



Contaminants *Compass*

October 2024 Edition

For more information,
contact:

W. Dixon Snukals

Associate | Raleigh

T: +1 919 755 6679

wsnukals@mcguirewoods.com

Samuel L. Tarry

Partner | Tysons

T: +1 703 712 5425

starry@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

Shannon M. Kasley

Partner | Washington, D.C.

T: +1 202 857 1759

skasley@mcguirewoods.com

Adam G. Sowatzka

Partner | Atlanta

T: +1 404 443 5749

asowatzka@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 recent federal PFAS strategies and regulatory developments; litigation concerning PFAS in consumer products, biosolids, and landfills; and EPA’s Interim PFAS Destruction and Disposal Guidance.

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

On Sept. 3, 2024, the Biden Administration released its [PFAS Federal Research and Development Strategic Plan](#), that identifies the goals, objectives and tasks for PFAS research and development (R&D) across the federal government for the next five years. The PFAS plan was developed to comply with the National Defense Authorization Act for Fiscal Year 2021, which directs the administration to identify research challenges and gaps in the understanding of the environmental and human health impacts of PFAS. The strategies identified in the PFAS plan aim to:

- Understand PFAS exposure pathways to individuals and communities
- Address current PFAS measurement challenges through the development of standards, advanced sampling and analytical methodologies
- Understand the toxicological mechanisms, human and environmental health effects, and risks of PFAS exposure
- Develop, evaluate and demonstrate technologies for the removal, destruction and disposal of PFAS and
- Identify PFAS alternatives and evaluate their human health and environmental effects.

For each of the five strategies, the PFAS plan includes specific research objectives and implementation tasks to inform researchers about opportunities for future research. According to the administration, the PFAS plan “will help strengthen and advance the state of the science to successfully address regulatory, scientific, and mitigation gaps and disproportionate exposure, contamination, and toxicity regarding PFAS.”

EPA Proposes Addition of 16 Individual PFAS and 15 PFAS Categories to Toxics Release Inventory

On Oct. 1, 2024, the EPA issued a [proposed rule](#) that would add 16 individual PFAS as well as 15 PFAS categories, representing over 100 PFAS, to the Toxics Release Inventory (TRI).

Under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), certain facilities that manufacture, process or otherwise use listed toxic chemicals in amounts above reporting thresholds are required to report environmental releases and other waste management quantities of those chemicals annually to the TRI. For most chemicals, the default threshold that triggers reporting is 25,000 or 10,000 pounds per year. However, chemicals that the EPA has designated as “chemicals of special concern” have lower reporting thresholds and the de minimis exemption is unavailable for them. The [January 2024 edition](#) of Contaminants Compass discussed the EPA’s October 2023 rulemaking that classified PFAS as chemicals of special concern.

The proposed rule would expand the list of reportable PFAS to approximately 300 different PFAS. Like the PFAS currently on the TRI list, the additional PFAS would be subject to a 100-pound reporting threshold.

In addition to increasing the number of PFAS subject to TRI reporting, the proposed rule would also expand the number of PFAS subject to supplier notification requirements under EPCRA. Under 40 C.F.R. § 372.45, suppliers who manufacture, process, sell or otherwise distribute a mixture or product containing a TRI-listed chemical must compile and provide their customers with written notices identifying the name and percent by weight of each toxic chemical in their product. Because PFAS have been designated as chemicals of special concern, the de minimis exemption for supplier notifications also does not apply.

EPA Delays Deadline for PFAS Reporting Requirement Under TSCA

The EPA issued [a direct final rule](#) on Sept 5, 2024, delaying the reporting period by eight months for the PFAS data reporting and recordkeeping requirements under the Toxic Substances Control Act (TSCA). As the [January 2024 edition](#) of Contaminants Compass covered, in October 2023, the EPA promulgated a [rule](#) requiring manufacturers (including importers) of PFAS in any year between 2011–2022 to report certain data to the EPA related to exposure and environmental and health effects. The rule established a reporting period for manufacturers to submit their reports to EPA, which was set to begin on Nov. 12, 2024, and end on May 8, 2025 (a later deadline applies to small manufacturers). EPA’s direct final rule amends its October 2023 rulemaking by pushing back the start date for the reporting period from Nov. 12, 2024, to July 11, 2025, with a corresponding change to the end of the submission period. The new reporting deadline is now Jan. 22, 2026, or July 11, 2026, for small manufacturers. The EPA determined it was necessary to amend the reporting period because of “constraints on the timely development and testing of the software being developed to collect information pursuant to this reporting rule” and budget limitations.

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

Minnesota Continues Efforts to Implement PFAS Use Prohibitions and Reporting

In 2023, Minnesota passed the strongest PFAS prevention [legislation](#) in the country as part of the omnibus environment, natural resources, climate, and energy finance and policy bill that Gov. Tim Walz signed into law. The legislation was named Amara’s Law after Amara Strande, a young woman who grew up in an area contaminated by PFAS and diagnosed with an exceedingly rare form of cancer. The law takes effect in phases between Jan. 1, 2025, and Jan. 1, 2032, when sales of products containing intentionally added PFAS will be prohibited in Minnesota except for those determined to involve currently unavoidable uses of PFAS. Implementation details for three parts of Amara’s Law will be developed through rulemaking.

The Minnesota Pollution Control Agency recently presented on the status of the PFAS rulemaking efforts in Minnesota, and a copy and recording of the presentation is available here: [Progress on PFAS rule development | Minnesota Pollution Control Agency \(state.mn.us\)](#).

III. What's Happening in PFAS Litigation

EPA Moves to Dismiss Citizen Suit Over PFAS in Biosolids

On Sept. 9, 2024, the EPA moved to dismiss a Clean Water Act citizen suit filed by Public Employees for Environmental Responsibility (PEER) in the U.S. District Court for the District of Columbia alleging that the EPA has a nondiscretionary duty to regulate several PFAS in sewage sludge (i.e., biosolids). PEER claimed that the EPA has “failed to identify as existing in sewage sludge at least 18 toxic [PFAS] that scientific evidence shows are present in sewage sludge in concentrations which may adversely affect public health or the environment in violation of 33 U.S.C. § 1345(d)(2).” Despite the EPA’s knowledge of PFAS in biosolids, PEER alleged the EPA has failed regulate potential discharges of PFAS connected to biosolids.

The EPA’s motion to dismiss argues that PEER lacks standing and has failed to identify a nondiscretionary duty imposed under the Clean Water Act that requires the EPA to promulgate the regulations PEER seeks. PEER will have an opportunity to file an opposition to the EPA’s motion to dismiss.

Beverage Manufacturer Wins Dismissal of Most Product Marketing Claims, But Suit Is Not Over

A federal judge in California on Sept. 9, 2024, dismissed most of the claims in a putative class action lawsuit against Prime Hydration that alleged the company falsely advertised its grape sports drink as containing “healthy” ingredients when the beverage contains multiple PFAS. The complaint asserted one federal claim under the Magnuson Moss Warranty Act (MMWA) and multiple claims under California consumer protection statutes. Contrary to Prime’s marketing statements, plaintiff alleged that independent, third-party testing of bottles of the grape sports drink detected multiple PFAS, including PFOA and PFOS at levels above their respective lifetime health advisories. The plaintiff alleged that she would not have purchased the beverage, or would have paid less, if she had known that it contained PFAS.

Prime moved to dismiss the suit for lack of standing and failure to state a claim. Prime argued that the plaintiff lacked standing because she did not plausibly allege that the bottles of grape sports drink that she bought contained unsafe levels of PFAS. The court rejected this argument and denied Prime’s motion to dismiss for lack of standing. The court explained that plaintiff did “not need to allege that her specific purchases contained PFAS. By alleging that she purchased the product during the class period and that independent testing showed unsafe levels of PFAS, [plaintiff] has established standing.”

In support of its motion to dismiss, Prime also argued that the plaintiff failed to adequately plead claims under the MMWA and state consumer statutes. The court granted Prime’s motion as to the MMWA without leave to amend. It also granted Prime’s motion to dismiss on all of the state-law claims, except one, but gave the plaintiff leave to amend the claims that were dismissed. The court held that the plaintiff failed to sufficiently plead that she relied on Prime’s alleged misrepresentations and thereby suffered an injury. It explained that the alleged misrepresentations were “general, vague statements about product superiority” that are not sufficient to mislead a reasonable customer and the listing of various healthy ingredients did not imply that the beverage only contained healthy ingredients.

The lone remaining claim is for breach of implied warranty of merchantability under California law, but the plaintiff will have an opportunity to amend the state-law claims that were dismissed.

North Carolina Landfill Enters Proposed Consent Decree Over PFAS Releases

The Southern Environmental Law Center on behalf of the Environmental Justice Community Action Network (EJCAN) filed a proposed consent decree in the U.S. District Court for the Eastern District of North Carolina to resolve a citizen suit against the Sampson County Landfill in Roseboro, North Carolina, alleging violations of the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA).

Under the proposed consent decree, the landfill is required to, among other things:

- Reduce discharges into the swamp to four parts per trillion (i.e., the lowest level that the EPA has determined laboratories can consistently qualify)
- Decline all new waste contracts for PFAS cleanup/waste streams from military bases and fire-fighting foams until these standards are met
- Use methane-sensing drones to identify emission hot spots and retain an independent consultant to develop a continuous air pollution monitoring system around the perimeter of the landfill
- Establish a community fund to be managed by and for residents of the Snow Hill community and
- Hold regular meetings with community members and establish a complaint response and escalation mechanism.

The consent decree would resolve EJCAN's lawsuit alleging that the landfill's treatment, storage and disposal of PFAS-laden solid waste contaminated surface water, groundwater and residential drinking water wells. EJCAN alleged that the landfill's waste management practices presented an imminent and substantial endangerment to human health and the environment in violation of Section 7002 of RCRA. Lastly, EJCAN claimed that discharges of PFAS from certain outfalls and stormwater conveyances and through groundwater transported into a swamp violated the CWA and RCRA.

IV. What We Are Reading

EPA's PFAS Disposal Guidance Provides Best Practices, But Uncertainty Remains

Earlier this year, the EPA updated its [Interim Guidance on the Destruction and Disposal of PFAS and PFAS-containing Materials](#). The interim guidance identifies three technologies that may be effective to destroy PFAS or significantly minimize or eliminate PFAS releases into the environment: thermal treatment, landfills and underground injection.

For each of the identified disposal methods, the EPA outlined certain minimum specifications in order to minimize the risk of future PFAS releases associated with its wastes. A thermal treatment technology should be capable of achieving temperatures at or above 1,100° C, ensure the waste is well-mixed so it is evenly exposed to heat and have a long residence time for waste during treatment. Research reviewed by the EPA showed that insufficient temperatures, time and mixing can result in incomplete destruction of the target PFAS or even promote the formation of different PFAS distinct from the original PFAS targeted for destruction.

For landfilling, the EPA determined that both hazardous waste landfills and municipal solid waste (MSW) landfills may be effective disposal options for wastes containing PFAS, depending on the type and quantify of PFAS in the waste. As between the two, the EPA recommends disposal in hazardous waste landfills, especially when the PFAS levels in waste are relatively high, because hazardous waste landfills have the most protective landfill engineering controls and practices. However, the EPA indicates that MSW landfills may be the preferable option for disposing wastes containing fluoropolymers, especially if the PFAS are contained in or comingled with biodegradable waste.

Regarding underground injection, the EPA recommends using Class I nonhazardous industrial waste and hazardous waste wells for high concentration liquid wastes that contain PFAS. Compared to thermal treatment and landfilling, the EPA determined that underground injection has a lower potential for environmental release because Class I wells are designed to isolate liquid wastes deep below the land surface and ensure protection of underground sources of drinking water. While underground injection is effective, the EPA identifies several practical limitations that may inhibit the widespread adoption of this disposal technology. The EPA observes that there are only a few wells that currently receiving PFAS, which is due, in part, to the fact that Class I wells can only be constructed in certain geographic locations. Additionally, the EPA acknowledges that there are significant logistical challenges associated with transporting liquid wastes.

The interim guidance represents the EPA's current understanding of science for these technologies. The EPA cautions that significant uncertainties remain about their effectiveness and long-term risks, and that ongoing research and data may change its understanding of each technology's ability to control PFAS.

The EPA further notes that the interim guidance is not a regulation and following the guidance does not necessary assure compliance with all regulatory requirements. Therefore, every facility that manages PFAS wastes should consider the nature of the waste, location, potential for environmental release and other factors to determine the most appropriate destruction, disposal or storage method.

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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