



Contaminants *Compass*

March 2024 Edition

For more information, contact:

Chauna A. Abner
Associate | Baltimore
T: +1 410 659 4555
cabner@mcguirewoods.com

E. E. "Matt" Mathews III
Partner | Richmond
T: +1 804 775 1313
mmathews@mcguirewoods.com

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

Gregory Hinojosa Evans
Partner | Los Angeles
T: +1 213 457 9844
gevans@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 a new test the U.S. Environmental Protection Agency developed to detect PFAS in plastic containers, the latest PFAS analysis on birth weight defects, PFAS in food packaging, new potential 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 any questions regarding PFAS issues.

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

EPA releases new test method for plastic containers.

On Feb. 15, 2024, the U.S. Environmental Protection Agency (EPA) released a [new test method](#) for plastic containers that "establishes robust and validated procedures that allow reliable detection and quantification of 32 PFAS directly from the walls of the container itself." The EPA has implemented this method under the national PFAS testing strategy, which the agency announced alongside the PFAS strategic roadmap in October 2021. The national PFAS testing strategy is implemented under the Toxic Substances Control Act and Toxics Release Inventory to collect information on PFAS used in commerce and to increase transparency concerning where PFAS are used and released.

According to the EPA, the new testing method enables industries that utilize high-density polyethylene (HDPE) containers, including container manufacturers, to test the containers before use, preventing PFAS contamination of pesticides and other products stored in HDPE plastic containers. This method has wide applicability for other industries, as it can be modified to test for PFAS in additional solid samples such as fabric, packing paper and more.

EPA releases latest PFAS analysis on birth weight effects.

On March 7, 2024, EPA released for [public comment](#) and scientific review the latest analysis of the hazards of one PFAS — [perfluorononanoic acid \(PFNA\)](#). The EPA's analysis raises issues regarding PFNA's effects on birth weight reductions that could occur from ingesting small amounts. The EPA already has plans to further regulate PFNA under various environmental statutes due to concerns about the persistence it and certain other PFAS have in the environment and on people's and animals' bodies, and the health effects observed. Industries must, for example, report environmental releases of PFNA to the agency's Toxics Release Inventory, although none have yet been reported. In addition, the agency has proposed to control amounts of PFNA and up to three other PFAS as part of a broader rule that would set enforceable limits on the amount of perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate acid (PFOS) in drinking water. A final rule is expected this year.

FDA makes an announcement on PFAS in food packaging.

On Feb. 28, 2024, the U.S. Food and Drug Administration (FDA) [announced](#) that grease-proofing substances containing PFAS materials are "no longer being sold by manufacturers for food contact use in the U.S. market." The shift is not the result of a formal ban or restriction on food contact surfaces, but through FDA securing from food packaging manufacturers voluntary agreements not to use PFAS substances in packaging. In furtherance of these efforts, FDA states the "announcement marks the fulfillment of a voluntary commitment by manufacturers to not sell food contact substances containing certain PFAS intended for use as grease-proofing agents in the U.S. This FDA-led effort represents a positive step forward as we continue to reevaluate chemicals authorized for use with, and in, food."

II. What's Happening in PFAS Litigation?

PEER and Texas farmers send EPA a notice of intent to file suit.

On Feb. 22, 2024, a watchdog group called the Public Employees for Environmental Responsibility (PEER) and five Texas farmers sent the EPA a [notice of intent](#) threatening to sue under the citizen suit provision of the Clean Water Act, 33 U.S.C. 1365. The notice of intent alleges that the EPA failed to perform its duties under the Clean Water Act by failing to identify all PFAS that have been found in biosolids and to promulgate regulations for 12 different PFAS: PFBA, PFBS, PFHxA, PFHxS, PFHpA, PFOA, PFOS, PFNA, PFDA, PFUnDA, PFDoDA and HFPODA (GenX).

The notice of intent alleges that scientific evidence shows that these PFAS may adversely affect public health and the environment by, among other things, increasing the risks of asthma, disrupting thyroid hormone balances, impairing lung function in children, increasing the risk of autoimmune diseases and impairing liver functions. PEER threatens to file suit in federal district court seeking declaratory relief, injunctive relief and litigation costs if, by April 23, 2025, the EPA does not take immediate steps to (1) adequately identify PFAS in biosolids; and (2) promulgate regulations for PFAS in biosolids for which it has sufficient scientific information, specifically including the 12 PFAS identified in the notice of intent.

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

U.S. Senate introduces PFAS Accountability Act of 2024.

On Feb. 1, 2024, U.S. Senate lawmakers introduced a bill known as the [PFAS Accountability Act of 2024](#), which would amend the Toxic Substances Control Act to codify a federal cause of action and remedy available to individuals. The bill would allow individuals who have been significantly exposed to PFAS or who have reasonable grounds to believe they have been significantly exposed to PFAS to bring a claim, individually or on behalf of a class of similarly situated individuals, against any person who engaged in any portion of a manufacturing process that created the PFAS, or any person who foresaw or reasonably should have foreseen that the creation or use of PFAS would result in human exposure to PFAS.

This bill, if passed, would create a rebuttable presumption that an individual was significantly exposed to PFAS if the individual can demonstrate that: (1) the defendant engaged in any portion of the manufacturing process that created the PFAS; and either (2a) the PFAS was released into one or more areas where the individual would have been exposed for a cumulative period of not less than one year, or (2b) the individual offers testing results that demonstrate that PFAS or metabolites of PFAS have been or currently are detected in the body or blood serum of the individual. If a plaintiff is able to establish the rebuttable presumption, the defendant can rebut the presumption by offering testing results that confirm that relevant PFAS or metabolites of PFAS were not in the body of the individual or class member at the relevant time in a sufficient quantity to qualify as significant exposure. The bill makes defendants responsible for the costs of testing.

This bill also would allow a court to lower the standard for scientific proof with regard to the risk of developing disease due to PFAS exposure, if there is insufficient toxicological data to reasonably determine whether an individual or class has suffered an increased risk of developing a disease associated with PFAS exposure, until independent and reliable data are available.

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

- [California](#) (Jan. 4, 2024) – A new bill would prohibit the manufacture, distribution, sale or offering for sale of any textile articles containing PFAS, effective 2030. This bill would effectively ban PFAS in all products in California. The Senate amended the bill on Feb. 21, 2024, to, among other things, remove language declaring that PFAS “are a class of persistent and highly toxic chemicals responsible for widespread contamination across California and the United States.”
- [California](#) (Feb. 13, 2024) – A new bill would prohibit any person in the state from selling any menstrual products that contain regulated PFAs.
- [Kentucky](#) (Jan. 3, 2024) – A new bill would establish a reporting requirement for manufacturers that intentionally include PFAS in products manufactured for sale or distribution, and establish a reporting requirement for the release of PFAS by manufacturers that intentionally include PFAS in their products. This bill was referred to the House Standing Committee for Health Services on March 6, 2024.
- [Maryland](#) (Feb. 7, 2024) – A new bill would establish a discharge limit for PFAS in any water, including stormwater; establish standards for reducing PFAS in water discharge; and establish standards for the storage, use and disposal of PFAS. This bill passed the third reading in the House on March 13, 2024, and has not yet had its first reading in the Senate.
- [Massachusetts](#) (Jan. 18, 2024) – A new bill would require producers of packaging materials or paper products to establish a producer responsibility organization and would define PFAS as a toxic material that is not recyclable, compostable or reusable.
- [New Jersey](#) (Jan. 9, 2024) – A new bill would prohibit the sale, manufacture, distribution and use of firefighting foam containing intentionally added PFAS.
- [New Jersey](#) (Jan. 9, 2024) – A new bill would require the Department of Environmental Protection and Drinking Water Quality Institute to perform a study concerning the regulation and treatment of PFAS in drinking water.
- [New Jersey](#) (Jan. 9, 2024) – A new bill would require the Department of Environmental Protection to perform assessments concerning regulation of PFAS every five years.
- [Virginia](#) (Jan. 10, 2024) – A new bill would require any facility identified as a potentially significant source of PFAS in the public water system’s raw water source to perform and report the results of quarterly discharge monitoring for one year and report its manufacture or use of PFAS to the Virginia Department of Environmental Quality. This bill passed both the House and Senate on Feb. 28, 2024, and was communicated to the governor on March 11, 2024. The governor’s action deadline is 11:59 p.m. on April 8, 2024.

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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