

## Agencies Gearing Up to Address Risks Posed by PFAS Contamination



image credit: [Ineke Huizing](#)

PFAS—a class of chemical substances commonly used in a wide range of products—are drawing increased scrutiny from regulators. Businesses and municipalities should closely follow these developments, as they create both new risks of liability for substantial response costs and opportunities to make gains on environmental quality.

Short for “per- and polyfluoroalkyl substances,” the term “PFAS” is sometimes used interchangeably with two of the most common compounds in the class, “PFOA” (for “perfluorooctanoic acid”) and “PFOS” (for “perfluorooctane sulfonate”). These compounds are ubiquitous—diverse products like non-stick cookware, stain-repellant fabric additives, and firefighting foam all contain PFAS. Contaminated drinking water poses one of the most acute risks for human exposure to PFAS, though there are many other exposure vectors.

Agencies at all levels of government face increasing pressure to take action, whether from national environmental NGOs or from grassroots groups organized to respond to the contamination of a local aquifer. Civil lawsuits have already resulted in substantial settlements. In the past two years, DuPont/Chemours and 3M both paid nine-figure settlements to settle claims related to PFAS-contaminated groundwater. Here in Massachusetts, Anderson & Kreiger represented the Town of Barnstable [in negotiating a settlement](#) over PFAS contamination of the local water supply.

State and federal agencies are starting to respond, though not as robustly as some would prefer. In the latest federal appropriations omnibus legislation, enacted in March, Congress appropriated over \$60 million for PFAS research and remediation. In May, EPA Administrator Scott Pruitt convened a [National Leadership Summit to Take Action on PFAS](#) and indicated that the agency is likely to adopt new regulations to counter PFAS contamination. First, EPA may promulgate binding Maximum Contaminant Levels (“MCLs”) for PFOA and PFOS under the Safe Drinking Water Act. Public water systems could then be required to adopt the best available technology to control PFOA and PFOS, potentially at considerable expense. Second, EPA may take steps to remediate PFOA and PFOS contaminated groundwater, possibly by designating them as “hazardous substances” under CERCLA Section 102. EPA even could decide to revisit closed Superfund sites if there is reason to believe that prior remedial efforts did not address a risk of PFAS contamination. Any moves by EPA in this direction will prompt PRPs to scrutinize the reopener provisions of the consent decrees and other documents governing cleanups at particular sites, as EPA’s authority to require the cleanup of PFAS contamination may differ from site to site.

Several states have refused to wait for EPA. A handful have already adopted advisory or binding standards for PFAS compounds in drinking water that are stricter than the standard EPA has suggested it will adopt (70 parts per trillion for PFOA and PFOS, combined). In Massachusetts, the Department of Environmental Protection (MassDEP) may soon adopt drinking water standards for PFOA, PFOS, and three other PFAS compounds, regardless of EPA’s actions. And like EPA under CERCLA, expect MassDEP to roll out new enforcement tools for PFAS in groundwater at sites covered by the Massachusetts Contingency Plan.

One immediate action item for Massachusetts municipalities is [a new program](#) jointly sponsored by MassDEP and the Massachusetts Department of Fire Services (MassDFS). The agencies have requested that local fire departments inventory any firefighting foam (sometimes referred to as “AFFF,” short for “aqueous film forming foam”) manufactured before 2003. This pre-2003 AFFF included PFAS compounds, and facilities where it was used (often airfields) frequently report PFAS contamination in nearby groundwater. MassDEP and MassDFS will then contract for the safe disposal of any pre-2003 AFFF identified by local fire departments.

As much as these initial steps may improve water quality—and increase cleanup costs—comprehensively mitigating the risks from PFAS will require sustained action on a much broader scale. Health studies take time and sustained funding, and there are thousands of PFAS compounds beyond the most prevalent, PFOS and PFOA, whose effects are understood poorly. The many compounds and diverse applications of PFAS make them the perfect candidates for applying the updated procedures under the 2016 amendments to the Toxic Substances Control Act, such as reporting requirements and Significant New Use Rules. Whether Congress, EPA, and other federal agencies will remain focused on the problem remains to be seen, but state and local governments and activist groups will surely press ahead.