

“PFAS” AND YOU

Dark Waters is a movie in the ilk of *A Civil Action*, but its focus is a corporate lawyer turned (reluctant) environmental activist, Rob Bilott, who pursues one of the world’s largest chemical companies and the Environmental Protection Agency (EPA) for PFAS contamination in rural Parkersburg, West Virginia. In recent years, product liability and regulatory lawsuits related to PFAS have been prolific. So what is “PFAS” and why is it important?

PFAS (pronounced “P-fass”) are *Per-* and *Poly-fluoroalkyl* substances created by scientists in the 1940s. They are in the news because they are the current “emerging contaminant” of concern to federal and state regulators ... the first big one since MTBE.

Since the 1950s, PFAS compounds have been used across the globe, perhaps reaching their peak in the ‘80s and ‘90s in everything from food packaging (such as pizza boxes), to anti-stain/waterproof coatings on fabrics, to specialty adhesives and firefighting foams. The two most notorious PFAS compounds are PFOA and PFOS, which are “long-chain” PFAS compounds (a reference to their molecular structure). The shorter chain PFAS compounds are sometimes referred to as **GenX** compounds. Your new non-stick cookware which prominently declares itself to be “PFOA/PFOS Free” is now made with these **GenX** versions.

PFOA and PFOS compounds are suspected of causing a variety of cancers and adverse health impacts, many involving the thyroid, and high cholesterol levels. The EPA has established a Health Advisory Level for PFOA and PFOS of 70 *parts per trillion* (ppt) combined, which is much lower than just about any other known carcinogen of concern to the EPA. Alarmed by their growing prevalence in the environment, and the developing health and scientific data on their safety, a number of states have proposed or set standards even lower, some pushing the very limits of detection in available analytical chemistry.

Although PFOA and PFOS are no longer manufactured in the United States (voluntarily), they are still produced overseas and can still be imported in manufactured items, including carpet, textiles, paper products/packaging, coatings and some plastics. PFAS compounds are incredibly resilient in the environment – as best we can tell, they do not break down – so now that we are looking for them, we are finding them in lots of places; health officials suspect they are detectable in the blood of most U.S. citizens. How they came to be where they are being found is not always apparent, given their widespread use in consumer products. But some sources are known and are

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the current focus of investigative efforts by federal and state regulators.

In addition to the work of Rob Bilott in Parkersburg, West Virginia, where PFAS compounds were released during the manufacturing of common chemical coatings and other products, PFAS compounds were a prominent component of firefighting foams used at most military bases and by some municipal fire departments. In 2010, the EPA directed certain public water suppliers to begin testing for six PFAS compounds. That testing revealed widespread PFAS contamination of public water supplies around military air bases across the country, with the use of firefighting foams over several decades being the primary culprit. The prevalence of PFAS compounds in firefighting foams has led state and federal regulators to begin looking for other sites where these foams were used. This includes firefighter training schools and the sites of major fires where foams were used in the firefighting effort. As well, the EPA acknowledged that PFAS foams also were widely used in the electroplating industry, as an approved emission-suppression technique. From there, EPA discovered that publicly owned wastewater treatment plants which treated wastewater from electroplaters had high levels of PFAS in their discharges and sludges. Many states have also now turned to landfill operations which accepted electroplating wastes and wastewater treatment plant sludges, or which may have used foam sprays for daily cover of wastes. Leachate at many of these landfills now has been found to contain PFAS.

With all of the publicity PFAS have garnered, some landfills now require that wastes be profiled for PFAS, and some have refused to accept PFAS-containing wastes. PFAS compounds can be removed from surface and groundwater by well-demonstrated treatment technologies (granular activated carbon and ion-exchange resins among them), which is the direction many public water suppliers are going. Meanwhile, studies are underway to determine whether other treatment or destruction technologies, such as incineration, are capable of providing effective treatment for soils and other PFAS wastes.

Plaintiffs' lawyers have filed suits across the country, most on a product liability theory, including 75 lawsuits that involve groundwater contamination from firefighting foams, which have been consolidated for discovery and pretrial proceedings in South Carolina. Many state attorneys general have sued or threatened suit for cleanup of PFAS in their states. In one 2018 case, Minnesota reached an \$850 million settlement.

On the regulatory front, PFAS compounds are *not* "hazardous substances" under the federal Superfund statute (CERCLA), or "hazardous wastes" under the federal hazardous waste statute (RCRA). That makes it challenging for parties who have been impacted by PFAS to seek to recover costs they may have incurred to respond to PFAS contamination on their properties or in their water supplies. To "fix" this problem, states like New York, California, New Jersey, New Hampshire and Vermont have taken action to designate them as



hazardous substances under state law. Other states are beginning to follow suit.

The EPA continues to study the problem, but because PFAS contamination is a huge problem for the Department of Defense at virtually every military air base in the country, the agency appears reluctant to get off of the sideline. That reluctance won't last forever, and EPA most recently identified certain PFAS compounds for release reporting under the Emergency Planning & Community Right to Know Act.

Attorneys at Armstrong Teasdale have been involved in PFAS issues for many years, and have recovered tens of millions of dollars for public water authorities or municipal governments, through the use of Cooperative Agreements with federal government agencies, and other creative measures. Doing so has helped these impacted parties to defray the cost of treatment for water supply users. We also have assisted clients in evaluating risks associated with past use of PFAS, and identifying remedial strategies to manage PFAS liabilities in corporate mergers and commercial real estate transactions. If you have concerns over these emerging contaminants, or other environmental risks facing your business, please visit our [Environmental](#) practice, or contact Tim Bergere at tbergere@atltp.com.