

Forever chemicals

Companies face uncertainties as governments crack down on PFAS

INTERVIEWED BY ADAM BURROUGHS

Fluorinated chemicals, or per- and polyfluoroalkyl substances (PFAS), are a large and diverse family of chemical compounds used in myriad consumer, commercial and industrial products. Because these “forever chemicals” do not break down and tend to accumulate when released into the environment, numerous state and federal agencies are emphasizing, and increasingly enforcing, new waste and water management practices.

“They’re attempting to significantly reduce PFAS compounds that may be present in water, air, soil and many products to mitigate any health-related risks that may come with them,” says Jean M. Mosites, shareholder and co-chair of the Environmental Practice Group at Babst Calland. “Because of this, businesses are facing regulatory uncertainty, high costs of mitigation, and the potential for class-action litigation amidst increasing public awareness.”

Smart Business spoke with Mosites about the uncertainties facing businesses as governments work to address the known or suspected impacts of PFAS.

HOW HAVE GOVERNMENT REGULATIONS CHANGED RECENTLY?

Recently, the Environmental Protection Agency (EPA) laid out a whole-of-agency approach to addressing PFAS. The roadmap sets timelines by which the agency plans to take specific actions and commit to bolder new policies.

Some states have already enacted laws regulating the presence of PFAS in drinking water, food packaging and consumer products. There have been increased federal and state regulation across a variety of program areas, including drinking water, site remediation and operational permits issued under the Clean Water Act.

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Among the more sweeping recent government regulatory developments has been the EPA’s March 2023 proposal of a first-ever national drinking water standard called the National Primary Drinking Water Regulations. The proposed standard is far below any of the standards adopted by the states, all of which will need to revise their laws to be as strict as federal law when finalized. Last fall, EPA had proposed listing certain PFAS compounds as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, which provides for the cleanup of hazardous waste sites as well as reporting obligations for accidents, spills and other releases of hazardous substances.

The Biden administration action plan also includes infrastructure funding, allocated to states and tribes through grants; a rule to prohibit resuming the use of 300 PFAS not made recently; and the elimination of Toxic Release Inventory reporting exemptions for de minimis PFAS use.

HOW MIGHT THIS NEW REGULATORY POSTURE AFFECT BUSINESSES?

Companies that have wastewater discharges, for instance, can expect permit changes that will impose new obligations. If they have cleanups, they will be looking at new standards with respect to PFAS constituents in contaminated soil or groundwater. New

and evolving federal and state regulations and laws are creating a very low threshold for action at a time when treatment and disposal options are very limited by the current state of science and technology. Any business should also re-examine the implications of evolving PFAS standards on both due diligence and agreements associated with procurement and real property transactions.

HOW SHOULD BUSINESSES RESPOND TO THESE CHANGES?

Businesses should consult with knowledgeable legal advisers to better understand the ramifications of state and federal regulations and navigate strategies across the spectrum of PFAS issues. Those strategies could include contract modifications, sampling strategies, permit modifications and how to handle requests for information from government entities. Further, states are acting differently and sometimes in advance of the federal government, so it is important to keep track of changes at each level of government.

This evolving area of the law and the science requires a new look at risk management for businesses, especially those with products and manufacturing processes that create or use PFAS, but also for transactional and operational considerations for property owners and businesses that may simply be PFAS adjacent. ●