

ALSTON & BIRD

PFAS PRIMER

2023 Q1 Update



Federal Regulatory Updates

JANUARY 2023

EPA Adds Nine More PFAS to Toxic Release Inventory

The EPA has automatically added nine more PFAS chemicals to its Toxic Release Inventory reporting requirements after lifting confidential business restrictions on four of them and finalizing a toxicity value for five other substances. Facilities releasing the nine additional PFAS are now mandated to start reporting 2023 releases, with reporting forms due July 1, 2024. With these additions, there are now over 180 PFAS chemicals that regulated entities must report under the Toxic Release Inventory.

EPA Proposes Significant New Use Rule on Inactive PFAS

The EPA proposed a significant new use rule under the Toxic Substances Control Act (TSCA) that would require companies to file new applications with the agency before manufacturing, processing, or importing an estimated 300 PFAS listed as “inactive” on the TSCA inventory of chemicals in commerce. Without this proposed rule, companies could resume uses of these PFAS absent notification to and review by the EPA.

FEBRUARY 2023

EPA Announces \$2 Billion to Address Emerging Contaminants

The EPA announced the availability of \$2 billion from President Biden’s Bipartisan Infrastructure Law to address emerging contaminants, including PFAS, in drinking water across the country. The investment is allocated to states and territories and will be made available to communities as grants through the EPA’s Emerging Contaminants in Small or Disadvantaged Communities grant program.

MARCH 2023

EPA Announces Proposed National Primary Drinking Water Regulation for Six PFAS

The EPA proposed National Primary Drinking Water Regulations (NPDWR) that would establish legally enforceable maximum contaminant levels for six PFAS in drinking water: PFOA, PFOS, PFNA, HFPO-DA, PFHxS, and PFBS. This is the first NPDWR proposal for any PFAS. The EPA is also proposing to impose strict limits on PFOA and PFOS at 4 parts per trillion, a level more stringent than any state has set. The EPA would regulate the four remaining PFAS as a mixture using a novel “hazard index” approach.

The proposed rule is the first federally enforceable drinking-water regulation to address any substances from the class of thousands of PFAS. The EPA is also proposing health-based, non-enforceable maximum contaminant level goals for these six PFAS.

Proposed National Primary Drinking Water Regulation for PFAS May Cost More Than \$1.2 Billion Annually

The EPA provided its economic analysis for the proposed PFAS NPDWR. The EPA is estimating that its proposal setting drinking-water standards for six PFAS may cost more than \$1.2 billion annually and affect as many as 6,300 drinking-water systems, though an agency analysis finds that quantifiable health benefits generally exceed those costs. While the EPA says the rule’s alleged health benefits will yield as much as \$1.23 billion annually, the agency was unable to fully quantify a range of additional health benefits, both cancer and non-cancer benefits, that the agency believes are significant. The EPA acknowledges the costs may be higher than it estimates.

Office of Management & Budget Clears Plan for Public Input on Designating Additional PFAS as Hazardous Substances

The White House Office of Management and Budget cleared the EPA’s plan to seek public input on whether the agency should consider designating additional PFAS, beyond PFOA and PFOS, as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act.

If the EPA moves ahead with a proposed rule to designate additional PFAS, and the proposed rule is ultimately adopted, the agency will be able to order cleanups and recover costs for a range of PFAS. The designation would also trigger contribution suits by responsible parties against other parties.

Senate Proposes Bill to Coordinate PFAS Research and Development

The U.S. Senate introduced a bipartisan bill, S. 82, to mandate the addition of the Consumer Product Safety Commission on a White House–led interagency work group that coordinates federally funded PFAS research and development. The purpose of the bill is to ensure future federal efforts on PFAS are viewed through a “product safety lens.” The interagency panel was formed under the National Defense Authorization Act for Fiscal Year 2021 to improve coordination among federal agencies to address PFAS contamination.

State Updates

JANUARY 2023

Massachusetts Introduces Legislation to Ban Use of PFAS

Massachusetts has introduced legislation that would ban the use of PFAS in food packaging, children's products, fabric treatments, cookware, personal care products, cookware, carpets and rugs, upholstered furniture, and firefighting protective gear beginning January 1, 2026. The ban would extend to other products on January 1, 2030. The legislation would regulate PFAS as a single class of chemicals and would require the Department of Environmental Protection to restrict industry discharges of the chemicals to groundwater and surface water.

The bill would also establish a cleanup trust fund to distribute settlements linked to ongoing and future litigation against chemical manufacturers, setting the bill apart from proposals in other states to ban PFAS.

Oklahoma Introduces Legislation Requiring Disclosure of Biosolids with PFAS

Oklahoma has introduced legislation that would require disclosure of biosolids containing PFAS when labeling products for sale and distribution. The bill would also require the state to publish and annually update a map of biosolid land application property sites on a publicly available website.

FEBRUARY 2023

New York Introduces Legislation to Broadly Regulate PFAS

New York has introduced three pieces of legislation that would regulate PFAS as a single class, including by: (1) requiring the disclosure of products containing PFAS and by January 1, 2027 prohibiting the sale of products containing PFAS unless the state has determined that the use is unavoidable; (2) prohibiting the sale or offer for sale of any cosmetic product or personal care product containing PFAS substances; and (3) phasing out the sale of products that contain regulated amounts of PFAS or intentionally added PFAS by January 1, 2024.

MARCH 2023

New York Finalizes Water Quality Criteria for PFOS and PFOA

The New York State Department of Environmental Conservation has issued new water quality criteria for PFOS, setting the guidance value at 2.7 parts per trillion – a level below both the

state's current drinking water standard for the PFAS chemical and the EPA's 4 parts per trillion maximum contaminant level proposal. The department has also finalized proposed values for PFOA at 6.7 parts per trillion.

Litigation Updates

JANUARY 2023

District Court Stays Litigation Challenging de Minimis Exemption for PFAS TRI Reporting

National PFAS Contamination Coalition, et al. v. U.S. Environmental Protection Agency, et al., No. 1:22-cv-00132 (D.D.C. Jan. 3, 2023).

The U.S. District Court for the District of Columbia stayed litigation challenging de minimis exemptions for PFAS Toxic Release Inventory (TRI) reporting. The plaintiff environmentalists' suit alleges the EPA's rule allowing the de minimis exemption to apply to PFAS violates the Emergency Planning and Community Right-to-Know Act, the federal law authorizing TRI, as well as the National Defense Authorization Act for Fiscal Year 2020, and allows companies to allegedly evade reporting PFAS that would otherwise be disclosed. In its January 3, 2023 order, the court cited judicial economy and unlikely harm to plaintiffs in granting the EPA's stay request. The EPA's primary argument in support of its motion to stay was that the agency is currently engaged in rulemaking, the outcome of which would likely moot the dispute.

Sports Drink Company Sued for Use of PFAS

Bedson v. BioSteel Sports Nutrition Inc., No. 1:23-cv-00620 (E.D.N.Y. Jan. 27, 2023).

Customers who purchased BioSteel Sports Nutrition's raspberry sports drink filed a lawsuit against the company, alleging third-party testing of the sports drink indicated that PFAS are present in the drinks and BioSteel knew or should have known. The lawsuit alleges the company made false and deceptive claims by marketing the drinks as "eco-friendly" and "good for you and the environment" and using well-known professional athletes in its campaign.

FEBRUARY 2023

Prospective Class Action Alleges Butter Sticks Contain PFAS

Winans v. Ornua Foods North America Inc., No. 2:23-cv-01198 (E.D.N.Y. Feb. 14, 2023).

A purchaser of the Irish butter brand Kerrygold has filed a prospective class action in New York, alleging its branding of the butter as "pure Irish butter" falsely leads consumers to believe the products do not contain PFAS.

Prospective Class Action Alleges Pomegranate Juice Contains PFAS

Hernandez v. The Wonderful Company LLC, No. 1:23-cv-01242 (S.D.N.Y. Feb. 14, 2023).

A prospective class action was filed on behalf of customers of Pom Wonderful 100% Pomegranate Juice, alleging the advertising of the beverage as “all natural” misleads customers to believe the products do not contain PFAS. The complaint alleges the customers would not have purchased the product if they had known it contained PFAS or would have purchased it only for a lower price.

MARCH 2023

New Hampshire Supreme Court Denies Plaintiffs’ Attempt to Recover Medical Monitoring Costs

Brown v. Saint-Gobain Performance Plastics Corp. No. 1:16-cv-00242 (D.N.H. Mar. 24, 2023).

The New Hampshire Supreme Court has rejected claims by plaintiffs that exposure to PFAS and the possibility of increased health risks require that a plastics manufacturer using the chemicals pay for medical monitoring of local residents, citing the state legislature’s failure to enact such a requirement.

The ruling, which was prompted by a federal district court’s request, could deal a blow to plaintiffs in other lawsuits seeking medical monitoring, among other measures, as a remedy for exposure to PFAS.

The New Hampshire Supreme Court said the question of whether the possibility of health risks is a cause of action for remedy was a matter best resolved by lawmakers, who had failed to enact such a requirement as recently as several years ago.

Science Updates

Toxicology Assessment for Six PFAS-Free Aqueous Film Forming Foam (AFFF) Products

February 2023 | *Integrated Environmental Assessment and Management*

A new study by U.S. Army researchers on the alleged toxicity of PFAS-free firefighting foams has identified tradeoffs among the products examined for short-term exposure risks, even while minimizing the likelihood of environmental persistence and bioaccumulation, underscoring the challenges Department of Defense acquisition officials face in phasing out use of the chemicals.

Demonstration and Validation of Environmentally Sustainable Methods to Effectively Remove PFAS from Fire Suppression Systems

March 23, 2023 | Department of Defense Strategic Environmental Research and Development Program and Environmental Security Technology Certification Program

Research funded by the Department of Defense has demonstrated a promising technology for flushing PFAS from firefighting systems in air hangars and firetrucks, which could be used to address not only a congressionally mandated ban on the department’s use of the chemicals in firefighting foam but also a growing number of state restrictions on the use of the foams at non-military facilities.

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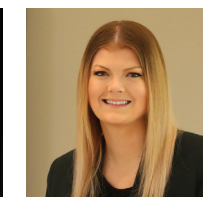
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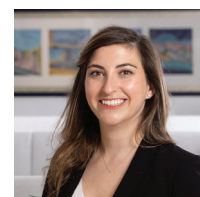
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Go to the [PFAS Primer](#) for more information about PFAS and regular updates on the latest regulations, litigation, and science involving PFAS.

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

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