

# PFAS DESKBOOK

MAY 2024 UPDATE



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# PFAS Deskbook Release Update – May 2024

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The *PFAS Deskbook* introduces lawyers and policymakers to the evolving state of PFAS regulation and litigation. Unlike a standard reference guide orienting readers to a single statute, the *PFAS Deskbook* covers how all the major federal environmental laws apply to PFAS chemicals. With a review of state laws as well as an analysis of the early lawsuits seeking to assign responsibility for addressing the nation's PFAS contamination crisis, the book is an invaluable resource for legal practitioners working on these issues.

Since the completion of the *PFAS Deskbook*'s final draft in mid-2023, the legal landscape for PFAS regulation and management has continued to shift. The authors will release regular updates summarizing major changes and events in PFAS litigation, legislation, and regulation. In conjunction with the Environmental Law Institute, the authors are also hosting Monthly PFAS Briefing on a variety of topics. You can learn more about those events at the following link: <https://www.eli.org/events-calendar>.

## Chapter 2

### *Amendments to New Chemical Review under Toxic Substances Control Act and Attempts at Enforcement Actions*

On May 26, 2023, the U.S. Environmental Protection Agency (EPA) proposed amendments to the procedure for reviewing new chemicals under the Toxic Substances Control Act (TSCA).<sup>1</sup> The agency proposed changes to the review process applicable to all chemicals, but also announced particular amendments to the regulation of PFAS. In particular, EPA proposed to make PFAS categorically ineligible for the low volume exemption and the low release and exposure exemption. As a result, the proposed rule would require all new PFAS to be reviewed through the premanufacture notice process and for applicants to fulfill the attendant data submission obligations, as summarized in Chapters 2 and 3. EPA is also considering whether to revoke low volume exemptions for complying with the premanufacture notice requirements that EPA has already granted to PFAS manufacturers.<sup>2</sup>

EPA also attempted to take enforcement actions based on the Significant New Use Rule for long-chain perfluoroalkyl carboxylates, which was finalized in 2020 and summarized in Chapters 2 and 3.<sup>3</sup> In December 2023, EPA ordered Inhance Technologies, Inc., a company that reinforces plastic packaging for food and household goods through fluorination, to stop creating PFAS through its fluorination process.<sup>4</sup> One order, issued under 15 U.S.C. § 2604(f), directed Inhance not to produce three PFAS based on EPA's determination that the chemicals were highly toxic and present unreasonable risks.<sup>5</sup> The second order, issued under 15 U.S.C. § 2604(e), directed Inhance not to produce another six PFAS chemicals that could present an unreasonable risk of injury to health or to the environment.<sup>6</sup> Inhance, which submitted Significant New Use Notices for the nine PFAS in compliance with the new rule, appealed the order, arguing that the

1. EPA, Updates to New Chemicals Regulations under the Toxics Substances Control Act (TSCA), 88 Fed. Reg. 34,100 (May 26, 2023).
2. 88 Fed. Reg. at 34,113-14.
3. EPA, Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances; Significant New Use Rule, 85 Fed. Reg. 45,109 (July 27, 2020).
4. EPA, *EPA Order Issued to Inhance Technologies Related to Long-Chain PFAS Significant New Use Notices* (Dec. 14, 2023), <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/epa-orders-issued-inhance>.
5. EPA, *TSCA Section 5(f) Order for a Significant New Use of Certain Chemical Substances, issued to Inhance Technologies, LLC* (Dec. 1, 2023), [https://www.epa.gov/system/files/documents/2023-12/sn-23-0002-0004-0005\\_order-signature-copy\\_12-01-2023\\_marked\\_redacted.pdf](https://www.epa.gov/system/files/documents/2023-12/sn-23-0002-0004-0005_order-signature-copy_12-01-2023_marked_redacted.pdf).
6. EPA, *TSCA Section 5(e) Order for a Significant New Use of Certain Chemical Substances, issued to Inhance Technologies, LLC* (Dec. 1, 2023), [https://www.epa.gov/system/files/documents/2023-12/sn-23-0003-0006-0008-0011\\_order-signature-copy\\_12-01-23\\_marked\\_redacted.pdf](https://www.epa.gov/system/files/documents/2023-12/sn-23-0003-0006-0008-0011_order-signature-copy_12-01-23_marked_redacted.pdf).

regulatory scheme improperly regulates the production of PFAS that the company has created through its fluorination process for forty years.<sup>7</sup>

On March 21, 2024, the Fifth Circuit vacated the orders on the grounds that EPA lacked statutory authority to issue them.<sup>8</sup> The court observed that EPA is empowered to regulate new chemicals and significant new uses of chemicals under Section 5 of TSCA, and to regulate all chemicals (not just new chemicals or significant new uses of existing chemicals) under Section 6. Inhance argued the orders, which were issued under Section 5 of TSCA, were invalid because its fluorination process, used by the company since 1983, was not a “significant new use” of PFAS. EPA countered that Inhance’s fluorination process was indeed “new” in the sense that the process was not previously known to EPA. The Fifth Circuit sided with the company, rejecting EPA’s interpretation of “new,” holding that the orders should have been issued under Section 6 of TSCA, not Section 5.

### *Closing a Reporting Loophole in the Toxics Release Inventory*

Chapter 2 described the Toxics Release Inventory (TRI) program under the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11001 et seq. The TRI program requires covered facilities to report on certain chemicals it uses or produces, and also requires information on all chemical releases into the environment. The TRI list includes 196 PFAS, including seven that EPA announced it would add to the list in January 2024.<sup>9</sup>

Additionally, EPA closed the so-called TRI reporting loophole for small releases of PFAS. That wrinkle in the reporting framework meant that many facilities that used small quantities of PFAS in mixtures did not qualify for reporting. This designation for PFAS became the subject of litigation by non-governmental organizations.<sup>10</sup> On October 31, 2023, EPA published a final rule adding PFAS to the list of Chemicals of Special Concern.<sup>11</sup> As a result, facilities handling such chemicals are no longer eligible for a de minimis exemption that allows regulated entities to refrain from reporting releases if those releases represent less than 1 percent of the total mixture released. The de minimis exemption permitted releases to remain unreported where, though the concentration of PFAS released was low, the quantity had the potential to cause harm. The EPA also removed PFAS’ eligibility for an equivalent exemption from the Supplier Notification Requirements. As a result, suppliers must inform purchasers if mixtures or products contain PFAS on the TRI list. This rule change will ensure that entities purchasing chemicals or other products containing even small quantities of regulated PFAS are informed of such chemicals’ presence, thereby helping such entities comply with their own TRI reporting obligations. These obligations apply to facilities that import, process, or otherwise use over 100 pounds of a regulated PFAS per year.

### *Listing PFAS as Hazardous Constituents under RCRA and Expanding RCRA’s Reach*

Chapter 2 previewed two anticipated rulemakings by EPA that have since been formally proposed. These proposed rules, which were both published on February 8, 2024, would add certain PFAS as “hazardous constituents” under RCRA and clarify RCRA’s applicability to emerging contaminants.<sup>12</sup> These proposed rulemakings are part of the federal government’s gradual steps to regulate PFAS under the nation’s hallmark environmental laws.

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7. Petition for Review, *Inhance Techs. v. EPA*, No. 23-60620 (5th Cir. Dec. 8, 2023).

8. *Inhance Techs. v. EPA*, 96 F.4th 888 (5th Cir. 2024).

9. EPA, *EPA Requires Toxics Release Inventory Reporting for Seven Additional PFAS* (Jan. 9, 2024), <https://www.epa.gov/newsreleases/epa-requires-toxics-release-inventory-reporting-seven-additional-pfas>. The 2020 National Defense Authorization Act, Pub. L. No. 116-92, § 7321(c), 133 Stat. 1198, 2278-79 (2019), mandates that PFAS chemicals be automatically added to the TRI annually after EPA finalizes a toxicity value for the chemical.

10. *National PFAS Contamination Coalition et al. v. U.S. EPA*, Case 1:22-cv-00132 (D.D.C. filed Jan. 20, 2022).

11. EPA, *Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notifications for Chemicals of Special Concern; Community Right-to-Know Toxic Chemical Release Reporting*, 88 Fed. Reg. 74,360 (Oct. 31, 2023).

12. EPA, *Listing of Specific PFAS as Hazardous Constituents*, 89 Fed. Reg. 8606 (Feb. 8, 2024) (listing: PFOA; PFOS; PFBS; HFPO-DA or GenX; PFNA; PFHxS; PFDA; PFHxA; and PFBA); EPA, *Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units*, 89 Fed. Reg. 8598 (Feb. 8, 2024).

The first proposed rule, listing nine PFAS as “hazardous constituents,” would directly impact only facilities that treat, store, or dispose of hazardous wastes (TSDFs). The proposal adds these PFAS compounds to the list of chemicals falling within the corrective action rules to which TSDFs are subject.<sup>13</sup> As a result, any releases of these PFAS from solid waste management units, or “SWMUs,” at the TSDF would need to be addressed under the RCRA Corrective Action Program, which is summarized in Chapter 2. However, because the rulemaking does not list the PFAS compounds as hazardous wastes, only facilities that are already TSDFs by virtue of handling hazardous wastes will be impacted; no facility will newly become a TSDF if these PFAS compounds are listed as hazardous constituents.<sup>14</sup> Accordingly, the proposed rule would also not subject compounds to RCRA’s “cradle to grave” regulatory system that requires the tracking of designated hazardous wastes. But this listing rule is a step in that direction. EPA notes in the rulemaking that “this hazardous constituent listing would form part of the basis for any future action the Agency may take to list these substances as a hazardous waste.”<sup>15</sup> Listing these PFAS as hazardous wastes would also automatically trigger coverage under CERCLA.<sup>16</sup>

In the second proposed rule, EPA would expand the agency’s authority to require investigation and cleanup under the Corrective Action Program for wastes that, while not formally listed as “hazardous waste” under RCRA, nonetheless meet the Act’s statutory definition of “hazardous waste.”<sup>17</sup> In the past, the Corrective Action Program has required substances targeted for cleanup to be designated as a hazardous waste pursuant to the regulatory requirements under Subtitle C of RCRA. The new interpretation would allow EPA to initiate cleanups for substances that meet the statutory definition of “hazardous waste” without having to first list those substances as hazardous wastes or constituents through the regulatory process. That interpretation would provide EPA with greater latitude to respond to emerging contaminants before engaging in a rulemaking to list such contaminants as hazardous wastes or constituents under RCRA. The Agency could mandate corrective action even where a particular contaminant has not been listed under the regulations. Therefore, this rule could force TSDFs to address thousands of other PFAS beyond the nine proposed as hazardous constituents.

### *Dismissal of the Personal Injury MDL*

Chapter 2 addressed the longstanding DuPont personal-injury MDL out of the U.S. District Court for the Southern District of Ohio. One of the last cases remaining in that MDL deserves mention.

On November 27, 2023, the Sixth Circuit vacated a class certification and remanded for dismissal of the case, illustrating some of the pitfalls of class actions as a vehicle for obtaining medical monitoring of health risks from PFAS.<sup>18</sup> Kevin Hardwick, a former firefighter with trace amounts of five PFAS in his bloodstream but with no symptoms or illnesses therefrom, filed suit against 10 PFAS manufacturers in the *In re E. I. Du Pont de Nemours and Company C-8 Personal Injury Litigation*, MDL No. 2433 in the U.S. District Court for the Southern District of Ohio.<sup>19</sup> Seeking medical monitoring and the creation of a “PFAS Science Panel” to study the results of such medical monitoring, Hardwick moved to certify a nationwide class of any person with 0.05 parts per trillion (ppt) or more of PFOA and 0.05 ppt or more of any other PFAS in their blood serum.<sup>20</sup> The district court certified a more limited class covering only such individuals in Ohio, reasoning that not every state in the country would recognize Hardwick’s theory of injury—harm through increased risk of certain diseases.<sup>21</sup>

13. 42 U.S.C. § 6924(u), (v).

14. 89 Fed. Reg. at 8610.

15. *Id.* at 8609.

16. 40 C.F.R. § 302.4.

17. *Compare* 42 U.S.C. § 6903(5) (defining “hazardous waste” under RCRA), *with* 40 C.F.R. § 261.11(a) (establishing the requirements for listing a solid waste as a “hazardous waste” under Subpart C of RCRA); 89 Fed. Reg. at 8600.

18. *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 87 F.4th 315 (6th Cir. 2023).

19. *Hardwick v. 3M Co.*, 589 F. Supp. 3d 832 (S.D. Ohio 2022), motion to certify appeal granted sub nom. *In re E.I. DuPont de Nemours & Co. C-8 Pers. Inj. Litig.*, No. 22-0305, 2022 WL 4149090 (6th Cir. Sept. 9, 2022), and vacated and remanded sub nom. *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 87 F.4th 315 (6th Cir. 2023).

20. *Hardwick*, 589 F. Supp. 3d at 842–44.

21. *Id.* at 847.

The Sixth Circuit vacated the class certification and remanded the case with instructions to dismiss for lack of standing.<sup>22</sup> “Seldom is so ambitious a case filed on so slight a basis,” the court wrote.<sup>23</sup> Specifically, the court determined that Hardwick had failed to show that his purported injury was fairly traceable to each of the 10 manufacturers he had named in his complaint, having only in general terms pleaded that “Defendants” collectively had manufactured and distributed “one or more PFAS materials, including in Ohio and this District, in such a way as to cause the contamination of Plaintiff’s and the class members’ blood[.]”<sup>24</sup> Accordingly, the court ruled, Hardwick lacked standing to sue the defendants.

Dismissals for lack of standing are without prejudice, so Hardwick could amend his complaint with specific allegations connecting each manufacturer to the PFAS detected in his blood. In practice, however, furnishing this type of causal evidence could be a herculean and even impossible task. Although certain PFAS are uniquely connected to a single manufacturer, many PFAS have been manufactured by multiple companies. Unless the PFAS in Hardwick’s blood was distinctive, or there is other sufficient contextual evidence (for example, where the PFAS exposure is related to a specific manufacturing site), the obstacle of traceability could pose an insurmountable barrier to reviving this class action for medical monitoring.

## Chapter 3 Updates

### *New Toxic Substances Control Act PFAS Reporting Rule*

In Chapters 2 and 3, we described the Toxic Substances Control Act (TSCA), which provides several mechanisms to regulate the manufacture, use, and import of chemicals, as well as products that contain those chemicals. At the time, Congress had adopted a provision in the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA) that required EPA to adopt a PFAS regulation under TSCA §8(a) no later than January 1, 2023, to collect information for a dataset on PFAS manufacturing and importation in the U.S. EPA missed the deadline, but eventually published its new reporting rule on October 11, 2023.<sup>25</sup>

The new rule, TSCA §8(a)(7), also referred to as the PFAS Reporting Rule, creates extensive compliance obligations for regulated entities. The rule requires all manufacturers and importers of products containing PFAS to report both the characteristics and quantity of PFAS in their products to EPA.<sup>26</sup> The rule broadly covers manufacturers of PFAS chemicals as well as manufacturers of consumer products and importers of articles containing PFAS. The reporting requirements apply to any company that has manufactured or imported a product containing PFAS between January 1, 2011, and December 31, 2022.<sup>27</sup> There is no small business exemption, and the rule provides only limited exclusions.<sup>28</sup> Businesses subject to the rule must also retain records documenting the reported information for at least five years after the end of the submission period.<sup>29</sup>

Reports under TSCA §8(a)(7) must contain the following: company and plant site information, chemical-specific information, categories of use and concentration ranges, manufactured concentrations and amounts, byproduct reporting, environmental and health effects, worker exposure data, and disposal data. Failure to provide reportable information under the rule may expose the reporting entity to civil and criminal penalties under TSCA. Violations could result in penalties that exceed \$45,000 per day, per violation.<sup>30</sup>

22. In re E. I. du Pont, 87 F.4th at 321.

23. *Id.* at 318.

24. *Id.* at 321 (internal quotation marks omitted).

25. EPA, Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances, 88 Fed. Reg. 70,516 (Oct. 11, 2023).

26. The rule employs a structural definition for defining PFAS: any substances that includes the following structure, “R-(CF<sub>2</sub>)-C(F)(R’)R”, in which both the CF<sub>2</sub> and CF moieties are saturated carbons and none of the R groups (R, R’ or R”) can be hydrogen.” *Id.* at 70,518. This definition encompasses 1,462 PFAS chemicals. *Id.* at 70,519.

27. *Id.* at 70,516.

28. Exclusions include when PFAS is produced solely for use as a pesticide, or in food, in food additives, drugs, cosmetics, or medical devices, or when it is found in municipal waste. 15 U.S.C. § 2602(2); 88 Fed. Reg. at 70,531.

29. 88 Fed. Reg. at 70,558 (to be codified at 40 C.F.R. § 705.25).

30. See 15 U.S.C. §§ 2614, 2615(a)(1); 40 C.F.R. § 19.4. The exact penalty would vary based on the adjustment factors outlined in the C.F.R. as well as the “extent” of the violation, which ranges from minor (a potential for a lesser amount of damage to human health or the environment) to major (potential for serious damage to human health or for major damage to the environment). See generally EPA, *TSCA Section 5*

EPA has made clear that it intends to make as much of this information public as it can. As a result, reporting entities may want to consider whether any reported information may be protectable as confidential business information.

The due diligence standard for PFAS reporting under TSCA §8(a)(7) is the same standard EPA uses in its Chemical Data Reporting rule: information “[k]nown to or reasonably ascertainable by” the submitter means “all information in a person’s possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know.”<sup>31</sup> EPA expects a “case-by-case” and “complete” analysis based on the submitter’s “particular circumstances.”<sup>32</sup> Such an analysis may require searching marketing, purchase order, and supplier communications. EPA has provided a few specific points on what this due diligence standard does not require. It is not a testing requirement. And it is not a survey requirement. However, limited outreach to key suppliers may be part of your obligation depending on your particular circumstances. And any historical testing or survey information that reporting entities already have would constitute reportable information.

For most regulated entities, the timeline for complying with this rule will be 18 months. The submission period begins one year from November 13, 2023 (the rule’s effective date) and will be open for six months—November 12, 2024 to May 8, 2025.<sup>33</sup> Certain “small manufacturers” whose reporting obligations under the rule exclusively concern article imports will receive an additional six months to submit the required data—until November 10, 2025.<sup>34</sup>

### ***Food and Drug Administration Announces PFAS Phaseout in Food-Contact Packaging***

Chapter 3 describes how food packaging manufacturers voluntarily agreed to phaseout sales of products containing certain PFAS. In February 2024, FDA announced that manufacturers were no longer selling grease-proofing substances containing PFAS for food contact use in the U.S. market.<sup>35</sup> Previously, food packaging, like fast-food wrappers, microwave popcorn bags, or take-out paperboard containers, would often be lined with a grease-proofing substance containing PFAS to provide a water-resistant barrier and prevent the leaking of grease or oil. FDA expects that it will take up to 18 months following final product sales for these materials to be used and exit the market. FDA is also developing a validated analytical method to facilitate future monitoring of the market for PFAS in food packaging.

### ***Delays to Maine PFAS Reporting Law***

The Maine Department of Environmental Protection’s rollout of the state’s breathtakingly broad PFAS reporting law had been marred by difficulties. The law as passed in 2021 required reporting of information on any consumer product containing intentionally added PFAS as well as the amount of each specific PFAS chemical, starting January 1, 2023. Despite that statutory deadline, the agency was still finalizing regulations to implement the reporting requirement well into 2023 and had granted thousands of companies extensions on reporting.

On June 8, 2023, Maine backpedaled in the face of these implementation problems and industry push-back.<sup>36</sup> The governor signed into law an amendment<sup>37</sup> of the PFAS reporting law, containing several critical changes, including pushing the reporting deadline to January 1, 2025.<sup>37</sup> The amendments also loosened the requirements for what needs to be reported for each product containing intentionally added PFAS, most notably permitting reporting of PFAS in terms of total organic fluorine content. Reporting can now

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*Enforcement Response Policy* (amended July 1, 1993), <https://www.epa.gov/sites/default/files/2016-06/documents/amendedtscasection5-erp.pdf>.

31. 88 Fed. Reg. at 70,549; see also *id.* at 70,548 (to be codified at 40 C.F.R. § 705.3).

32. EPA, *Instructions for Reporting 2020 TSCA Chemical Data Reporting* at 4.2 (2020), [https://www.epa.gov/sites/default/files/2020-12/documents/instructions\\_for\\_reporting\\_2020\\_tsc\\_a\\_cdr\\_2020-11-25.pdf](https://www.epa.gov/sites/default/files/2020-12/documents/instructions_for_reporting_2020_tsc_a_cdr_2020-11-25.pdf).

33. 88 Fed. Reg. at 70,557.

34. *Id.* (to be codified at 40 C.F.R. § 705.20).

35. FDA, *FDA Announces PFAS Used in Grease-Proofing Agents for Food Packaging No Longer Being Sold in the U.S.* (Feb. 28, 2024), <https://www.fda.gov/food/cfsan-constituent-updates/fda-announces-pfas-used-grease-proofing-agents-food-packaging-no-longer-being-sold-us>.

36. Lori Valigra, *Maine delays start of 1st-in-nation PFAS law*, BANGOR DAILY NEWS (Sep. 18, 2023), <https://www.bangordailynews.com/2023/09/18/news/maine-delays-pfas-law-joam40zk0w/>.

37. Me. Rev. Stat. tit. 38, § 1614.

be based on supplier-provided information rather than testing. And there is a small business exemption for manufacturers employing 25 or fewer people.

### *Settlements in the AFFF MDL*

In June 2023, days before a bellwether trial for public water providers was scheduled to begin in the AFFF Multidistrict Litigation (MDL), 3M Company (3M) and DuPont de Nemours, Inc. and related companies (DuPont), among the largest and most well-known defendants in the MDL, announced proposed class settlement agreements to resolve all water-supplier claims against them. Plaintiffs have estimated 3M's liability share in the AFFF MDL at 70%, while assigning DuPont a smaller but sizable share of 3–7%.

Both settlements propose nationwide class settlement with American water providers impacted by AFFF. In return for an aggregate payment over time of between \$10.5 and \$12.5 billion, 3M asks water providers to forever release their PFAS-related water supply claims against 3M.<sup>38</sup> The proposed DuPont settlement agreement similarly promises \$1.185 billion in exchange for a release of claims against the DuPont-related defendants.<sup>39</sup> While the MDL includes over 400 water-supplier plaintiffs, over 12,000 water suppliers are part of the proposed settlement classes defined in these agreements.

In February 2024, the court granted final approval of the DuPont settlement.<sup>40</sup> In March 2024, the court likewise granted final approval of the 3M settlement.<sup>41</sup> As of April 2024, resolution of claims against defendants with smaller market shares is ongoing. One of these defendants, Kidde-Fenwal, declared bankruptcy in May 2023,<sup>42</sup> and another, Tyco Fire Products, reached a \$750 million settlement with water providers in April 2024.<sup>43</sup>

### *Policy Changes Governing Department of Defense AFFF Usage*

The Department of Defense (DoD) continues to manage the fallout from decades of reliance on AFFF in its firefighting foam. In August 2023, DoD agreed to terminate its final contract to burn unused stores of AFFF, a response to a lawsuit alleging that such contracts failed to undergo proper environmental review.<sup>44</sup> The risks posed by the incineration of PFAS and resulting air emissions are uncertain. DoD will now need to arrange alternative methods for destroying such legacy AFFF.

DoD also approved its first PFAS-free firefighting foam, or “F3”, in September 2023.<sup>45</sup> The approval will help DoD reach the target mandated by the 2020 National Defense Authorization Act to phaseout firefighting foam containing PFAS by 2024. Airports have been permitted since 2018 to transition to an F3 with specifications approved by the military.<sup>46</sup> DoD's approval now permits airports, and military facilities, to execute that transition away from AFFF.

38. Pls.' Mot. for Prelim. Approval of Class Settlement, Ex. 2, Dkt. No. 3370-3, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2:18-mn-2873-RMG (D.S.C. July 3, 2023).

39. Pls.' Mot. for Prelim. Approval of Class Settlement, Ex. 2, Dkt. No. 3393-2, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2:18-mn-2873-RMG (D.S.C. July 10, 2023).

40. DuPont Settlement Final Approval Order and Judgment, Dkt. No. 4543, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2:18-mn-2873-RMG (D.S.C. Feb. 26, 2024).

41. 3M Settlement Final Approval Order and Judgment, Dkt. No. 4754, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2:18-mn-2873-RMG (D.S.C. Mar. 29, 2024).

42. *In re Kidde Fenwal Inc.*, No. 1:23-BK-10638 (Bankr. D. Del. filed May 14, 2023).

43. Tyco Fire Products Settlement Agreement, Dkt. No. 4911-3, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2:18-mn-2873-RMG (D.S.C. Apr. 26, 2024).

44. Settlement Agreement, *Save our County v. U.S. Defense Logistics Agency*, No. 21-1861 (N.D. Ohio Aug. 30, 2023).

45. Federal Aviation Administration, Availability of Fluorine Free Foam (F3) on the Navy's Qualified Products List (QPL), No. 23-07, Sept. 13, 2023, [https://www.faa.gov/sites/faa.gov/files/part\\_139\\_cert\\_alert\\_23\\_07\\_F3\\_Release.pdf](https://www.faa.gov/sites/faa.gov/files/part_139_cert_alert_23_07_F3_Release.pdf).

46. FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 332, 132 Stat. 3186, 3273 (2018).

## Chapter 4 Updates

### *Final National Primary Drinking Water Standards for Six PFAS*

On April 10, 2024, EPA announced the long-awaited final National Primary Drinking Water Rule (NPDWR) for six PFAS compounds—PFOA, PFOS, PFNA, HFPO-DA, PFHxS, and PFBS. The final rule sets individual drinking water standards expressed as Maximum Contaminant Levels (MCLs) for PFOA and PFOS at 4 ppt and for PFHxS, PFNA, and HFPO-DA at 10 ppt.<sup>47</sup> The rule also contains a Hazard Index MCL for mixtures containing two or more of PFNA, HFPO-DA, PFHxS, or PFBS, set at 1.0.<sup>48</sup> (A full explanation of how a Hazard Index operates is included in Chapter 4).

The final rule deviates from the proposed rule in two significant ways: 1) the proposed rule did not include individual MCLs for PFNA, PFHxS, and HFPO-DA, and 2) the effective date of the rule is now in five years instead of three.<sup>49</sup>

### *Wisconsin Groundwater Rule Woes*

Although states are typically able to move faster than the federal government in regulating PFAS in water sources, that is not always the case. In Wisconsin, efforts by the state Department of Natural Resources to regulate PFAS in groundwater have been stymied by large compliance and implementation costs. Since 2017, Wisconsin administrative rules have been subject to the REINS Act, which automatically freezes state agencies' work on any rulemaking process that is projected to exceed \$10 million in implementation and compliance costs over any two-year period unless and until the state legislature acts to authorize further work on the rulemaking.<sup>50</sup> The Department of Natural Resources accordingly had to halt its work on creating groundwater standards for PFAS in late 2023, when estimates emerged that complying with the rule would cost industrial facilities and wastewater treatment plants \$33 million in the first two years of the rule's operation.<sup>51</sup>

## Chapter 5 Updates

### *PFOA and PFOS Designated as CERCLA Hazardous Substances*

On April 19, 2024, EPA issued a final rule designating PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>52</sup> CERCLA establishes strict, joint and several liability for: (1) owners and operators of facilities; (2) former owners and operators of facilities at the time hazardous substances were disposed of; (3) any person who owned or possessed hazardous substances and arranged for their disposal or treatment at a facility; and (4) any person who transported hazardous substances to a facility.<sup>53</sup> Entities that fall into one of these categories are considered potentially responsible parties, or PRPs, under CERCLA. Because of the broad categories of potential PRPs, the designation will have significant consequences for not only chemical manufacturers and manufacturers of products containing PFAS, but for hundreds of other entities like waste management

47. EPA, PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32,532 (Apr. 26, 2024) (to be codified at 40 C.F.R. pts. 141, 142).

48. *Id.* at 174-75. The HI is calculated by calculating a ratio for each of the 4 PFAS compounds using the Health Based Water Concentration ("HBWC") for each compound. The HBWCs are set at 10 ppt for PFNA, PFHxS, and HFPO-DA and at 2,000 ppt for PFBS. The HI is then calculated by the following formula:  $HI = ([HFPO-DA_{water} \text{ ng/L}] / [10 \text{ ng/L}]) + ([PFBS_{water} \text{ ng/L}] / [2000 \text{ ng/L}]) + ([PFHxS_{water} \text{ ng/L}] / [10 \text{ ng/L}]) + ([PFNA_{water} \text{ ng/L}] / [10 \text{ ng/L}])$ . *Id.*

49. *Compare id.* at 177-78, 281 with EPA, PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. 18,638, 18,666-68, 18,690 (Mar. 29, 2023).

50. Wis. Stat. Ann. § 227.139.

51. Todd Richmond, *Excessive costs force Wisconsin regulators to halt work on groundwater standards for PFAS chemicals*, AP News (Dec. 19, 2023), <https://apnews.com/article/pfas-pollution-groundwater-standards-dnr-rule-a81f3de671854994a51b89f90a231133>.

52. EPA, Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39,124 (May 8, 2024) (to be codified at 40 C.F.R. pt. 302).

53. 42 U.S.C. § 9607(a)(1)-(4).



and wastewater treatment facilities that have regularly handled these ubiquitous chemicals during their operations.

The rule will mandate further reporting on PFAS releases and significantly increase the number of cleanups initiated to address PFAS contamination. The final rule requires facilities to immediately report any releases of over one pound of PFOA or PFOS over a 24-hour period to the National Response Center, the federal point of contact for certain environmental emergencies.<sup>54</sup> Further, the designation allows EPA to either conduct a response action to address PFAS contamination or to force a potentially responsible party (PRP) to conduct the cleanup. Alternatively, private parties can also clean up hazardous substances and seek to recover the cost of doing so from PRPs.<sup>55</sup>

To mitigate the impact of the rulemaking, EPA concurrently released a memorandum summarizing its “PFAS Enforcement Discretion and Settlement Policy under CERCLA.” Under this policy, EPA will decline to pursue enforcement actions against PRPs where requiring such entities to execute CERCLA cleanups would be inequitable. Such entities include community water systems and publicly owned treatment works, municipal separate storm sewer systems, publicly owned/operated municipal solid waste landfills, publicly owned airports and local fire departments, and farms where biosolids are applied to the land. EPA will also seek to protect such entities from lawsuits from third parties through its settlement policies.<sup>56</sup>

### *Appeals in Michigan Drinking Water Rule Case*

Chapter 5 addresses Michigan’s drinking-water and groundwater cleanup standards for PFAS, as well as 3M’s challenge to the same for violating the state’s Administrative Procedures Act. The trial court had ruled that the drinking-water rules were procedurally defective, because Michigan’s Department of Environment, Great Lakes, and Energy (EGLE) failed to estimate the costs to businesses of setting more stringent groundwater cleanup criteria, which by operation of statute must correspond to new drinking-water standards.

A divided panel of the Michigan Court of Appeals affirmed in August 2023.<sup>57</sup> The majority agreed with the trial court’s reasoning. Judge Maldonado dissented, arguing that the state’s Administrative Procedures Act as written contained a loophole allowing EGLE to elide consideration of compliance costs for rules that are derivative of other rules—like the groundwater cleanup criteria that are derivative of drinking-water standards. Judge Maldonado wrote, “The Legislature decided to tie groundwater-cleanup standards directly to drinking-water standards. The APA does not require a regulatory-impact statement for one proposed rule to account for ripple effects in other rules, which is what has occurred in this case.”<sup>58</sup>

The Michigan Court of Appeals’ decision is not the last word on the subject—the Michigan Supreme Court agreed to hear an appeal by the Attorney General.<sup>59</sup> The drinking-water standards remain in effect pending appeal.<sup>60</sup>

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54. 89 Fed. Reg. at 39,131.

55. 42 U.S.C. § 9604(a)(1); 42 U.S.C. § 9607(a)(4)(A)-(B).

56. EPA, PFAS Enforcement Discretion and Settlement Policy under CERCLA, Apr. 19, 2024, <https://www.epa.gov/system/files/documents/2024-04/pfas-enforcement-discretion-settlement-policy-cercla.pdf>.

57. 3M Co. v. Dep’t of Env’t Great Lakes & Energy, No. 364067, 2023 WL 5418164 (Mich. Ct. App. Aug. 22, 2023).

58. *Id.* at \*6 (Maldonado, J., dissenting).

59. Michigan Dep’t of Attorney General, *Michigan Supreme Court to Hear AG Nessel’s Appeal on Rule Limiting PFAS Contamination to Drinking Water* (Feb. 8, 2024), <https://www.michigan.gov/ag/news/press-releases/2024/02/08/michigan-supreme-court-to-hear-ag-nessels-appeal-on-rule-limiting-pfas-contamination>.

60. *Id.*