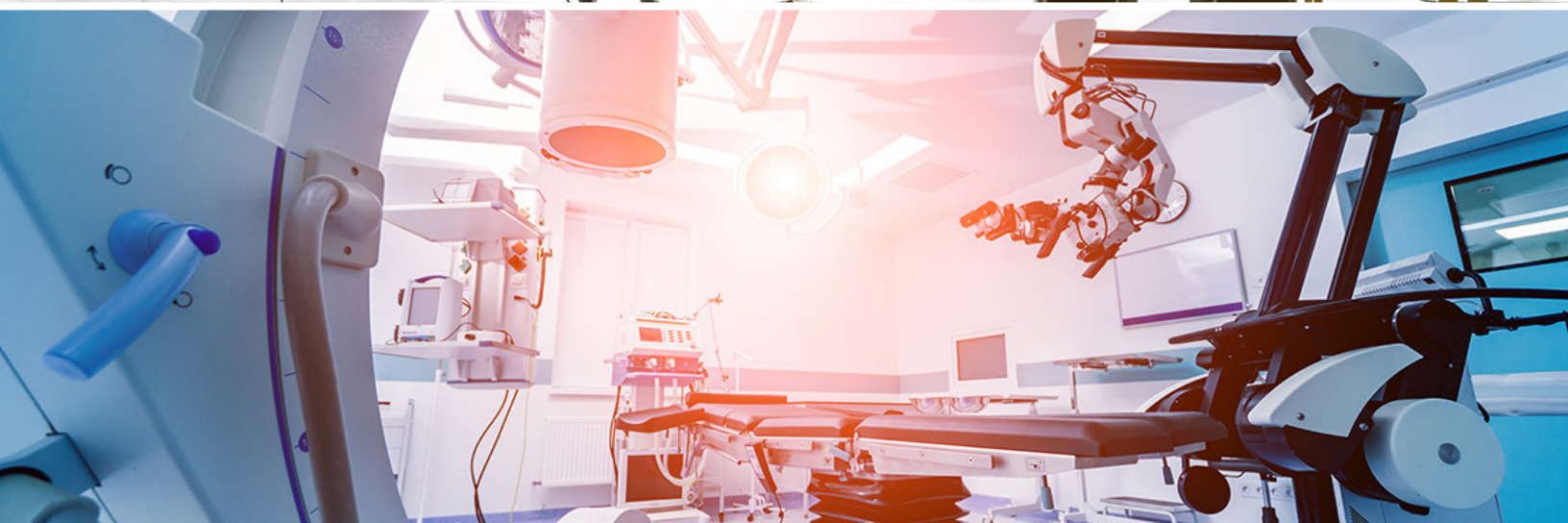


ALSTON & BIRD

PFAS PRIMER

2023 Q4 Update



Federal Regulatory Updates

DECEMBER 2023

OMB Completes Review of RCRA PFAS Rule

The White House Office of Management and Budget (OMB) completed review of a proposed EPA rule that would clarify that PFAS listed as “hazardous constituents” are subject to the Resource Conservation Recovery Act (RCRA) corrective active program. However, a second RCRA PFAS rule that sought to list four PFAS as “hazardous constituents” remains under interagency review. The Department of Defense and industry have expressed concerns about listing at least some of these PFAS as hazardous constituents. Listing PFAS as hazardous constituents could lead to their listing as RCRA hazardous wastes, which would result in their automatic listing as Superfund hazardous substances and therefore open the door to cost recovery and contribution claims.

OMB Reviews Final EPA Rule to Designate PFAS Under CERCLA

On December 6, 2023, the White House OMB initiated its interagency review of the EPA’s proposed rule to designate PFAS as Superfund “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The EPA received 65,000 comments on its proposal, and the EPA is scheduled to meet an internal deadline to promulgate the rule by March 2024.

EPA Sends PFAS Drinking Water Rule to OMB for Interagency Review

On December 15, 2023, the EPA sent its National Primary Drinking Water Regulations to set enforceable Safe Drinking Water Act limits for PFAS to the White House OMB for interagency

review. Under the draft rule, released last March, the EPA proposed to set strict standards for six PFAS in drinking water, including limits on PFOA and PFOS at 4 parts per trillion, a level more stringent than any state has set, while regulating four other PFAS as a mixture using a novel “hazard index” (HI) approach. Under the HI approach, the EPA proposed to set a maximum contaminant level (MCL) at a unitless 1.0. The four chemicals that would be subject to the HI approach under the draft rule are hexafluoropropylene oxide (HFPO) dimer acid, which is more commonly referred to as a GenX chemical, PFNA, PFHxS, and PFBS.

U.S. House Reintroduce PFAS Action Bill

The U.S. House of Representatives introduced a sweeping bipartisan bill addressing PFAS. The PFAS Action Act would, among other things, require the EPA to establish national drinking-water standards for PFOA and PFOS, accelerate designation of PFOA and PFOS as hazardous substances (and require the EPA to decide whether to list other PFAS within five years), designate PFOA and PFOS as hazardous air pollutants under the Clean Air Act within five years, require the EPA to place discharge limits on industrial releases of PFAS, prohibit certain incineration of PFAS wastes and place a moratorium on the introduction of new PFAS into commerce, and create a voluntary label for PFAS in cookware.

NOVEMBER 2023

EPA Releases New Monitoring Data Under UCMR5, Showing Additional PFAS Drinking-Water Detections

The Safe Drinking Water Act requires that once every five years, the EPA must issue a list of unregulated contaminants to be monitored by public water systems. The fifth Unregulated Contaminant Monitoring Rule (UCMR5) was published on December 27, 2021. As required by UCMR5, the EPA released a second set of

data that shows increased detections of the two most-studied PFAS (PFOA and PFOS) compared to the first set of data, and varying detections for 27 other PFAS. A summary of the new data can be found [here](#).

OCTOBER 2023

EPA Could Reopen Superfund Cleanup Decisions at PFAS-Contaminated Sites on Case-by-Case Basis

During an October 27 session of the Association of State and Territorial Solid Waste Management Officials’ annual conference, the chief of the EPA’s Office of Resource Conservation and Recovery – Cleanup Programs Branch said the EPA’s proposal to designate PFAS as hazardous under CERCLA (also known as Superfund) could lead it to reopen past cleanup actions. The chief elaborated that the agency would most likely make such decisions on a “case-by-case basis.”

EPA Finalizes TRI Rule Eliminating de Minimis Exemption for PFAS and Other Chemicals of Special Concern

The EPA finalized a Toxics Release Inventory (TRI) rule that eliminates the reporting exemption for de minimis amounts of PFAS and removes the de minimis exemption for all chemicals of special concern when notifying downstream manufacturers and purchasers. TRI data is reported to the EPA annually by facilities in industry sectors such as manufacturing, metal mining, electric power generation, chemical manufacturing, and hazardous waste treatment, as well as federal facilities that manufacture, process, or otherwise use notable quantities of TRI-listed chemicals. This new rule eliminates the de minimis exemption for TRI-listed PFAS and requires facilities to report on PFAS regardless of their concentration in mixtures, since according to the EPA, many PFAS are used in low concentrations in mixtures and the continued availability of the exemption for

PFAS would permit facilities to discount those uses when determining their TRI reporting responsibilities. The rule will apply to the reporting year beginning January 1, 2024.

EPA Issues Guidance for PFAS Reporting Under Final TSCA Rule

Shortly after publishing Toxic Substances Control Act (TSCA) Section 8(a)(7), which requires comprehensive PFAS reporting and recordkeeping by manufacturers of PFAS, the EPA issued [detailed instructions](#) for companies to follow when submitting the required data. The instructions outline who must report, what information must be reported, and whether to report through joint submissions. Additionally, the instructions explain how to report when a chemical identity is unknown and how to report worker exposures and disposal of PFAS.

EPA Formally Publishes TSCA Rule Requiring Comprehensive PFAS Reporting and Recordkeeping

The EPA published a final rule, Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances, also known as TSCA Section 8(a)(7). The rule requires any entity or person that has manufactured PFAS for a commercial purpose in any year since January 1, 2011 to submit PFAS uses, production volumes, byproducts, disposals, exposures, and existing information on environmental or health effects to the EPA. The rule does not include de minimis exemptions, meaning that *any* amount of PFAS that is manufactured or imported must be reported to the EPA. The rule became effective on November 13, 2023.

EPA Begins Applying PFAS Framework to Nine Pending Applications

The assistant administrator for the EPA's Office of Chemical Safety and Pollution Prevention (OSCPP) wrote to the U.S. House of Representatives that the EPA "is applying the [PFAS Framework] in its review" of nine pending significant new use notices filed by Inhance Technologies, along with "other PFAS new chemical notices currently under review and any received in the future." The PFAS Framework, announced by the EPA in late June 2023, tightens practices for reviewing new PFAS and new PFAS uses under the TSCA. In particular, the PFAS Framework focuses on data needs and the alleged potential for human exposure or environmental releases from the uses under consideration.

State Updates

Maine

Adopted LD 1591 / SP 622, which promotes the economic reuse of contaminated land, including PFAS-contaminated farmland, through renewable energy projects that guarantee financial benefits to public utility customers.

Washington

Washington regulators are requesting public comment on a draft programmatic environmental impact statement, which describes potential environmental and public health impacts associated with the collection, transport, and disposal of AFFF stock at municipal fire stations. AFFF is a firefighting foam used to extinguish flammable liquid fires, such as those involving oil or gasoline. The 45-day public comment period begins December 20, 2023, and closes February 5, 2024.

Litigation Updates

Significant Win for Chemical Manufacturers May Be Reviewed En Banc by Sixth Circuit

Hardwick v. 3M Company, et al., No. 22-3765 (6th Cir. Dec. 11, 2023).

Plaintiff Kevin Hardwick, a former firefighter, used firefighting foam containing PFAS, and now his blood contains PFAS. Hardwick sued certain PFAS manufacturers. The district court certified a class comprising essentially every Ohioan with PFAS detectable in their blood. The Sixth Circuit reversed, holding that Hardwick failed to plead that the PFAS in his blood is actually traceable to each named defendant. The panel stated: "Hardwick has not alleged facts supporting a plausible inference that any of these defendants caused these five particular PFAS to end up in his blood. ... He elides rather than meets the Supreme Court's requirements as to pleadings and traceability. Hardwick therefore lacks standing to proceed with his claim."

The circuit court reviewed the case on interlocutory appeal at the request of the PFAS manufacturer defendants. It reviewed de novo the district court's finding that Hardwick had standing. In December 2023, Hardwick challenged the panel's decision in a petition for rehearing en banc, which the defendants opposed.

Forever Chemicals in Cat Food?

Kueck v. Nestlé Purina PetCare Co., No. 3:23-cv-05962 (N.D. Cal. Nov. 17, 2023).

In this putative class action, pet owner plaintiffs allege that Purina falsely advertises its cat food products as healthy when the cat food allegedly contains PFAS because of the packaging. For example, the Cat Chow Complete Chicken product says it contains the "cornerstones of nutrition," is "100% Complete & Balanced," and is "formulated to help cats live a long, healthy life."

The plaintiffs allege that laboratory test results show that Purina's packaging contains more PFAS than other pet food brands.

Chemical Companies' Fight to Protect Settlement Terms Continues

E.I. du Pont Nemours & Co., et al. v. City of Rome, Georgia, et al., No. A24E0033 (Ga. Ct. App. Nov. 20, 2023).

The Georgia Court of Appeals granted an emergency motion filed by manufacturers seeking a stay of a trial court order requiring the disclosure of financial terms of settlement agreements resolving claims that the entities were responsible for contaminating the City of Rome, Georgia's drinking water with PFAS. As part of their motion, the companies argued that the trial court erred by failing to conclude that the financial terms were "trade secrets" excluded from disclosure under the Georgia Open Records Act. These entities further argued that, if a stay were not issued, the financial terms would be disclosed and their appeal would be moot. The Georgia Court of Appeals granted the motion without explanation.

Ohio Resolves PFAS Litigation Tied to West Virginia Facility

State of Ohio v. E.I. du Pont de Nemours & Co., et al., No. 18OT32 (Ohio Ct. Comm. Pleas Nov. 29, 2023).

Three chemical manufacturers agreed to pay the State of Ohio \$100 million to resolve litigation arising out of claims that the entities caused PFAS contamination at a facility in neighboring Parkersburg, West Virginia. Eighty percent of the settlement will be allocated to restoring natural resources related to the operation of the facility, 16% will be used to address alleged damages caused by PFAS-containing firefighting foam, and the remaining 4% will be put toward mitigation of alleged damage to natural resources. The settlement concludes litigation that began in 2018.

U.S. Supreme Court Declines Review of PFAS Case

E.I. du Pont de Nemours & Co. v. Abbott, No. 23-13 (U.S. Nov. 20, 2023).

The U.S. Supreme Court denied review of a case that involved questions of when rulings in multidistrict litigation can prevent relitigation of certain issues. DuPont asked the Supreme Court to review a 2-1 ruling from the Sixth Circuit that applied collateral estoppel to bar relitigating settled issues when it upheld PFAS negligence claims against the company, arguing the ruling would cut a critical method to resolve mass tort suits.

AFFF Manufacturers Hit with Another State Attorney General Lawsuit

Delaware v. 3M Company, et al., No. N23C-10-272 (Del. Super. Ct. Oct. 26, 2023).

The State of Delaware has sued 14 chemical manufacturers alleging that "PFAS compounds traceable to the use and disposal of AFFF products in Delaware now contaminate natural resources." Delaware's complaint specifically identifies an airport and an air force base as key sites. It highlights facts relating to its failure to warn claim, including failure to provide appropriate instructions for preventing the release of PFAS into the environment. Delaware's complaint is expressly limited to AFFF products.

Science Updates

Subsurface PFAS Distribution at Two Contaminated Sites

November 2023

[EPA Office of Research and Development](#)

An EPA study found that four PFAS substances have sufficient vapor pressure to be designated as vapor-forming chemicals. Vapor-forming chemicals warrant investigation for vapor intrusion when they occur as subsurface contaminants at sites subject to federal statutes for land cleanup, such as CERCLA and RCRA. This report represents the EPA's initial research into whether the vapor intrusion exposure pathway is pertinent to PFAS chemicals with a focus on fluorotelomer alcohols, which are common chemical intermediaries and byproducts in some PFAS manufacturing operations. According to the EPA, "the research will provide regulators information that will help them decide whether [vapor intrusion] should be evaluated at the hundreds of sites where PFAS are reasonably expected to have been released to the subsurface."

Per- and Polyfluoroalkyl Substances (PFAS) in PubChem: 7 Million and Growing

October 23, 2023

[Environmental Science & Technology](#)

In 2021, the Organisation for Economic Co-operation and Development revised the definition of PFAS to include any chemical with at least one fully fluorinated methyl or methylene carbon atom. As a result, PubChem, one of the largest open chemical databases used in suspect screening, now contains over 7 million PFAS.

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Go to the [PFAS Primer](#) for more information about PFAS and regular updates on the latest regulations, litigation, and science involving PFAS.

Learn more about our [Perfluoroalkyl & Polyfluoroalkyl Substances \(PFAS\) Team](#) and how we can help you stay ahead of the curve.

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