July 2024 Edition

For more information, contact:

W. Dixon Snukals
Associate | Raleigh
T: +1 919 755 6679
wsnukals@mcguirewoods.com

Mark E. Anderson
Partner | Raleigh
T: +1 919 755 6678
manderson@mcguirewoods.com

Andrew F. Gann, Jr.
Partner | Richmond
T: +1 804 775 1643
agann@mcguirewoods.com

Adam G. Sowatzka
Partner | Atlanta
T: +1 404 443 5749
asowatzka@mcguirewoods.com

Shannon M. Kasley
Partner | Washington, D.C.
T: +1 202 857 1759
skasley@mcguirewoods.com

"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 potential headwinds to federal PFAS regulatory actions, updates on significant federal PFAS litigation, and new research on potential PFAS contamination and exposure pathways.

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

Business Groups Challenge EPA's Designation of Two PFAS as Hazardous Substance Under CERCLA

The U.S. Chamber of Commerce, Associated General Contractors of America and National Waste & Recycling Association filed a petition for review with the U.S. Court of Appeals for the D.C. Circuit on June 10, 2024. The petition challenges the EPA's final rule, which went into effect June 8, 2024, designating two PFAS chemicals, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS), as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

As discussed in the April special edition of "Contaminants Compass," the rule would immediately require parties to report releases of PFOA and PFOS in quantities equal to or greater than 1 pound within a 24-hour period to the National Response Center. The rule also is likely to drive significant indirect impacts, including expanding the scope and costs of ongoing response actions at existing Superfund sites or the relisting of several deleted Superfund sites. Additionally, because of the widespread presence of PFOA and PFOS in the environment, the final rule is expected to bring many new landowners under CERCLA jurisdiction and liability.

While the petition does not contain details about the basis for the groups' challenge, they did submit substantial public comments on the rule that may shed light on their legal strategy. The comments questioned whether the EPA has statutory authority to designate PFOA and PFOS as hazardous substances, criticized deficiencies in the EPA's cost analysis and asserted that the scientific evidence does not support the designation.

McGuireWoods

Following the filing of the petition, the groups' challenge received a boost by the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which overturned the *Chevron* doctrine. Under *Chevron*, if Congress has not directly addressed a particular issue or question in its delegation of authority to an administrative agency, a court was required to defer to the agency's interpretation of the statute as long as it was reasonable. The loss of the *Chevron* doctrine will likely restrict the EPA's ability to expand its regulatory authority without specific congressional authorization, which is what the final rule attempts to do.

Department of Defense Likely to Seek Two-Year Extension for PFAS Firefighting Foam Phaseout

The Government Accountability Office (GAO) filed a report on July 8, 2024, following its review of the Department of Defense's (DOD's) efforts to transition to firefighting foams that do not contain PFAS. Under the National Defense Authorization Act for Fiscal Year 2020, DOD was required to discontinue use of PFAS-containing aqueous film-forming foam (AFFF) by October 2024. The GAO was asked to review DOD's progress in transitioning to PFAS-free alternatives to AFFF and identify challenges that may impact DOD's ability to meet the statutory deadline. The GAO found that DOD has taken steps to replace AFFF by developing a specification for PFAS-free firefighting foam. To date, DOD has approved two PFAS-free foams for purchase.

Despite this progress, DOD faces significant challenges that may necessitate extending the deadline for the full elimination of AFFF use. According to the GAO report, DOD acknowledged several compatibility issues with the alternative foams "that preclude them from being drop-in replacements for AFFF" in many firefighting systems. For example, DOD found that the alternative foams cannot withstand the same temperature ranges, which limits the use of these alternatives in regions that experience extreme hot or cold temperatures. Additionally, several of the alternatives cannot be mixed with water in advance, but instead must be prepared immediately before use. Due to these challenges, DOD "anticipates that completing the transition of these systems within the required time frame will be a challenge." This delay means that military facilities may continue to be sources of PFAS releases beyond 2024.

II. What's Happening in PFAS Litigation

States Urge Fourth Circuit to Uphold Remand of PFAS Suits to State Courts

In a joint brief filed on July 8, 2024, Maryland and South Carolina urged the U.S. Court of Appeals for the Fourth Circuit to uphold district court rulings remanding their civil suits against PFAS manufacturers and others to state court. The states sued PFAS manufacturers and others in state court alleging that the companies' manufacturing, sale and use of products containing PFAS contaminated the states' water and natural resources. One of the manufacturers, 3M Co., removed both cases to federal court based on the federal officer removal statute, 28 U.S.C. § 1442(a).

3M asserted that any alleged PFAS contamination may be commingled with PFAS stemming from AFFF, which 3M said it manufactured for the federal government to military specifications. The district courts remanded the cases to the state courts concluding that federal officer jurisdiction did not exist because the states' complaints specifically disavowed claims relating to AFFF. The states contended that remand was correct because their claims relate to contamination from other PFAS-containing products. 3M argued that the states' disclaimers regarding AFFF claims rested on a fiction because it is not possible to tell if PFAS contamination originated with AFFF or another source.

Fourth Circuit: Federal Courts Lack Jurisdiction to Review EPA Grant of Petition Under TSCA to Test 54 PFAS

In *Center for Environmental Health v. Regan* the U.S. Court of Appeals for the Fourth Circuit held on June 10, 2024, that federal courts do not have jurisdiction to review the EPA's grant of a petition under the Toxic Substances Control Act (TSCA) to test 54 PFAS. Four citizen groups filed a petition under TSCA asking the EPA to require a company to conduct testing on 54 PFAS manufactured at its facility in North Carolina. The groups asserted that additional toxicological testing was needed, because these PFAS lack sufficient data to understand their potential adverse effects on human health and the environment.

The EPA granted the petition but declined to adopt the groups' proposed testing regime. The groups viewed the rejection of its proposal as an effective denial and filed suit against the EPA. The Fourth Circuit disagreed, holding that "by promptly commencing a proceeding for determining how to best test PFAS, the EPA gave Petitioners all that they were entitled to receive." Since TSCA does not authorize federal courts to review the grant of a petition, the Fourth Circuit held that dismissal of the groups' suit was proper.

III. What to Read

Study: Rechargeable Batteries and Potential PFAS Pollution

Researchers from Duke University and Texas Tech published a study on July 8, 2024, in *Nature Communications* addressing whether the clean energy sector may be "an unrecognized and potentially growing source" of PFAS releases. The study focused on a class of PFAS called bis-perfluoroalkyl sulfonimides, or bis-FASIs, used in lithium-ion battery manufacturing.

The researchers found that Bis-FASIs share similar bio-persistence and ecotoxicity properties with PFOA. The study also found that one potential pathway for bis-FASI to enter the environment is through landfill leachate from the disposal of lithium-ion batteries. The researchers called for more scrutiny of clean energy infrastructure as a potential source of PFAS pollution.

Study: PFAS Can Be Absorbed Through Skin

In the June issue of *Environment International*, researchers from the United Kingdom published a study that found that PFAS can seep through skin and enter the bloodstream. While it is understood that humans can be exposed to PFAS through food and water, less is understood about exposure from skin contact with PFAS-containing products. Numerous consumer products are known to contain PFAS, including cosmetics, clothing and personal care products. The study concluded that dermal exposure to PFAS could be a significant source of exposure, especially for shorter-chain PFAS.

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.

McGuireWoods marketing communications are intended to provide information of general interest to the public. Marketing communications are not intended to offer legal advice about specific situations or problems. McGuireWoods does not intend to create an attorney-client relationship by offering general interest information, and reliance on information presented in marketing communications does not create such a relationship. You should consult a lawyer if you need legal advice regarding a specific situation or problem.

Contents © 2024 McGuireWoods LLP.