

## TRACKING CASE NEWS AND DEVELOPMENTS IN BENZENE AND EMERGING TOXIC TORT LITIGATION

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## PFAS: 2022 Trending Towards A Major Turning Point in Regulation and Litigation

*A Commentary by Stephanie A. Fox, Samuel D. Habeeb, and  
Robert W. Petti of Maron Marvel Bradley Anderson & Tardy, LLC  
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What's in Per- and Poly- Fluoroalkyl Substances (PFAS), that makes them "forever chemicals"? With so many subsets of PFAS, and over 4,000 different PFAS, the answer is not simple. But one of the main reasons common to PFAS is the presence of the Flourine-to-Carbon bond in the molecules of PFAS. The Flourine-to-Carbon bond is the strongest chemical bond between two elements in organic chemistry.

PFAS have been widely used across many industrial processes and in several consumer products for decades. Some examples include, non-stick coating in skillets, stain-resistant coatings for upholstery and carpets, fire-fighting foam, water-proof jackets and boots, food packaging and others. PFAS are man-made substances that do not break down naturally. Because of this fact, PFAS are considered "forever chemicals," that can only be removed from the environment by human intervention and expensive remediation services. PFAS persistence in the environment causes some observers to analogize PFAS contamination and human exposure to other more well-known toxic torts, such as asbestos.

Due to their persistence in the environment as contaminants, PFAS have drawn the interest of plaintiffs' attorneys, governmental agencies, and environmental advocacy groups for over two decades. Such interest among the plaintiff's bar will be emboldened by the United States Environmental Protection Agency's (EPA) recently announced *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024* to drastically change and nationalize regulation of PFAS. What's in the EPA's plan?

The basic goals of the EPA's Roadmap are to create "bolder new policies to safeguard the public health, protect the environment, and hold polluters accountable." U.S. EPA, *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024*, October 18, 2021. ("EPA Roadmap, 2021") The EPA will approach the issue with an eye on the entire lifecycle of PFAS from their production process to all subsequent downstream uses and disposal. This may well include EPA action targeting the creation

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of PFAS during the manufacture and by-product process, to the use of products containing PFAS in subsequent manufacturing. Further, this effort would also target the use by the general public of consumer products as well as people affected by contamination in water. In sum, the EPA's overall plan involves the three "R's": research, restrict, and remediate.

Also, the EPA explicitly plans to try to prevent PFAS from being introduced into the environment any longer, by positioning its resources "upstream of the problem." *EPA Roadmap, 2021*. Further parts of the EPA Roadmap include plans to invest government resources into scientific research to seek to fill in some "gaps" in the scientific knowledge to study and determine at what levels PFAS have health effects on humans and the environment. *EPA Roadmap, 2021*. The plan for research also involves the development of new methods to easily identify the presence of PFAS and to eliminate them. The EPA anticipates using its powers to implement a prevention program to proactively keep PFAS from entering the air, land, and water, "at levels that can adversely impact human health and the environment." *EPA Roadmap, 2021*.

The obvious question is whether this signals that the EPA will seek to make a threshold determination. Previously, PFAS thresholds have been discussed in units of parts-per-trillion, so clearly a very, very miniscule amount could be subject to scrutiny and potentially considered harmful.

Although the Roadmap as announced indicates an aggressive, fast-paced series of actions, the EPA does state in its

Roadmap that all stakeholders will be given an opportunity to provide input and to be heard in "listening sessions." *EPA Roadmap, 2021*. Presumably manufacturers of PFAS, industries using them, and municipalities and individuals affected will all be given an opportunity to be heard.

In some parts, the Roadmap suggests the EPA desires to prevent future release of PFAS into the environment, which would leave some observers, at first glance, to perceive an intent to ban all PFAS. However, the EPA's Roadmap also makes statements that future versions of PFAS might be allowed. That is, new PFAS would require approval which would be filtered through a "robust" review process under the Toxic Substances Control Act. As for existing PFAS, they will be scrutinized to determine whether they can continue to be used in safe manners and to prevent so-called "legacy PFAS" from being produced or to be used in different ways than before. *EPA Roadmap, 2021*.

EPA will be implementing actions that will make certain PFAS subject to new reporting requirements, and some reporting exemptions are likely to be revoked. Some of these actions have already begun, including the fifth Unregulated Contaminant Monitoring Rule (UCMR5) that imposes new monitoring requirements on many suppliers of public drinking water.

Industries and manufacturers in general and various fields can anticipate more focused regulations and more data collection and monitoring. Yet, it should be noted that the EPA Roadmap specifies certain fields which will be subject to regulation. Industries that are expected to be affected including those involved in the following: organic chemicals; biosolids; plastics/synthetic fibers; metal finishing/electroplating; electrical components; textile mills; landfills; leather tanning/finishing; plastics molding; paint

formulating; pulp/paper/paperboard; and airports.

The EPA's new regulations will be derived from its authority under the Toxic Substances Control Act (TSCA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The EPA is authorized to collect information on PFAS under TSCA Section 8(a)(7), and to mandate that manufacturers pay the costs of PFAS research under TSCA Section 4, when the EPA issues Test Orders. Further, it is expected that the EPA may seek to relay on authority, although such authority may be questioned, derived from the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and CERCLA.

Also, by 2023, EPA plans to issue new guidance on the disposal and destruction of PFAS, and to designate some PFAS as "hazardous substances" under its CERCLA statutory authority, which will require reporting of release incidents, increase access to PFAS data, and clear the path for recovering costs of remediation. This designation will certainly change the status quo, because previously, absent other state or governmental law or regulation, the EPA's position on PFAS did not involve the enforcement power that it will have after designating certain PFAS "hazardous substances" under CERCLA's Superfund sections. Designation of certain PFAS as hazardous substances under CERCLA, would allow the EPA to take additional actions with respect to previously targeted cleanup sites that may still have the presence of PFAS, and to mandate periodic testing for certain PFAS to meet five-year review requirements.

In addition to the EPA's actions expected in 2022 and beyond, there will be additional impacts in 2022 as a result of expected trial activity in already pending

lawsuits in the fire-fighting foam litigation in the federal MDL Court in South Carolina, which involves hundreds of cases. Judge Richard Gergel, the presiding judge in the MDL, recently selected a subset of bellwether cases to be substantively litigated first to frame expected outcomes in other matters. The first to be set for trial involve PFAS contamination claims from public water system utilities and municipalities. As a reason for choosing these cases, the Court anticipates these claims will have more focused and straightforward causation evidence. The theory is that water-providing municipalities need only prove that PFAS have contaminated their water sources, and then connect that contamination back to the actual source which released PFAS originally. The cases which are believed to present more difficult and complex causation issues involve personal injury, and are not expected to go to trial as early as the bellwether cases. The bellwether cases are concluding written discovery and have involved about 50 depositions so far. They appear to be on schedule for some trials in 2022.

The next 12 months, will see major developments in the PFAS litigation landscape due to the ongoing civil litigation and the recent EPA Roadmap targeting PFAS. The Roadmap indicates that the EPA will regulate PFAS from upstream production to environmental contamination to consumer use. With some trials in the MDL expected in 2022, during the same year of the first goals for the EPA's Roadmap, these heightened litigation activities and aggressive regulatory measures will no doubt have a direct impact on multiple industries, businesses, and individuals. Also, it is possible that indirect effects may involve a potential increase or expansion of litigation.



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*Editor's Note: This article was previously published in a newsletter of the International Association of Defense Counsel's (IADC's) Toxic and Hazardous Substances Litigation Committee, of which Ms. Fox and Mr. Habeeb are members.*