

In February 2019, the United States Environmental Protection Agency (“USEPA”) issued its PFAS Action Plan, which outlined USEPA’s strategy to limit exposure to per- and polyfluoroalkyl substances (“PFAS”) in the environment. USEPA’s PFAS Action Plan identified four ‘next steps’ for USEPA, including: (1) the development of drinking water standards and possible Maximum Contaminant Levels (“MCLs”) for certain PFAS compounds, (2) possible listing of Perfluorooctanoic Acid (“PFOA”) and Perfluorooctane Sulfonate (“PFOS”) as hazardous substances under the federal Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”), (3) development of interim groundwater cleanup guidelines for certain PFAS compounds, and (4) where appropriate, employing an enforcement strategy in conjunction with state and federal authorities.

USEPA’s implementation of the 2019 Action Plan has moved forward, albeit slowly. Frustrated with the pace of PFAS regulation, the U.S. House of Representatives has attempted to accelerate some aspects of the Plan through federal legislation. Meanwhile, several states, including Illinois, have taken steps to address PFAS under their own statutory and regulatory authority.

Federal Actions

On February 26, 2020, USEPA issued its PFAS Action Plan: Program Update, which outlined the following actions taken by USEPA since the issuance of the original Action Plan:

- The issuance of a new validated test method, Method 33, for 29 PFAS constituents in drinking water;
- Commencement of the Safe Drinking Water Act (SDWA) rulemaking process through issuance of preliminary determinations to regulate PFOA and PFOS in drinking water in February 2020;
- Issuance of a final Significant New Use Rule restricting the manufacture, import and sale of long-chain PFAS in the United States under the Toxic Substances Control Act (“TSCA”);
- Issuance of Interim Recommendations for Addressing Groundwater Contamination with PFOA and PFOS in December 2019, which recommended a screening level of 40 ppt and a preliminary remediation goal of 70 ppt for PFOA and PFOS to be utilized at federal cleanup sites;
- Issuance of an Advanced Notice of Proposed Rulemaking in November 2019 to add 286 chemicals and chemical categories to the Toxic Release Inventory (“TRI”) list of toxic chemicals. (On June 21, 2020, USEPA issued its Final Rule which added 172 PFAS compounds to the TRI list of chemicals. The reporting threshold for

the newly-added PFAS compounds is 100 pounds, and the first TRI reports including the PFAS compounds will be due by July 1, 2021.)

While USEPA has made some progress on the action items outlined in the 2019 PFAS Action Plan, completion of the remaining action items will take time, particularly those measures that require USEPA rulemaking. In the meantime, the U.S. Congress added PFAS-related provisions to the National Defense Authorization Act, which was passed in December 2019. These provisions included requirements for the Department of Defense to limit and monitor exposure of military personnel to PFAS, but also contained several mandates for USEPA and other federal agencies relating to monitoring and regulation of PFAS in U.S. drinking water systems; U.S. Geological Survey monitoring of lakes, streams, wells, wetlands and soils; and interim guidance for the destruction and disposal of PFAS-containing materials (including firefighting foam).

H.R. 535, which was passed by the U.S. House of Representatives in January, 2020, would have, among other things, designated certain PFAS as CERCLA hazardous substances and required remediation of releases of such PFAS, and USEPA would have been required to make a determination as to whether other PFAS should be designated as hazardous substances. H.B. 535 would have also required USEPA to promulgate national primary drinking water regulations for certain PFAS, and required that certain PFAS be added to the list of hazardous air pollutants. While H.B. 535 did not make it out of Senate committee, there is a strong likelihood that similar legislation will be introduced again in Congress.

Another federal initiative involving PFAS that could potentially impact transfers and/or cleanup of impacted property involves proposed revisions to the ASTM standard for Phase I Environmental Site Assessments. Updates to the ASTM E 1527-13 standard are expected to be finalized and published in 2021. One of the proposed updates to ASTM 1527 would identify PFAS as an “emerging contaminant,” but clarify that “emerging contaminants” are not within the scope of the ASTM 1527 Standard. However, if federal legislation similar to H.B. 535 were to be adopted pri-



or to issuance of a final ASTM 1527 Standard, any PFAS compounds designated as CERCLA hazardous substances would be included in the scope of the ASTM 1527 Standard. Uncertainty regarding the status of PFAS may limit the utility of Phase I environmental site assessments at former industrial properties, particularly for parties hoping to rely on the innocent purchaser or bona fide prospective purchaser exemptions from CERCLA liability.

State Actions

With some federal regulation of PFAS – including designation of certain PFAS as CERCLA hazardous substances and/or the development of MCLs for certain PFAS compounds – potentially years away from being completed, states have stepped up to fill the perceived gap in PFAS regulation. And while states are clearly monitoring other states' approaches to PFAS regulation, there has been little effort among states to coordinate such approaches. The result has been a national patchwork of PFAS statutes and regulations, with some state laws focusing on monitoring of public water systems, other state laws regulating PFAS in groundwater and/or landfill leachate, and still other state laws that prohibit the use of materials containing PFAS, including firefighting foam and food packaging. (The Interstate Technology Regulatory Council ("ITRC") website is an excellent national resource for PFAS-related information, including statewide screening levels and remediation standards for soil, groundwater and drinking water.

Illinois Actions

Efforts to pass legislation in Illinois aimed at PFAS have so far been unsuccessful. These efforts included H.B. 3982, which directed the Illinois Department of Public Health to establish MCLs for PFAS in public water systems; S.B. 3154 (the PFAS Reduction Act) which would have prohibited the manufacture, sale and distribution of Class B firefighting foam containing "intentionally added" PFAS; and H.B. 5529, which established a voluntary take-back program for local fire departments using and storing PFAS-containing firefighting foam. However, similar legislative proposals are likely to be introduced in the 2020-2021 legislative session.

The Illinois Environmental Protection Agency ("IEPA") has also taken several actions related to PFAS. In December 2019, IEPA issued proposed changes to 35 Ill. Adm. Code Part 620: Groundwater Quality, which included the addition of five

PFAS compounds to the list of regulated chemicals under the Part 620 groundwater quality standards. IEPA held a Stakeholders Meeting in February 2020, and accepted public comments on the draft amendments to Part 620.

On September 14, 2020, IEPA issued a press release announcing its plan to begin testing for eighteen PFAS chemicals at all 1,749 community water supply systems in Illinois. IEPA expects the testing to be completed in 12-15 months, and the data collected will be published on-line and used in the development of state MCLs for PFAS. The press release also indicated that IEPA is preparing to file its rulemaking proposal with the Illinois Pollution Control Board on proposed groundwater quality standards for five PFAS compounds.

DUE TO THE UBIQUITOUS NATURE OF PFAS AND THE LOW CONCENTRATION THRESHOLDS THAT ARE BEING ADOPTED ON A FEDERAL AND STATEWIDE BASIS, ILLINOIS MANUFACTURERS WILL LIKELY HAVE TO FOCUS THEIR ATTENTION IN THE NEAR FUTURE ON THE POSSIBLE PRESENCE OF PFAS IN SOIL, GROUNDWATER, WASTEWATER, AND AIR EMISSIONS.

The press release provided information regarding the updated IEPA PFAS webpage, which includes links to the PFAS Interactive Dashboard and map for community water supply sampling and the proposed groundwater quality standards for PFAS compounds.

The actions being taken by IEPA do not address PFAS and air emissions, but on March 10, 2020, members of the Illinois Congressional delegation sent a letter to USEPA Region 5 asking USEPA to begin

testing air emissions at hazardous waste incinerators and other industrial sources known to emit PFAS in Illinois.

PFAS Litigation

Meanwhile, across the county, litigation involving PFAS is expanding at a rapid pace. One of the closely-watched national cases is *Hardwick v. 3M Company*, a proposed class action filed in Ohio federal court in 2018 on behalf of an Ohio firefighter and similarly situated class members against nine PFAS manufacturers. The class action complaint seeks the establishment of an "independent panel of scientists, including but not limited to epidemiologists, toxicologists, medical doctors, and/or exposure-risk assessors" to evaluate the health effects of PFAS exposure.

South Carolina is the venue for multi-district litigation comprised of hundreds of cases involving the use of PFAS-containing aqueous film-forming foams ("AFFF"), and claims of personal injury and property damage resulting from groundwater contamination. The South Carolina MDL includes claims regarding the use of AFFF by military installations, states, municipal fire stations, and airport authorities, among others. PFAS multi-district litigation is also pending in Ohio and involves claims related to drinking water contamination discharged from a West Virginia manufacturing facility. Several states, including Michigan and Vermont, have filed their own lawsuits against PFAS manufacturers.

Due to the ubiquitous nature of PFAS and the low concentration thresholds that are being adopted on a federal and statewide basis, Illinois manufacturers will likely have to focus their attention in the near future on the possible presence of PFAS in soil, groundwater, wastewater, and air emissions. On the federal level, Illinois manufacturers should begin to consider the 2021 TRI reporting requirement and implications, and closely track any federal legislation or rulemaking that designates PFAS compounds as hazardous substances, drinking water contaminants, or hazardous air pollutants. On the state level, IEPA is moving forward with PFAS regulatory efforts addressing groundwater and drinking water, and efforts to regulate PFAS may be pushed along by the Illinois General Assembly. PFAS are here to stay – but Illinois manufacturers have the opportunity to prepare for future regulation of these compounds. ♦