



Contaminants *Compass*

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“Contaminants Compass” is a monthly McGuireWoods newsletter that provides updates, legal observations and actionable tips to navigate the evolving legal challenges of per- and polyfluoroalkyl substances (PFAS). This edition discusses two proposed federal rules that would expand EPA’s authority to require investigation and cleanup of PFAS releases, recent federal and state legislative efforts, new PFAS litigation, and other federal and state PFAS-related issues.

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

What’s Happening on the PFAS Federal Regulatory Front?

EPA Releases Second Annual Progress Report on PFAS Strategic Roadmap

On December 14, 2023, EPA announced it published the second annual progress report highlighting EPA’s accomplishments since it first released its PFAS Strategic Roadmap in October 2021. The key accomplishments outlined in the report include:

- EPA’s proposal to list perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). EPA now anticipates issuing a final rule in early 2024.
- EPA’s proposed national primary drinking water regulation (NPDWR) for six PFAS including PFAO, PFOS, perfluorononanoic acid (PFNA), hexafluoropropylene oxide dimer acid (HFPO-DA), perfluorohexane sulfonic acid (PFHxS), and perfluorobutane sulfonic acid (PFBS). EPA expects to finalize the rule in early 2024.
- Nationwide monitoring for 29 PFAS at more than 10,000 public water systems under the Fifth Unregulated Contaminant Monitoring Rule. Results are posted publicly each quarter through [EPA’s website](#).

- Providing \$10 billion to remove PFAS and other emerging contaminants in drinking water and wastewater more than half of which is going to disadvantaged and underserved communities. In 2023, EPA distributed nearly \$1 billion through the Bipartisan Infrastructure Law's State Revolving Fund Emerging Contaminants programs and announced the first \$2 billion in grant funding to states, tribes and territories through the new Small or Disadvantaged Communities Emerging Contaminants grant program.

PFAS Reporting Rules to Ring in the New Year

As manufacturers ring in the new year, they should be aware of two new PFAS reporting requirements that could need careful attention in 2024.

De Minimis Exemption No Longer Available for PFAS Under EPCRA

Certain PFAS have been subject to Toxics Release Inventory (TRI) reporting under the Emergency Planning and Community Right to Know Act (EPCRA) since 2020. This reporting obligation began with an initial list of 172 PFAS, which has since expanded. That said, only a few dozen facilities submitted TRI reports for PFAS in each of the years since 2020. EPA followed up with facilities from which it had expected to receive filings and reported that such facilities had concluded that TRI reporting was not necessary because of the de minimis exemption to TRI reporting.

Under the de minimis exemption, substances present in mixtures in a concentration below 1 percent (or 0.1 percent for carcinogens) could be omitted from TRI reports. Since PFAS often are present in mixtures in very low concentrations, the de minimis exemption essentially allowed almost all PFAS to remain unreported. By a new rule published October 31, 2023, EPA designated PFAS subject to TRI reporting as "chemicals of special concern" subject to enhanced reporting requirements. Because chemicals of special concern are not subject to the de minimis exemption to TRI reporting and must be reported even in minute concentrations, this change will dramatically increase the amount of PFAS subject to reporting in the 2024 reporting year (2024 TRI filings are due July 1, 2025).

In the same rule that became final on October 31, 2023, EPA also eliminated the use of the de minimis exemption to supplier notification requirements for any chemicals of special concern (including TRI-reportable PFAS, and also lead, mercury and other chemicals of special concern). As a result, manufacturers soon may learn that products in their supply chain contain small concentrations of PFAS that previously would not have been reported or disclosed because they would have been below the de minimis threshold. This enhanced knowledge would in turn also inform TRI reports for the chemicals of special concern.

TSCA Reporting Rule for Manufacturers and Importers

Under a new PFAS reporting rule promulgated under the Toxic Substances Control Act (TSCA) on October 11, 2023, any person manufacturing (including importing) PFAS or PFAS-containing articles in any year since 2011 must provide EPA information on PFAS identity, concentration, uses, production volumes, disposal, exposures, and hazards. The definition of PFAS under TSCA is much broader than under EPCRA (defined by chemical properties rather than a list of substances) and could apply to thousands of different compounds.

It is important to note that TSCA defines manufacturing to include importing. Furthermore, unlike some other TSCA reporting requirements, the new PFAS reporting rules will apply to finished product "articles" in addition to bulk chemicals, so importers of finished articles are subject to reporting rules for products that might have had PFAS added several steps earlier in the supply chain. For example, boots made from materials treated with a PFAS-containing water-repellent coating would be considered a PFAS-containing article subject to the reporting rule if imported since January 1, 2011.

Reporting forms are due within 18 months after the effective date of the rule (i.e., by May 13, 2025) except for small article importers, who must report within 24 months after the effective date (i.e., by November 13, 2025).

What's Happening in PFAS Litigation

***Tyco Fire Products LP v. AIU Insurance Company, et al.*: Order Denying Defendants' Motion for Reconsideration of Dismissal Denial**

On December 18, 2023, the District Court in South Carolina overseeing the aqueous film-forming foams multidistrict

litigation (AFFF MDL) reaffirmed its decision rejecting various insurance companies' motion to reconsider the court's denial of the companies' motion to dismiss Tyco Fire Products' complaint. In that complaint, Tyco sought both declaratory relief and damages from its insurers related to claims against Tyco that fire-fighting aqueous film-forming foams had contaminated groundwater and drinking water nationwide. Defendants, consisting of more than 20 insurance companies, filed a motion to dismiss principally challenging the court's jurisdiction over the matter.

The district court rejected all of defendants' arguments and denied their motion to dismiss. Two notable issues in the district court's order on reconsideration are: The insurance companies argued the court misinterpreted South Carolina's door-closing statute and should have abstained from hearing the case because of a similar first-filed lawsuit in Wisconsin state court.

The court ruled that the South Carolina door-closing statute did not block the filing of the lawsuit, especially since the case is linked to numerous related cases in the state and aligns with a broader federal consolidation effort. Secondly, regarding the Wisconsin lawsuit, the court emphasized that it would step back only if the state court could handle the issues efficiently. Given various factors — including the early stages of both federal cases, the unique state laws involved, the court's management of numerous related cases and sizable settlements reached — the court decided against abstaining in light of the Wisconsin suit.

What's Happening on the PFAS Federal Legislative Front

Lawmakers Reintroduce PFAS Action Act

On December 11, 2023, a group of bipartisan federal lawmakers reintroduced the PFAS Action Act, to address concerns related to PFAS and other persistent chemicals. The bill proposes various measures, such as establishing national drinking water standards for PFAS, designating certain PFAS as hazardous under federal Superfund law, banning unsafe incineration, categorizing certain PFAS as hazardous air pollutants, limiting PFAS discharge and allocating \$200 million annually for cleanup efforts in water utilities and wastewater treatment facilities. See [PFAS Action Act proposed bill](#).

What's Happening on the PFAS State Regulatory Front

Wisconsin PFAS Groundwater Standards Halted

In late December 2023, the Wisconsin Department of Natural Resources (DNR) formally halted its efforts to adopt PFAS groundwater standards due to the significant projected enforcement and compliance costs associated with the standards. See [Wisconsin DNR Halts Efforts to Set PFAS Groundwater Standards, Concedes Legislative Action Will Be Required for Adoption of Proposed Standards – Lexology](#).

Ohio Announces New PFAS Testing Program

In early December 2023, Ohio Governor Mike DeWine announced a pioneering initiative to test 29 major rivers in the state for PFAS, aiming to enhance water quality and ensure safe fish consumption. Key rivers such as the Cuyahoga and Scioto, along with tributaries feeding into larger water bodies like the Ohio River, will be examined. See [Governor DeWine Announces Expansion of H2Ohio](#).

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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