BCLP. Client Intelligent

# PFAS

## OVERVIEW

Per- and polyfluoroalkyl substances ("PFAS") are a family of over 5,000 fluorinated chemicals that have been used since the 1940's across a variety of industries as part of manufacturing processes, and as components of consumer products. According to the United States Environmental Protection Agency ("USEPA"), PFAS are found in:

- **Food** packaged in PFAS-containing materials, processed with equipment that used PFAS, or grown in PFAS-contaminated soil or water.
- **Commercial household products**, including stain- and water-repellent fabrics, nonstick products (e.g., Teflon), polishes, waxes, paints, cleaning products, and fire-fighting foams (a major source of groundwater contamination at airports and military bases where firefighting training occurs).
- **Workplace**, including production facilities or industries (e.g., chrome plating, electronics manufacturing or oil recovery) that use PFAS.
- **Drinking water**, typically localized and associated with a specific facility (e.g., manufacturer, landfill, wastewater treatment plant, firefighter training facility).
- **Living organisms**, including fish, animals and humans, where PFAS have the ability to build up and persist over time.

The regulatory and litigation risks posed by PFAS chemicals are evolving and significant. Various groups are working on new technologies to more effectively and efficiently remediate PFAS in the environment.

PFAS are receiving quite a bit of media attention, including a movie called "Dark Waters" (released in November 2019), which focused on PFAS and claims by townspeople against a PFAS manufacturer. As a result, the regulation and litigation surrounding PFAS accelerated.

PFAS risks arise in a variety of different contexts, including the following:

- **Manufacturing** – Companies that manufacture PFAS chemicals, or use them as part of the manufacturing process or as an ingredient in products have been sued by both government agencies and private parties. So far the suits have included personal injury claims, statutory

violations, and efforts to recover the cost of remedial or filtration equipment installed to address the presence of PFAS compounds. The potential risk in these cases can be significant, with settlements reaching as high as $850 million.

- **Due Diligence** – Until recently, there was little attention paid to PFAS contamination during transactional due diligence. Recent state and federal regulations have made it clear that these chemicals will be the subject of investigation and remedial actions in the future. Given the significant costs associated with remediating these chemicals because they do not break down naturally in the environment, companies should consider their potential presence during due diligence in both real estate and corporate transactions.

- **Consumer Products** – Manufacturing, purchasing, or selling consumer products that contain PFAS may lead to product liability and toxic tort litigation, as well as resulting in discharges to soil, groundwater, and possibly drinking water from manufacturing operations.

- **Cleanup Obligations** – USEPA and states are evaluating PFAS contamination at legacy clean-up sites such as landfills. The re-opening of these closed sites will lead to more liability for entities that were potentially responsible parties ("PRPs") at those sites. While this is currently being achieved through state regulations, the USEPA has announced plans to identify two PFAS chemicals, PFOA and PFOS, as hazardous substances under CERCLA. This could upend CERCLA settlements (which are typically tied to the contaminants previously identified), and lead to PRP litigation.

- **Permit Compliance** – New regulations are expected to result in facility-specific discharge limits for both air and wastewater.

There is significant disagreement about the scientific basis for the health concerns regarding PFAS, but complete agreement on one thing: the historic and ongoing use of these chemicals presents material regulatory and litigation risks, and is something that members of a wide range of industries will be forced to address over the next several years, if not decades.

## BCLP'S PFAS TEAM

BCLP's Environmental team has members who are dedicated to assessing and mitigating the risks posed by PFAS in the transactional context, managing client exposure in PFAS cleanups, and defending product liability and toxic tort suits involving PFAS. The following are a few examples of our PFAS work to date:

- Helping clients evaluate the PFAS cleanup risk based on historic operations across their real estate portfolios, including the possibility of re-opening of closed and ongoing cleanups.

- Defending a client in several ongoing lawsuits based on the alleged presence of PFAS in drinking water systems in Georgia and Alabama.

- Analyzing the potential PFAS risk posed by target properties and/or business units during the real estate or M&A due diligence process.
- Counseling clients on the Proposition 65 enforcement risks posed by their product inventory based on the listing of PFOA and PFOS, including developing a product testing regime and exposure assessment.
- Counseling clients on potential Proposition 65 liability as a result of their discharge of PFOA and PFOS in their industrial wastewater.
- Advising clients on developing PFAS regulations in groundwater, drinking water, and consumer products, and draft public comments when appropriate.

Members of our PFAS team are located in San Francisco, St. Louis, Chicago, Phoenix, Denver, Atlanta, and New York. Each of these members handles matters across the United States. We work with environmental consultants and public relations firms that also focus on PFAS. If you have a question about how to manage your PFAS risk, contact Tom Lee (leader of the PFAS team), John Kindschuh, Emma Cormier, or any other member of our PFAS team.

## WHAT ARE PFAS CHEMICALS AND WHERE ARE THEY FOUND?

PFAS are defined by having elemental bonds of fluorine and carbon, rendering them extremely pervasive and persistent (which means that they do not break down easily either in the environment or after uptake in living organisms). PFAS chemicals can repel both water and oil and move quickly through water, and PFAS have been detected in surface water, groundwater, drinking water, soil, and consumer products. PFAS chemicals have also been detected in various living organisms, including in the blood stream of almost every American tested, and even polar bears.

Both Congress and USEPA are working to address what some call a “PFAS contamination crisis.” Enforcement actions and lawsuits have so far focused on the companies that have manufactured the two most widely used, and now most heavily regulated, PFAS compounds, PFOA and PFOS.

PFOA and PFOS were the subject of a USEPA Stewardship Program, in which the relevant companies agreed to stop manufacturing these two chemicals in the United States, to eliminate importing them, and to restrict using them in certain products. However, some countries continue to manufacture PFOA and PFOS (Russia, India, and China), and use them in products that are imported to the United States. In addition, studies have demonstrated that some of the PFAS compounds used to replace PFOA and PFOS breakdown and form PFOA and PFOS over time.

Several states are investigating the impact these chemicals have had on human health and the environment. In addition, many states have started regulating the presence of these chemicals in consumer products. For example, California has added PFOA and PFOS to the list of chemicals

regulated under its Proposition 65 consumer product regulations, so enforcement is anticipated under that law as well.

## WHAT ARE THE CURRENT REGULATIONS?

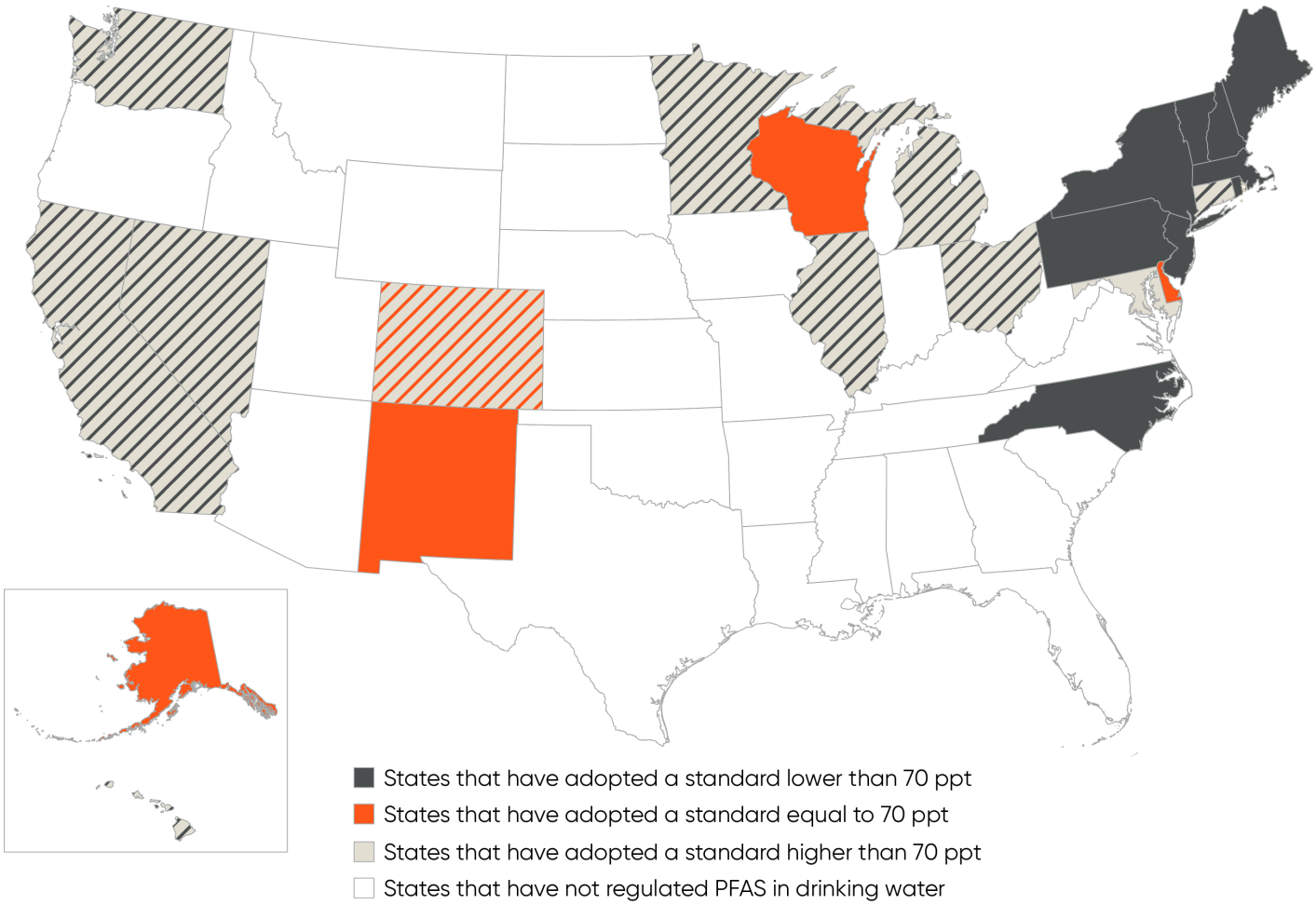
The regulation of PFAS chemicals is rapidly developing on both the state and the federal levels. In October of 2021, the Biden Administration launched the PFAS Strategic Roadmap. See BCLP's Client Alert regarding this topic. Numerous states are developing their own standards, creating a patchwork regulatory landscape. The following PFAS chemicals have been the focus of most of the regulatory attention to date: PFOA, PFOS, PFNA, GenX (also known as HPFO – DA), PFBS, PFHpA, and PFHxS.

### Drinking Water Regulation

In 2016, EPA revised its drinking water Health Advisory ("HA") level for the combined concentration of PFOA and PFOS to 70 ppt. While not an enforceable drinking water standard, this HA level has essentially been used as a screening level for public drinking water supplies.

In the meantime, states have started regulating the concentration of various PFAS chemicals in drinking water:

# PFAS Drinking Water Regulations




As of September 9, 2024

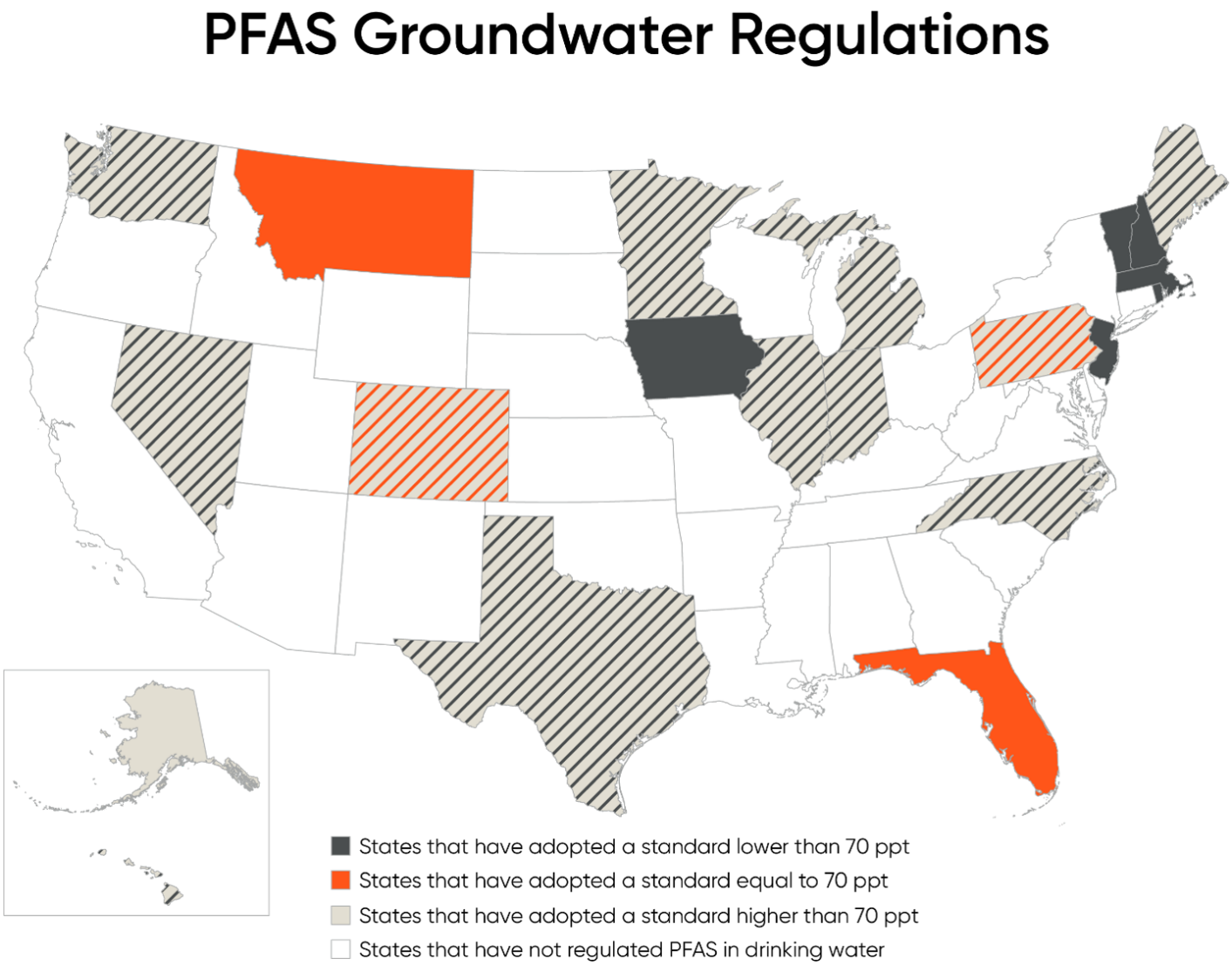
For a more detailed discussion of the state-by-state regulation of PFAS in drinking water please see our guide, PFAS drinking water standards: state-by-state regulations.

## Groundwater Regulation

The snapshot provided below is current as of **May 6, 2024** but it is important to note that this is a developing regulatory space. Some states, such as Florida and Rhode Island, have proposed groundwater regulations, or have indicated that they will revise groundwater regulations, for various PFAS substances that may take effect soon.

Businesses should consider whether they currently use or discharge any PFAS compounds which may reach groundwater and evaluate if any state regulations apply, particularly if they operate in any of the below-listed jurisdictions. In addition, owners of property with legacy PFAS use, and prospective purchasers of commercial and industrial properties, should review the most current groundwater quality standards as part of the due diligence process.

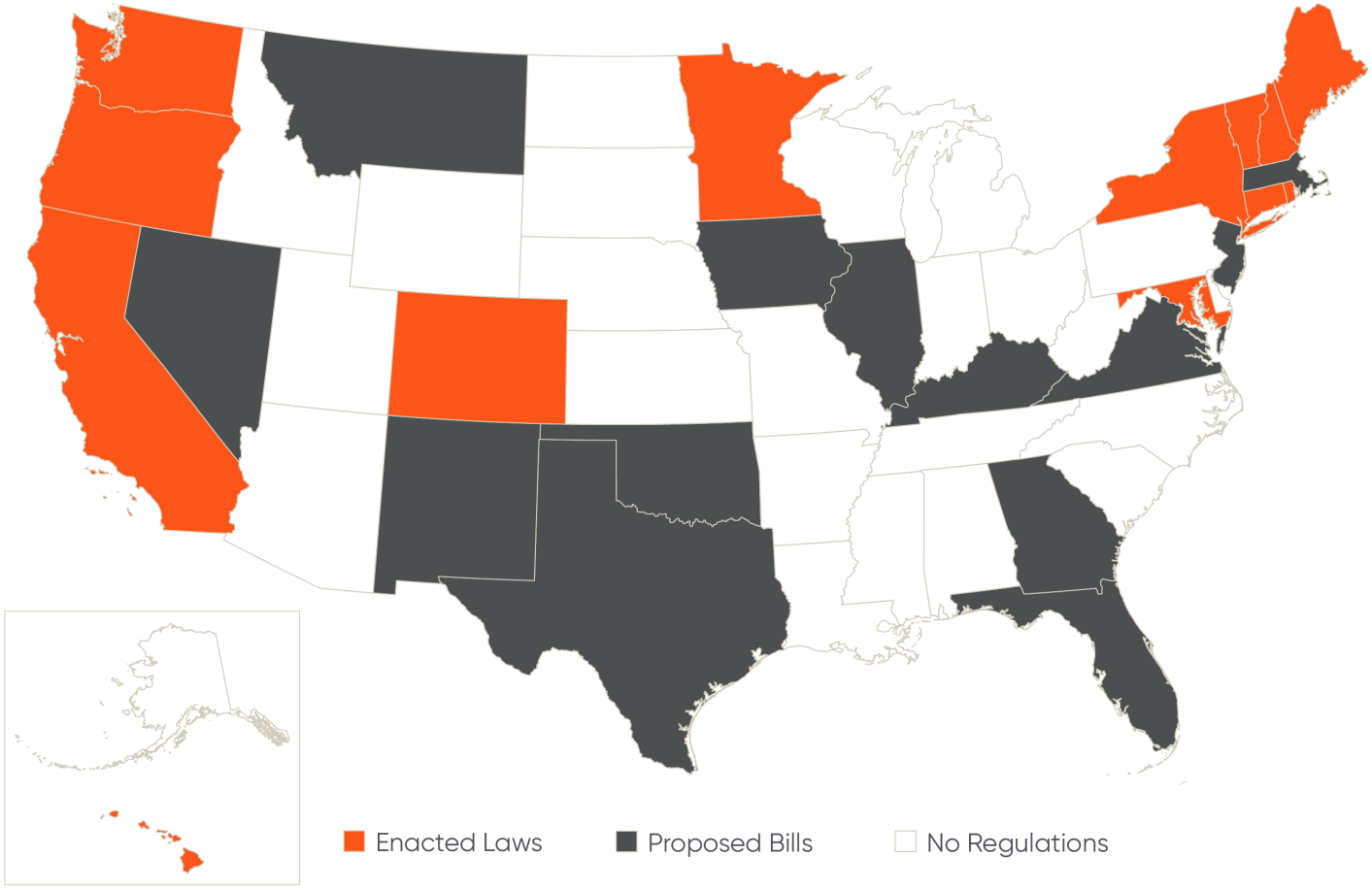
For a more detailed discussion of the state-by-state regulation of PFAS in groundwater please see our guide, PFAS in groundwater: state-by-state regulations.




## Consumer Products

Once again, states have proceeded independently, and have implemented a wide variety of consumer product regulations:

# Enacted and Proposed PFAS Consumer Product Laws




As of March 27, 2025

Because PFAS chemicals have been detected in such a wide variety of products, it should come as no surprise that the regulations of consumer products have taken many different forms. For an analysis of the different types of state consumer product regulations relating to PFAS, we encourage you to review our guide, PFAS in consumer products: state-by-state regulations.

## WHAT YOU CAN DO

For more information on a variety of PFAS-related topics please take a look our recent insights and subscribe for PFAS topic updates. We also encourage you to look through the biographies of our team members and reach out to any of us to discuss any questions that you might have about the impact of these chemicals on your business.

## MEET THE TEAM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## RELATED INSIGHTS

Blog Post
Apr 17, 2025

### PFAS Air Emissions Restrictions

When evaluating legal risk relating to per- and polyfluoroalkyl substances (“PFAS”), most businesses typically consider wastewater, groundwater, or soil impacts, not air emissions. However, state and federal regulatory agencies have increasingly considered whether PFAS in air emissions affect the environment, paving the path for future emission controls. This article outlines the legal and policy developments at the state and federal level that

relate to PFAS in air emissions to help businesses mitigate risk and anticipate changes that may impact their operations.

Blog Post
Updated: Apr 11, 2025

## New Mexico Bans Certain PFAS in Consumer Products

On April 8, 2025, the Governor of New Mexico, Lujan Grisham, signed HB 212 prohibiting certain PFAS substances in various consumer products. This bill (now enacted into law) establishes on specific product categories beginning on January 1, 2027, and January 1, 2028. Notably, on January 1, 2032, New Mexico prohibits a manufacturer from selling or distributing any consumer product containing intentionally added PFAS substances. However, the definition of PFAS in the bill is unique in that it excludes certain fluoropolymers like PTFE from the prohibitions.

Blog Post
Mar 31, 2025

## PFAS in Consumer Products: State-by-State Regulations

Manufacturers, distributors, and retailers of consumer products across a broad spectrum of industries are being impacted by state laws regulating the presence of per- and polyfluoroalkyl substances (“PFAS”) in their products. This area is rapidly developing as states create new laws or amend existing ones, and the penalties and litigation risks for non-compliance can be significant.

Blog Post
Updated: 27 Feb, 2025

## EPA Guidance on PFAS in Biosolids

Blog Post
Feb 04, 2025

## PFAS in Soil: State Regulations

In the absence of enforceable federal standards for per- and polyfluoroalkyl substances (“PFAS”) in soil, several states have started the process of regulating PFAS in soil themselves. These regulations have implications for due diligence, site investigations, and remediation decisions. This client alert explores the current landscape of state regulations regarding the advisory, notification, and cleanup levels for PFAS – most commonly perfluorooctane sulfonic acid (“PFOS”) and perfluorooctanoic acid (”PFOA”) – in soil.

Blog Post
Jan 24, 2025

## EPA Risk Evaluation for 1,4-Dioxane

Blog Post
Dec 19, 2024

## PFAS in firefighting foam (AFFF) and equipment: state-by-state regulations

Numerous states have either enacted or proposed regulations regarding per- or polyfluoroalkyl substances (“PFAS”) present in Class B Aqueous Film-Forming Foams (“AFFF”) used for firefighting, or present in firefighters’ clothing and equipment. These regulations typically involve restrictions in four general areas: Discharge or Use Restrictions. These regulations usually limit or prohibit the use of AFFF in training or testing exercises, and may only allow the use of AFFF in active firefighting situations; Disposal, Storage, Inventory or “Take-back” Provisions. Some states have enacted state run programs to purchase and dispose of AFFF, usually purchasing

supplies from government agencies; Notification or Reporting Requirements. When continued use of AFFF is allowed, some states have required that businesses report specific details regarding their discharge; and Limitations on Personal Protective Equip…

Blog Post
Nov 27, 2024

## PFAS in groundwater: state-by-state regulations

In the absence of federal cleanup standards for per- and polyfluoroalkyl substances (“PFAS”) in groundwater, several states have started the process of regulating PFAS in groundwater themselves. As a result, states have adopted a patchwork of regulations and guidance standards that present significant compliance challenges to impacted industries. This client alert explores the current landscape of state regulations regarding the advisory, notification, and cleanup levels for PFAS – typically perfluorooctane sulfonic acid (“PFOS”) and perfluorooctanoic acid (”PFOA”) – in groundwater.

Blog Post
Nov 13, 2024

## PFAS in food packaging: state-by-state regulations

In the absence of comprehensive federal regulation of PFAS in food packaging, states are dishing out their own laws.  Thus far, 13 (thirteen) states have enacted laws addressing PFAS substances in food containers and packaging materials (“Food Packaging”), and there are 15 (fifteen) proposed bills that are currently pending in various states.  These laws are intended to address concerns that storing food in Food Packaging that contains PFAS compounds may result in increased ingestion of those PFAS substances.  Related to food packaging, a growing number of states are enacting or proposing general bills involving the recyclability of food or beverage packaging, but this client alert does not specifically address those requirements as these measures do not exclusively involve PFAS substances. According to the United States Environmental Protection Agency (“EPA”), commonly cited examples of Food Packagi…