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Dark Waters and the Future of PFAS Laws

The newly-released movie *Dark Waters*, starring A-list actors Mark Ruffalo and Anne Hathaway, has increased public attention on a group of emerging chemicals called Per- and Polyfluoroalkyl substances (“PFAS”). This increased awareness portends more regulations adding to the patchwork of existing laws to address these chemicals.

PFAS are a class of biologically and environmentally persistent compounds manufactured and used in a wide variety of industries since the 1940s. By some estimates, there are over 4,000 PFAS compounds used in products sold in the United States. PFAS is ubiquitous and may be found in places such as food, water-resistant cloths, fire-fighting foam (Aqueous Film Forming Foams (“AFFF”)), stain-resistant carpet and other household products. The exposure pathway of greatest concern is PFAS released to groundwater that may find its way into drinking water. There are over 600 known sites where PFAS is found in the United States. The government’s response to PFAS has created murky waters in federal and state legislatures, and the environmental agencies.

CONGRESS TO ADDRESS PFAS ISSUES

At last count, there are at least ten proposed bills in Congress to address PFAS. They include proposals to formally include PFAS within the statutory definitions of hazardous waste, setting PFAS standards in drinking water (maximum contaminant levels) and including PFAS in the toxic release inventory. Other proposed laws provide grant funding for communities with water systems contaminated with PFAS.

One of the most immediate issues is how to address and fund the remediation of PFAS from military bases and their release of PFAS from fire-fighting operations. Negotiations over PFAS have stalled efforts to pass an annual defense policy bill through Congress. Speaker of the House Nancy Pelosi has refused to bring the bill to the House floor for a vote unless provisions are included to address management of PFAS at military bases. The PFAS threatens to leach into nearby groundwater supplies. Republican lawmakers on the other hand have been reluctant to support a bill with broad measures to address PFAS contamination.



EPA DELAYED ACTION ON PFAS

Perhaps in response to these new pressures, EPA announced its plans on November 20 to designate perfluorooctanoic acid (“PFOA”) and perfluorooctane sulfonic acid (“PFOS”) as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act, and on November 25 to add PFAS substances to its Toxic Release Inventory. The announcement is part of EPA’s Action plan announced in February 2019 and discussed in our prior client alert [here](#). EPA’s reaction comes after public campaigning by environmental and health advocates, and a bipartisan group of lawmakers. EPA has yet to take final steps under its Action Plan to exercise other parts of its statutory authorities under the Safe Drinking Water Act.

STATE ACTION IN THE ABSENCE OF FEDERAL ACTION

Coupled with criticism of the slow federal response, at least eight states have enacted their own legislation to address PFAS issues. Some laws are directed at products. Most recently, New Hampshire prohibited the use of PFAS in furniture, carpeting and certain fire-fighting foam products. Washington State adopted broad legislation to regulate PFAS and other chemicals in consumer products and packaging. Washington and Colorado are requiring notice at the point of sale of any PFAS-containing materials in firefighting personal protective equipment. Other state laws are directed at protecting the groundwater. California authorized its public water systems to monitor and report PFAS detections and has embarked upon a testing program. Vermont will adopt its own maximum contaminant level for PFAS in drinking water.

PFAS LITIGATION

There has been a myriad of lawsuits filed throughout the country, including multidistrict litigation filed in South Carolina involving AFFF. See *Aqueous Film-Forming Foams (AFFF) Products Liability Litigation*, MDL No. 2873. The nature and scope of PFAS litigation will be the subject of a future Client Alert.

King & Spalding has a true national environmental practice with former agency leaders and leading attorneys in the major government and industrial centers in America. In addition to the authors, our team includes **Ilana Saltzbar** (D.C.), the former lead EPA attorney in its first PFOA enforcement action, **Matt Blaschke** (San Francisco) who litigated against the plaintiff’s attorney in *Dark Waters*, **Joe Eisert** (D.C.), **Carmen Toledo**, **Jim Vines**, **Les Oakes** and **Doug Henderson** (Atlanta) who are veteran PFAS and toxic-tort attorneys, and **Brian Stansbury** (D.C.) who works with Congressional leaders on PFAS issues. If you have questions about how PFAS regulations may affect you or your business, please contact our lawyers noted in the contact section on the first page. In 2019, for the fourth time, *Law360* recognized King & Spalding’s Environmental Health and Safety practice as Practice Group of the Year.

ABOUT KING & SPALDING

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.”

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