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2024 Q3 Update

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Federal Regulatory Updates

SEPTEMBER 2024

EPA Delays Deadline for Submitting Reporting Data Under TSCA

The EPA has finalized reporting and recordkeeping requirements for PFAS under the Toxic Substances Control Act. 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 to the EPA. The reporting period was scheduled to begin on November 12, 2024. The EPA has now extended initiation of the reporting period to July 11, 2025. The extension is due to increased agency responsibilities, technical difficulties, and budgeting shortfalls, according to the EPA. Businesses subject to this rule will now have additional time to come into compliance and make certain they are collecting accurate data on the manufacturing and importing of PFAS. Despite this extension, businesses must remain diligent and thorough in their data collection and reporting efforts.

AUGUST 2024

States Petition EPA to List PFAS as Hazardous Air Pollutants

North Carolina, New Jersey, and New Mexico filed a petition asking the EPA to list PFOA, PFOS, PFNA, and HFPO-DA (also known as GenX) as hazardous air pollutants (HAPs) under Section 112 of the Clean Air Act (CAA). The EPA promulgates emissions standards for the list of HAPs in Section 112(b)(1), and Section 112(b)(2) explicitly authorizes the EPA to add pollutants to the list of HAPs based on periodic reviews. If granted, this request would permit the EPA to regulate the releases of these chemicals under the agency's air toxics rule and would constitute the first federal agency program to regulate PFAS in air.

State Updates

CALIFORNIA

September 2024: The California Office of Environmental Health Hazard Assessment (OEHHA) is recommending that the State Water Resources Control Board establish the notification level for PFHxA at a drinking-water concentration of 1 part per billion, equivalent to 1 microgram per liter. A notification level is a concentration of a contaminant in drinking water that would pose no significant health risk to individuals consuming the water daily over a lifetime. If adopted, the notification level would trigger various notification requirements to drinking-water customers when the level is exceeded. According to OEHHA, "it is likely that PFHxA has been used in various industrial and consumer products since the 1970s," including food contact materials.

MASSACHUSETTS

August 2024: Passed S.2902, which requires a manufacturer that sells firefighting personal protective equipment containing PFAS chemicals to provide written notice to the purchaser at the time of sale.

NEW HAMPSHIRE

August 2024: The governor signed HB 1649, which bans, beginning on January 1, 2027, the selling of certain categories of products that were made for consumers after the effective date and contain intentionally added PFAS and subjects the owners and operators of facilities releasing PFAS resulting in specified levels of contamination to the state's strict liability statute.

July 2024: The governor signed HB 398, which requires sellers of real property to provide the buyer with a form PFAS notification.

Litigation Updates

SEPTEMBER 2024

Court Rejects Attempt to Dispose of Suit Alleging "Compostable" Products Contain PFAS

Little v. NatureStar North America LLC, No. 1:22-cv-00232 (E.D. Cal. Sept. 11, 2024).

A California plaintiff survived a motion to dismiss her claims that NatureStar North America and Target Corporation should be liable for the allegedly false and deceptive business practice of marketing tableware and food storage bags—which allegedly contain PFAS—as "compostable" when PFAS cannot be composted. The defendants' motion challenged the plaintiff's standing on three grounds: (1) lack of a concrete injury; (2) ripeness; and (3) failure to support injunctive relief. Ultimately, the court agreed with the defendants' injunctive relief argument—because the plaintiff failed to allege that she was likely to purchase the product in the future—but the court also noted that this deficiency can be cured and therefore granted the plaintiff leave to amend. The court rejected the defendants' concrete injury and ripeness arguments, ruling that the plaintiff properly pleaded the "well-established" concrete injury of paying a premium for a falsely advertised product and further ruling that the plaintiff's claims were ripe because they presented a ripe legal question about the FTC Green Guides' definition of "compostable."

Wisconsin Supreme Court Will Review Decision Striking Down PFAS Hazardous Substance Listing

Wisconsin Manufacturers and Commerce Inc. v. Wisconsin DNR, No. 2022AP000718 (Wis. Sept. 11, 2024).

The Wisconsin Supreme Court has agreed to review a landmark ruling that struck down Wisconsin's hazardous substance listing for PFAS, which effectively blocked regulators from requiring cleanup of PFAS without first completing a rulemaking. The Wisconsin Court of Appeals invalidated the state Department of Natural Resources' policies on PFAS as hazardous substances under the state's long-standing Spills Law and voided enforcing thresholds or requirements for the substances and the department's liability waiver policy. The court of appeals agreed with the lower court that these policies are rulemakings that did not follow procedural rulemaking requirements.

Sports Drink Manufacturer Can't Avoid PFAS Suit

Castillo v. Prime Hydration LLC, No. 3:23-cv-03885 (N.D. Cal. Sept. 9, 2024).

A California district court dismissed most—but not all—of a plaintiff's claims in a false advertising suit against Prime Hydration, the manufacturer of a sports beverage. The plaintiff alleged that the beverage's product label—which included claims such as "refresh, replenish, and refuel" and "250 mg BCAAs, B Vitamins, antioxidants, and 835 mg electrolytes"—was false and misleading because the label led consumers to believe that the product was healthy, despite third-party testing allegedly showing that the beverage contained "material levels of PFAS" that exceeded the EPA's health advisory levels. For its part, the court determined that a reasonable consumer would not be misled by the "healthy" label claims and consequently dismissed the plaintiff's claims for violations of California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act. However, the court determined that the plaintiff's breach of implied warranty claim should survive, citing the testing data alleged, as well as the plaintiff's allegations that the presence of PFAS compromised the product's safety and fitness for consumption.

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EPA Moves to Dismiss Lawsuit Challenging Failure to Regulate PFAS in Biosolids

Farmer v. Environmental Protection Agency, No. 1:24-cv-01654 (D.D.C. Sept. 9, 2024).

The EPA has moved to dismiss a lawsuit brought by farmers from Texas and Maine who allege the agency has a nondiscretionary duty to regulate PFAS in sewage sludge under the Clean Water Act. They allege the EPA is also violating the Administrative Procedure Act by failing to regulate PFAS in this manner as well as arguing that the agency's failure to identify the presence of certain PFAS is arbitrary and capricious. The EPA argues the Clean Water Act gives the agency discretion on whether to identify and regulate toxic pollutants in sewage sludge. In addition, the EPA contends the plaintiffs have not identified any Clean Water Act section that requires the EPA to regulate PFAS in the manner the plaintiffs urge, and the plaintiffs therefore failed to meet Clean Water Act citizen suit requirements.

AUGUST 2024

Plaintiffs Roll Out a New Lawsuit Against Chemical Manufacturers

Peterson v. 3M Co., No. 0:24-cv-03497 (D. Minn. Aug. 30, 2024).

A putative class action on behalf of consumers who have allegedly been exposed to PFAS found in carpets and rugs wasfiled in a Minnesota district court. The plaintiffs allege that PFAS confer stain-, soil-, and water-resistance qualities to carpets and rugs and that the defendants sold PFAS products to carpet companies for that purpose but without disclosing the toxicity of the products. The putative class is limited to those who purchased carpeting, had the carpeting installed before January 1, 2020, still own the building where the carpeting was installed, and have not removed the carpeting. The complaint includes a whopping 127 tort-related claims under various states' laws.

Seventh Circuit Remands PFAS Contamination Suit to State Court

Illinois ex rel. Raoul v. 3M Co., No. 23-3031 (7th Cir. Aug. 7, 2024).

The Seventh Circuit affirmed an Illinois district court order remanding the State of Illinois's PFAS-contamination lawsuit against 3M back to state court. 3M originally removed the case to federal court based on the federal officer removal statute based on the belief that some of the contamination at issue came from PFAS-containing AFFF that 3M provided to the U.S. Army at the Rock Island Arsenal, which is located just 25 miles downstream from 3M's Cordova Facility. While the Seventh Circuit acknowledged that 3M might have had a "colorable federal defense" justifying removal because of the "mixed PFAS contamination," the state "clearly and unequivocally" conceded at oral argument that it would not seek relief for the mixed PFAS contamination, resulting in a lack of jurisdiction for the district court.

JULY 2024

Third Circuit Dismisses Chemical Company's Attempt to Invalidate EPA Water Advisory

Chemours Co. FC LLC v. United States EPA, No. 22-2287 (3rd Cir. July 23, 2024).

The Third Circuit dismissed Chemours's legal challenge to the EPA's health advisory for the PFAS chemical HFPO-DA. While Chemours argued that the health advisory violated the Administrative Procedure Act and the nondelegation doctrine, the Third Circuit did not reach those conclusions and instead dismissed the action for lack of subject-matter jurisdiction. For the health advisory to be subject to review under the Safe Drinking Water Act, as Chemours argued, the health advisory would have to qualify as a "final action." And ultimately the Third Circuit reasoned that the health advisory, which is not enforceable and non-regulatory, was not a final action because it did not directly bring about legal consequences or impose requirements or prohibitions.

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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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