

THE LATEST ON PFAS LITIGATION & POLICY

Tess Dunham, *Kahn, Soares, & Conway, LLP*

November 1, 2021

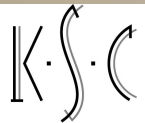


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PFAS UPDATES ON A NATIONAL SCALE

New statutes, regulations, agency guidance,
and litigation from the U.S.



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PFAS NEWS IN THE U.S.

FALL – WINTER
2020

Former EPA Administrator Wheeler signed a MOU with the State of North Carolina to address PFAS contamination and redevelopment work with agricultural communities and Brownfields sites.

JANUARY –
MARCH 2021

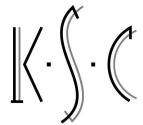
The **NATIONAL DEFENSE AUTHORIZATION ACT** becomes law, requiring disclosure of PFAS levels, prohibiting PFAS exposure/release of military agents and installations, funding PFAS health studies, setting performance standards, etc.

SUMMER 2021

EPA Office of Water, Engineering and Analysis Division with Dept. of Defense issued draft method 1633 for use in the **CLEAN WATER ACT** for determination of PFAS in aqueous, solid, and tissue samples.

FALL 2021

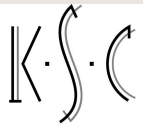
EPA responds to New Mexico Governor's request to address PFAS contamination under the **RESOURCE CONSERVATION AND RECOVERY ACT**. EPA will soon initiate the rulemaking process, to add PFAS as a listed hazardous waste, and thus require investigation and cleanup of PFAS compounds.





U.S. EPA STRATEGIC ROADMAP

Biden-Harris Administration's plan for addressing PFAS and timelines to hold the Administration accountable



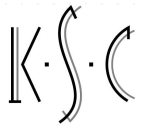
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FIVE GUIDING PRINCIPLES

1. Consider the PFAS Lifecycle
2. Get Upstream of the Problem
3. Hold Polluters Accountable
4. Use Science-based Decision-making
5. Prioritize Disadvantaged Communities



U.S. EPA COUNCIL ON PFAS: OBJECTIVES

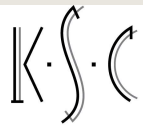
PLANNED ACTIVITIES

- ❑ National webinars
- ❑ Stakeholder listening sessions
- ❑ Focusing on vulnerable populations



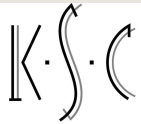
ROADMAP GOALS

- ✓ RESEARCH risks PFAS poses to human health and ecological effects using the best available science.
- ✓ RESTRICT identifiable PFAS toxins from entering natural resources to mitigate harm imposed to human health and the environment.
- ✓ REMEDIATE existing PFAS contamination.

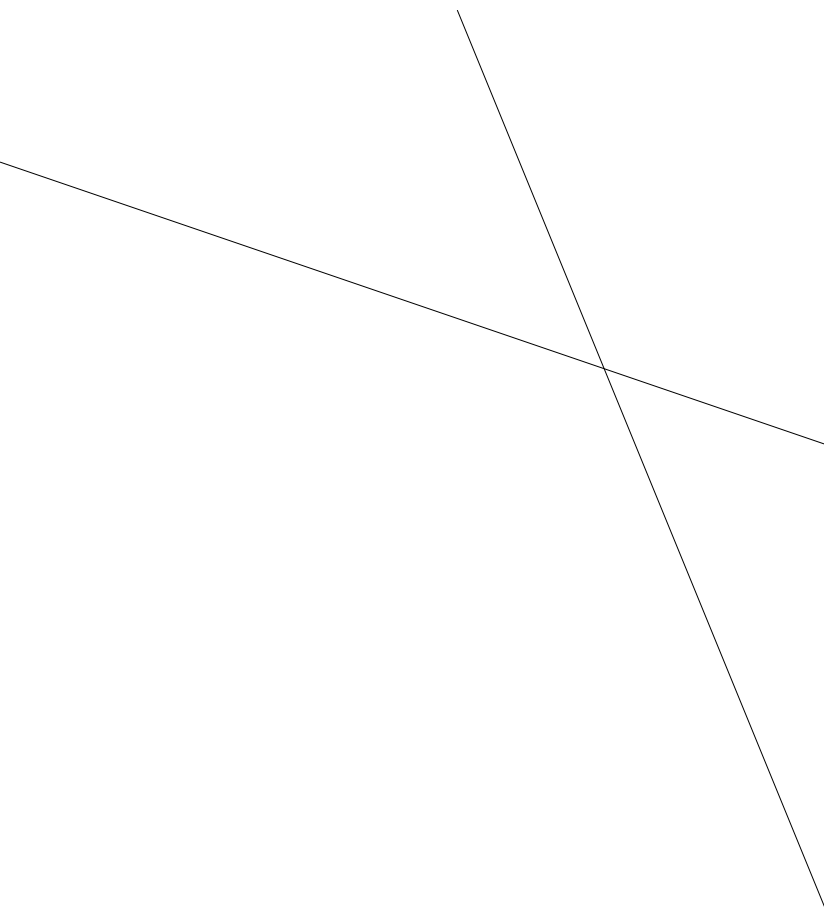




RECENT LITIGATION ON PFAS IN THE U.S.

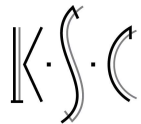


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WEST VIRGINIA: WEIRTON AREA WATER BD. V. 3M CO.(2020) U.S. DIST. LEXIS 237871

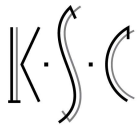
- Plaintiffs sued multiple manufacturer defendants for strict liability and nuisance
- WV Northern Dist. Ct. found all elements met for defective design claim against defendants because the products containing PFAS were not reasonably safe for their intended use, and the manufacturers knew or should have known of the risks of PFAS contaminating the water system
 - Defendants also failed to warn because it was foreseeable to the manufacturers that PFAS products would contaminate the water.
- Manufacturers proximately caused contamination of groundwater resource, including plaintiffs' drinking water supply, which caused a significant interference with a public right, under public nuisance law.





MICHIGAN: ZIMMERMAN V. 3M CO. (2021) U.S. DIST. LEXIS 106984

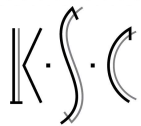
- Plaintiffs sued defendants for negligence, private nuisance, public nuisance, and negligence.
- MI Western Dist. Ct. found since plaintiffs were foreseeable victims of contamination from PFAS, their relationship with defendants was sufficient to impose a duty.
 - Though the Court dismissed the negligence claim because of a lack of personal injury, it survived to the extent related to property damage.
- Finally, the court allowed the plaintiff to raise a private nuisance action because preceding case law establishes one can bring a private nuisance claim over a contaminated water well.





NEW JERSEY: *GIORDANO V. SOLVAY SPECIALTY POLYMERS USA, LLC* (2021) 522 F.SUPP.3D 26

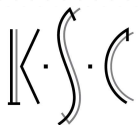
- Plaintiffs sued, alleging Defendants knowingly contaminated their private water supply through intentional manufacturing use, discharge, and/or disposal of PFAS compounds, including “GenX”.
- Plaintiff’s claim that Defendants violated the N.J. Spill Act was adequate, but a couple of issues remain unclear:
 - Whether purchasing and using plastic water bottles, due to contaminated personal drinking water supply, is eligible for reimbursement as “clean up costs”
 - Whether Plaintiffs have a private cause of action to recover cleanup costs.
- Plaintiff is entitled to medical monitoring as relief.





GEORGIA: *JOHNSON V. 3M* (2021) U.S. DIST. LEXIS 187688

- Defendants included 3M, chemical suppliers, carpet manufacturers, and municipalities in Dalton area.
- Plaintiff and Class Members sued, alleging Defendants caused PFAS chemicals to be discharged to the surface waters of Northern Georgia, contaminating the drinking water in the City of Rome and Floyd County.
- Plaintiff adequately claimed Dalton Utilities discharged PFAS from sewage, without a NPDES permit.
- Plaintiff met all requirements for public nuisance and abatement claim against Defendants





PFAS UPDATES IN CA

The latest in PFAS litigation and policy from California.

PFAS NEWS IN CA

MARCH 2021

- **Dept. of Drinking Water** issued drinking water notification level and response level of 0.5 ppb and 5 ppb, respectively, for perfluorobutane sulfonic acid.
- **State Water Resources Control Board (“SWRCB”)** issued Investigative Orders to refineries and bulk fuel terminals for one-time sampling effort.

JULY 2021

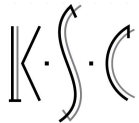
- **Dept. of Toxic Substances Control** designated certain carpets and rugs containing PFAS, manufactured in or imported to CA, as “Priority Product”. Requires domestic and foreign rug and carpet manufacturers that use PFAS to report to the Dept. to reduce human exposure and demonstrate intent to remove or replace PFAS in products.
- **Office of Environmental Health Hazard Assessments (“OEHHA”)** initiates public review period of draft document setting PHGs for PFAS in drinking water.

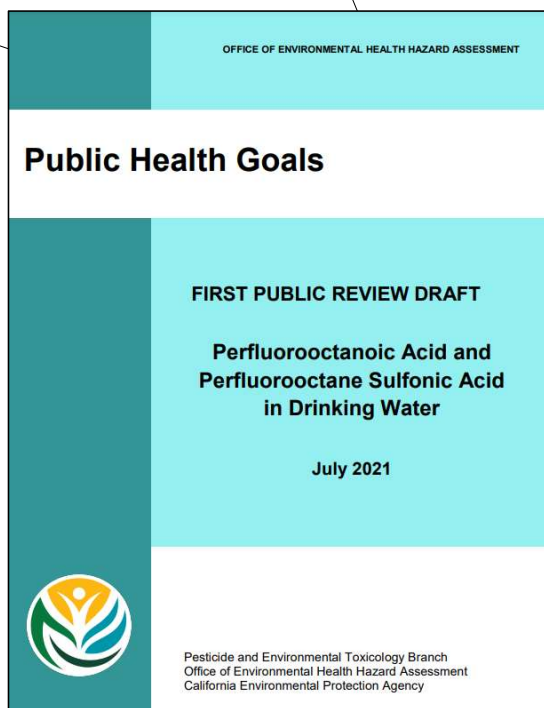
JULY 2021

- U.S. EPA announced \$131 million Water Infrastructure Finance Innovation Act loan to the **Orange County Water District** to help remove PFAS from local groundwater sources providing drinking water.

OCTOBER 2021

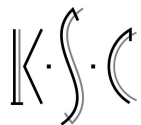
- **OEHHA** announces availability of draft technical support document for Public Health Goals for PFAS in drinking water.



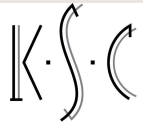


PROPOSED PUBLIC HEALTH GOALS FOR PFAS

- Led by OEHHA, the process for establishing public health goals (“PHGs”) for PFOA and PFOS in drinking water commenced in Fall 2019.
- On September 28, 2021, OEHHA hosted a virtual public workshop on the development of the PHGs with the public and interested stakeholders.
- OEHHA published the first public review draft technical support document for the proposed PHGs on July 22, 2021, starting the 60-day public comment period. The comment period was extended for the American Chemistry Council, to end October 28, 2021.



RECENT CALIFORNIA PFAS LITIGATION



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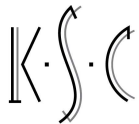
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CENTRAL DISTRICT: CITY OF CORONA V. 3M CO. (2021) U.S. DIST. LEXIS 162833

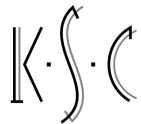
- Plaintiffs City of Corona and the Corona Utility Authority sued manufacturer defendants to remediate contamination of the city's water supply with PFAS chemicals.
- 3M and other defendants argued at least part of the contamination was from a fire-extinguishing agent, aqueous film-forming foam, which must conform to strict military specifications ("MilSpec AFFF"). Thus, defendants were acting under the direction of a federal officer.
 - Central Dist. Ct. disagreed, finding defendants failed to meet its burden to remove this case to federal court, enabling the plaintiffs to remand the case back to the Superior Court in the County of Riverside.





CENTRAL DISTRICT: ORANGE CTY. WATER DIST. V. 3M CO. (2021) U.S. DIST. LEXIS 134146

- Plaintiffs Orange County Water District (“OCWD”), along with several other Orange County municipalities, sought relief for PFAS contamination of their surface water and groundwater supplies. Raised claims of strict products liability, negligence, nuisance, and trespass, and alleged entitlement to relief under the OCWD Act.
 - Defendants removed to federal court, and plaintiffs sought to remand back to the Orange County Superior Court.
- Co-defendants argued plaintiff failed to allege a sufficient connection between PFAS contamination in Orange County and their activity in the state.
 - Central Dist. Ct. disagreed, finding briefing adequately explained that three major military installations in the area could be potential sources of PFAS contamination: Navy Seal Beach, Los Alamitos, and Tustin Marine Corps Air Station.



THANK YOU

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