

# EPA Makes Important Announcement, Ushering in the Next Era of Mass Tort and Environmental Litigation: “Forever Chemicals” Will Now Be Subject to Regulation

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*Abstract: The U.S. Environmental Protection Agency (EPA) announced the long-awaited proposed National Primary Drinking Water Regulation for six per- and polyfluoroalkyl substances, known as “PFAS,” on March 14, 2023. The agency anticipates finalizing the regulation by the end of 2023, and claims that it will save thousands of lives and reduce tens of thousands of serious illnesses. The EPA has been aware of PFAS since at least the 1990s, when one farmer’s investigation into the chemicals concluded with a seminal lawsuit against multinational chemical company DuPont. A book and subsequent feature film put that lawsuit in the spotlight, and PFAS became mainstream news. Today, PFAS claims are widely recognized as the next frontier of mass tort and environmental litigation. With the EPA poised to finally enact the first regulation of these chemicals, that frontier is ripe for exploration. This article explores PFAS and the origin of litigation around the substances as well as the state of PFAS litigation and regulation today. It concludes with some thoughts on what to expect when it comes to PFAS litigation going forward.*

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## Background

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### What Are PFAS?

PFAS (per- and polyfluoroalkyl substances) are man-made chemicals used in a variety of applications because of their ability to resist soil, water, heat, oil, and grease. Originally developed by chemists at DuPont and 3M in the late 1930s and early 1940s, the first widely used PFAS were perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS). PFAS are used in clothing (especially water-resistant outerwear), shoes, makeup, carpet, food packaging, household cleaners, non-stick cookware, medical devices and supplies, and aqueous film forming foam (AFFF) used for firefighting and military operations. Today, there are thousands of known PFAS chemicals.

The same qualities that make PFAS useful, however, also make them problematic. Dubiously named “forever chemicals,” PFAS are extremely stable and persist in the environment unless they are actively remediated. PFAS can also travel through the environment and bioaccumulate in wildlife, groundwater, and surface waters. Because of their widespread use and persistence, PFAS can be found in the blood of most humans, as well as rainwater throughout the world. Some early studies suggest that high levels of exposure to certain PFAS can lead to adverse health outcomes, including increased cholesterol levels, low infant birth weights, increased risk of cancer, and thyroid disruption. However, the human health effects of PFAS remain largely unknown and are the subject of ongoing research.

### The Origin of PFAS Litigation: A Farmer’s Case Against DuPont

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The first major lawsuit concerning PFAS was brought by Wilbur Tennant in the late 1990s. Tennant was a farmer whose land abutted a DuPont chemical plant in Parkersburg, West Virginia, where Teflon was made. Teflon—at least at that time—contained PFOA. Tennant’s cows grazed and drank from a stream where DuPont’s chemical waste had leached from a nearby landfill, and it was not

long before the cows began to die. Tennant eventually put two and two together, and began reaching out to DuPont and, later, the EPA to get some answers.

After years of being ignored, Tennant sued DuPont. During the case, the chemical company produced hundreds of thousands of documents that revealed it had found PFOA could be toxic to animals. Documents produced in *Tennant et al. v. DuPont et al.* and other PFAS litigation have revealed that 3M and DuPont began looking into the potential health and environmental effects of PFAS as far back as the 1960s, including conducting studies and experiments on animals and even monitoring their own employees who worked directly with the chemicals.

In a 1978 study by 3M (which had supplied PFAS to DuPont), every monkey fed PFAS (specifically, PFOS) died. Separately, DuPont had also determined that PFOA passed from pregnant employees to their fetuses. In fact, two of seven babies born to Teflon plant employees in 1981 had facial deformities similar to what 3M had found in newborn rats.

Although Tennant ultimately settled his case, the damage from discovery of DuPont’s records was done. His attorney subsequently sued DuPont on behalf of thousands of people who lived near the Teflon plant in Parkersburg and had been exposed to PFAS through their drinking water and air. When DuPont settled that class action lawsuit in 2004, the company agreed to finance a study of PFOA’s health effects. Nearly 70,000 people participated. That study, conducted by the C8 Science Panel, found a “probable link” between PFOA and certain diseases in humans, some of which 3M and DuPont had found in animals years earlier. DuPont later paid more than \$750 million to settle lawsuits filed by Teflon plant neighbors with PFOA-linked diseases, including testicular and kidney cancer, high cholesterol, ulcerative colitis, thyroid disease, and pregnancy-induced hypertension.

## PFAS Litigation Today

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These early lawsuits against DuPont started a wave of PFAS litigation that has expanded greatly. In addition to individuals and classes of people, plaintiffs in pending PFAS lawsuits across

the country today include states, counties, municipalities, and environmental groups.

Apart from the chemical manufacturers themselves, plaintiffs have sued commercial users that make products containing PFAS and/or use packaging with PFAS. These lawsuits have included claims for trespass and nuisance (i.e., where the alleged harm stems from discharge of PFAS into the environment), product liability, violation of consumer protection laws relating to advertising and unfair trade practices, violation of the Clean Water Act, and violation of state-specific regulations and drinking water standards.

Some environmental groups have sued manufacturers for false advertising, alleging that they have engaged in “greenwashing” their products that contain PFAS. Chemours, a spin-off of DuPont, has been the target of a shareholders’ derivative suit by investors claiming that the company intentionally understated its costs associated with remediating PFAS from the environment by over a billion dollars.

Defendants, for their part, have relied on numerous defenses, including:

- lack of legal duty to the plaintiff (particularly if they do not manufacture PFAS);
- lack of proximate cause (for instance, where a PFAS supplier has been sued in a location where it does not, in fact, operate a manufacturing facility);
- lack of foreseeability (especially where the plaintiff is seeking to recover for alleged discharges that occurred long before the dangers of PFAS were public knowledge);
- no violation of state or federal limitations on PFAS in industrial discharges;
- the Public Services Doctrine, which prohibits local governments from recovering the costs of carrying out public services from the tortfeasor who caused the need for such services; and
- the “permit shield” defense, which automatically protects a permit holder who has acted in compliance with its permit from liability under the Clean Water Act.

Plaintiffs in many of these lawsuits have sought money damages, including recovery for the diminution in value of their property where PFAS has been detected, medical monitoring costs, and the cost of systems that filters PFAS out of water. But several have also demanded equitable relief, including injunctions prohibiting the defendants from discharging PFAS and requiring remediation of PFAS from where it has been discharged into the environment. The costs associated with such relief can be astronomical.

Perhaps unsurprisingly, the settlements announced in PFAS litigation have been astounding. In March 2023, a federal judge in Michigan approved a \$54 million settlement between Wolverine Worldwide and 3M, on one side, and approximately 1,700 residents of Kent County, Michigan, who filed suit over the level of PFAS contamination on their properties. This comes just years after Wolverine and 3M settled another class action lawsuit and agreed to pay \$69.5 million to bring PFAS-free municipal water to the same Kent County residents.

Numerous other sizable settlement payouts have been made across the country. DuPont and 3M alone have paid hundreds of millions of dollars to compensate plaintiffs and install new water filtration systems in municipalities where they have manufacturing operations.

Many litigators are monitoring the progress of *Hardwick v. 3M* in the U.S. District Court for the Southern District of Ohio, brought by the same attorney who represented Wilbur Tennant. In that case, the plaintiffs are seeking to certify a class of any U.S. citizen with detectable levels of PFAS in their blood, which is estimated to be over 95% of the U.S. population. Plaintiffs want to establish a medical monitoring program for affected citizens and an independent science panel to study the effects of numerous PFAS (including short-chain PFAS) on human health.

This is similar to the one secured following *Tennant* almost 20 years ago, which led to the landmark findings of probable links between C8 PFAS and adverse effects on human health. Those findings significantly influenced litigation activity, regulatory and legislative activity with respect to PFAS, and media attention on PFAS issues. If a medical monitoring program in *Hardwick* is granted, this should lead to more scientific findings about the many

thousands of other PFAS chemicals yet to be extensively analyzed for their potential impact on human health.

## Regulation of PFAS

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There are no federally enforceable limits or monitoring requirements on PFAS in drinking water, groundwater, or soils. California, Colorado, Connecticut, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, and Vermont have adopted or proposed limits for PFAS in drinking water. Although the EPA issued a health advisory for PFOA and PFOS in 2016, that advisory is—by its own terms—non-enforceable. For many years, it appeared that PFAS were not a priority for the federal government.

That all changed in 2021, however, when President Joe Biden nominated Michael Regan to direct the EPA. Regan had extensive personal experience with litigation concerning PFAS, having previously sued chemical manufacturer Chemours on behalf of North Carolina over its Fayetteville plant, which was discharging PFAS into the Cape Fear River. That lawsuit culminated in a consent order whereby Chemours agreed to undertake numerous remediation measures, including installing expensive equipment and infrastructure to filter and treat the groundwater and surface waters surrounding the plant.

During his Senate confirmation hearing, Regan reiterated that he would make PFAS a “top” priority during his tenure at the EPA, and that is precisely what he has done. Within a few months of his appointment, the EPA published a “PFAS Strategic Roadmap,” outlining the agency’s projected time lines for taking specific actions to address PFAS. This includes publishing a national PFAS testing strategy, implementing a review process for new PFAS under the Toxic Substances Control Act, undertaking nationwide monitoring for PFAS in drinking water under the fifth Unregulated Contaminant Monitoring Rule, and issuing a proposal to designate certain PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The latter strategy would require reporting of PFAS releases, enhance the availability of data for further evaluation, and ensure agencies can recover cleanup costs against polluters.

Most notable is the EPA's effort to establish a national primary drinking water regulation for PFAS. Under the Safe Drinking Water Act, the EPA has the authority to set enforceable National Primary Drinking Water Regulations (NPDWRs) for drinking water contaminants and require monitoring of public water systems. In March 2023, the EPA announced it was proposing an NPDWR to establish legally enforceable levels, called maximum contaminant levels (MCLs), for six PFAS in drinking water: PFOA and PFOS as individual contaminants, and PFHxS, PFNA, PFBS, and HFPO-DA (commonly referred to as GenX Chemicals) as a PFAS mixture. The EPA has proposed the lowest MCLs for PFOA and PFOS at four parts per trillion (for context, one part per trillion is equivalent to a single drop of water in 20 Olympic-sized swimming pools). The proposed rule further requires public water systems to monitor for these PFAS, notify the public of the levels of these PFAS, and reduce the levels of these PFAS in drinking water if they exceed the proposed standards.

## Conclusion

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An enforceable drinking water standard will be an important tool for plaintiffs. Defendants will no longer be able to assert that they have not violated any federal limitations on PFAS in their industrial discharges or point to the historic lack of response to PFAS on the part of state and federal governments. And with more government scrutiny of PFAS on the horizon and the backing of the Biden administration, businesses can expect that the wave of recent PFAS litigation will not only continue but likely increase across the country. Indeed, the new era of PFAS litigation is beginning.

## Note

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