

# What's on the US horizon for PFAS-containing goods this year?

INSIGHT GLOBAL OUTLOOK

24 January 2023

United States

PFAS

US TSCA

Chemical management



**The PFAS issue has become one of the hottest topics of the day, with regulation and litigation on the increase. In part five of our 2023 Global Outlook series of special reports, North America desk editor Julia John outlines what to expect in the US in the coming year**

## Key developments

- The EPA intends to release a broad PFAS reporting rule, prompting businesses to query their supply chains to collect information on the compounds' applications
- The agency plans to designate PFOA and PFOS as CERCLA hazardous substances, which will intensify litigation around the compounds
- The Department of Defense (DoD) expects to cease procurement of most PFAS-containing firefighting foams and propose rules to move away from those articles and certain other goods containing PFOA or PFOS
- Maine aims to issue a wide-ranging PFAS disclosure rule to shape a 2030 prohibition on all non-essential applications of the substance class
- Bans on PFAS-containing food contact materials (FCMs) will enter into force in seven states, following those that just took effect in California and New York
- California will adopt a first-ever prohibition on PFAS-containing children's products, which is anticipated to amount to a nationwide phaseout

- 2023 will probably continue to bring greater federal scrutiny, state requirements and lawsuits around the use of per- and polyfluoroalkyl substances in an array of articles in the US

Stephanie Feingold, a partner at law firm Morgan Lewis, predicts that the EPA "will see more of the activity shift to actually enacting and implementing those regulations" floated under its 2021-2024 PFAS roadmap. That activity should include a sweeping reporting rule in the next couple of months, and hazardous substance designations this summer for two legacy long-chain compounds.

At the state-level, Maine plans to finalise its own far-reaching PFAS disclosure rule in the spring. Moreover, limits on the persistent chemicals' use in several goods are taking effect, including a California ban covering children's products, as well as food packaging prohibitions in different parts of the country. And more states may adopt multiproduct PFAS restriction and notification mandates.

## Reporting rule

The EPA expects to publish its final PFAS TSCA section 8(a)(7) reporting [rule](#) in March. As proposed, the controversial rule would compel manufacturers to extensively detail their use of some 1,300 PFASs going back to 2011, with no carveouts for small businesses or article importers.

The agency missed the 1 January 2023 deadline for the final rule – established by the 2020 National Defense Authorization Act (NDAA) – and has been examining feedback on an [economic analysis](#) pointing to almost \$1bn in compliance costs for small entities. The agency is contemplating ways to alter its proposal to alleviate that burden.

Regardless, "companies should take steps now to evaluate PFASs that may be present in their raw materials and manufacturing processes, including imported articles," Ms Feingold told Chemical Watch.

## Test orders

Companies could receive more TSCA section 4 test [orders](#) under the EPA's national PFAS testing [strategy](#).

The agency has so far issued orders for the surfactant 6:2 fluorotelomer sulfonamide betaine (6:2 FTSB) and the gaseous intermediate hexafluoropropylene oxide (HFPO).

The agency had hoped to finish an initial two dozen test orders on health impacts in 2021 but said they were delayed due to budget constraints. Still, it **expects** to initiate 45 additional PFAS-related test orders between FYs 2023 and 2025.

The EPA **estimates** that it will need at least six months to develop each order.

## Snurs

Any day now, the EPA could propose a significant new use rule (Snur) for PFASs on the inactive portion of the TSCA inventory.

The Snur would obligate entities to notify the agency at least 90 days before commencing any abandoned PFAS application deemed a significant new use and let the agency review and control future applications of those inactive compounds.

The proposal had been scheduled for December 2022, and the final rule for next December, according to the latest federal **regulatory agenda**.

Additionally, the EPA may keep proposing 'catch-up' Snurs on **150 PFASs** approved subject to certain restrictions for the original premanufacture notice (PMN) submitters. New Snurs would expand those limits to other manufacturers and preclude further applications of the compounds without notification to and authorisation from the agency.

The EPA proposed 35 of these catch-up Snurs in December 2022.

In the months ahead, it could continue to push for compliance with a 2020 **Snur** on long-chain perfluoroalkyl carboxylates (LCPFACs).

The agency has noted that the possible formation of PFASs during the fluorination of high-density polyethylene (HDPE) receptacles can breach the **Snur**. At the end of 2022, the agency **sued** a big plastic fluorinator for such an alleged violation.

## TRI supplier notification

By the end of this year, the EPA intends to finalise a proposal to designate a subset of PFASs as 'chemicals of special concern' under the toxics release inventory (TRI) reporting programme.

The measure would require facilities to annually report discharge information on minor quantities of more than 175 PFASs under the scheme.

To further promote accurate figures, the proposal would compel downstream suppliers to alert purchasers to any amount of a chemical of special concern in a mixture or trade name product, potentially generating numerous PFAS notifications across the supply chain.

## **CERCLA designations**

This summer, the EPA expects to finalise a rule naming PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Such a move could trigger an avalanche of lawsuits demanding cleanup funds from anyone linked to PFAS contamination at a Superfund site, including the compounds' downstream users.

CMBG3 Law shareholder John Gardella says businesses "will seek to bring other responsible parties into the remediation under way to offset their cleanup costs as much as possible".

"For 2023, the CERCLA designation is, in my opinion, the top PFAS-related item that will trigger widespread litigation and enforcement action costs to companies," he says.

He recommends companies "take proactive steps to understand the potential scope of risk from the CERCLA changes", such as determining any PFASs used and the timing of that use.

## **Further litigation**

Another arena of litigation likely to intensify this year involves consumer deception cases over PFAS-containing offerings marketed as non-toxic or sustainable, Mr Gardella says. These lawsuits, which could address anything from clothing to cosmetics to children's products to FCMs, will keep growing because they "have much lower standards of proof for plaintiffs' attorneys" compared with other types of lawsuits, he says.

Furthermore, Prop 65 private enforcement actions may increase in California in 2023, continuing a [pattern](#) observed last year.

Under the right-to-know scheme, product warning requirements for [PFOS](#) and [PFNA](#) took effect last month, and additional ones for PFOA are scheduled for February. This means more manufacturers could be hit with litigation alleging failure to warn of PFAS exposure, based on findings of even trace concentrations of the listed chemicals.

Meanwhile, California's Office of Environmental Health Hazard Assessment (Oehha) may propose adding [PFBS and GenX](#) to the scheme.

## DoD transitions

The Department of Defense also has actions planned for 2023.

The agency, which recently [issued](#) a military specification (Milspec) for fluorine-free firefighting foam (F3), faces a 1 October deadline to stop buying most PFAS-containing foam. It appears on track to propose a phaseout rule in April, as indicated by the fall 2022 regulatory agenda.

The Milspec will support military installations' statutorily mandated switch to F3 by autumn 2025. It will likewise enable the Federal Aviation Administration (FAA), which follows military criteria for firefighting foam, to phase out PFAS foams at commercial airports.

Furthermore, the DoD aims to propose another rule in April to cease procurement of certain PFOS- or PFOA-containing goods. Affected items include nonstick cookware and stain-repellent upholstered furniture, carpets or rugs.

## State efforts

With federal agencies focused on data gathering and remediation for specific PFASs, and little successful legislation expected in Congress, states will keep leading on restrictions targeting the substance class.

State activity will resemble last year but "taken up a notch", according to Sarah Doll, director of NGO Safer States.

As environmental detection of the compounds grows and more stringent federal drinking water standards come into effect, states will increasingly consider upstream controls to reduce the huge cleanup expenses, she says.

Those considerations are especially likely given rising market momentum toward PFAS-free alternatives for items already under scrutiny, like textiles and FCMs, she says.

State lawmakers will tend to pursue legislation that simultaneously addresses multiple product types, with the goal of eventually getting rid of every non-critical PFAS application, Ms Doll says, in addition to disclosure schemes like Maine's.

At least a dozen states could advance measures seeking disclosures or prohibitions, including California, New York, Washington state, Massachusetts, Connecticut, Rhode Island, New Hampshire, Vermont, Michigan, Minnesota, Alaska and North Carolina.

More southern states could start clamping down on PFAS-containing goods, Ms Doll says, with bipartisan efforts to help impacted firefighters and farmers.

As in past years, states will continue to push legislation to ban aqueous film forming foam (AFFF) or implement previously passed restrictions. For example, in [Maryland](#), a prohibition on most AFFF will commence 1 January 2024.

### **FCMs, textiles, cosmetics and more**

Food contact materials will represent another sphere of ramped-up state regulation in 2023. With bans now in place on PFAS-containing food packaging in [California](#) and [New York](#), a nationwide industry transition to PFAS-free options is probable.

A handful of other states have similar prohibitions on the horizon. [Washington state](#) will restrict PFASs in plates, food boats, pizza boxes and wraps and liners from February onwards. A broader prohibition starts in [Vermont](#) on 1 July.

Blanket bans on PFAS-containing food packaging are slated to begin next January in [Colorado](#), [Minnesota](#), [Maryland](#), [Connecticut](#) and [Rhode Island](#).

New disclosure requirements are already in effect for cookware in California. As of 1 January, manufacturers must disclose online any PFASs in cookware handles or food-contact surfaces, with on-product labelling requirements coming on 1 July. Furthermore, businesses can no longer claim an article is free of one PFAS type if it contains a different PFAS. Similar provisions take effect in Colorado next January.

Legislation on textiles will also remain a state-level priority, with [California](#), [New York](#), [Washington state](#) and others recently approving prohibitions on PFAS-containing fabrics such as apparel or furnishings.

In Maine, restrictions for carpets, rugs and textile treatments entered into force on 1 January. Similar bans will follow in Vermont on 1 July and in Colorado on 1 January 2024, when Maryland is also set to adopt its own ban on carpets and rugs.

Washington state's reporting requirements for PFAS-containing outdoor furnishings are expected by the start of 2024 as well.

PFAS-containing personal care goods may also see more state bans, on the heels of a measure [California](#) enacted in 2022. Relevant bills may advance in New York, Vermont, Washington state and Oregon, Ms Doll says.

Meanwhile, juvenile products will face new restrictions this year. On 1 July, [California](#) will implement a first-in-nation prohibition on PFAS-containing juvenile products, essentially ending this application of the substance class throughout the country, according to the Juvenile Product Manufacturers Association (JPMA). Colorado will follow next January.

Novel products that could be subject to state legislative efforts to eliminate PFASs include paints and cleaning goods, Ms Doll says. Some jurisdictions may look to replicate Colorado's unique restriction on PFAS-containing oil and gas products, she adds.

According to Susan Richardson, counsel with Kilpatrick Townsend & Stockton, with "checkerboard regulation across the states", businesses may "start falling in line with California and New York". Ultimately, she says, industry may look to the federal government to bring consistency.

## **Maine PFAS programme**

With Maine's PFAS disclosure mandate in effect as of 1 January, manufacturers selling PFAS-containing items there must ensure they have sent preliminary notifications to the state's Department of Environmental Protection (DEP) if they have not received an extension.

The agency aims to promulgate a final rule in April explaining the disclosure obligations imposed by a 2021 statute. The agency intends to launch the rulemaking process by releasing a draft rule for comment in February.

Entities that filed a successful extension request can use the extra time this year to inspect their offerings and supply chains for PFASs and compile the necessary information on their use of the compounds.

In late 2023, the DEP may begin studying the data to select "currently unavoidable" applications to exempt from a PFAS phaseout due in 2030.

Given expanding restrictions on the substance class, Ms Feingold says, "companies should seek to identify and eliminate any intentionally added PFASs from their products" where possible.

## Key dates

- February – Washington state restrictions on four categories of PFAS-containing FCMs begin
- March – US EPA to publish final PFAS reporting rule
- April – Maine to promulgate final PFAS disclosure regulation and launch reporting portal
- July – California to adopt first-ever prohibition on PFAS-containing juvenile products
- July – Vermont restrictions on PFAS-containing food packaging begin
- August – US EPA to finalise rule naming PFOA and PFOS as CERCLA hazardous substances
- January 2024 – PFAS-containing food packaging bans to start in Colorado, Minnesota, Maryland, Connecticut and Rhode Island