



Contaminants *Compass*

April 2024 Edition

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“Contaminants Compass” is a monthly newsletter that provides updates, legal observations and actionable tips to navigate the evolving legal challenges of per- and polyfluoroalkyl substances (PFAS). This edition discusses the Environmental Protection Agency’s final rule setting strict limits for six PFAS in drinking water and other important EPA developments including its FY2025 budget increase request; the Federal Aviation Administration’s recent guidance concerning cleaning firefighting vehicles and equipment; the U.S. District Court’s recent final approval of the 3M AFFF MDL settlement with water districts around the country; and important federal and state legislative developments.

Look for new editions every month and feel free to reach out to the McGuireWoods team with any questions regarding PFAS issues.

I. What’s Happening on the PFAS Federal Regulatory Front?

EPA Sets Strict Limits for Six PFAS in Drinking Water

On April 10, 2024, for the first time, EPA [published](#) enforceable limits for six PFAS in drinking water. The [final rule](#) differs slightly from the proposed rule announced in March 2023, after public comment. The six PFAS affected by this rule are:

- (1) perfluorooctanoic acid (PFOA);
- (2) perfluorooctane sulfonic acid (PFOS);
- (3) hexafluoropropylene oxide dimer acid (HFPO-DA or “GenX Chemicals”);
- (4) perfluorononanoate (PFNA);
- (5) perfluorohexanesulfonic acid (PFHxS); and
- (6) perfluorobutane sulfonic acid (PFBS).

The major takeaways are:

- For PFOA and PFOS, individually, EPA set an enforceable maximum contaminant level (MCL) of four parts per trillion. According to EPA, this will reduce exposure from these PFAS in drinking water to the lowest levels that are feasible for effective implementation.
- EPA set a maximum contaminant level goal (MCLG) for PFOA and PFOS of zero — a non-enforceable health-based goal. According to EPA, this reflects the latest science showing there is no level of exposure to these contaminants without risk of health impacts, including certain cancers.
- For “GenX Chemicals,” PFNA and PFHxS, EPA set the MCLGs and MCLs at 10 parts per trillion.
- Because “PFAS can often be found together in mixtures, and research shows these mixtures may have combined health impacts,” EPA adopted a hazard index mixtures formula approach for mixtures of two or more of GenX Chemicals, PFNA, PFHxS and PFBS.
- Water systems have five years to comply with the requirements outlined in the final rule. During the initial three years, all public water systems must complete initial monitoring for PFAS. The systems will then have to provide public notice of the levels. If the levels of PFAS exceed the MCL, the system must implement methods for treatment within the final two years.
- EPA estimates that between 6% and 10% of the 66,000 public drinking water systems subject to this rule may have to take action to reduce PFAS to meet these new standards.
- To reduce PFAS amounts to meet the limits, several technologies are available: granular activated carbon, reverse osmosis and ion exchange systems.
- EPA will work with state co-regulators in supporting local officials and water systems to implement this rule.
- Before publication of the final rule, localities [grew concerned](#) regarding the potential costs associated with compliance. In response, EPA is making \$21 billion available to support the nation’s drinking water systems. Of that amount, \$9 billion is aimed at PFAS and emerging contaminants.

EPA to Conduct Information Collection Request

Per its [March 26, 2024, notice](#), EPA plans to submit a “U.S. Environmental Protection Agency POTW Influent PFAS Study DATA Collection” to the Office of Management and Budget for review and approval. As announced in EPA’s [Effluent Guidelines Program Plan 15](#), published in January 2023, EPA seeks to collect and analyze nationwide data on industrial discharges of PFAS to publicly owned treatment works and influent, effluent and sewage sludge.

The notice requests public comments by May 28, 2024. EPA is soliciting comments to enable it to:

- evaluate whether the proposed collection of information is necessary for the proper performance of the functions of EPA, including whether information will have practical utility;
- evaluate the accuracy of EPA’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- enhance the quality, utility and clarity of the information to be collected; and
- minimize the burden of the collection of information on those who are to respond, including through the use of appropriate forms of information technology.

FAA Issues Guidance to Clean Aviation Firefighting Vehicles and Equipment

On March 18, 2024, the FAA [issued guidance](#) for cleaning aviation firefighting vehicles and equipment as airports transition from firefighting foam that contains PFAS (AFFF) to fluorine-free firefighting foam (F3). This guidance is one component of FAA’s [overall plan to assist airport operators](#) transitioning away from firefighting foam that contains PFAS

(AFFF). The FAA states that the “guidance reflects an industry best practice” and the “minimum removal and rinsing requirements to ensure AFFF is removed from mobile systems before new F3 foams are used.” The guidance explains that cleaning best practices should involve four basic steps:

1. Completely drain the system of AFFF.
2. Conduct a single water rinse of the entire system from the AFFF tank through all components and piping, to all discharge nozzles, including external equipment (e.g., hoses, nozzles, fittings) that previously contained AFFF.
3. Empty rinsate from the system and reconfigure it for the selected fluorine-free alternative agent in accordance with the agent manufacturer’s recommendations.
4. Ensure appropriate spill prevention measures and containment are incorporated into the process to minimize any releases or impacts.

FAA’s guidance essentially adopts similar [cleaning guidance](#) issued by the Department of Defense (DOD) on March 4, 2024. Section 322 of the Fiscal Year 2020 National Defense Authorization Act requires DOD to discontinue the use of AFFF at all military installations beginning Sept. 30, 2024. While nonmilitary airport operators are not required to transition to F3, FAA has encouraged the transition “to reduce potential human health and environmental impacts from PFAS contamination” due to AFFF use.

EPA Budget Request Escalates

In keeping with its [2021 PFAS Strategic Roadmap](#), EPA seeks an 8.4% increase, or \$11 billion, in “discretionary budget authority” for fiscal year 2025. Its [budget justification document](#) repeatedly stated that this budget increase would assist with addressing PFAS.

Beyond the drinking water rule described above, EPA also wants to upgrade aging analytical equipment and modernize associated critical information technology infrastructure in regional laboratories. With this budget, EPA will continue its efforts to develop analytical methods, drinking water health advisories, toxicity values and effluent limitation guidelines, as well as risk communication and other tools to support tribes, states and localities in managing PFAS risks in their communities.

Under the area of “clean and safe water,” EPA is seeking an additional \$42.8 million and 22 full-time equivalent employees above the FY23 level, “which will allow EPA to accelerate its efforts to develop various methods and tools to support, tribes, states, and localities in managing PFAS risks, particularly in small and underserved communities,” according to the document. To address PFAS, EPA seeks a key budget increase in its Clean Water Act (CWA) grant programs where the agency requests \$509.5 million for its categorical grants to support states, tribes and local partners. Within this amount, \$288 million is provided to the section 106 grants program — an increase of \$51.7 million from the FY23 level — to help state, interstate and tribal water pollution control programs assess and mitigate PFAS in the environment.

II. What’s Happening in PFAS Litigation?

Federal District Court Approved 3M Settlement

On March 29, 2024, the U.S. District Court for the District of South Carolina finalized its approval of the class settlement and certification in the case of Re: Aqueous Film-Forming Foams Productions Liability Litigation. In doing so, the court determined that the proposed settlement, totaling at least \$10 billion, was fair, reasonable, and adequate, meeting the Fourth Circuit’s standards.

The litigation involves PFAS claims by approximately 12,000 public water utilities. 3M agreed to pay between \$10.5 billion and \$12.5 billion, for which it will receive releases, covenants not to sue and dismissals from active public water utility settlement class members. The settlement class is divided into two phases. Phase One includes water utilities that detected PFAS in their water sources by June 22, 2023. Phase Two includes water utilities that will or have detected PFAS during tests under EPA’s Fifth Unregulated Contaminant Monitoring Rule method (which continues until 2025), or that serve more than 3,300 people according to the Safe Drinking Water Information System.

Phase One class members will receive 55% of the settlement funds, and the remaining 45% will go to Phase Two class members. Phase One class members must file their claims within 60 days of the order's effective date. Phase Two class members must file their claims by Jan. 1, 2026.

The settlement has certain exclusions: water systems associated with specific PFAS manufacturing facilities owned by 3M, specific government-owned systems lacking independent suing authority, settled systems and privately owned wells.

III. What's Happening on the PFAS Federal Legislative Front?

Senate Environment and Public Works Committee Hearing

At the end of March, the Senate Environment and Public Works Committee held a hearing titled "[Examining PFAS as Hazardous Substances](#)." Impacted entities including state and local governments, drinking water and wastewater systems, airports, agricultural groups and waste facilities submitted more than [250 letters](#). These entities urged Congress to include passive receiver liability protections when addressing PFAS cleanups, arguing that such protections would ensure original polluters, not taxpayers or utility ratepayers, pay for cleanup.

The following witnesses testified:

- [Kate R. Bowers](#) (legislative attorney, American Law Division of the Congressional Research Service);
- [Scott Faber](#) (senior vice president of government affairs, environmental working group);
- [James Kenney](#) (secretary, New Mexico Department of Environment);
- [Michael D. Witt](#) (general counsel, Passaic Valley Sewerage Commission, on behalf of the Water Coalition Against PFAS); and
- [Robert Fox](#) (partner, Manko Gold Katcher Fox LLP, on behalf of the Solid Waste Association of North America and National Waste Recycling Association).

The witnesses and committee indicated that due to the environmental health issues associated with PFAS exposure, the federal government should strategically target those actively responsible for contamination, or make sure the "polluter pays" as Ranking Member Shelley Moore Capito (R-W.Va.) advocated in her [opening statement](#).

IV. What's Happening on the PFAS State Regulatory Front?

State Appeals Court Agrees DNR Lacks Broad Authority to Regulate PFAS

A three-judge panel of the Wisconsin Court of Appeals [affirmed](#) a Waukesha County Circuit Court's ruling that regulators must first list PFAS as hazardous substances through the state's rulemaking process. On March 6, 2024, the Court of Appeals held that policy changes enacted by the Wisconsin Department of Natural Resources (DNR) to address PFAS are unlawfully adopted unenforceable rules. The Wisconsin attorney general will appeal the decision to the Wisconsin Supreme Court.

If the Supreme Court affirms, the DNR would have to wait on legislation that would allow the agency to continue crafting regulations for PFAS in groundwater. Since the lawsuit was filed in 2021, Wisconsin has passed standards for the chemicals in drinking water and surface water, but there are no state standards for the chemicals in groundwater.

As discussed in McGuireWoods' [January newsletter](#), DNR [formally halted](#) its efforts to adopt PFAS groundwater standards due to the significant projected enforcement and compliance costs associated with the standards. In February, a [bill](#) was introduced in the Wisconsin Senate that would restart this process, authorizing DNR to "resume the permanent rule-making process ... with respect to a proposed permanent rule ... relating to the development of numerical groundwater quality standards." Although the bill died during the 2024 legislative session, following the Court of Appeals' ruling, this bill appears inadequate to permit DNR to make such a rule without first establishing a list of hazardous substances through the state's rulemaking process.

About McGuireWoods

McGuireWoods supports clients as they assess and mitigate their PFAS risk, develop and apply business operational responses to changing PFAS laws and regulations at federal and state levels, and defend litigation as it arises, including navigating and coordinating national scientific defenses in novel contexts. [Click here](#) to learn more.

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