

States Eclipse Feds in Cleaning ‘Forever Chemicals’ in Soil (1)

By Tripp Baltz

Deep Dive

Nov. 10, 2021, 6:00 AM; Updated: Nov. 10, 2021, 1:01 PM

- More states considering cleanup standards for PFAS in soil
 - Maine’s standard for PFAS in milk tied to soil contamination
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States are moving to set cleanup targets for so-called “forever chemicals” in soil—guidelines that attorneys say could create the potential for state and federal conflict over standards as the Biden administration advances its own plan to combat PFAS pollution.

Pennsylvania, Massachusetts, and Maine recently have established standards for per- and polyfluoroalkyl substances, or PFAS, in soil, and California and Washington are exploring them. They reflect the reality that PFAS seeping into the ground can migrate into groundwater.

So far, no state has established an enforceable liability standard for PFAS in soil, at least not explicitly. But that could be coming as the U.S. Environmental Protection Agency moves forward with the roadmap for addressing the chemicals that the White House announced in mid-October, attorneys said.

The roadmap includes a commitment to hold polluters responsible and includes a reference to PFAS contamination in soil, said Allyson Cunningham, partner at Lathrop GPM LLP’s environmental and tort practice group in Kansas City.

“So while states continue to develop their own varying thresholds and guidelines for cleanup, it is almost certain that federal regulations are looming, and potential liability is on the horizon,” she said.

Soil standards for PFAS, similar to those for drinking water, are designed to protect the public from the family of toxic substances. PFAS chemicals have an ability to build up in organisms and move up the food chain, and their persistence in the environment has led them to be dubbed “forever chemicals.”

Waiting for Feds

For now, Maine is “pretty far ahead of the federal government,” said Patrick MacRoy, deputy director of the environmental group Defend Our Health in Portland, Maine.

A dairy in Arundel, Maine, in 2016 discovered extremely high levels of PFAS in milk, water and soils. It drew national attention because the contamination was linked to treated sludge or paper mill waste that had been legally applied to fields as a fertilizer.

Although it's conceivable an attorney could sue a company if a PFAS in soil standard were exceeded and someone got sick, that hasn't typically happened if levels are set only in states, said John Gardella, a shareholder at CMBG3 Law in Boston whose practice focuses on environmental litigation and compliance.

"Plaintiffs' attorneys typically wait for federal agencies to weigh in on toxicity of chemicals before filing lawsuits for personal injury," he said.

This was the case with glyphosate litigation, he said. Despite the EPA and European Union finding no link between that chemical and toxicity to humans, when the World Health Organization issued a statement finding a probable link, Roundup weed killer lawsuits "boomed overnight," he said.

Still, he said, personal injury litigation is most likely to occur with PFAS drinking water standards that are on the horizon from the federal government.

The American Chemistry Council, the largest group representing chemical producers, said it wants to avoid entanglements between federal and state law. National action "would be preferable to a patchwork of competing state-based standards that could cause confusion and undermine public confidence in our regulatory system," the council said in a statement.

Difficult Position

Companies are in a difficult position if they want to clean up PFAS-contaminated soil, Cunningham said. Few remedial technologies capable of treating impacted soil exist, and those that do remain costly, she said.

Rulemaking to regulate PFAS under the Comprehensive Environmental Response, Compensation and Liability Act and the Resource Conservation and Recovery Act is proceeding, but likely won't take effect until 2023, she said.

"It's not too early to start gathering facts and communicating with regulators about what sort of cleanup standards will be expected, but potentially impacted landowners should also proceed with caution," Cunningham said.

The potential for state and federal conflict over clean-up standards is real, she said.

"Diving in too early without regulator approval, or knowing exactly what clean-up standards may be set by the federal government as the rulemaking proceeds, could result in remedial work that is later considered insufficient by a regulator or thresholds set under" federal law, Cunningham said.

Businesses that operate in multiple states should also anticipate a patchwork approach to addressing PFAS in soil, with different states adopting regulations or guidance that may vary by standard, type of PFAS chemical, or property use, she said.

As more states jump on board, they'll likely set PFAS soil standards that include a cleanup target and a liability purpose, attorneys said.

As they do, companies should use the limits in the regulations as guidelines when determining whether they inadvertently might be polluting with elevated levels of PFAS at a site where future liability concerns could arise, Gardella said.

"If they don't do it to the state's recommended standard, any buyer would be very hesitant to purchase that land," he said.

States' Efforts

The Massachusetts Department of Environmental Protection filed a final rule in December 2019 for groundwater and soil cleanup standards of certain per- and polyfluoroalkyl substances. The rule also listed six PFAS compounds as hazardous substances.

The Washington Department of Ecology in late October determined PFAS meets the definition of a hazardous substances under the state's Model Toxics Control Act. The agency will develop cleanup levels for groundwater and soil once the state Department of Health finalizes State Action Levels for five PFAS compounds in drinking water, likely later this year, said Priscilla Tomlinson, a Department of Ecology toxicologist.

The Pennsylvania rules provide soil standards for PFAS compounds so companies engaged in cleanup can attain the statewide health standard and as a result obtain liability relief under state law, said Jamar Thrasher, spokesman for the Pennsylvania Department of Environmental Protection.

The standards are designed to encourage voluntary cleanup and reuse of contaminated commercial and industrial sites, and assures that sites are protective of present and future uses, he said.

They set medium specific concentrations, or MSCs, for perfluorooctanoic acid (PFOA), perfluorooctanesulfonic acid (PFOS), and perfluorobutane sulfonic acid (PFBS).

For PFOA/PFOS, the level is 4.4 mg/kg for residential sites and 64 mg/kg for non-residential, while for PFBS the level is 66 mg/kg for residential and 960 mg/kg for non-residential. The standards will take effect in mid-November.

PFOA, PFOS, and PFBS are regulated substances in Pennsylvania, although the EPA hasn't designated them as hazardous substances, Thrasher said.

Providing Standards

Harry Weiss of Ballard Spahr in Philadelphia said Pennsylvania's MSCs provide those remediating a site with standards for residential and non-residential cleanups of soil and groundwater impacted by the chemicals.

He said he would advise clients that are conducting even voluntary cleanups to consider meeting the new Pennsylvania cleanup limits, given that it could provide a future shield to liability.

Maine's standards, like Pennsylvania's, are screening levels to guide remediation, MacRoy said. But they go beyond direct exposure to soil and consider the more potent leaching of PFAS compounds into drinking water resources, he said.

Maine also has studied agricultural pathways for PFAS that are "much more in line with the groundwater leaching number than direct soil exposure," he said.

To see the latest updates on state-level PFAS regulations and legislation, check out Bloomberg Law's PFAS State Activity Tracker [here](#).

—With assistance from Pat Rizzuto.

(Adds PFAS State Activity Tracker link at bottom.)

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