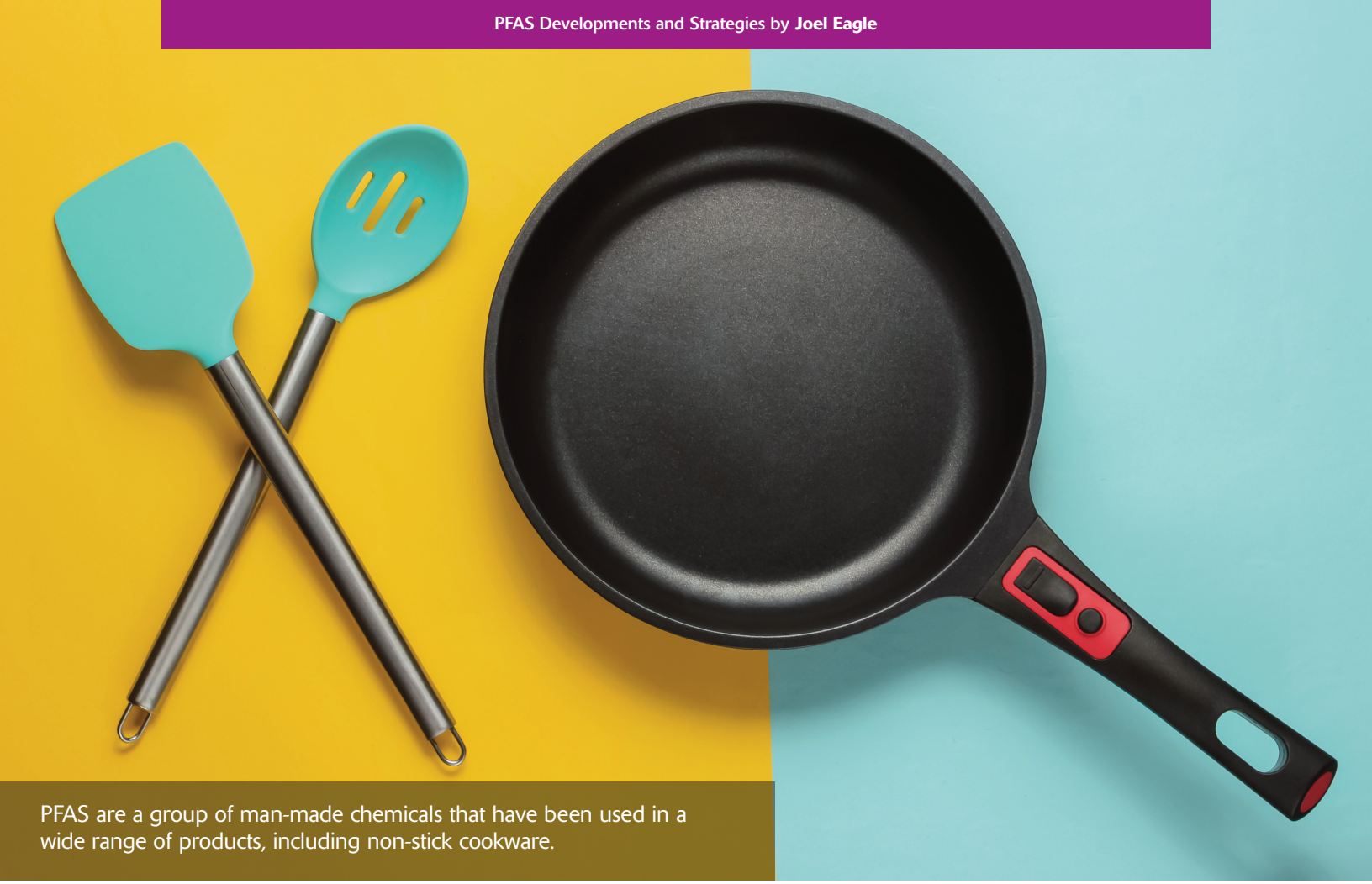

PFAS are a group of man-made chemicals that have been used in a wide range of products, including non-stick cookware.

PFAS Developments and Strategies: Ounces of Prevention or Pounds of Cure?

An overview of some of the top developments in PFAS legislative and regulatory action, permitting, litigation, and environmental due diligence, as well as practical tips to mitigate PFAS-related risks.

Per- and polyfluoroalkyl substances (PFAS) are a group of thousands of unique man-made chemicals that have historically been used, and in many cases are currently used, in a wide range of industries and products, including aqueous film forming foam (AFFF) for fire-fighting applications, non-stick cookware, clothing and carpet stain and water repellants, and food packaging. PFAS, often referred to as "forever chemicals" because of their nearly indestructible carbon-fluorine bonds, are seemingly ubiquitous—in products, in the environment, in Hollywood (e.g., 2019's *Dark Waters* with Mark Ruffalo), and in the news. If you find it hard to keep up with the head-spinning pace of changes in state and federal regulation and other PFAS-related developments, you are not alone. When it comes to PFAS, the old adage may prove true that "an ounce of prevention is worth a pound of cure."

Federal PFAS Drinking Water Standards

The U.S. Environmental Protection Agency (EPA) issued its "PFAS Action Plan" in February 2019 (updated February 2020), and recently announced progress on several Action Plan priorities. One key development relates to EPA's plans to set drinking water standards for some PFAS compounds. On February 22, 2021, EPA reissued a final regulatory determination under the Safe Drinking Water Act (SDWA) regarding perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA), two historically widely used "long-chain" PFAS with more developed toxicity evaluations. EPA considered over 11,000 public comments before this announcement to proceed, setting the stage for EPA to establish enforceable national primary drinking water standards (also referred to as Maximum Contaminant Levels) for PFOS and PFOA. Once finalized, this will create new standards and requirements for water suppliers and environmental site remediation, among other impacts. Pursuant to the set timeframe under the SDWA, however, it will likely take several years to finalize these standards and is one reason many states have established their own PFAS drinking water and remediation standards.

State Regulations

EPA currently utilizes non-binding health advisory levels for PFOS and PFOA of 70 parts per trillion (ppt). While regulating chemicals at the ppt level is extraordinary in its own right (most chemicals are regulated at the parts per million or parts per billion levels), many states such as New Jersey have taken their own action ahead of EPA to regulate PFAS at even lower levels. For example, as of 2020, New Jersey now regulates PFOS at 13 ppt, PFOA at 14 ppt, and perfluorononanoic acid (PFNA), another PFAS chemical, at 13 ppt. Other states (e.g., Michigan, New York, Minnesota, and New Hampshire) have recently taken similarly aggressive actions, and many more states (e.g., North Carolina, Illinois, Ohio, and Rhode Island) have launched various actions, including comprehensive state-wide water supply sampling and PFAS advisory or notification levels.

PFAS as CERCLA Hazardous Substances

The Biden Administration announced PFAS regulation as a top environmental priority, and Michael Regan, confirmed on March 10, 2021, as EPA Administrator, has a history of PFAS enforcement while the Secretary of the North Carolina Department of Environmental Quality. In addition to announcing plans to establish national drinking water standards, Biden will also prioritize establishing PFOA and PFOS (and possibly other PFAS) as "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Legislative action in 2019 and 2020, including the PFAS Action Act, sought but failed to accomplish this, but this is an area where Congressional partisanship may make way to action in the 117th Congress. Once certain PFAS chemicals become CERCLA "hazardous substances," EPA will likely seek environmental investigation and remediation at sites across the country. Given the likelihood of detecting PFAS in groundwater across the country, this may create significant remedial obligations at new and existing sites. Regulated entities, including companies, government agencies, and municipalities, should be prepared for EPA to "reopen" even closed, fully remediated sites that had not previously been investigated for PFAS.

EPCRA Reporting

In the Fiscal Year 2020 National Defense Authorization Act, several PFAS provisions were passed, including adding 172 PFAS to the list of chemicals that must be reported pursuant to the Toxic Release Inventory (TRI) under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA). The first deadline for TRI reporting of the listed PFAS chemicals, for calendar year 2020, is July 1, 2021. For entities subject to the TRI reporting thresholds, this will be the first time that PFAS usage and releases into the environment will become available to the public. This first-time public disclosure may have immediate ripple effects such as state and federal information requests, enforcement actions, and public and private party lawsuits including citizen suits and cost recovery actions, to address known or perceived PFAS impacts to health, the environment, and property.

Water and Air Permitting

PFAS could also soon be subject to water and air sampling and discharge limits. In November 2020, EPA issued a memorandum called, "Interim Strategy for PFAS in Federally Issued NPDES Permit," in which it recommended that PFAS monitoring and best management practices be included in federal-issued water discharge permits. These requirements would be quite expensive, including the costly nature of PFAS laboratory analyses.

PFAS air emissions are another fast-developing topic at the federal and state levels. In 2020, as part of state-led

2021 is shaping up to be a busy year in the world of PFAS legislation, regulation, permitting, litigation, and due diligence.

litigation, New Hampshire issued an operating facility a temporary air permit requiring Best Available Control Technology (BACT) to limit PFAS air emissions. Similarly, in North Carolina, a recent Consent Order required a facility to achieve at least 99% reduction in PFAS air emissions. In January 2021, New York became the second state, after Michigan, to seek to regulate any PFAS in air emissions, proposing to establish an Annual Guideline Concentration for PFOA of 0.0053 µg/m^3. In 2020, Michigan set an allowable concentration limit of 0.07 µg/m^3, with a 24-hr averaging time, for PFOA and PFOS. Additional PFAS air emission regulations will likely follow, as will permits and enforcement orders/settlements to address PFAS emissions in water and air.

Ongoing and Expanded PFAS Litigation

PFAS litigation over the past decade has exploded nationwide in state and federal courts, with claims brought by state attorneys general and environmental agencies, private citizens, and companies. Recent settlements in Minnesota (US$850 million) and Ohio/West Virginia (US$671 million) demonstrate the potential monetary costs and resulting public relations impacts from PFAS litigation. In November 2020, the State of New Jersey filed suit against several companies regarding PFAS contamination at a site in West Deptford, NJ, and in January 2021, New Jersey filed suit against the U.S. Department of Defense, alleging PFAS contamination from AFFF usage at three former air force bases.

The number of PFAS lawsuits, and legal theories continues to grow. In a series of 2020 lawsuits brought in California seeking class action certification, claims were made based on consumer product marketing—that products marketed as "compostable" in fact contained PFAS that might render those claims false. State and municipalities are filing lawsuits under environmental laws and common law theories to recover significant civil penalties and natural resource damages, and remediation of soil, ground water and surface water, from PFAS releases. The likely ubiquity of PFAS in the environment, mobility in groundwater and the nascent field of PFAS source chemical fingerprinting will create challenges in defending against these claims. Entities that may have manufactured, used, or otherwise handled PFAS in the past or presently may wish to begin to proactively evaluate the scope of such connections to PFAS in preparation for the growing wave of PFAS litigation.

PFAS in Due Diligence and Transactional Strategies

It likely comes as no surprise that PFAS also presents challenges in real estate and corporate transactions. ASTM 1527-13, the typical standard used in environmental diligence to meet "All Appropriate Inquiries" and allow companies to qualify for innocent purchaser defenses, is tied to CERCLA "hazardous substances." PFAS will not be assessed in a Phase I environmental site assessment unless they are specifically added as a "non-scope consideration," which is becoming more common, especially for buyers considering a property with possible historical PFAS connections such as at or near airports or air force bases where AFFF may have been used, or at/near properties such as landfills and manufacturing operations where PFAS chemicals may have been used or disposed of. Adding PFAS as a non-scope consideration would become moot if all PFAS become CERCLA hazardous substances, but at this time it appears that only PFOA and PFOS are likely to be added first. Furthermore, ASTM may issue a new 1527 Phase I standard in 2021, although the extent to which PFAS are addressed is not yet known. For now, careful consideration of PFAS in relation to Phase I assessments should be given depending on the nature and context of the transaction.

Conclusion

2021 is shaping up to be a busy year in the world of PFAS legislation, regulation, permitting, litigation, and due diligence. Given the pace of change, it is critical to evaluate PFAS risks based on current information while remaining up to date on new developments. While federal action continues, particular attention should be paid to state and even local levels, where PFAS are receiving significant scrutiny. Working with environmental attorneys and consultants to prepare specific PFAS evaluation and action plans and protocols is one way to identify and mitigate the growing risks associated with these forever chemicals. While these steps may entail more than an "ounce of prevention," the impacts may ultimately necessitate much more than a "pound of cure." **em**

Joel Eagle Esq. is a Partner in the Environmental Practice Group at the law firm of Thompson Hine LLP.
E-mail: **joel.eagle@thompsonhine.com.**