

ELI Summer School Law and Policy of Products Regulation

July 20, 2021

PFAS are Used and Found Everywhere



Responding to PFAS

- Thousands of PFAS substances produced since 1940s, over 600 in commerce today
- Focus on Perfluorooctane Sulfonate (PFOS) & Perfluorooctanoic Acid (PFOA)
 - Prevalent and commonly used for decades; production ended in early 2000s
 - Aqueous Film Fighting Foam (AFFF) (firefighting foam) can contain both
- Varying federal and state action values, policy approaches, and data collection efforts
 - Only Federal Level is a 70 PPT lifetime drinking water exposure level, over which there is concern
- Research focus on replacements and new chemistries

Why are PFAS Concerning?

Toxic & Persistent ("forever chemicals")

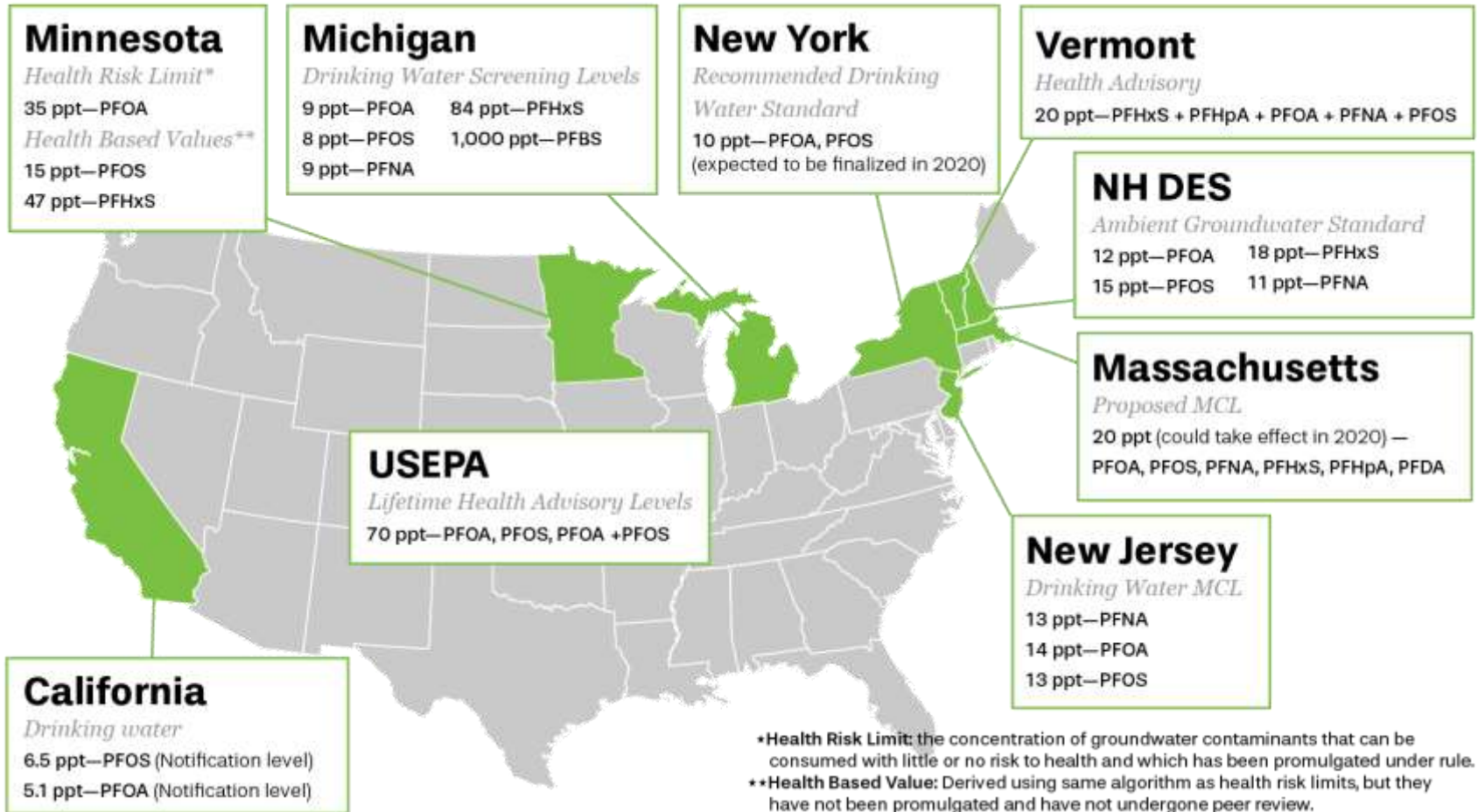
Mobile (highly water soluble)

Bioaccumulative

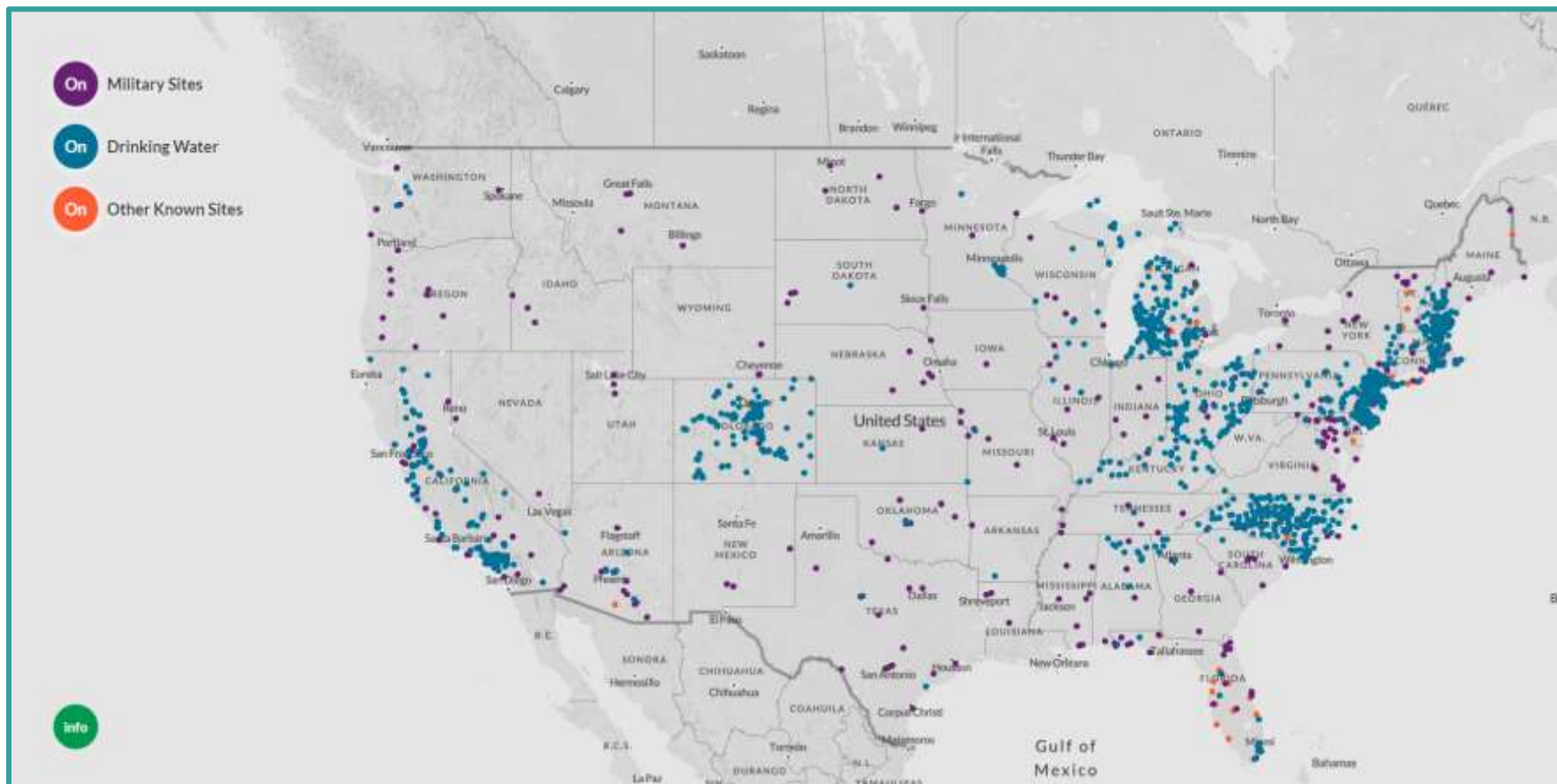
Globally distributed

Negative Health Effects
(pulmonary, liver, reproduction, cancer, etc.)

Varying Levels for Response, Notification, Regulation



PFAS Contamination Snapshot

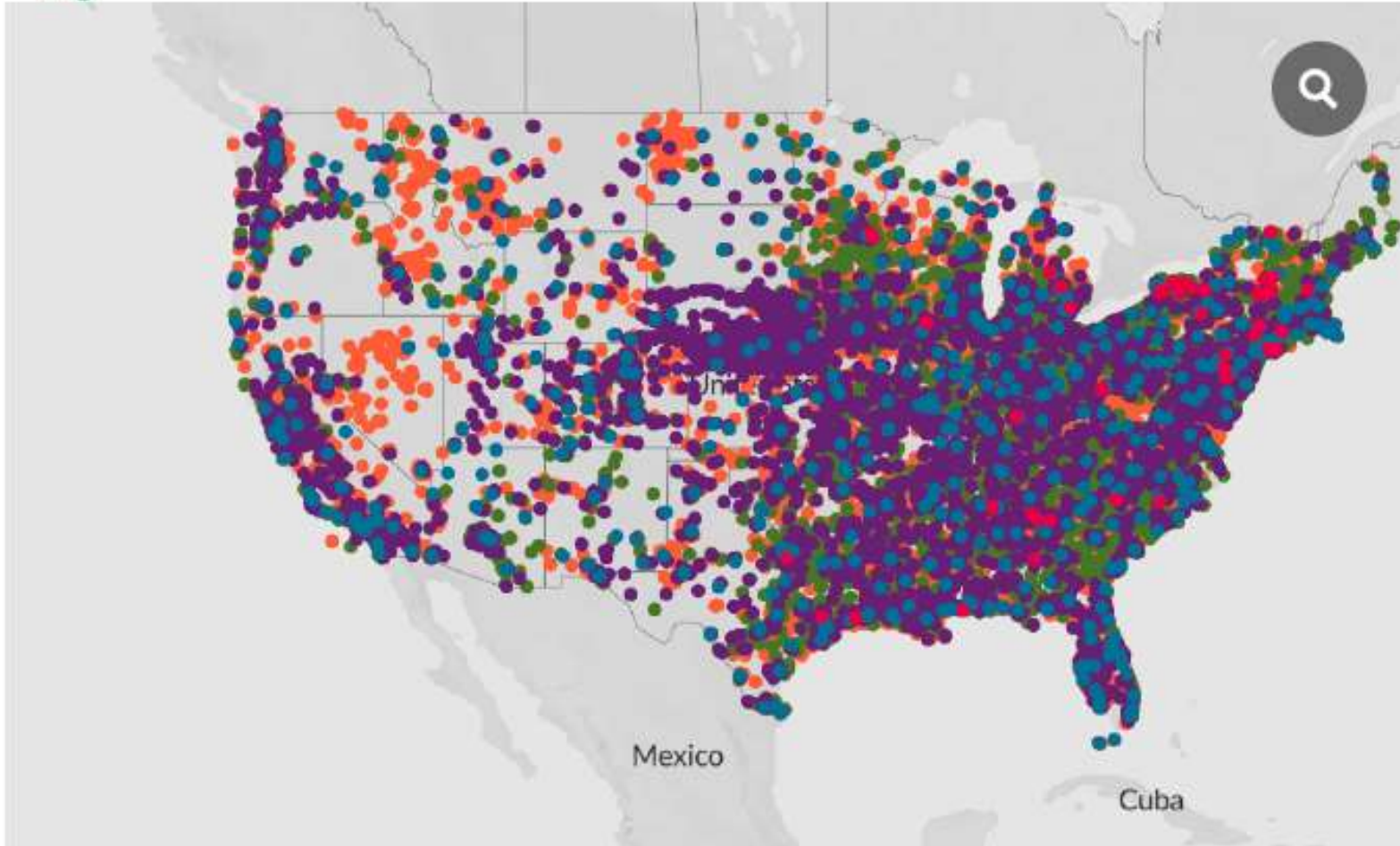


Environmental Working Group and SSEHRI at Northeastern University, *PFAS Contamination in the U.S.*, https://www.ewg.org/interactive-maps/pfas_contamination/map/ (last updated Jan. 6, 2021)

PFAS Contamination Snapshot: By Industrial Source/Activity that Used PFAS

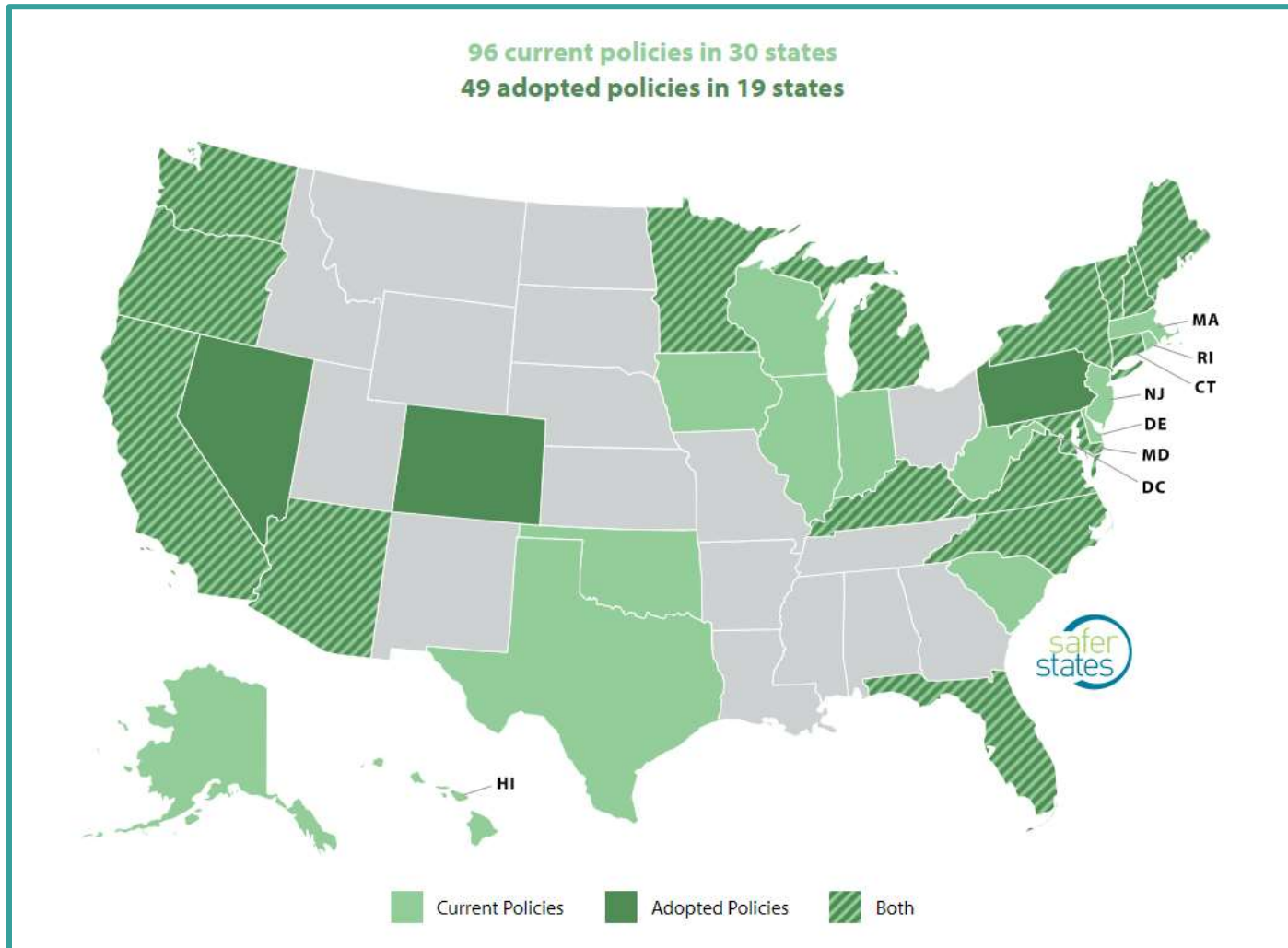
7/19/2021

Interactive Map: Suspected industrial discharges of PFAS



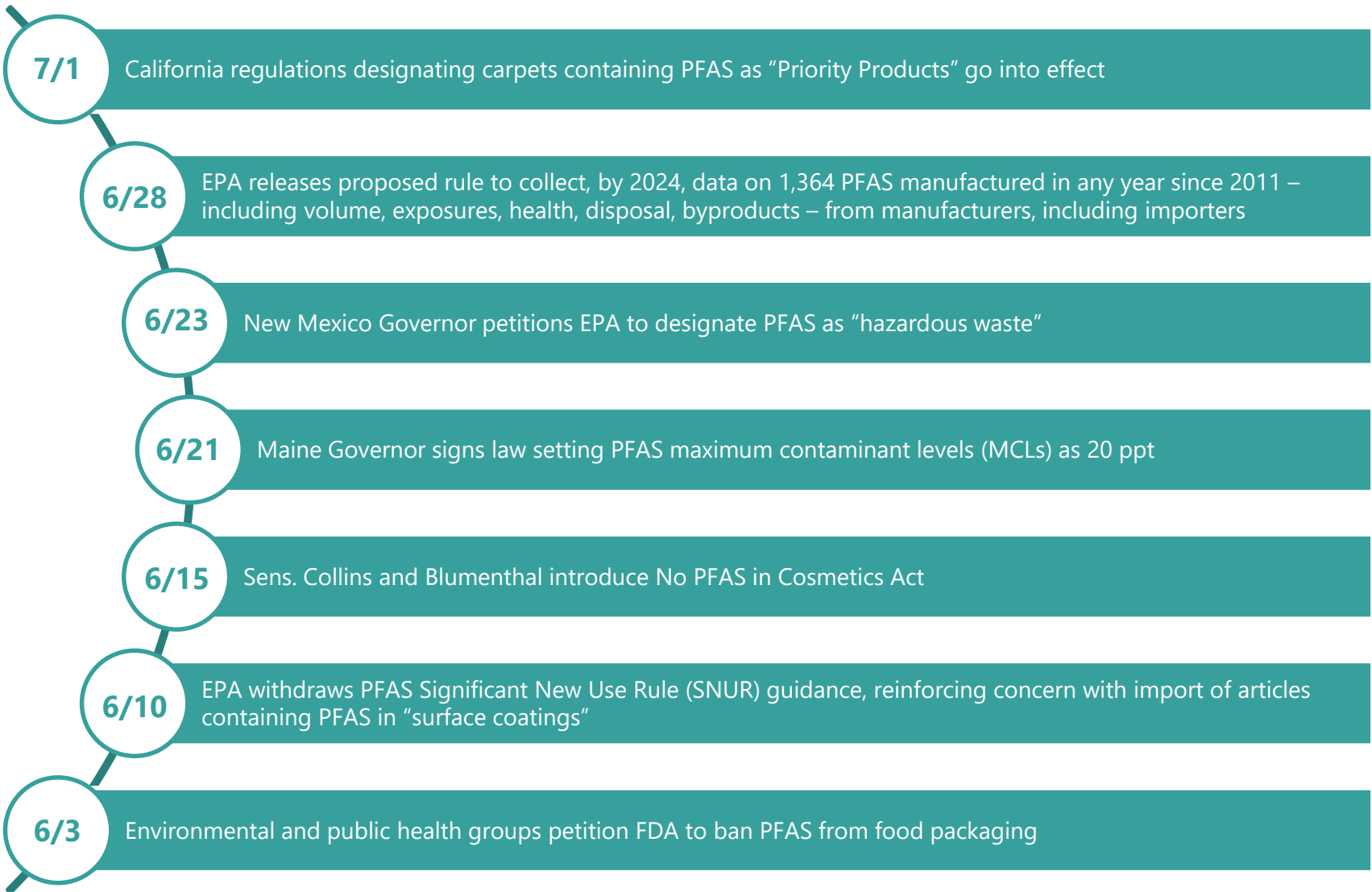
https://www.ewg.org/interactive-maps/2021_suspected_industrial_discharges_of_pfas/map/

State Regulation Snapshot



Safer States, *PFAS*, <https://www.saferstates.com/toxic-chemicals/pfas/> (last visited June 28, 2021)

PFAS in the News



PFAS in the News

7/20

House voting on PFAS legislation, deadlines, H.R. 2467 PFAS Action Act of 2021

7/19

EPA publishes CCL 5 to collect PFAS in drinking water information, uses "class" approach

7/15

Maine to Ban PFAS Containing Products by 2030

7/14

EPA announces PFAS Testing Order Plans & Voluntary Program for Companies to Give up "LVEs" – both under TSCA

7/13

PFAS Manufacturers settle with Delaware for \$50M

6/30

EPA calls for experts for SAB PFAS panel

Federal Regulation Examples

Safe Drinking Water Act (SDWA)

Authorizes EPA to set national health-based standards for drinking water to protect against both naturally-occurring and man-made contaminants

Proposed Fifth Unregulated Contaminant Monitoring Rule (UCMR 5): requires sampling for 29 PFAS

Toxic Substances Control Act (TSCA)

Authorizes EPA to regulate chemical substances and mixtures

EPA requires notice and review before the use of long-chain PFAS that had been phased-out can begin again; certain PFAS-containing imports must be reviewed and approved; proposed "Data Call" rule out for comment now

Resource Conservation and Recovery Act (RCRA)

Authorizes EPA to regulate hazardous waste

Petition to designate PFAS as hazardous waste from NGOs & NM
EPA also considering on own

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)

Authorizes EPA to clean up hazardous waste sites

Proposed bill to designate PFOA and PFOS as hazardous substances
EPA considering on own

State Regulation Examples

Drinking Water Standards

Setting Maximum Contaminant Limits (MCLs), Notification and Response Levels, or other Drinking Water Guidance

New Hampshire, New Jersey, Michigan, Maine – MCLs

California – Notification and Response Levels

Minnesota – Guidance

“Hazardous” Designation

Designating PFAS as “hazardous” substances subject to additional remediation criteria

Massachusetts – PFAS are “hazardous material” subject to the notification, assessment and cleanup requirements of the Massachusetts Waste Cleanup Program

Minnesota – SF 1852 would designate perfluorochemicals as hazardous substances under Minnesota Environmental Response and Liability Act

Food Packaging

Prohibiting added PFAS in food packaging or banning packaging containing PFAS if alternatives are identified

New York, Washington, Vermont, and Maine

Consumer Products

Requiring manufacturers to consider alternatives – state can place restrictions on use of PFAS or manufacture can use alternative, remove PFAS, or withdraw the product

Maine: Ban set for 2030

California – listed carpets and rugs containing PFAS as priority product

May 2021 Vermont ban includes ski wax, carpets

Claims Against PFAS Manufacturers and PFAS Users



Manufacturers

- Defective Product
- Property Damage
- Groundwater / Soil Contamination
- Nuisance
- Injury
- Medical Monitoring
- Cleanup

Users

- Property Damage
- Groundwater / Soil Contamination
- Nuisance
- Injury
- Medical Monitoring
- Cleanup

AFFF Multi-District Litigation

In re Aqueous Film-Forming Foam Prods. Liab. Litig., MDL No. 18-02873 (D.S.C., filed Dec. 7, 2018): 13,000 PFAS Cases Combined

1. Water Providers - 93
2. States - 9
3. Medical Monitoring – 7,174
4. Personal Injury – 2,416
5. Property Damage – 3,740
6. Medical Monitoring and Personal Injury – 36
7. Medical Monitoring and Property Damage – 268
8. Medical Monitoring and Personal Injury and Property Damage – 55
9. Personal Injury and Property Damage - 81
10. Class Actions – 6 - Medical Monitoring

PFAS in a Pesticide Product – A Case Study

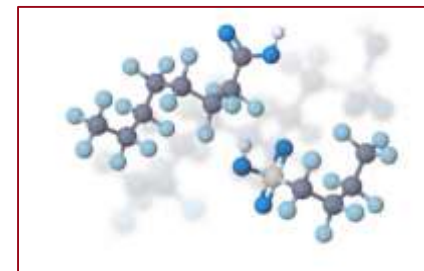
- September 1, 2020, Public Employees for Environmental Responsibility (PEER) contacted Massachusetts regulators claiming that there were unspecified PFAS in a pesticide used for mosquito control.
- December 2020, rinsates of containers used to store and transport the pesticide product yielded results supporting the source of contamination is associated with fluorinated HDPE containers.
- January 13, 2021, EPA asked states with existing stock of the mosquito product distributed in fluorinated HDPE containers to discontinue use and hold.
- January 14, 2021, EPA issued TSCA subpoena to the fluorination company.
- March 5, 20201, EPA confirms it has detected eight different PFAS from the fluorinated HDPE containers, with levels ranging from 20-50 parts per billion.

Toxic ‘forever chemicals’ found in pesticide used on millions of Mass. acres when spraying for mosquitoes

By **David Abel** Globe Staff, Updated December 1, 2020, 8:27 a.m.



Business Responses to PFAS Concerns



- Track Legal, Regulatory & Policy Developments (Federal and State)
- Evaluate Corporate PFAS Compliance Policies & Procedures
 - PFAS Program Governance, Structure & Content
 - Internal Due Diligence
 - Corporate Information Sharing
 - Monitoring & Reporting
 - Management of PFAS Stockpiles / Disposal of PFAS
 - Develop Corporate Risk Profile
 - Policies and Practices Related to Community and Media/External Engagement
 - Benchmarking
- Evaluate Legal Claims & Litigation Holds
- Manage and Respond to State Requests for Data and Information
- Assess Contamination Issues in Transactions

AUSTIN

BRUSSELS

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MOSCOW

NEW YORK

PALO ALTO

RIYADH

SAN FRANCISCO

WASHINGTON

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