September 2024 Edition

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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 how to differentiate two upcoming Toxic Substances Control Act (TSCA) reporting deadlines, updates on significant federal PFAS regulatory and litigation matters, 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 questions regarding PFAS issues.

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

Two Upcoming TSCA Disclosure Deadlines Could Cause Confusion

An upcoming Sept. 30, 2024, reporting deadline under TSCA (the Chemical Data Reporting Rule under Section 8(a)(1)-(6) of TSCA) should not be confused with a separate TSCA reporting requirement recently established by the EPA (the PFAS Reporting Rule under Section 8(a)(7) of TSCA) with a later regulatory deadline of May 2025.

PFAS Reporting Rule. A previous issue of "Contaminants Compass" discussed the EPA's new requirements under the TSCA that require manufacturers and importers to report on their production and use of PFAS from 2011 through the end of 2022 (PFAS Reporting Rule). The PFAS Reporting Rule was prompted by Congressional amendments to Section 8 of TSCA in the National Defense Authorization Act for Fiscal Year 2020, which added subsection 8(a)(7) containing specific reporting requirements for PFAS. The deadline for manufacturers and importers to submit their reports to the EPA under the PFAS Reporting Rule is **May 2025.**

Chemical Data Reporting Rule. The PFAS Reporting Rule should not be confused with other chemical reporting requirements under Section 8 of TSCA, which are unaffected by the amendments. The Chemical Data Reporting (CDR) Rule, established under Section 8(a)(1)-(6) of TSCA, requires manufacturers and importers to report information on the production and use of a broad array of chemicals in commerce, the vast majority of which are not PFAS.

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Under the CDR Rule, information is collected from manufacturers and importers every four years regarding their production and use of chemicals during that reporting period. Reporting thresholds under the CDR Rule are relatively high. For most chemicals, the reporting threshold is 25,000 lbs., although a lower reporting threshold of 2,500 lbs. applies to some chemicals. The CDR rule also exempts certain chemicals and uses from the reporting requirements, including many polymers, substances present only as impurities, certain byproducts, research and development chemicals, and chemicals contained in articles. For the current reporting period (2020-2024), the deadline to submit reports required under the CDR Rule is **Sept. 30, 2024.**

Unlike the CDR Rule, the PFAS Reporting Rule is a one-time reporting requirement with a 12-year look-back period. There are no reporting thresholds or de minimis exceptions, and there are no exemptions for polymers, impurities, byproducts or articles. Therefore, while manufacturers and importers may not be required to report under the CDR Rule because they do not meet reporting thresholds or qualify for an exemption, they could still be required to report under the PFAS Reporting Rule. The following examples illustrate the applicability of both reporting requirements in different scenarios:

	CDR Rule	PFAS Reporting Rule
Company 1 — Produces or uses TSCA chemicals above CDR thresholds but no PFAS	X	
Company 2 — Produces or uses TSCA chemicals above CDR thresholds and PFAS below CDR thresholds	X (only for non-PFAS)	X
Company 3 — Produces or uses TSCA chemicals below thresholds but produces or uses PFAS above CDR thresholds	X	X
Company 4 — Produces or uses PFAS and other TSCA chemicals below CDR thresholds		X
Company 5 — Produces or uses TSCA chemicals below CDR thresholds and no PFAS		

Air Force Fights EPA Clean-Up Order in Arizona

The U.S. Air Force is currently fighting an order from the EPA requiring the Air Force to address PFAS contamination at the Tucson International Airport Superfund Site. The site encompasses approximately 10 square miles beneath the airport, Air Force Plant #44 (AFP 44), and the Morris Air National Guard Base (MANG). The site contains groundwater contaminated from years of waste solvents and other solvents, including trichloroethylene (TCE), 1,4-dioxane and PFAS.

In 1983, the EPA listed the site on the National Priorities List. In 1991, the U.S. District Court for the District of Arizona entered a consent decree involving several parties, including the Tucson Airport Authority and the City of Tucson, to install a groundwater remediation system to capture groundwater in the aquifer at the northern end of the site, prevent contaminants from migrating toward the City of Tucson and treat water.

This system, known as the Tucson Area Remediation Project (TARP), was originally designed to remove TCE. The City of Tucson's water department later installed a granular activated carbon (GAC) treatment system to help treat for 1,4-dioxane. The GAC system now serves a dual role helping treat groundwater for 1,4-dioxane and PFAS.

In 2016, the City of Tucson's water department detected multiple PFAS chemicals at wells in the TARP well field. The high concentration of PFAS — with some sampling as high as 53,000 ppt or 5,300 times the acceptable maximum containment level — prompted the water department to shut down wells and take other measures to reduce the amount of PFAS contamination entering the TARP facility. Some wells remain out of service to this day.

On May 29, 2024, the EPA filed an emergency administrative order requiring the Air Force, along with the Arizona National Guard, to submit a PFAS water treatment plan to the EPA for approval. According to the order, "[t]here currently is no extraction and treatment system for containing or treating PFAS contaminated groundwater from AFP 44 or the MANG Base, which allows PFAS to migrate northwest and throughout the TARP system's wellfield."

The order also notes that "[w]ith the GAC system currently serving the dual purposes of peroxide quenching and PFAS adsorption, GAC bed life is significantly reduced, requiring media change-out multiple times per year, as opposed to every three to five years." The order warned of a possible GAC breakthrough of PFAS, 1,4, Dioxane and TCE, which would pose a significant threat to the City of Tucson's drinking water supply.

For those reasons, the EPA ordered the Air Force (and other respondents) to submit a long-term water treatment method to allow the use of TARP water as a source of drinking water. The EPA required the Air Force to provide such a plan within 60 days of the order.

On July 18, 2024, the Air Force provided the EPA with a notice requesting that the EPA withdraw its May 29, 2024, order. The Air Force argued that the EPA's short deadline does not comport with ongoing response actions under the Comprehensive Environmental Response Compensation and Liability Act. The Air Force further argued that the order conflicts with the recent National Primary Drinking Water Regulation for PFAS, which provides public water systems five years, or until 2029, to implement solutions to reduce PFAS in drinking water. In making that argument, the Air Force relied upon the U.S. Supreme Court's decision in Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

According to the Air Force, "EPA's Order does not explain why this five-year time frame for the remediation of PFAS does not apply here." Thus, the EPA ignored its duties to ensure "reasoned decision-making" and "explain" its reasoning and conclusion. The Air Force also emphasized that the EPA will no longer benefit from any "Chevron deference" in any future administrative hearing under the Administrative Procedure Act.

The Air Force's challenge to the EPA's order is unique in that represents a dispute between separate arms of the executive branch. It is also one of the first challenges to the EPA's enforcement authority and efforts to tackle PFAS contamination.

II. What's Happening in PFAS Litigation

PFAS Insurance Dispute Remanded to Ohio State Court

The U.S. District Court for the Northern District of Ohio, on Aug. 9, 2024, remanded a PFAS insurance coverage dispute to state court. The dispute in Fire-Dex, LLC v. Admiral Insurance Company stemmed from several underlying lawsuits brought by firefighters and their spouses alleging bodily injuries and property damages due to PFAS exposure. The firefighters alleged that they suffered injuries from exposure to firefighting foam and PFAS and PFAS-containing materials in their personal protective equipment.

Fire-Dex is an Ohio-based manufacturer of personal protective equipment for firefighters. The plaintiffs alleged that Fire-Dex manufactured, sold or distributed products containing PFAS. But when Fire-Dex tendered the underlying lawsuits to its insurers, all its insurers, with the exception of Admiral Insurance Co., agreed to defend Fire-Dex. Admiral filed a declaratory judgment action in the Northern District of Ohio seeking a declaration that, based on exclusions in the applicable insurance policies, Admiral had no duty to defend or indemnify Fire-Dex for the underlying lawsuits.

Among other policy exclusions, Admiral relied on an "occupational disease exclusion." The exclusion provided that no coverage existed for bodily injuries resulting from "any occupational or environmental disease arising out of any insured's operations, completed operations, or productions." The policies, however, did not define the phrase "occupational or environmental disease."

In response to Admiral's declaratory judgment action, Fire-Dex filed a motion to dismiss for lack of subject matter jurisdiction. The Northern District of Ohio sustained Fire-Dex's motion because the court could not reasonably predict how state courts would rule on the coverage issue given the existence of the occupational disease exclusion. The Sixth Circuit affirmed the lower court's judgment and recognized that Admiral effectively asked the district court "to 'declare' how Ohio law would interpret contractual language addressing liability to non-employees for PFAS exposure."

Following the Sixth Circuit's decision, Fire-Dex filed a declaratory judgment action against Admiral in the Medina County Court of Common Pleas and asked the court to declare that Admiral is obligated to defend and indemnify Fire-Dex in the underlying lawsuits. Fire-Dex also brought breach of contract and bad faith claims against Admiral, alleging that Admiral "failed to conduct a good faith investigation into Fire-Dex's claims" before denying coverage. Fire-Dex also alleged that Admiral could not remove the matter to federal court based on diversity of citizenship under Sixth Circuit precedent. Admiral removed the action to the Northern District of Ohio alleging diversity jurisdiction. Fire-Dex subsequently filed a motion to remand.

The Northern District of Ohio granted in part and denied in part Fire-Dex's motion to remand. While the court remanded Fire-Dex's declaratory judgment claim to the Medina County Court of Common Pleas, it stayed Fire-Dex's remaining claims until the state court addressed the declaratory judgment claims.

Time will tell how the Medina County Court of Common Pleas will rule on Fire-Dex's claims and Admiral's "occupational disease" exception coverage defense. Regardless of the outcome, manufacturers faced with PFAS claims and their insurers will likely face similar coverage battles when faced with ambiguous or undefined policy language.

III. What We Are Reading

EPA Funding Opportunity Seeks Research Applications to Detect, Monitor and Degrade PFAS in Drinking Water

As of July 31, 2024, the EPA is seeking applications for a new research award to combat PFAS in drinking water sources. Specifically, the EPA is seeking applications for research using nanotechnology to detect, monitor and treat PFS-contaminated groundwater or surface water that may be used as drinking water sources. The initiative is part of the EPA's Science to Achieve Results Program, a competitive, peer-reviewed extramural grant program through which the EPA has awarded over 4,100 grants since 1995.

The EPA opened the funding opportunity mindful of the challenges associated with measuring PFAS at low levels and degrading PFAS through traditional chemical and biological methods. But with recent advances in nanoscience and nanotechnology, the EPA hopes to build better environmental sensors and utilize nanotechnology in the sequestration and degradation of PFAS. Recent studies have demonstrated that engineered nanomaterials — natural and manmade chemical substances or materials possessing at least one dimension that is less than approximately 100 nanometers — can destroy the strong carbon-fluorine bonds that give PFAS their desirable properties but also make such compounds resistant to degradation. Studies have also demonstrated that nanomaterials may destroy carbon-fluorine bonds through mineralization, which creates non-harmful by-products.

Based on such promising studies, the EPA is seeking applications for funding that address two specific research areas:

- **Research Area 1**: Develop and demonstrate nanosensor technology to detect and monitor PFAS in drinking water sources
- **Research Area 2:** Develop and demonstrate nanosensor technology with functionalized catalysts to degrade PFAS

While the EPA may consider applications that only address one of the two research areas, such applications "may not be rated as highly as those that address both."

Finally, the EPA anticipates awarding one grant of up to $1.5 million. Applications must be submitted by Nov. 13, 2024.

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