings, EPA unveiled its formal PFAS Action Plan last February describing both the long-term and short-term actions the agency planned to take surrounding the chemicals. Those actions included:

- Developing a maximum contaminant level process outlined in the Safe Drinking Water Act for PFOA and PFOS by the close of 2019.
- Listing PFOA and PFOS as hazardous substances and issuing interim groundwater cleanup recommendations for affected sites.
- Assisting states with PFAS enforcement activities.
- Including PFAS in national drinking water monitoring.
- Considering the chemicals for listing in the Toxic Release Inventory (TRI).,
- Developing new methods to better detect and remove PFAS in drinking water, soil and ground water.
- Developing a risk communication toolbox for states, tribes and local partners to communicate with the public.

Since the publication of that action plan, the agency has started or completed several actions within their plans, among others. To date, EPA has:

- Released interim recommendations for addressing PFOA and PFOS contaminated groundwater.
- Developed two regulatory proposals on PFAS, both of which are currently being circulated for interagency review. The first is an advanced notice of proposed rulemaking that would allow the public to provide input on adding PFAS to the TRI toxic chemical list. Second is a supplemental proposal to ensure that certain persistent long-chain PFAS chemicals cannot be imported into the United States without notification and review by EPA–the agency has the authority to deny such "significant new use requests" under the Toxic Substances Control Act.
- Released the Systematic Review Protocol for five PFAS toxicity assessments for a 45-day public comment period under the Integrated Risk Information System (IRIS) Program, describing how the IRIS assessments will be conducted.
- Sent the proposed regulatory determination for PFOS and PFOA in drinking water to the Office of Management and Budget for review.
- Announced a new method to test for additional PFAS in drinking water.

For a full list of what the agency has done see EPA's website here.

Congress

While the administration continues to cross items off its action plan, Congress is also attempting to regulate the class of chemicals. To date, the 116th Congress has introduced over 45 bills to address PFAS. If passed, the laws would amend existing statutes and authorize new programs, with several pieces of legislation focused on enhancing research and knowledge of the chemicals, issuing new regulatory mandates, dealing with the cleanup, and addressing contamination related to military institutions.

Heated negotiations took place over what PFAS-related provisions would be included in the FY 2020 National Defense Authorization Act (NDAA). The agreement included language directing the Department of Defense (DOD) and EPA to engage in a variety of actions surrounding the chemicals, including:

- Stopping DOD's use of PFAS-containing firefighting foam by October 2024.
- Requiring a review of DOD efforts to clean up and mitigate contamination at military basis. notably, it also requires that the DOD, upon the request of a state's governor, will be required to "work expeditiously" on cooperative agreements to address, test, monitor, remove, and remediate PFAS contamination in drinking and surface water or groundwater originating from DOD activities.
- The inclusion of certain PFAS chemicals in EPA's TRI and requires EPA to finalize a significant new use rule for some of the chemicals by 2020.
- Requiring EPA to publish interim guidance within the year regarding the destruction and disposal of PFAS substances and PFAS-containing materials, as well as to develop an interagency working group on emerging contaminants and how to best consider them.

Additionally, within the FY 2020 appropriations package, which passed mid-December, $3 million was included for EPA to establish maximum contaminant levels under the Safe Drinking Water Act for PFAS chemicals, and $5 million to designate PFAS chemicals as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), more commonly referred to as Superfund. The bill also included $1 million for PFAS work in drinking water systems, and a total of $20 million was included for state-led remediation effort of PFAS contamination. The Centers for Disease Control and Prevention was allocated $10 million to access the health effects of exposure to PFOS and PFOA. Additionally, the measure provided $60 million above the administration's proposal for PFOS and PFOA cleanup and requires the department to submit a plan detailing how they will spend the additional cleanup funds.

Apart from NDAA and FY 2020 appropriations, there are several other measures still going through committees. A fairly major piece of legislation is H.R. 535, the PFAS Action Act of 2019, a PFAS omnibus package, which passed the House, 247-159, but faces significant uncertainty in the Senate, with the president threatening to veto the legislation. The bill would require EPA to designate PFOS and PFOA as hazardous substances under the Superfund law within one year of the bill's enactment and to consider designating other PFAS substances within five years and would require set drinking water standards. Under the Superfund law, the federal government is liable for remediating hazardous

substances that it released on properties it formerly owned. Additionally, the bill would authorize, but not appropriate, $200 million over the 2020-2021 period for the agency to establish a grant program for community water systems to pay for implementing water treatment technology, which would remove the chemicals.

While the bill would authorize grants to states and community water systems totaling $700 million over FY 2020-2024 to cover capital costs associated with implementing some of the bill's requirements, it has been classified as an unfunded mandate by the Congressional Budget Office under the Unfunded Mandates Reform Act as it would exceed the 2019 thresholds established for both the intergovernmental and private-sectors by $82 million and $164 million, respectively.

What actions are states taking?

As the federal government spars over how to address the class of chemicals, states are filling the void by continuing to enact limits of their own. To date, numerous states have acted on their own to establish maximum contaminant levels more stringent than those of EPA. A few of those include Michigan, which has adopted a groundwater maximum contamination level of 70 parts per trillion (ppt) for PFAS; New Jersey, which adopted a drinking water contamination level of 14 ppt; and Vermont, which adopted a level of 20 ppt.

In 2019, legislatures introduced 106 bills with language on PFAS, with 15 new laws being enacted—an increase from 2018, which saw 76 PFAS-related bills, or supplemental appropriations introduced. In 2019 the appropriation bills in Alaska, Michigan and Washington had language on PFAS remediation; bills in California, Georgia, Manie, Minnesota, North Carolina, New Hampshire, New York, Pennsylvania, Vermont addressed specifics of PFAS, such as banning use of PFAS in firefighting foam. North Carolina and Vermont enacted legislation focused on PFAS in water. For an overview on what states are doing, please visit NCSL's Environmental Health State Bill Tracking Database.

In addition to passing legislation, some states have sued the manufacturers of the chemicals for contaminating water supplies and other natural resources. The leading state PFAS-related case was filed by Minnesota against the 3M Company for discharging PFAS into both surface and groundwater in specific cities—that case was settled for $850 million in 2018. Additionally, New York, New Hampshire, Vermont, New Jersey, and Ohio have all filed lawsuits within the last few years against manufacturers, and New Mexico has a suit against the federal government regarding water contamination at Air Force bases.

Multidistrict litigation is also ongoing in Ohio and South Carolina. In South Carolina the suits are against 3M Company and other manufacturers over PFAS in firefighting foam, and Ohio's case involves PFAS water contamination near a manufacturing site.

Action surrounding PFAS and the related chemicals isn't likely to cease anytime soon and seemingly has the potential to be around as long as the chemicals themselves. NCSL staff will continue to provide updates as they become available.