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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 new state attorney general and other PFAS litigation including courts evolving treatment of PFAS testing questions and state legislative developments, and updates on the status of recent challenges to EPA regulations.

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

I. What's Happening in PFAS Litigation

Michigan Sues Paper Company for Wastewater Lagoon PFAS Discharges

On Oct. 31, 2024, the Michigan attorney general commenced a lawsuit against Ox Paperboard P and hite Pigeon Mills collectively, Ox Paperboard after Ox Paperboard failed to submit a properly detailed closure plan for a wastewater lagoon Ox Paperboard owned and maintained in hite Pigeon, Michigan. The complaint alleges the state identified PFAS contaminants in 19 groundwater monitoring wells on the site and that Ox Paperboard received seven violation notices for improperly discharging wastewater contaminated with PFAS between 2021 and 2024.

In its lawsuit, Michigan seeks a declaratory judgment that Ox Paperboard is in violation of the Michigan administrative code and an injunction ordering Ox Paperboard to cease its unpermitted discharge of wastewater to the waters of the state and to submit a plan to properly close the lagoons at the site. Michigan also seeks an order that Ox Paperboard pay a 2,500 to 25,000 per day civil fine for violation of Part 31 of the Natural Resources and Environmental Protection Act and associated administrative rules; pay reasonable attorneys fees, costs of litigation, and costs of sampling and enforcement; and pay an additional 500,000 to 5 million fine for the substantial endangerment posed to the public health, safety or welfare by Ox Paperboard s unauthorized discharges.

Plaintiffs File Third Amended Complaint in Lawsuit Against Procter & Gamble

On Nov. 5, 2024, after the U.S. District Court for the Northern District of California dismissed the plaintiffs first and second amended complaints, the plaintiffs filed a third amended complaint against the Procter Gamble Co. alleging the company engaged in false and deceptive advertising by representing that its tampon products were "Pure and Organic" when they contained organic fluorine.

The second amended complaint in Bounthon v. The Procter Gamble Co. alleged that Procter Gamble 1 violated consumer protection statutes under the laws of California, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New ork and ashington; 2 violated the California Consumers Legal Remedies Act; 3 violated the California Unfair Competition Law; 4 violated the California False Advertising Law; and 5 engaged in unjust enrichment quasi-contract by falsely representing that Tampax Pure Cotton Tampons were "Pure and Organic" when those products allegedly contained harmful PFAS. The court dismissed the second amended complaint, finding the plaintiffs did not "plausibly allege that the presence of organic fluorine, as detected by their TOF analysis, indicates that the Tampon Products contain PFAS." The court held that the plaintiffs testing method, which only looked at total organic fluorine content, "may detect organofluorine chemicals that are not PFAS." The court further reasoned that the plaintiffs failed to allege that "PFAS are present in the Products at a harmful level."

In the third amended complaint, the plaintiffs allege the same counts as the second amended complaint but shift the emphasis of the lawsuit from PFAS to organic fluorine. Specifically, the plaintiffs allege that Procter Gamble falsely and misleadingly represented that its tampon products were organic when the products contained organic fluorine, a chemical found in pesticides, pharmaceuticals, agrochemicals and PFAS. According to the third amended complaint, Procter Gamble "states that the cotton used in the Tampon Products is purified to remove contaminants, leading reasonable consumers to conclude that extra care has been taken to remove any undisclosed and unnecessary chemicals and contaminants, like organic fluorine."

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

The July 2024 issue of Contaminants Compass first reported on the U.S. Chamber of Commerce and others challenge to the EPA s final rule designating two PFAS chemicals, perfluorooctanoic acid PFOA and perfluorooctane sulfonate PFOS , as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act CERCLA with the U.S. Court of Appeals for the D.C. Circuit. On Nov. 4, 2024, the chamber, along with six other groups representing manufacturing, paper, recycling and waste sectors, filed their opening brief challenging the EPA s final rule.

The petitioners argue that the EPA overstepped its authority under CERCLA Section 102 by adopting an "unreasonably broad" interpretation of the statutory term "may present substantial danger," which CERCLA requires the EPA to demonstrate before listing any chemical as hazardous. The petitioners claim that the EPA interprets "may" to require only a "possibility" that a substance, when released into the environment, presents a substantial danger. This interpretation, the petitioners argue, could include any substance; for example, salt sodium chloride could be deemed hazardous if released in sufficient quantities. Additionally, the petitioners claim that the EPA s broad interpretation gives it "unbounded discretion" to list substances without clear or predictable criteria, essentially providing the agency with a "blank check." They argue that this interpretation lacks "fixed boundaries" and raises constitutional concerns, referencing the recent U.S. Supreme Court ruling in Loper Bright Enterprises v. Raimondo.

The petitioners also assert that the EPA s evaluation of costs was "fundamentally flawed." They argue that the EPA violated the Administrative Procedure Act APA by failing to properly disclose its cost-benefit analysis in the rule s initial proposal, instead offering a revised analysis only in the final rule, without adequate public input during the notice-and-comment period. The petitioners also claim that the cost-benefit analysis contains "significant substantive errors," as it focuses mainly on the "direct" costs of the rule s reporting requirements, without adequately considering the "indirect" costs, thereby underestimating the rule s financial impact on industry. The petitioners argue that the cleanup costs, as considered, add to the rule s arbitrary and capricious nature. They request that the court vacate the rule.

Environmental groups, including Clean Cape Fear and the National Resources Defense Council, intervened in the case. These groups argue that the rule is essential to enhancing public health protections and addressing widespread PFAS contamination, as it will require parties responsible for significant PFAS contamination to bear cleanup costs, rather than taxpayers or ratepayers in affected communities. The interveners also argue that the reporting requirement would enable community groups to identify and inform their members of potential PFAS exposure.

The EPA has not filed its reply brief, and the court has not yet set oral arguments. It is uncertain if the next administration will defend the final rule. Notably, the Trump administration developed the original PFAS Action Plan, which is the foundation for many of the regulatory actions the Biden administration has taken regarding PFAS

Court Dismisses Lawsuit Alleging PFAS Detected in Diapers

On Oct. 3, 2024, the U.S. District Court for the Southern District of New ork dismissed a putative class action lawsuit against Coterie Baby that alleged the company sold diapers containing PFAS despite advertising that its diapers were free from PFAS and other harmful chemicals. The plaintiff alleged that she signed up for Coterie s subscription service to receive monthly shipments of diapers and received her first shipment in March 2024. She claimed that she was induced to pay a price-premium for Coterie diapers because of representations on the product packaging and Coterie s online marketing about the lack of chemicals in its products, including a statement that its diapers are “Free From PFAS.” Despite Coterie s representations, the plaintiff alleges that independent, third-party laboratory testing of a Coterie diaper in February 2024 identified the presence of multiple PFAS. The complaint asserted causes of action, including breach of express warranty, unjust enrichment and violations of several state consumer-protection statutes.

Coterie moved to dismiss the complaint for lack of standing. To properly plead a price-premium injury to confer standing, the court explained that a plaintiff must plausibly allege she purchased at least one Coterie diaper that was misbranded because it contained PFAS. As the court noted, the plaintiff “does not take the simplest path to achieving this result.” Instead of alleging that she tested diapers that were among those she received in her March 2024 delivery and that one of those diapers contained PFAS, the plaintiff alleged that one could infer the diapers she received in March 2024 contained PFAS based on the February 2024 testing and the fact that PFAS are “ubiquitous.” These allegations, the court held, are insufficient. The court further explained that a single test of one diaper and “general allegations that PFAS are ubiquitous do not make it plausible that Coterie s products are systematically and routinely contaminated with PFAS and therefore that the plaintiff overpaid for at least one diaper.” The court dismissed without prejudice all claims asserted in the complaint for lack of standing, meaning the plaintiff could conceivably amend and refile her complaint.

Federal Court Allows “Environmentally Conscious Consumer’s” PFAS Claims to Proceed against NatureStar and Target

On Sept. 11, 2024, the U.S. District Court for the Eastern District of California held in Little v. NatureStar N. Am., LLC that “an environmentally conscious consumer” had standing to pursue a putative class action lawsuit against NatureStar North America and Target Corp. “for the allegedly false and deceptive business practice of advertising and marketing single-use tableware and food storage bags as compostable when they contain” PFAS, which are not compostable.

The defendants moved to dismiss the complaint for lack of standing, arguing the complaint failed to sufficiently allege a concrete injury, ripeness and entitlement to injunctive relief. hile the court agreed the plaintiff was not entitled to injunctive relief because he did not allege that he had a continued desire or intent to purchase products in the future, the court rejected the defendants other arguments. The court reasoned that the defendants concrete-injury argument failed because the plaintiff alleged he paid a premium for a falsely advertised product and the defendants ripeness argument failed because the plaintiff presented a ripe legal question about the FTC Green Guides definition of "compostable."

AWWA and ASMA File Opening Brief in Challenge to EPA's SDWA Regs Setting National Primary Drinking Water Regs for PFAs

The American ater orks Association A A and Association of Metropolitan ater Agencies AM A filed a petition for review on June 7, 2024, with the U.S. Court of Appeals for the District of Columbia of the EPA s final rule titled "PFAS National Primary Drinking ater Regulation," 89 Fed. Reg. 32, 532 April 26, 2024 , with respect to six specified PFAS.

On Oct. 7, 2024, the associations filed their opening brief arguing, among other things, that:

1 The EPA violated the APA by proposing regulations for index PFAS before issuing a determination to regulate those PFAS; using a hazard index value of 1 as a level for index PFAS; arbitrarily determining that HFPO-DA, PFNA and Index PFAS have a "substantial likelihood" of occurrence in public water systems with frequency and levels of public health concern based upon a limited patchwork of state-level data; and by underestimating the costs of the rule.

2 The use of a hazard index as an enforceable level for mixtures of two or more index PFAS violated the act and was arbitrary and capricious because the hazard index is not a " Level under the Act, and hazard indices are designed as risk screening comparison tools, not the bases for regulation."

3 The EPA s determinations to regulate HFPO-DA, PFNA and mixtures of two or more index PFAs were unreasonable and should be vacated.

4 The best available occurrence information that the EPA relies on does not support the determinations that "HFPO-DA, PFNA, or mixtures of two or more Index PFAS, have a substantial likelihood of occurring in public water systems with a frequency and at levels of public health concern."

5 The EPA s rule arbitrarily regulates at levels that impose significant additional costs without commensurate health benefits and are not feasible.

II. What's Happening on the State PFAS Regulatory Front

New England Establishes Biosolids Hub

The New England Interstate ater Pollution Control Commission NEI PCC announced on Oct. 7, 2024, the development of a Biosolids Technology Hub BioHub . NEI PCC, in partnership with the North East Biosolids Residuals Association and Maine ater Environment Association, developed the hub "to serve as an information clearinghouse on research and funding for piloting, planning, and permitting treatment of PFAS in municipal biosolids or sludge." The BioHub includes links to published literature, technology vendors that treat various PFAS and municipal biosolids PFAS treatment projects across the country.

California Governor Approves Bill to Enforce PFAS Laws

On Sept. 29, 2024, Gov. Gavin Newsom approved AB 347, which tasks the California Department of Toxic Substances Control DTSC with enforcing California s laws regulating the use of PFAS substances in certain covered products such as children s or juvenile products, textile articles and food packaging.

AB 347 more clearly defines the term "juvenile product," which previously was defined as "a product designed for use by infants and children under 12 years of age, including, but not limited to, specified products." AB 347 identifies specific products that are "juvenile products" and those that are excluded from the definition.

AB 347 requires manufacturers of products containing PFAS to register with the DTSC, pay a registration fee, and provide a statement certifying compliance with the applicable prohibitions on the use of PFAS on or before July 1, 2029. Under AB 347, the DTSC is required to adopt regulations for the enforcement of prohibitions on the use of PFAS by Jan. 1, 2029, and on and after July 1, 2030, to "enforce and ensure compliance with those provisions and regulations."

AB 347 also requires the DTSC to publish a list of appropriate methods for testing whether a covered product complies with PFAS restrictions and appropriate third-party accreditations for laboratories on or before Jan. 1, 2029. If a person or entity is found in violation of the promulgated regulations, they shall be subject to a penalty of 10,000 or more for the first violation. A penalty may be assessed for each violation of a separate provision and for each day that the violation continues. In addition, AB 347 allows the California attorney general to bring an action for a temporary or permanent injunction restraining any person or entity from violating any provision of AB 347.

New Hampshire Signs Bill Banning Intentional Addition of PFAS in Products

New Hampshire Gov. Chris Sununu signed HB 1649 on Aug. 2, 2024, banning the sale of products with intentionally added PFAS including carpets or rugs; cosmetics; textile treatments; feminine hygiene products; food packaging and containers; products for children under 12 such as high chairs, play mats and strollers; upholstered furniture; and textile furnishings. The ban takes effect Jan. 1, 2027. Exempted products include medical devices, adult mattresses, personal computers, wireless phones and other electronics, products made with at least 85% recycled content, products manufactured prior to the ban, and replacement parts for products manufactured prior to the ban.

The bill holds facilities strictly liable to the state for "containment, cleanup, restoration, or other remediation related to the release or threatened release of hazardous waste or hazardous material in accordance with applicable law and departmental rules."

Massachusetts Governor Signs Bill Protecting Firefighters from PFAS in Gear

On Aug. 15, 2024, Massachusetts Gov. Maura Healey signed into law a bill that requires manufacturers and sellers of personal protective equipment for firefighters containing PFAS to provide written notice to the purchaser at the time of sale stating that the equipment contains PFAS, the reason the equipment contains PFAS and the specific PFAS in the product. As a result, effective Jan. 1, 2027, manufacturers and sellers of personal protective equipment for firefighters will be prohibited from knowingly selling gear containing intentionally added PFAS.

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

House of Representatives Members Reintroduce Legislation to Ban PFAS in Food Containers

On Sept. 27, 2024, U.S. Reps. Debbie Dingell, D-Mich., and Brian Fitzpatrick, R-Pa., reintroduced the bipartisan Keep Food Containers Safe from PFAS Act, which would prohibit intentionally added PFAS in food packaging. This bill was previously introduced during the 117th Congressional Session from 2021 through 2022 but never received a vote in the House of Representatives.

The EPA Publishes Final National Recommended Aquatic Life Criteria for PFOA

In September 2024, the EPA published final national recommended aquatic life criteria for PFOA, a type of PFAS, in freshwater, which reflect the latest scientific knowledge regarding the effects of PFOA on freshwater organizations. The criteria are based upon PFOA and PFOS toxicity studies published through March 2024. The EPA has stated that states and tribes can adopt its recommended criteria into water quality standards to protect against the harmful effects of PFAO on aquatic life.

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.