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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 updates on significant federal PFAS regulatory and litigation matters, a look ahead to the second Trump administration, state regulations banning PFAS in apparel and new research on removing PFAS in water treatment.

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

I. What's Happening on the PFAS Federal Regulatory Front

Biden Administration Announces New PFAS Strategic Plan

The U.S. Environmental Protection Agency released its third annual progress report in November 2024. It provided an update on the agency's efforts to address PFAS through its Strategy Roadmap launched in 2021. The roadmap reflects the Biden administration's efforts to restrict PFAS use, improve remediation efforts, and advance research to understand and mitigate risks. Administrator Michael Regan emphasized the administration's leadership, stating, "[b]efore President Biden took office, the federal government wasn't doing enough to address PFAS pollution across the country. The Biden-Harris Administration has since taken unprecedented steps to develop the science, implement strong standards, and invest billions into solutions to protect all Americans from these forever chemicals." The progress report provides updates on drinking water protection, PFAS contamination cleanup, chemical safety, safeguarding waterways, infrastructure investments, enforcement actions, and reducing PFAS in products and federal procurement.

Prior Contaminants Compass editions covered many actions by the Biden administration, including the designation of PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as well as the enforceable drinking water standards for six PFAS (MCL rule). Additional highlights include finalized water quality criteria to protect aquatic life from the effects of PFOA and PFOS and monitoring recommendations for state and tribal fish and shellfish advisory programs. The EPA also proposed adding 16 individual PFAS and 15 PFAS categories covering more than 100 chemicals to the Toxic Release Inventory (TRI), requiring stricter reporting for these substances. The PFAS categories proposed include the acid as well as its associated salts, associated acyl/sulfonyl halides and an anhydride. This proposal sets a 100-pound reporting threshold for manufacturing, processing and use.

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With this rule, the EPA seeks to clarify how PFAS are automatically added to the TRI under the National Defense Authorization Act by specifying toxicity values that trigger inclusion.

The EPA also announced nearly $1 billion in fiscal year 2025 funding for emerging contaminants via the Drinking Water State Revolving Fund. The remaining $2.8 billion in funding from the Bipartisan Infrastructure Law for addressing emerging contaminants in drinking water will be made available in FY 2025 and 2026. The agency also announced enhanced online resources to help users identify ecolabels and sustainability standards to inform decision-making on PFAS in products. The EPA has removed PFAS from the Safer Choice program and taken steps with the General Services Administration to ensure that federal procurement tools and cleaning products used in federal buildings are PFAS-free.

The EPA is preparing for the next unregulated contaminant monitoring rule under the Safe Drinking Water Act (SDWA) and updating the interim destruction and disposal guidance for PFAS. The EPA plans to release draft water quality criteria for protecting human health from several PFAS and a draft risk assessment of PFOA and PFOS in biosolids, which will guide future actions under the Clean Water Act. The EPA is also focusing on understanding PFAS transport in air, assessing less-studied exposure pathways such as inhalation and skin contact, and enhancing categorization methods under the National PFAS Testing Strategy to address PFAS collectively rather than one at a time. All future actions remain to be seen under the new administration.

II. Looking Ahead to the Second Trump Administration

The new administration under Donald Trump will undoubtedly change how the EPA regulates PFAS. The Heritage Foundation's Project 2025, which Trump previously disavowed, may nevertheless provide a blueprint for the second Trump administration. Project 2025 proposes various regulatory rollbacks, including changes to PFAS regulations, explicitly calling to "revisit" the designation of PFOA and PFOS as "hazardous substances" under CERCLA.

How the EPA will address PFAS issues under the second Trump administration may depend largely on the administrator. Former New York Rep. Lee Zeldin, who represented Long Island from 2015 to 2023 and ran for governor of New York in 2022, is Trump's nominee for the next EPA administrator and anticipated to gain confirmation. Zeldin was a member of the bi-partisan PFAS task force and supported multiple PFAS bills, including the bipartisan Protect People from PFAS Act (H.R. 2467), which directed the EPA to establish drinking water standards for PFOA and PFOS and designate them as CERCLA hazardous substances.

Two key rules finalized under the Biden administration that could be under threat include the MCL rule under the SDWA and the CERCLA hazardous substance designation of PFOA and PFOS. Industry groups have already challenged both rules, arguing that the EPA exceeded its authority. If the new administration opts not to defend the CERCLA hazardous substance designation in court, it may be struck down by default or be remanded back to EPA for revision. The administration could also request an abeyance to delay procedures, giving it time to weaken the rule. The strategy of postponing the defense of a rule to evade a potentially unfavorable ruling was often used during the first Trump administration.

In 2019, the first Trump administration issued a PFAS action plan, and in 2021, former administrator Andrew Wheeler issued an Advanced Notice of Proposed Rulemaking, seeking comments in connection with the possible designation of PFOA and PFOS as hazardous substances, showing some desire to regulate PFAS. Lawmakers have also previously discussed protecting various entities from CERCLA liability pertaining to PFAS.

With a Republican majority, Congress could revisit discussions about carving out CERCLA liability exemptions for specific entities regarding PFAS contamination. These carve-outs, previously advocated for by industry, would aim to shield a "passive receiver" of PFAS, such as wastewater treatment, composting and recycling facilities, from liability for chemicals they did not manufacture. Creating a carve-out could shift liability toward the manufacturers of PFAS, potentially relieving financial pressures on passive receivers and shielding from third-party litigation under CERCLA, while still addressing environmental remediation. However, establishing such carve-outs under CERCLA may open the floodgates for other entities looking for similar liability protections.

The Congressional Review Act (CRA), which provides a mechanism for Congress to overturn regulations issued by agencies, will likely not apply to the CERCLA hazardous substance designation or the MCL rule. The CRA provides Congress with an expedited procedure to review and potentially block rules and regulations completed by the previous administration, as long as the rules were finalized within a "look-back window" of 60 legislative days of its finalization. Because both the MCL rule and the CERCLA hazardous substance designation were finalized before the CRA deadline, Congress cannot overturn either rule under the CRA. Any attempt by the Trump administration to reverse the rules will require a lengthy process, which includes initiating a new rulemaking procedure, including a public comment period, seeking justification based on scientific and economic evidence and complying with the Administrative Procedure Act. The process can take years to complete and is subject to judicial scrutiny.

The burden of proof for regulatory rollbacks has also increased, with progressively skeptical courts requiring new data or analysis to counter existing scientific findings and justify changes. For the Trump administration to repeal existing PFAS regulations, it would likely have to demonstrate specific evidence and justification. Because the EPA has established a record that PFAS exposure can be harmful even at low levels, developing the opposite record now could be difficult, and any attempt to do so could open the Trump administration to legal exposure. Even if it succeeds in doing so, the administration will likely face significant resistance and lawsuits.

If federal actions on PFAS slow, state governments are expected to continue enacting and enforcing their own standards, which in certain states could be even more aggressive than the federal standards. For companies, this could create a complex regulatory environment with numerous and varying (and even conflicting) PFAS regulatory requirements and added compliance responsibilities. As the new administration sets its regulatory agenda, businesses, environmental advocates and state authorities will need to stay on top of the developments and attempt to adapt accordingly. While industry groups may welcome relief from certain compliance costs, a diverse array of state-level rules could pose even more significant challenges. A broad collection of industry groups led by the National Association of Manufacturers (NAM) issued a roadmap targeting specific rules they want the next administration to revise or reverse. In its Dec. 5, 2024, letter, NAM asked to pause PFAS rulemaking and listings by the Biden administration as they were "overly burdensome and unworkable" and instead take an incremental approach to PFAS that first addresses the higher-risk non-polymer PFAS chemicals. Meanwhile, environmental and public health advocates are likely to become more litigious as they closely monitor federal actions in the coming Trump administration.

III. What's Happening in PFAS Litigation

PFAS Settlements Earn $96 Million in Fees for Plaintiffs' Counsel

On Nov. 22, 2024, the U.S. District Court for the District of South Carolina awarded approximately $96 million in combined fees and costs to lead counsel representing water systems in the multidistrict litigation (MDL) over PFAS contamination in In Re: Aqueous Film-Forming Foams Products Liability Litigation. The awards followed settlements with BASF Corp. for $316.5 million and Tyco Fire Products for $750 million, addressing claims that their products contained PFAS linked to environmental and health risks. Both attorneys' fees, totaling 8% of the combined settlement amounts, and the costs reimbursement of approximately $10.5 million were unopposed. The court also approved plaintiffs' settlements with the two companies, which are continuing to progress in the ongoing MDL.

Class counsel requested an 8% fee allocation from both settlements, amounting to $60 million from the Tyco PWS settlement and $25.32 million from the BASF settlement. Cost reimbursements totaled $7.33 million and $3.14 million, respectively. The fees and costs will be distributed to those who contributed to the common benefit of the litigation, which the plaintiffs' executive committee claimed to be over 500,000 hours of work.

The MDL includes over 10,000 cases with claims from public water systems, individuals, property owners and states. The BASF and Tyco settlements follow a $12.5 billion settlement with 3M and a $1.185 billion settlement with DuPont, Corteva and Chemours.

Sixth Circuit Rejects Federal Jurisdiction Claim in FAA-linked PFAS Case

In *Michigan Department of Environment, Great Lakes, and Energy (EGLE), et al. v. Gerald R. Ford International Airport Authority (GFIAA)*, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision to remand to state court a Michigan lawsuit brought by the Michigan EGLE, together with Michigan Attorney General Dana Nessel, against the General R. Ford International Airport Authority, alleging that the airport's use of aqueous film-forming foam (AFFF), a firefighting foam containing PFAS, led to environmental contamination. The complaint asserted two violations under Michigan's Natural Resources and Environmental Protection Act (NREPA): that the use of AFFF contaminated soil and groundwater at and near the airport, and that stormwater discharge exceeded effluent limits, contributing to water pollution.

The Airport Authority removed the case to federal court under the federal officer removal statute, arguing that it acted under the Federal Aviation Administration (FAA), which mandates using AFFF for certified airports. However, the district court found that the Airport Authority did not meet the "acting under" requirement necessary for federal officer removal because "mere compliance with federal regulations does not satisfy the 'acting under' requirement for removal under § 1442(a)(1)."

The Sixth Circuit affirmed the district court's decision, finding that the Airport Authority retains control over its operations and is independently responsible for complying with environmental laws and regulations beyond FAA requirements. The court highlighted that the FAA does not direct the Airport Authority's day-to-day operations or exercise control over its employees. It explained that the "highly regulated" nature of the aviation industry does not transform regulatory compliance into federal authority. The court noted that firefighting is traditionally a state or local function, not a federal one, and that the Airport Authority's adherence to FAA safety standards did not establish it as an agent of the federal government. "[D]ifferences in the degree of regulatory detail or supervision cannot by themselves transform … regulatory compliance into the kind of assistance that might bring [a private person] within the scope of the statutory phrase 'acting under' a federal 'officer,'" the court stated quoting the U.S. Supreme Court's decision in *Watson v. Philip Morris Cos.*

The Sixth Circuit also rejected the Airport Authority's argument that federal grant funding, such as the Airport Improvement Program, created a contractual relationship with the FAA in which the airport acts on behalf of the FAA. The case will return to state court, where the Michigan EGLE will seek to hold the Airport Authority accountable for environmental contamination under state law.

IV. What's Happening on the State Level

State Bans on PFAS in Textiles and Apparel Begin Jan. 1, 2025

Effective Jan. 1, 2025, several states will implement stricter restrictions on the use of PFAS in consumer products. Bans on PFAS in textiles will go into effect in California and New York. Colorado will also implement the first phase of its restrictions. Minnesota's sweeping ban of products containing intentionally added PFAS, previously covered in the October Contaminants Compass Issue, will also start at the beginning of 2025. Businesses should be aware of these restrictions as other states explore similar bans, creating a growing web of regulatory requirements.

- California's Safer Clothes and Textiles Act (AB 1817) was signed into law by Governor Gavin Newsom on Sept. 30, 2022, and sets one of the strictest restrictions on PFAS in textiles. Effective Jan. 1, 2025, the law bans manufacturing, distributing, selling or offering for sale new textile articles containing regulated PFAS. Textile articles include a wide array of items such as accessories, apparel, backpacks, furnishings, handbags, household goods and upholstery. Some exemptions apply, including for carpets, rugs, fabric treatments, vehicles, vessels, aircraft, permanent fabric structures intrinsic to a building's design or construction, personal protective equipment, and clothing items for exclusive use by the U.S. military. Thresholds for PFAS content will also become more restrictive, dropping from 100 ppm of total organic fluorine in 2025 to 50 ppm in 2027. Outdoor apparel for severe wet conditions will not need to comply with the law until 2028, but as of 2025, these articles must include a disclosure stating, "[m]ade with PFAS chemicals." Manufacturers are to also use the "least toxic alternative" when removing PFAS in textile articles. The law requires manufacturers of textile articles to provide compliance certificates to distributors and retailers, who will not be held liable if they relied in good faith on these certificates.

- Colorado's SB 24-081 implements a phased ban on the products containing intentionally added PFAS. Starting on Jan. 1, 2025, the law requires outdoor apparel for severe wet conditions to include the disclosure statement, "[m]ade with PFAS chemicals" if it contains intentionally added PFAS. This condition will sunset in 2028, at which time the state will transition to a full ban on PFAS-containing outdoor apparel for severe wet conditions as well as other textile articles, cleaning products, and food equipment. Starting Jan. 1, 2026, Colorado law will also prohibit the sale of a wider group of products that may have intentionally added PFAS, including cleaning products, cookware, dental floss, menstruation products and ski wax.

- Minnesota is implementing similar bans starting on Jan. 1, 2025. Under Amara's Law, Minnesota will ban the sale, offer for sale, or distribution for sale of 11 categories of products that contain intentionally added PFAS, including: carpets or rugs, cleaning products, cookware, cosmetics, dental floss, fabric treatments, juvenile products, menstruation products, textile furnishing, ski wax, or upholstered furniture. If the commissioner of the Minnesota Pollution Control Agency suspects that a product could contain intentionally added PFAS, the commissioner may require the manufacturer to provide PFAS testing results within 30 days. Manufacturers must also notify any person who sells or offers for sale the banned products and provide the commissioner with a list of these individuals. The commissioner may itself also notify these sellers.

- New York's PFAS ban established by Bill S1322/A994 targets new apparel with intentionally added PFAS, effective Jan. 1, 2025. The definition of apparel is broad and is defined as clothing items intended for regular wear or formal occasions including, but not limited to, bibs, bodysuits, dancewear, diapers, dresses, formal wear, leggings, leisurewear, onesies, outdoor apparel, overalls, pants, saris, scarves, shirts, skirts, suits, tops, undergarments, vests. Professional uniforms or outerwear worn for extreme conditions to protect from health or environmental risks are excluded. Beginning Jan. 1, 2026, product with intentionally added PFAS are to be prohibited from sale in New York. Similar to the restrictions in California, the restrictions for outdoor apparel used in wet conditions in New York are not effective until 2028. The New York State Department of Environmental Conservation (NYSDEC) will set enforcement thresholds by 2027. Violations may result in civil penalties of up to $1,000 per day, increase to $2,500 for a second infringement, and include injunctive relief. The law does not require manufacturers to supply compliance certifications. However, it does encourage retailers to obtain written guarantees from manufacturers, which they can rely upon in good faith. Compliance certifications must be available upon request by NYSDEC where apparel is sold.

V. Scientific Research Update

A recent study by researchers at Cranfield University suggests that PFAS treatment may become more accessible. Researchers examined the removal of PFOA and PFOS using coagulation, a process commonly employed in water treatment to remove contaminants at a low cost. They explored the efficiency of various metal-based coagulants in removing PFAS, specifically PFOA and PFOS, from contaminated water. While coagulation is not specifically designed for micropollutant removal, it plays a crucial role in water treatment, especially in the context of PFAS accumulation in sludge. The study compared four metal coagulants — zirconium, iron, zinc and aluminum — selected for their hydrophobicity and charge profiles. Aluminum-based coagulants performed the best, followed by iron and zirconium. PFOS was removed more favorably than PFOA for four of the coagulants tested, and aluminum showed the highest potential for removal of PFOS. The study provided important insights into the behavior of PFAS during coagulation. Enhancing the coagulation process with metals such as aluminum may provide a more cost-effective way to remove PFAS, potentially making PFAS treatment more accessible and practical for entities with limited resources.

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.