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PFAS PRIMER

2023 Q2 Update





Federal Regulatory Updates

APRIL 2023

EPA Announces Intention to Create CERCLA Enforcement Discretion Policy for Certain PFAS

The EPA announced its intention to draft a formal enforcement discretion policy that would shield certain PFAS polluters from federal enforcement actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). If adopted, the policy would focus federal enforcement actions under CERCLA on PFAS manufacturers, federal facilities, and other entities that presently or historically caused or contributed to significant levels of PFAS contamination in the environment. The EPA announced categories of regulated entities that it would not pursue under the proposed policy, including publicly owned and operated water utilities and publicly owned and operated municipal solid waste landfills.

EPA Issues Advance Notice of Proposed Rulemaking to Inform Potential Future CERCLA Regulations

On April 13, 2023, the EPA issued an advance notice of proposed rulemaking asking for public input on potential future hazardous substance designations of PFAS under CERCLA. The notice requests public information and input about seven PFAS that the EPA is considering for potential designation as hazardous substances under CERCLA: PFBS, PFHxS, PFNA, HFPO-DA (also known as GenX), PFBA, PFHxA, and PFDA. This request follows the EPA's September 2022 proposed rule to designate two PFAS—PFOA and PFOS, and their salts and structural isomers—as hazardous substances under CERCLA.

MAY 2023

OMB Reviewing Rule to Subject PFAS to RCRA

On May 8, 2023, the White House Office of Management and Budget (OMB) began interagency review of proposed rules that would allow regulators to subject four PFAS to the Resource Conservation Recovery Act (RCRA) corrective program. The two proposed rules follow EPA Administrator Michael Regan's commitment to New Mexico Governor Michelle Lujan Grisham to write a rule to propose listing four PFAS as hazardous constituents, which would trigger "corrective action."

While the rules would subject PFAS to RCRA corrective action for the first time, they do not list these PFAS compounds as hazardous wastes, which would create cradle-to-grave liability where companies become liable for how their waste is handled from generation to disposal.

Comment Period for SDWA Rule Ended May 30, 2023

The EPA rejected requests from the public to extend the comment period on its proposed Safe Drinking Water Act (SDWA) national primary drinking water regulation to limit the amount of PFOA, PFOS, PFNA, PFHxS, PFHpS, and PFDA in drinking water. The comment period closed May 30, 2023. The rule proposes a maximum contaminant level (MCL) for PFOA and PFOS at 4 parts per trillion. The four other PFAS are regulated as a mixture using a novel "hazard index" approach that would establish an MCL at a unitless 1.0.

EPA Sends New PFAS Reporting Rule to OMB

The EPA missed the statutory deadline of January 1, 2023 to promulgate its statutorily mandated data-gathering rule for PFAS manufacturing and importing and recently sent the rule to the OMB after the EPA raised its cost estimate from \$10.8 million to \$875 million. The increase is based largely on new calculations of burdens on small companies that make or import finished articles and will have to scrutinize their supply chains for PFAS. The EPA is drafting its rule under a policy rider in the fiscal year 2020 National Defense Authorization Act, which says the EPA must enact a rule requiring “each person” that manufactured or imported PFAS after January 1, 2011 to key data on use of the chemicals and possible exposures to workers, the general public, and the environment, using data-gathering authorities in the Toxic Substances Control Act.

JUNE 2023

EPA Finalizes Rule Adding PFAS to Toxic Release Inventory

The EPA is issuing a final rule that formally incorporates nine PFAS into the Toxics Release Inventory (TRI) program, codifying additions the agency first announced in January while also signaling that those will be the only PFAS that the agency finds to meet statutory triggers for addition to the TRI in the current reporting year.

The additions of the nine PFAS became effective January 1, 2023, meaning facilities that release any of those chemicals from that date on must report to the TRI. Submissions for the program’s 2023 reporting year are due July 1, 2024.

The EPA originally announced the additions in January but is only now finalizing the regulatory changes.

EPA Extends Comment Period on Plan to Add PFAS to CERCLA Designation


The EPA is giving stakeholders more time to provide input and data on whether the agency should consider regulating additional PFAS under CERCLA beyond the two most-studied ones, PFOA and PFOS, extending the comment period by 60 days to August 11, 2023. These include PFBS, PFHxS, PFNA, HFPO-DA, PFBA, PFHxA, and PFDA. The EPA published the advance notice of proposed rulemaking on April 13, 2023, and the public comment period ended on June 12, 2023.

Designating these PFAS as CERCLA hazardous substances would trigger new release reporting requirements and give the EPA authority to require investigation and remediation of releases of these chemicals into the environment.

EPA Extends Internal Deadline to Finalize Rule to Designate PFAS Under CERCLA

The EPA extended its internal deadline, previously August 2023, until February 2024 to finalize a rule to designate PFOA and PFOS as “hazardous substances” under CERCLA. The agency’s target for proposing the addition of PFAS to the TRI, as required by the fiscal year 2020 National Defense Authorization Act, has also been delayed by seven months, while the target to finalize additional PFAS has been delayed by nine months.





The delay also gives Congress more time to respond to the proposed designation and offer statutory protections for water and wastewater utilities and other passive receivers like solid waste disposal facilities and composting facilities.

Senate EPW Leaders Introduce Bill Narrowing PFAS Definition

The U.S. Senate is floating draft legislation seeking to narrow the definition of PFAS, excluding polymer chemicals and requiring at least two fluorinated carbon atoms. The draft legislation does not include any liability exemptions for passive receivers and certain other sectors from CERCLA liability—something water utilities, the waste sector, and others have pushed for because they can be held liable under CERCLA as passive receivers of PFAS that do not contribute to contamination. The bill also makes clear that the EPA's proposed drinking water rule should include all six substances the EPA listed, rejecting pushes for the EPA to group four additional PFAS beyond PFOA and PFOS. The draft bill allows the EPA until September 2024 to finalize the drinking-water rule.

State Updates

Oregon

Oregon enacted SB 543, which prohibits the sale, offer for sale, and distribution of foodware containers containing intentionally added PFAS, beginning January 1, 2025. "Foodware container" includes bowls, plates, cups, lids, clamshells or other containers or any other items used for serving or containing prepared food." Violations can result in civil penalties that accrue daily.

Rhode Island

Rhode Island enacted legislation (2022-H 7438A, 2022-S 2044A) that amends its Toxic Packaging Reduction Act to also regulate PFAS by prohibiting the manufacture, knowing sale, or distribution of food packaging with intentionally added PFAS. Beginning January 1, 2024, manufacturers and distributors cannot offer for sale or promotional purposes in Rhode Island food packaging containing intentionally added PFAS. The law also limits the ability to use substitute materials in food packaging that present the same hazards as PFAS.

Maine

The Maine Department of Environmental Protection (DEP) has delayed until 2025 reporting requirements for PFAS manufacturers and users under the state's first-in-the-nation law banning uses of PFAS, after the governor signed legislation revising the statute to give DEP more time to develop the reporting rule. The law requires manufacturers of products with intentionally added PFAS to report the presence of PFAS in those products to DEP beginning January 1, 2025, instead of January 1, 2023. The move marks the first step by the department in implementing the new reforms, setting the stage for possible additional changes to the program.

Minnesota

In Minnesota, HF 2310, which bans PFAS in certain product types that contain “intentionally added PFAS,” became effective January 1, 2024. Product types include:

- Carpets or rugs
- Cleaning products
- Cookware
- Cosmetics
- Dental floss
- Fabric treatments
- Firefighting foam
- Food packaging
- Juvenile products
- Menstruation products
- Textile furnishings
- Ski wax
- Upholstered furniture

The ban requires, by 2026, any company selling products to the state to provide the state with information about the PFAS content in its products sold in the state. In addition, all products sold in the state must not contain any intentionally added PFAS, unless necessary for public health purposes, effective January 1, 2032.

Nevada

Nevada Governor Joe Lombardo vetoed Nevada State Bill 76, which would have established restrictions on the manufacturing and sale of products containing intentionally added PFAS. The bill was designed to include a misdemeanor penalty for failure to comply with its provisions.

Washington

Washington enacted the Toxic-Free Cosmetic Act. Beginning January 1, 2025, no person may manufacture, sell, or distribute for use in the state any cosmetic product that contains PFAS. Those who violate the Act are subject to a civil penalty not to exceed \$5,000 for each violation for a first offense and a civil penalty not to exceed \$10,000 for each repeat offense .

Litigation Updates

3M Pays \$10.3 Billion to Settle PFAS Liability with Water Systems

City of Stuart, Florida v. The 3M Co., et al., No. 2:18-cv-03487 (D.S.C. June 22, 2023).
In re Aqueous Film-Forming Foams Products Liability Litigation, No. 2:18-mn-02873 (D.S.C. June 22, 2023).

3M has reached a \$10.3 billion settlement with public water systems over drinking water contamination linked to use of aqueous film-forming foam (AFFF) containing PFAS. The landmark agreement will see the company pay for PFAS treatment and testing at water systems that have detected contamination or do so in the future, while avoiding any admission of liability. The deal is still subject to judicial approval.

A vertical strip on the left side of the page shows laboratory glassware, including a large Erlenmeyer flask and several test tubes, all containing a blue liquid. The background is a soft-focus laboratory setting.

More State AG Suits Against PFAS Manufacturers

State of Arizona v. 3M Company, et al., No. CV2023-008075 (Maricopa Cnty. Super. Ct. May 26, 2023).

State of Arkansas v. 3M Company, et al., No. 72CV-23-1583 (Washington Cnty. Circuit Ct. June 5, 2023).

State of Maryland v. 3M Company, et al., No. 24C23002528 (Baltimore City Circuit Ct. May 30, 2023).

State of Maryland v. 3M Company, et al., No. 24C23002529 (Baltimore City Circuit Ct. May 30, 2023).

State of New Mexico, et al. v. 3M Company, et al., No. D-101-CV-2023-01158 (Santa Fe Cnty. Dist. Ct. May 26, 2023).

State of Oregon v. 3M Company, et al., No. 23CV21902 (Multnomah Cnty. Circuit Ct. May 31, 2023).

Commonwealth of Pennsylvania v. EIDP Inc., et al., No. 259 MD 2023 (Commonwealth Ct. May 30, 2023).

State of Washington v. 3M Company, et al., No. 23-2-09821-8-SEA (King Cnty. Super. Ct. May 30, 2023).

Arizona, Arkansas, Maryland, New Mexico, Oregon, Pennsylvania, and Washington joined Rhode Island and other states that had previously filed lawsuits against PFAS manufacturers. Alleging harm to their natural resources and property and threats to public health and safety, these states seek to recover mounting costs associated with investigating, testing for, and remediating PFAS in drinking water and in the environment more broadly. They assert common-law tort claims such as nuisance and negligence, as well as state statutory claims under consumer protection and environmental laws.

Court Greenlights Pet Food Packaging Case

Humphrey v. The J.M. Smucker Company, No. 3:22-cv-06913 (C.D. Cal. May 22, 2023).

A putative class action against Smucker alleges that the company falsely represented that pet food products are healthy when in fact the food allegedly contains titanium dioxide and the packaging “contains (or risk containing)” PFAS. The pet owner’s claims—including consumer protection, false advertising, fraud, and negligent misrepresentation claims—survived Smucker’s motion to dismiss. As in other consumer class actions targeting PFAS in food packaging, the plaintiff in this case alleges that PFAS migrate onto the food and thereby pose health risks, yet the presence of PFAS is not disclosed to consumers.

Science Updates

Study by Harvard Researchers Says PFAS Precursors Could Contaminate Military Sites for Decades

May 15, 2023 | [“Centurial Persistence of Forever Chemicals at Military Fire Training Sites,”](#) *Environmental Science & Technology*

A study by a team of Harvard University researchers says current approaches to cleaning up contamination from PFAS-based firefighting foam, known as AFFF, at Defense Department (DOD) sites fail to target precursor chemicals that could continue to produce regulated PFAS for centuries, adding to questions about the pace of the DOD’s efforts. “The estimated PFAS reservoir in the vadose zone and modeled flux into groundwater suggest PFAS contamination above regulatory guidelines will persist for centuries without remediation,” the study says. The vadose zone is the Earth’s terrestrial subsurface that extends from the surface to the regional groundwater table.

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The researchers contend this work highlights the importance of unregulated and often overlooked precursors for total PFAS exposures near AFFF releases and their role in sustaining high concentrations of regulated terminal PFSA, especially PFBS and PFHxS. “Little is known about population-wide exposure to precursors.”

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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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