February 2025

Welcome to GableGotwals' PFAS Pulse! In this update, we'll provide a brief overview of PFAS – a class of compounds widely used in industrial and consumer applications for decades – and highlight key regulatory, litigation, and other PFAS issues from 2024 and look ahead to 2025. Managing PFAS risks is becoming increasingly important for our clients across a number of industries, and we're here to help navigate those challenges. Thank you for reading, and please feel free to reach out with any questions.

Background: What are PFAS?

Per- and polyfluoroalkyl substances ("PFAS") are a broad class of human-made compounds characterized by a strong carbon-fluorine bond that makes them heat resistant and gives them surfactant qualities capable of repelling water, oil, and grease. Those durable qualities that give PFAS such a high utility for industrial and consumer applications also make them persistent and highly mobile in the environment (e.g., soil and groundwater), and in some cases bioaccumulative and toxic in humans and animals, hence the nickname, "forever chemicals." For more than 10 years, the United States Environmental Protection Agency ("EPA") has been laying the groundwork for a broad PFAS regulatory regime. 2024 represented a significant milestone in those efforts, as EPA finalized and continued to expand PFAS regulations under a number of federal environmental laws. With the Trump administration and change in EPA leadership, there should be some slowdown in the development of PFAS regulations in 2025. Nevertheless, the regulations that are already in effect will continue (for now), PFAS litigation will continue to grow, and we can be sure that more issues related to PFAS will emerge and merit attention from businesses, consumers, and regulators.

2024 PFAS Review

Hazardous Designation for Specific PFAS: CERCLA and RCRA

In May 2024, EPA finalized a rule designating perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS") as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"). This rule grants EPA jurisdiction to require investigation and remediation of PFOA and PFOS contamination of real property, holding responsible parties accountable for cleanup costs. While it does not establish specific cleanup standards, the new Safe Drinking Water Act ("SDWA") standards established in April 2024 (see below) and state-level maximum contaminant levels ("MCLs") for PFOA and PFOS may influence cleanup criteria at Superfund sites. And in September 2024, the Department of Defense issued guidance aligning cleanup standards with the SDWA standards.

Notably, when the Superfund regulations were finalized, EPA also issued a guidance memo on CERCLA enforcement discretion, highlighting its priority of addressing PFAS contamination due to its toxicity and persistence. The EPA went on to state that it would focus on parties significantly responsible for PFAS releases, such as manufacturers, federal facilities, and industrial entities, while not targeting entities like municipal water systems, treatment plants, landfills, airports, fire departments, and farms, where PFAS contamination may be less directly linked to their actions.

In addition to CERCLA, in February 2024, EPA proposed two rules addressing PFAS under the Resource Conservation and Recovery Act ("RCRA"). One of the proposed rules listed nine PFAS as "hazardous constituents" under RCRA and the other proposed rule changed the regulatory definition of "hazardous waste" under RCRA's Corrective Action Program to include emerging contaminants that may not be listed as hazardous but still meet the statutory definition of hazardous waste, which would include certain PFAS. These proposed rules would enhance EPA's ability to manage PFAS contamination at hazardous waste facilities. However, on January 20, 2025, the Trump administration issued a memorandum ordering executive agencies not to "propose or issue any rule in any manner" until the current administration has reviewed and approved the rule, thus the pending RCRA PFAS rules are on hold until the new administration decides what to do.

Federal Drinking Water Standards for certain PFAS

In April 2024, EPA finalized the first drinking water regulation for PFAS under the Safe Drinking Water Act ("SDWA"). The regulation sets drinking water standards for PFOA, PFOS, perflourohexane sulfonic acid ("PHxS"), perfluorononanoic acid ("PFNA"), hexafluoropropylene oxide dimer acid ("HFPO-DA"), and perfluorobutane sulfonic acid ("PFBS"). Public water systems must complete initial monitoring within three years and, starting in 2027, provide the public with PFAS level information. By 2029, systems with PFAS levels exceeding one or more of the maximum contaminant levels ("MCLs") established under the regulation must take corrective action and notify the public of any exceedances.

Expansion of PFAS Reporting under SNUR, TSCA and TRI Programs

In January 2024, EPA finalized a significant new use rule ("SNUR") for companies that want to manufacture or import any of the 329 PFAS listed as inactive on the Toxic Substances Control Act ("TSCA") inventory. The SNUR requires companies to submit a significant new use notice ("SNUN") to EPA before manufacturing or importing those listed PFAS. Such PFAS are listed as "inactive" because they have not been manufactured, imported or processed for any purpose in the United States since at least 2006. The rule includes exemptions for impurities, byproducts not used for commercial purposes, and imported or processed PFAS-containing articles. The rule went into effect in March 2024 and remains in effect.

In May 2024, EPA added seven PFAS to the reporting requirements in the Toxics Release Inventory ("TRI") Program under the Emergency Planning and Community Right-to-Know Act ("EPCRA") and the Pollution Prevention Act ("PPA"), for a total of 196 reportable PFAS for TRI reporting year 2024. Previously, EPA removed the *de minimus* exemption under TRI and identified all listed PFAS as "chemicals of special concern," lowering the reporting threshold to 100 pounds. On January 6, 2025, EPA published a final rule adding another nine PFAS to TRI reporting year 2025, for a total of 205 reportable PFAS, though those additional PFAS are on hold under the Trump administration transition freeze.

Also noteworthy, in 2023 EPA finalized the PFAS TSCA Section 8(a)(7) reporting rule, which requires reports from companies that manufactured or imported any of the more than 1,400 listed PFAS or products containing PFAS between January 1, 2011 and December 31, 2022. The reports were originally due by May 2025, but EPA has extended that deadline to January 2026 due to the volume and burden of reporting.

Preliminary Wastewater Effluent Guidelines on Hold

In December 2024, under its Clean Water Act ("CWA") authority, EPA published its preliminary effluent guidelines and standards for PFAS, which outlined plans for establishing effluent limitations guidelines ("ELGs") and pretreatment standards for industrial wastewater discharges of PFAS and other chemicals. On January 21, 2025, the Office of Management and Budget ("OMB") withdrew the proposed ELGs as part of the Trump administration's regulatory freeze because the rule had not yet been finalized. Notwithstanding such freeze on ELGs, EPA and state programs likely have the authority

to investigate various PFAS discharges under CWA programs (administered by EPA or state agency with primacy to administer) or the National Pollutant Discharge Elimination System ("NPDES") programs (administered by EPA or state agency with primacy to administer), not to mention under authority to address PFAS vis a vis drinking water, pollution remediation, and waste management under the SDWA, CERCLA, and RCRA, as referenced above.

Expansion of Analytical Testing Methods

In January 2024, EPA finalized its validation of testing Method 1633 and Method 1621 to test for 40 individual PFAS as well as adsorbable organic fluorine ("AOF"). Method 1633 is designed to test non-potable water and other media, including wastewater, surface water, groundwater, soil, biosolids, sediment, landfill leachate, and fish tissue. Method 1621 was developed because designing analytical methods for each individual PFAS compound is impractical, and therefore 1621 is a procedure to determine an aggregate measure of organofluorine substances in aqueous material as a proxy for PFAS and other fluorinated pesticides and pharmaceuticals. In the context of PFAS investigations, understanding and using the appropriate testing methods is critically important for determining the presence of PFAS in the environment and associated liability. Note that with respect to PFAS air emissions, EPA has issued Method OTM-50 for monitoring volatile fluorinated compounds ("VFCs") in stationary sources though that method has not been validated as an official EPA method. The takeaway here is to hire people that know the differences between various PFAS analytical methods and have experience working with labs on PFAS issues. Otherwise, incorrect methods conducted by inexperienced and uncertified labs generate the wrong data, which leads to bad decisions.

Destruction and Disposal of PFAS

In April 2024, EPA issued interim guidance on the destruction and disposal of PFAS. The document shared the latest science including considerable uncertainty related to three technologies that can destroy PFAS or control PFAS released into the environment: thermal destruction (destruction), hazardous waste landfills (disposal), and Class I underground injection control ("UIC") wells (disposal). The guidance encourages a risk-based approach to destruction and disposal, utilizing options that have a lower potential for releasing PFAS to the environment. The EPA also recommended interim storage of containerized or high PFAS-content materials as a short-term solution while further research is conducted into options for destruction and disposal. Similar to prior guidance going back to December 2020, thermal destruction remains uncertain, and research is ongoing. Otherwise, disposal options are all that remain, with hazardous waste landfill and Class I UIC wells as recommended options. Research into PFAS destruction and disposal methods is ongoing, and EPA will be required to update the interim guidance within three years.

What to do with Firefighting Foams?

PFAS contamination surrounding military bases, airports, and other industrial facilities has mostly been attributed to the historic use of aqueous film-forming foams ("AFFF") in fire suppression systems. Notably, AFFF is very effective at fighting flammable liquid fires such as gasoline, oil, and other hydrocarbons. Section 322(c) of the National Defense Authorization Act ("NDAA") for fiscal year 2020 prohibited the Department of Defense ("DOD") from using AFFF for fighting fires by October 1, 2024. The NDAA also allows the DOD two one-year waivers from the prohibition. In August 2024, DOD availed itself of such waiver, explaining that while it has found comparable PFAS-free alternatives and installed those systems in several of its facilities, due to the complexity, ongoing investigations, and supply constraints for PFAS-free alternatives, it would be unable to prohibit the use of all fluorinated AFFF by October 1, 2024. Meanwhile, a number of states have enacted programs to investigate PFAS contamination and phase out fluorinated AFFF at facilities that have historically relied on fluorinated AFFF for fire suppression. The scope of those investigations and responses varies by state/agencies involved but requires a knowledgeable legal and technical team to manage data and negotiate investigations and response measures. Furthermore, converting AFFF systems to fluorine-free is another issue many facilities and industries are currently navigating.

2025 PFAS Outlook

Under Trump's regulatory freeze and flurry of executive actions signaling contraction of administrative agencies and their regulatory functions, it is to be expected that the pace of PFAS regulation will slow down. Nevertheless, the CERCLA and SDWA regulations as well as the TRI and TSCA reporting requirements remain in effect, and PFAS liability concerns will continue to grow through regulation and litigation.

Zeldin Confirmed and Sworn in as EPA Administrator

Former New York Congressman, Lee Zeldin, was confirmed by the Senate and sworn in as administrator of the EPA on Jan. 29, 2025. Zeldin is no stranger to PFAS. While representing Long Island in the House from 2015 to 2023, Zeldin was a member of the bipartisan PFAS task force and supported the bipartisan Protect the People from PFAS Act (H.R. 2467), which (1) directed EPA to designate PFOA and PFOS as hazardous substances under CERCLA, (2) directed EPA to publish human health and water quality criteria under the Clean Water Act ("CWA"), (3) directed EPA to establish standards to limit effluent discharges of PFAS from industrial sources, (4) directed EPA to establish national primary drinking water standards for at least PFOA and PFOS, (5) directed EPA to promulgate a final rule adding PFOA and PFOS to the list of hazardous air pollutants, and (6) provides incentives, including grants, to help community water systems treat water contaminated by PFAS. The law passed the House, but never made it out of committee in the Senate. It remains to be seen how Zeldin will balance the momentum behind the growing regulatory PFAS regime against the Trump administration's deregulatory agenda.

Challenges to Final SDWA and CERCLA Rules

On January 17, 2025, 17 states and the District of Columbia filed an amicus brief with the D.C. Circuit Court of Appeals in *American Water Works Ass'n v. EPA*, supporting EPA's final SDWA standards issued in April 2024. In their brief, the attorneys general argue that the drinking water standards are consistent with the safe drinking water health mandate in the SDWA and that the process for developing the standards was compliant with the law. They request that the D.C. Circuit deny petitions challenging the rule that were filed by the American Water Works Association, Association of Metropolitan Water Agencies, National Association of Manufacturers, American Chemistry Council, and the Chemours Company FC. Those entities argue that EPA lacked authority to promulgate the final SDWA PFAS standards and its cost benefit analysis was flawed, arguments that align with the Trump administration's views on agency authority. Recently, on February 7, EPA sought and was granted a 60-day stay of the litigation to "allow new Agency leadership to review the underlying rule."

On January 17, 2025, EPA filed its brief in *Chamber of Commerce, et al. v. EPA* in the D.C. Circuit, defending its designation of PFOA and PFOS as "hazardous substances" under CERCLA. The U.S. Chamber, Associated General Contractors of America, and the National Waste & Recycling Association petitioned for review of the rule that was finalized in May 2024.

With recent opinions from the United States Supreme Court that (1) limit the amount of deference given to agency interpretations, *see Loper Bright v. Raimondo* (2024), and limit the authority of agencies to address major issues that impact the economy or society (absent express authorization from Congress) such as in *West Virginia v. EPA* (2022), the fate of these regulations remains uncertain.

PFAS as Necessary Part of Due Diligence

PFAS should now be considered a standard component of all environmental due diligence. Back in December 2022, the EPA took final action to amend its "All Appropriate Inquiry Rule" ("AAI Rule") to allow the use of the updated American Society for Testing and Materials ("ASTM") standard E1527-21. ASTM standards are the environmental due diligence measures that prospective purchasers of

real property can perform to satisfy the AAI Rule and avoid or otherwise minimize liability for contamination as a potentially responsible party ("PRP") under CERCLA. Under the updated ASTM standard, a party performing a Phase I Environmental Site Assessment ("Phase I") was given the option of including "emerging contaminants" such as PFAS in a Phase I. However, now that the EPA has finalized certain CERCLA PFAS designations, those specific PFAS may qualify as a recognized environmental condition ("REC") on properties and warrant additional action prior to acquiring such properties in order to minimize CERCLA liabilities stemming therefrom.

PFAS in Biosolids Issue

PFAS in biosolids have become a major issue recently. Traditionally, wastewater treatment facilities, including those receiving pretreated industrial wastewater, would arrange for the leftover sediments and sludge – known as biosolids – to be used as fertilizer by local farmers. These biosolids are valued for their nutrient content, and as a replacement to costly synthetic fertilizers. However, PFAS have been detected in biosolids, leading to contamination when they are applied to land. As a result, EPA and states are pushing for new legislation requiring monitoring and disclosure of PFAS in biosolids and agricultural products, restricting biosolids use, and providing liability protections for industries unknowingly involved in PFAS discharge, such as landfills and farmers using biosolids. In January 2025, EPA released its Draft Sewage Sludge Risk Assessment for Perfluorooctanoic Acid ("PFOA") and Perfluorooctane Sulfonic Acid ("PFOS"), showing that there may be human health risks associated with exposure to PFOA or PFOS from land application of biosolids, surface disposal of biosolids in landfills, or incineration. The EPA notes in the assessment that it focuses on individuals living on or near impacted sites or otherwise relying on those sites for food crops, animal products, and drinking water, and that the assessment does not model risks for the general public. Nevertheless, the findings show that applying biosolids containing 1 part per billion ("ppb") of PFOA or PFOS at high rates for long periods (e.g., 40 years), as well as disposal in unlined or clay-lined landfill units, may exceed EPA's acceptable risk threshold. Notably, EPA's the land application modeling showed exposure risk pathways from (1) drinking milk from pasture-raised cows consuming contaminated forage, soil, and water, (2) drinking water sourced from contaminated surface or groundwater on or adjacent to an impacted property, (3) eating fish from a lake impacted by runoff from an impacted property, and (4) eating beef or eggs from majority pasture-raised hens or cattle where the pasture has received impacted sewage sludge. The EPA is currently taking comments through March 17, 2025 on the draft assessment and will use the draft assessment and comments to inform potential future regulations. Many states are ahead of the EPA on this. In 2022, Maine banned land application of biosolids due to concerns from PFAS contamination, and Oklahoma has pending legislation in the 2025 legislative session that would impose various obligations related to biosolids and PFAS, including imposing a temporary moratorium on land application of biosolids until July 2028.

Litigation Continues to Grow

PFAS-related lawsuits will continue to grow across the United States. The most common defendants are manufacturers, distributors, and users of products containing PFAS. Individuals (consumers), state and local governments are usually the plaintiffs in these cases. One of the most significant proceedings is the multidistrict litigation ("MDL") involving AFFF, *In re Aqueous Film-Forming Foam Products Liability Litigation*, in the United States District Court for the District of South Carolina. This MDL consolidates more than 9,000 active lawsuits alleging that the use of AFFF has led to widespread PFAS contamination, particularly affecting water supplies near military bases, airports, and industrial sites where AFFF was historically used. Similar lawsuits are being steered into the MDL as they arise. Furthermore, under the MDL, 3M has set aside $10.3 billion, DuPont has set aside $1.2 billion, BASF Corporation has set aside $316.5 million, and Tyco Fire Products LP has set aside $750 million to settle those claims related to drinking water contamination in public water systems. Each of the four settlements have obtained final approval by the MDL Judge. Despite the settlements, litigation continues, with new cases still being consolidated into the MDL.

There is also a growing trend in consumer protection cases related to PFAS. These cases are typically against manufacturers of products such as dental floss, cosmetics, and waterproof fabrics that contain PFAS, alleging deceptive practices related to product safety and the environmental impacts. For example, in January 2025, a proposed class action lawsuit was filed in the U.S. District Court for the Northern District of California against Apple, *Cavelier v. Apple, Inc*. The suit alleges that the company deceived customers by advertising that its smartwatches are designed to promote health and wellness and to support the company's sustainability goals, despite the presence of PFAS in the wristbands. The suit cites a December 2024 study in *Environmental Science & Technology Letters* that tested the wristbands of various watch brands and found detectable levels of PFAS in most of the wristbands. The suit is seeking injunctive relief to force Apple to change its business practices and for money damages to the proposed class of plaintiffs.

States Continue to Expand Their Own PFAS Laws

Many states are moving forward with (1) establishing their own maximum contaminant levels ("MCLs") for drinking water that are at least as strict as the federal standards and may include additional PFAS, (2) monitoring, testing, and disclosure laws for presence of PFAS in real property and consumer goods; and (3) prohibitions and phase-outs of import, use, and sale of PFAS and PFAS-containing goods, including the use of biosolids containing PFAS. Make sure to stay appraised of state-specific regulations that may affect you or your business.

PFAS Reporting Obligations Continue

As referenced above, there are two significant developments: (1) TRI tracking and reporting and (2) TSCA reporting. Those obligations are not going away.

On January 17, 2025, the EPA established a proposed rule providing details on when a supplier company is required to notify customers that a mixture or trade name product contains PFAS that has been added to the TRI list pursuant to the National Defense Authorization Act for Fiscal Year 2020 ("NDAA"). Under Section 7321(c) of the NDAA, certain PFAS are automatically added to the TRI list on January 1 of each year in response to EPA taking certain triggering actions in the preceding year. The proposed rule clarifies that notification requirements being immediately after the PFAS are added to the TRI list. Accordingly, suppliers must notify customers beginning with the first shipment of the product in the same calendar year the PFAS was added to the TRI list. The EPA is currently taking comments on the proposed rule.

Furthermore, on February 5, 2025, EPA published a notice that it is delaying the effective date of its final rule adding nine new PFAS to the TRI for calendar year 2025, pursuant to Section 7321 of the NDAA. The final rule, originally published on January 6, 2025, is now scheduled to go into effect on March 21, 2025. The delay was a result of Trump's executive order freezing all rulemaking pending review.

As mentioned above, the reporting deadline for the PFAS TSCA Section 8(a)(7) reporting rule, which requires reports from companies that manufactured or imported any of more than 1,400 listed PFAS or products containing PFAS between January 1, 2011 and December 31, 2022, has been extended to January 2026. Because the rule requires reporting large amounts of data regarding all PFAS produced or imported since January 2011, it is highly recommended that entities begin collecting data as soon as possible. All manufacturers of PFAS or PFAS-containing articles in any amount are covered by the rule, which also includes incidental manufacturing and byproducts. If a company knows it is manufacturing or has manufactured PFAS or PFAS-containing articles, or such information is reasonably ascertainable, it must report.

These PFAS reporting obligations are a reminder to companies to scrutinize your supply chain to identify if and where PFAS exist, and to ensure proper precautions are taken with respect to handling

and disposal of PFAS and PFAS-containing materials, workplace safety, disclosures to customers, and consideration of PFAS alternatives.

Conclusion

The PFAS landscape is constantly evolving. In 2024, EPA advanced PFAS regulations under several federal laws, including CERCLA and SDWA. Looking ahead to 2025, regulatory actions at the federal level may slow under the Trump administration. However, expect continued growth in state-level PFAS regulations and ongoing PFAS litigation. PFAS-related risks remain widespread and persistent.

Thank you for reading this edition of PFAS Pulse, and feel free to reach out with any questions.

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Additional Announcements

Tyler A. Self Joins GableGotwals Environmental Practice

GableGotwals Sixth Annual Energy Market Drivers and Current Legal Issues Seminar

The Journal Record — Gavel to Gavel: Unleashing American Energy by Executive Order by Ashlyn Smith