ALERT
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PFAS: A New Four-Letter Word in Environmental Law? Updates from 2024 and Predictions for 2025

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(by **Sloane Wildman**, **Joseph Schaeffer** and **Jessica Deyoe**)

The final year of the Biden administration saw several significant developments related to the regulation of per- and polyfluoroalkyl substances, more commonly known as PFAS. These developments included the U.S. Environmental Protection Agency's designation of the two most common PFAS compounds as hazardous substances under federal cleanup laws and its limitation of six PFAS compounds under federal drinking water regulations, among others. The past year also saw a growing number of PFAS-related lawsuits, which are currently in various stages of litigation. What could happen to all these developments in 2025? Can the Trump administration change these rules and policies? What about the numerous PFAS related lawsuits that have been filed in the past year? This update takes a look at some of the more significant PFAS-related developments from the past year and considers what might happen in 2025 and beyond.

What are PFAS and what were the prior administration's PFAS priorities?

The term "PFAS" encompasses thousands of manmade chemicals. PFAS compounds have been widely used for decades in various applications, including manufacturing water-, stain-, and heat-resistant consumer products, e.g., waterproof clothing and food packaging, and as ingredients in aqueous film forming foams (known as AFFF) used to extinguish certain kinds of chemical fires. There is research indicating that exposure to certain PFAS, which are prevalent and persistent in the environment, may cause various health-related impacts. In an effort to address the impacts related to PFAS, in 2021, the Biden administration published a "PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024" identifying a number of regulatory priorities that the administration planned to take during its four-year term. The Strategic Roadmap and annual progress reports are available **here**.

What were some of the most significant federal regulatory developments in 2024?

Two of EPA's more significant regulatory actions in 2024 occurred almost back-to-back in April with its designation of two PFAS compounds as hazardous substances under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and its rule imposing regulatory limits on six PFAS compounds under the Safe Drinking Water Act (SDWA). We reported on both of these developments in updates available **here** and **here**.

Specifically, in April 2024, the EPA published a final rule designating perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), and their salts and structural isomers, as "hazardous substances" under CERCLA, available **here**. As we reported previously, EPA's designation of PFOA and PFOS as CERCLA hazardous substances was unprecedented and controversial because it was the first time the Agency used its statutory authority under CERCLA to designate a hazardous substance. Until that point, hazardous substances under CERCLA had only been defined by reference to other statutes (e.g., the Clean Water Act and the Resource Conservation and Recovery Act). Among other things, the rule requires parties to report unpermitted releases of PFOA and/or PFOS at or above the applicable "reportable quantity" (one pound or more within a 24-hour period) to federal, state, and local authorities. It also imposes certain obligations on federal agencies when selling and transferring federally owned real property. And most significantly, the rule provides the federal government with additional authority under CERCLA to address PFOA/PFOS contamination in the environment, allows private parties who conduct cleanups consistent with CERCLA's National Contingency Plan to seek to recover PFAS cleanup costs from other potentially responsible parties (PRPs), and potentially affects closed sites with existing remedies. At the same time EPA published the final

CERCLA rule, it issued a policy **memorandum**, "PFAS Enforcement Discretion and Settlement Policy Under CERCLA" summarizing the Agency's intent to use its discretion to not "pursue entities where equitable factors do not support seeking response actions or costs under CERCLA . . . ." and generally focus on so-called "major PRPs" – parties who, in EPA's view, "have played a significant role in releasing or exacerbating the spread of PFAS into the environment, such as those who have manufactured PFAS or used PFAS in the manufacturing process, and other industrial parties." Some industries that would be protected under this Policy, including publicly owned treatment works and publicly owned/operated municipal solid waste landfills, expressed concern that the policy provides only discretionary rather than mandatory protection and that it does not prevent other PRPs from pursuing claims against them.

Also in April 2024, EPA published a National Primary Drinking Water Regulation establishing the first-ever national enforceable drinking water standards for six PFAS under the Safe Drinking Water Act (SDWA), available **here**. The rule sets enforceable Maximum Contaminant Levels (MCLs) and non-enforceable health-based Maximum Contaminant Level Goals (MCLGs) for PFOA and PFOS, and four additional PFAS compounds – perfluorononanoic acid (PFNA), hexafluoropropylene oxide dimer acid and its ammonium salt (HFPO-DA, commonly known as GenX chemicals), and perfluorohexane sulfonic acid (PFHxS). EPA set MCLs (the maximum concentrations allowed in drinking water that can be delivered to the users of a public water system) at 4.0 parts per trillion (ppt) for PFOA and PFOS and 10 ppt for PFNA, PFHxS and HFPO-DA. In addition, EPA set MCLGs at 0 parts per ppt for PFOA and PFOS and at 10 ppt (same as the enforceable MCL) for PFNA, PFHxS and HFPO-DA. Under the rule, public water systems are given until 2027 to complete initial monitoring of each of the six PFAS, followed by ongoing compliance monitoring, and until 2029 to implement solutions to reduce PFAS where MCLs are exceeded. After those five years, public water systems that exceed one or more of the MCLs must take action to reduce PFAS levels and provide notice to the public of the violation.

In 2024, EPA proposed other rules related to PFAS that have not yet been finalized. For example, in February 2024, EPA published two proposed rules to address PFAS and other emerging contaminants under the authority of the Resource Conservation and Recovery Act (RCRA). First, EPA proposed to add nine PFAS (including their salts and structural isomers) to the list of "hazardous constituents" in Appendix VIII of 40 C.F.R. Part 261 that would need to be considered in facility assessments and, where necessary, considered in any further investigation and cleanup through the corrective action. Second, EPA also proposed to clarify, by regulation, that emerging contaminants – including PFAS – can be addressed under RCRA's Corrective Action Program. For more information about the proposed RCRA rules, see our previous update, available **here**.

What were some of the major developments in PFAS litigation?

Regulatory developments directly influenced litigation developments. While the regulated community pushed back, plaintiffs' attorneys relied on the new regulations to identify new targets for litigation and prove the elements of their cases. Overall, the prior year signaled three major developments in PFAS litigation.

First, a variety of stakeholders pushed back at the Biden administration's efforts to regulate PFAS. In *American Water Works Association v. U.S. Environmental Protection Agency*, No. 24-1188 (D.C. Cir. 2024), a coalition of industry and major water utilities challenged the EPA's regulation of PFAS under the SDWA. They argue that the Agency set MCLs for six PFAS beyond what are technologically and economically feasible and, further, adopted an unprecedented "hazard index" approach to regulating two additional PFAS. And in *Chamber of Commerce v. U.S. Environmental Protection Agency*, No. 24-1193 (D.C. Cir. 2024), industry challenged the EPA's designation of two PFAS as hazardous substances under CERCLA. Emphasizing that the Agency has never before invoked its statutory authority to directly designate hazardous substances under CERCLA, they argue that the Agency conducted an improper "substantial danger" analysis and failed to properly consider the costs and consequences of its regulation. Barring deregulatory action from the Trump administration, both cases are expected to be decided in 2025 and will have major implications for whether and how the EPA may regulate PFAS going forward.

Second, PFAS manufacturers cemented a significant victory when the U.S. Court of Appeals for the Sixth Circuit declined to revisit its opinion in *Hardwick v. 3M Co.*, where it ruled that the district court erred by allowing a "class comprising every person residing in the State of Ohio" to bring claims against ten manufacturers of PFAS for allegedly contaminating their blood with PFAS. *Hardwick v. 3M Co.*, No. 22-3765, at *2 (6th Cir. Nov. 27, 2023). Holding that the lead plaintiff lacked standing, the Court noted that he "does not know what companies manufactured the particular chemicals in his blood stream; nor does he know, or indeed have much idea, whether those chemicals might someday make him sick; nor, as a result of those chemicals, does he have any sickness or symptoms now." *Id.* at *1. Given the ubiquity of PFAS in the environment, and the numerous potential sources of exposure, *Hardwick*'s

legacy may be to raise the bar for standing, causation, and harm in cases alleging PFAS exposure.

And, third, enterprising plaintiffs' attorneys avoided the standing issues raised in *Hardwick* by bringing false advertising claims against manufacturers of products alleged to contain PFAS. Relying frequently on state consumer protection laws, the plaintiffs in these cases allege that product manufacturers misled consumers and delivered products that are worth less than they would have been if the presence of PFAS had been disclosed. In one such case filed in late 2024, for instance, the plaintiff alleges that Samsung Electronics failed to disclose the presence of PFAS in bands used with its smart watches, thereby "causing [plaintiff] to overpay for Products" and "enjoy[ing] an unfair competitive advantage, receiving millions of dollars from consumers in ill-gotten proceeds while putting the health and welfare of millions of consumers and their families at risk …." Class Action Complaint at ¶ 8, *Gonzalez v. Samsung Electronics Am., Inc.*, No. 2:24-cv-11234 (C.D. Cal. filed Dec. 31, 2024). Expect these lawsuits to proliferate as government reporting obligations and third-party investigations lead to the discovery of PFAS in products where it was previously unknown to have been used.

What can happen to these rules and cases under the new administration?

On the regulatory front, the Trump administration is expected to deregulate at the federal level and take a less active approach to PFAS than the Biden administration. One major tool that can be used to rescind regulations is the Congressional Review Act (CRA). The first Trump administration liberally used the CRA to rescind regulations issued in the final days of the then-outgoing Obama administration. A "lookback" provision in the CRA allows a new Congress to review and overturn regulations issued during the final sixty legislative days of the prior session – for purposes of the incoming Trump administration, the "lookback" period of the CRA is August 2024. The Biden administration intentionally finalized many regulations, including the PFAS MCLs and designation of PFOA and PFOS as hazardous substances under CERCLA, prior to August 2024 to stay out of reach of the CRA.

Though these PFAS-related regulations are out of reach of the CRA "lookback period" for rescinding regulations, there are other tools for doing so. EPA can amend or overturn a rule through ordinary notice and comment rulemaking under the Administrative Procedure Act. The notice-and-comment rulemaking requires that EPA develop a legal record justifying the proposed change and undergo a lengthy public notice process on the proposed regulatory/deregulatory action. Although it would be time-consuming, the EPA can use this option to amend or overturn the designation of PFOA and PFOS as hazardous substances under CERCLA as well as the PFAS MCLs. Of course, the future of these rules could also be determined by the ongoing litigation discussed above.

Another tool that already has been used by the new Trump administration to direct regulatory action in numerous substantive areas is the issuance of executive orders (EOs). On the first day of his second term, President Trump signed several EOs affecting environmental policy established by the Biden administration, including an EO entitled "**Initial Rescissions of Harmful Executive Orders and Actions**," which expressly rescinds a number of Biden administration EOs, including those addressing climate change and environmental justice. Proposed rules and guidance documents, such as the RCRA proposal discussed above, are now subject to President Trump's EO entitled "**Regulatory Freeze Pending Review**" which requires that (1) no federal agency propose or issue any rule without review and approval of an agency head appointed or designated by President Trump, and (2) any rule submitted to the Federal Register that is not yet published must be withdrawn pending review. It is also possible that EOs will be issued to withdraw specific guidance documents inconsistent with the new administration's goals and policies. For example, the EPA's PFAS Strategic Roadmap could be shelved or rescinded.

These anticipated Trump administration regulatory actions could impact the trajectory of litigation challenging the Safe Drinking Water Act and CERCLA rules, especially if the EPA signals that it intends to withdraw or modify those actions. The private civil litigation, however, is expected to continue unabated.

As the new administration is expected to significantly alter the federal regulatory efforts to address PFAS across multiple program areas, potentially impacting both existing and yet-to-be-filed litigation, Babst Calland attorneys will track these developments and are available to assist you with these matters. For more information on the federal regulatory and litigation developments discussed in this update or related matters, please contact Sloane Wildman at (202) 853-3457 or **swildman@babstcalland.com**, Joseph Schaeffer at (412) 394-5499 or **jschaeffer@babstcalland.com**, Jessica Deyoe at (202) 853-3489 or **jdeyoe@babstcalland.com** or any of our other **environmental attorneys**. For additional resources and more information on other PFAS developments, please visit Babst Calland's *PFAS Perspectives* page, **here**.