



Contaminants *Compass*

August 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 litigation against the Environmental Protection Agency (EPA) concerning alleged failures to regulate under the Clean Water Act the spread of sludge contaminated by PFAS, three recent decisions by New York federal courts rejecting inadequate product testing in support of litigation claiming PFAS contamination, numerous enacted and promulgated state statutes banning PFAS in consumer and other products, and disclosure requirements in connection with home sales.

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

Groups Sue EPA Over PFAS in Sewage Sludge

The Maine Organic Farmers and Gardeners Association (MOFGA) and Johnson County, Texas, joined a lawsuit on July 23, 2024, against the EPA for allegedly failing to regulate the spread of sewage sludge contaminated with PFAS under the Clean Water Act, which directs the agency to identify pollutants in biosolids every two years. The lawsuit — filed on June 6, 2024, in the U.S. District Court for the District of Columbia by Public Employees for Environmental Responsibility on behalf of ranchers in Johnson County, Texas — alleges that their water and land were contaminated after sludge was spread nearby. In its [press release](#), the parties noted their intention to hold “the EPA accountable for its inaction.”

MOFGA and Johnson County allege that spreading sewage sludge has caused PFAS contamination in numerous locations, with MOFGA alleging that the primary source of PFAS contamination in Maine has been traced to the use of sewage sludge applied to farmland.

II. What's Happening in PFAS Litigation

New York Federal Courts Dismiss PFAS Claims That Relied on Inadequate Testing

The U.S. District Court for the Southern District of New York dismissed a proposed class action on March 1, 2024, alleging Coty Inc. failed to disclose the presence of PFAS in two of its CoverGirl waterproof mascara products, Lash Blast and Clump Crusher. *Brown v. Coty, Inc.*, No. 22-cv-2696 (S.D.N.Y. Mar. 1, 2024). Plaintiffs argued that in light of Coty's use of "strict quality control measures" and "rigorous testing," Coty "knew or should have known [that Lash Blast and Clump Crusher] contain toxic PFAS at the point of sale," and misled consumers by failing to disclose the alleged presence of PFAS in those products.

Plaintiffs relied on two studies to support their claims, a 2021 Notre Dame Study and a study commissioned by plaintiffs. The Notre Dame Study, which plaintiffs claimed was a "scientifically valid, widely used method to investigate whether PFAS are present" in cosmetics, found that certain beauty products from a variety of brands contain high proportions of fluorine. The study commissioned by plaintiffs found that Lash Blast and Clump Crusher each contained up to five different types of PFAS.

The court found the cited studies did not support plaintiffs' allegations that Lash Blast and Clump Crusher contained PFAS. Regarding the Notre Dame Study, the court found that the plaintiffs did not allege the total number of mascara products tested, whether the presence of fluorine in those products necessarily indicated the presence of PFAS, or whether Lash Blast or Clump Crusher were among the products tested. The court found the plaintiffs' commissioned study did not establish that the PFAS found in the tested tubes of Lash Blast and Clump Crusher — not purchased by the plaintiffs — supported an inference that PFAS contamination was so "systemic" in Coty's products that the tubes purchased by the plaintiffs must also contain PFAS. The court noted that "[t]hese details are necessary not to scrutinize the [plaintiffs'] Test's scientific validity, but to understand what the Test found."

Soon after this decision, the Southern District of New York dismissed a putative class action in which the plaintiffs alleged that Shiseido deceptively labeled its bareMinerals cosmetic products as "clean" and "natural" when the products allegedly contained PFAS. *Onaka v. Shiseido Americas Corporation*, No. 1:21 cv 10665 PAC (S.D.N.Y. Mar. 19, 2024). The court found that the plaintiffs lacked standing because they failed to plausibly allege that any of the products they purchased did, in fact, contain PFAS.

Rather than test the items purchased by the plaintiffs to support their claims, the plaintiffs tested two samples of five products within the same product line as the items they bought. The court found the plaintiffs failed to "meaningfully link the results of their independent test to Plaintiffs' actual Purchased Products" because the plaintiffs did not allege they tested the products near in time to their purchases of those cosmetic products.

The plaintiffs also relied on the 2021 Notre Dame Study, and the court found their reliance on the study was insufficient because it did not specify which line of products were tested, and it only tested products purchased well before any of plaintiffs' alleged purchases.

Last month, the Eastern District of New York dismissed claims that Keurig Dr. Pepper's Nantucket Nectars and Snapple product lines were misbranded as "all natural" because they allegedly contained PFAS. *Walker v. Keurig Dr. Pepper, Inc.*, No. 22-cv-5557 (E.D.N.Y. July 16, 2024). Citing the two SDNY cases, the court found the plaintiff failed to establish he suffered an injury in fact. The plaintiff commissioned a testing lab to conduct independent testing on a sample of the products, which allegedly detected "material levels of numerous PFAS" in the products. The court found that the plaintiff's allegations detailing his independent testing of the products was too vague for the court to conclude that the plaintiff

purchased and consumed products containing PFAS. The plaintiff failed to allege that he tested the actual products he purchased and did not claim the testing was performed reasonably close in time to his purchase of the tested products.

The court rejected the plaintiff's claims that the products were "systematically contaminated" and that his independent testing revealed "the Products all contain PFAS in amounts that dramatically exceed" the EPA recommended limit for PFAS in drinking water. The court found the plaintiff's allegations did not confirm "how many of each type of Product was tested, when they were tested, or which Products were within the bucket of the 'some Products' " the plaintiff argued contained PFAS in excess of the EPA's recommended limit for drinking water. The court found that because the plaintiff failed to provide sufficient information regarding the testing performed or the actual products the plaintiff purchased, it could not conclude it was plausible the plaintiff had purchased a contaminated product.

New Mexico Department of Justice Files Contribution Claim Against U.S. Departments of Air Force, Army

The New Mexico Department of Justice filed a second amended [complaint](#) on July 8, 2024, against the U.S. departments of the Army and Air Force, alleging they contaminated natural resources and endangered public health with PFAS. The complaint utilizes the new [EPA rule](#) that designates perfluorooctanoic acid and perfluorooctanesulfonic acid as Comprehensive Environmental Response Compensation Liability Act hazardous substances.

III. What's Happening on the PFAS State Legislative Front

Rhode Island Bans PFAS in Numerous Consumer Products

Rhode Island Gov. Dan McKee signed H7356 into law on June 21, 2024, which bans the manufacture, sale and distribution of numerous products containing PFAS. The ban applies to products including carpets or rugs, cookware, cosmetics, fabric treatments, juvenile products, menstrual products, ski wax, artificial turf, outdoor apparel and textile articles. The ban does not apply to the sale or resale of used products.

Pennsylvania Introduces Bill to Ban PFAS in Certain Products

Pennsylvania introduced [HB 2238](#), which proposes to ban the inclusion of PFAS in certain covered products including artificial turf, cleaning products, carpets or rugs, cookware, cosmetics, dental floss, fabric treatment, food packaging, juvenile products, menstrual products, oil and gas products, ski wax and textile articles. If enacted, the law would be effective Jan. 1, 2027, and a total ban on products containing PFAS would become effective Jan. 1, 2033, except for when the introduction of PFAS is an unavoidable use.

North Carolina House Environment Committee Votes to Hold PFAS Manufacturers Liable for Water Systems Cleanup

The North Carolina House Environment Committee voted in support of [HB 864](#), which proposes to mandate PFAS manufacturers to cover cleanup costs for public water systems across the state.

New Hampshire Home Sellers Required to Notify Potential Buyers About Potential PFAS Contamination

New Hampshire Gov. Chris Sununu signed [HB 398](#) into law on July 3, 2024, requiring home sellers in New Hampshire to notify potential buyers about the possibility of water contamination from PFAS, beginning Jan. 1, 2025.

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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