

ALSTON & BIRD

PFAS PRIMER

2023 Q3 Update



Federal Regulatory Updates

July 2023

EPA Seeks to Expand Ban on Items Containing PFAS from Labeling Programs

The EPA requested written comments on how it can expand two voluntary programs that highlight cleaning products with “safer” chemicals into more product categories, while also upholding pledges to ban products that contain “intentionally added” PFAS from the program. The Safer Choice program certifies products containing ingredients that meet the program’s specific human health and environmental toxicological criteria and allows companies to use its label on certified products with sister ingredients and that perform as well as prior formulations. The EPA hopes to eliminate all PFAS from the Safer Choice program by January 2024 and is contemplating expanding the program to include personal care products regulated by the FDA.

EPA Considers Requiring Facilities to Report PFAS Air Emissions Under Federal Requirements

The EPA announced proposed revisions to the federal air emissions reporting requirements (AERR), including an option to include PFAS as a required pollutant. The EPA believes the revisions are necessary because point source emissions can deposit PFAS into nearby drinking-water bodies. The agency is seeking feedback on subjecting 189 PFAS (already subject to Toxics Release Inventory reporting) to AERR. The deadline to submit written comments on the proposed revisions is October 18, 2023.

August 2023

EPA Aims to Finalize Safe Drinking Water Act PFAS Rule by the End of December 2023

The EPA announced it will promulgate its Safe Drinking Water Act PFAS proposed rule by the end of December 2023, even as water utility officials have pressured the agency to delay the proposed rule until the EPA receives new data. The proposed rule would set a maximum contaminant level for PFOA and PFOS at 4 ppt, while regulating four other PFAS (HFPO, PFNA, PFHxS, and PFBS) as a mixture using a novel “hazard index” approach.

EPA Issues Test Order Under National PFAS Testing Strategy

The EPA issued its third Toxic Substances Control Act test order requiring testing on PFAS under its National PFAS Testing Strategy, the latest action taken under the EPA PFAS Strategic Roadmap. The test order also requires certain companies to conduct and submit testing and data on HFPO-DAF, a substance used as a reactant in organic chemical manufacturing and is also known to be used to make GenX. HFPO-DAF is also widely used as a replacement for PFOA.

EPA Addresses PFAS in Its National Enforcement and Compliance Initiatives

The EPA selected and adopted its National Enforcement and Compliance Initiatives for the 2024–2027 cycle, which includes an initiative to address exposure to PFAS contamination. According to the EPA, the initiative will focus on implementing the EPA’s PFAS Strategic Roadmap to pursue those who manufactured PFAS and/or used PFAS in the manufacturing process, federal facilities that released PFAS,

and other industrial parties that may have significantly contributed to the release of PFAS into the environment. Initial goals include:

- Identifying and characterizing the extent of PFAS contamination near PFAS manufacturing/use facilities in the country, using authorities such as CERCLA, the Resource Conservation and Recovery Act, the Clean Water Act, and the Safe Drinking Water Act.
- Performing oversight of PFAS characterization and control activities at federal facilities.
- Continuing to address alleged violations and imminent and substantial endangerment situations by major PFAS manufacturers, federal facilities, and other industrial parties.

Department of Defense Requires Use of EPA Method for Sampling PFAS

The Department of Defense will require military services to use EPA Draft Method 1633 for definitive analysis of PFAS in environmental matrices other than drinking water. The EPA, in partnership with the Department of Defense, published Draft Method 1633, a single-laboratory validated method to test for 40 PFAS in media such as wastewater, surface water, groundwater, soil, biosolids, sediment, landfill leachate, and fish tissue. Other methods for analysis may be considered for screening samples to determine the presence or magnitude of PFAS concentration, but not to confirm absence.

September 2023

EPA Finalizes PFAS Reporting Rule Under the Toxic Substances Control Act

The EPA finalized its reporting and recordkeeping rule under the TSCA. Any person that manufactures (including imports) or has manufactured (including imported) PFAS or PFAS-containing articles in any year since January 1, 2011, must electronically report information about PFAS uses, production volumes, disposal, exposures, and hazards. Any entities that have manufactured (including imported) PFAS in any year since 2011 will have 18 months following the effective date to report PFAS data to the EPA. Small manufacturers whose reporting obligations under the rule are exclusively from article imports will have 24 months from the effective date to report PFAS.

The EPA did not implement a blanket articles exemption and instead sought to alleviate the burden on industry by allowing manufacturers (including importers) that do not know or cannot “reasonably obtain” certain information on PFAS in their products to indicate that on a streamlined form. The EPA expanded the proposed definition of PFAS and is providing a list of substances that meet this definition.

The rule will enable the EPA to better characterize the sources and quantities of manufactured PFAS in the United States.

EPA Sends Updated PFAS Destruction Guidance for White House Review

The EPA sent to the White House for interagency review an updated version of its interim guidance for the destruction and disposal of PFAS. The EPA’s guidance was issued in 2020 and outlined available technologies but declined to endorse or dismiss any, including incineration, while noting uncertainties and knowledge gaps that still needed to be addressed.

Consumer Product Safety Commission Requests Comments on PFAS

The Consumer Product Safety Commission is requesting the public to submit comments on PFAS in commerce or potentially used in consumer products, potential exposures associated with the use of PFAS in consumer products, and potential human health effects associated with exposures to PFAS from their use in consumer products. Written comments must be submitted by November 20, 2023.

State Updates

Alaska

On August 26, 2023, Alaska Governor Mike Dunleavy vetoed HB 51, which would have prohibited the use of firefighting foam containing PFAS under most circumstances. In his veto statement, Dunleavy said the legislation “does not provide alternatives to [firefighting foam containing PFAS] for firefighting.” If such foam “is removed from a community, residents will have no capabilities to fight a large-scale fire. When balancing the environment and life and safety of Alaskans, this bill falls short by removing a lifesaving tool from the toolbox.”

California

On September 9, 2023, California lawmakers approved AB 727 to phase out PFAS in household, industrial, and institutional cleaning products beginning in 2026 and to ban schools from purchasing artificial turf that contains PFAS beginning in 2026. Governor Gavin Newsom vetoed the bill on October 8.

On September 11, 2023, the California legislature removed from consideration AB 347, which would have required the Department of Toxic Substances Control to enforce and ensure compliance with prohibitions on the sale and distribution of food packaging containing PFAS. The bill would have also required the department to select and test samples of such products for compliance.

Maine

The Maine Department of Environmental Protection (DEP) released a “concept draft” that would prohibit the sale or distribution of food packaging intended for direct food contact and made from paper (or other plant-based fibers) to which PFAS has been intentionally added. The draft includes nine categories of food packaging that would be subject to this statewide ban: bags and sleeves, bowls, closed containers, flat serviceware, food boats, open-top containers, pizza boxes, plates, and wraps and liners. The DEP will initiate formal rulemaking with the Board of Environmental Protection in fall 2023 to incorporate these prohibitions into the existing rule.

Minnesota

The Minnesota Pollution Control Agency published a notice of request for comments on its rulemaking to establish a program for the agency to collect information about products containing intentionally added PFAS. The public comment period is September 25 – November 28, 2023.

The agency is also reviewing language in Minnesota’s new law that bans nonessential use of PFAS to identify key timelines, policy decisions, and implementation steps.

Litigation Updates

Michigan Appellate Court Overturns Michigan’s Rules for PFAS in Drinking Water

3M Company v. Department of Environment Great Lakes and Energy, No. 364067 (Mich. Ct. App. Aug. 22, 2023).

The Michigan Court of Appeals struck down some of the country’s most stringent standards for regulating PFAS in drinking water. 3M Company had argued that the rulemaking process behind those standards was invalid because the state failed to take certain costs into account. Specifically, 3M argued that Michigan’s Administrative Procedures Act required the state to calculate the cost that businesses would incur to comply with the groundwater cleanup criteria imposed by the new regulations. A divided panel of the appellate court agreed. The state environmental department has indicated that it will appeal to the state supreme court.

New Jersey Appellate Court Rejects Challenge to State’s Drinking Water and Groundwater Rules for PFAS

In Re Appeal of the New Jersey Department of Environmental Protection’s June 1, 2020, Adopted Amendments, No. A-0307-20 (N.J. Super. Ct. App. Div. Aug. 23, 2023).

A New Jersey state appellate court affirmed the New Jersey Department of Environmental Protection’s (DEP) rule amendments setting maximum contaminant levels (MCLs) for PFOA and PFOS in New Jersey drinking water and groundwater. The appellants argued that the DEP failed to comply with New Jersey’s Administrative Procedure Act (APA) because it provided an insufficient cost analysis and gave

cursory and dismissive responses to comments. Appellants also argued that the DEP adopted standards for wastewater without an approved laboratory testing method for quantifying PFOA and PFOS in wastewater. The appellate court held that the DEP complied with the APA in its proposal and adoption of the rule amendments. The court also held that in the absence of federal analytical standards, the DEP was permitted to prescribe more than one approved testing method for contaminants.

Judge Dismisses PFAS Litigation in New York for Lack of Standing

Mahoney, et al. v. U.S. Department of the Interior, et al., No. 2:22-cv-01305 (E.D.N.Y. Jul. 17, 2023).

A New York district judge dismissed a complaint brought against the federal government by four East Hampton, New York residents seeking to halt construction of the South Fork Wind Farm and the South Fork Export Cable Project, an offshore wind facility. According to the residents, the onshore trenching caused by the South Fork Export Cable Project would allegedly worsen existing PFAS contamination in their private wells. The residents maintained that the federal government was at fault for issuing permits for the project without sufficiently considering the possibility of additional PFAS contamination. The government moved to dismiss for lack of standing, explaining that while it issued permits to construct the offshore wind farm, the New York Public Service Commission was responsible for issuing permits for the onshore route of the South Fork Export Cable Project, which included the trenching that the residents complained of. Because the residents could not show causation, the government claimed the residents lacked standing. The judge agreed with the government and dismissed the complaint.

New Suit Alleges That School Uniforms Containing PFAS Pose “Health Dangers” to Children

Garland v. The Children’s Place Inc., No. 1:23-cv-04899 (N.D. Ill. Jul. 27, 2023).

A class action suit alleges that a national children’s apparel company violated Illinois’ Consumer Fraud and Deceptive Business Practices Act by knowingly designing, manufacturing, promoting, and selling school uniforms containing PFAS. According to the complaint, recent studies have shown varying levels of PFAS in school uniforms, including those sold by the defendant. At issue are failure to warn, fraudulent concealment, breach of implied warranty, and unjust enrichment claims, as well as the claim under the state’s deceptive trade practices statute.

Science Updates

The EPA is reviewing a study, “Revising the EPA Dilution-Attenuation Soil Screening Model for PFAS,” published in the *Journal of Hazardous Materials Letters*. The EPA established a soil screening model for determining soil screening levels (SSLs) under CERCLA. However, according to the study, the model does not consider the unique retention properties of PFAS and, consequently, the SSLs established with the model may not represent the actual levels that protect groundwater quality. The study proposes revisions to the standard EPA SSL model to reflect the unique properties and associated retention behavior of PFAS.

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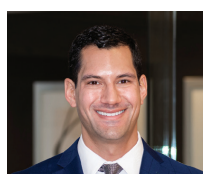
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Go to the [PFAS Primer](#) for more information about PFAS and regular updates on the latest regulations, litigation, and science involving PFAS.

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