

EPA Issues Guidance Pushing States to use NPDES Permits to Reduce PFAS Discharges

Alert

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This week, the [U.S. Environmental Protection Agency issued guidance advising states](#) how to use National Pollution Discharge Elimination System (NPDES) permit requirements to restrict the discharge of per- and polyfluoroalkyl substances (PFAS) at their source. The guidance, which addresses both industrial dischargers and publicly-owned treatment works (POTWs), also urges states to include PFAS monitoring requirements in state-issued permits. The agency anticipates the data collected will provide it with comprehensive information on the sources and quantities of PFAS discharges, which in turn, will be used to inform other EPA efforts to address PFAS.

OVERVIEW OF THE CLEAN WATER ACT AND NPDES PROGRAM

The Clean Water Act (CWA) is the primary federal statute that addresses water pollution in the United States. It regulates activities such as the discharge of pollutants via wastewater and stormwater into the waters of the United States, and the discharge of pollutants and wastewater by industrial dischargers to POTWs.

The CWA specifically prohibits the discharge of “pollutants” through a “point source” into a “water of the United States” unless the discharger has an NPDES permit. The primary purpose of an NPDES permit is to establish enforceable effluent limitations (ELGs), which are parameters that dictate the amount of pollution a facility may discharge to waters of the United States. There are two basic types of effluent limitations: technology-based and water quality-based. Both can be numeric (e.g., 28 ug/L copper) or narrative (e.g., “no visible sheen”).

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NPDES permits include a number of other enforceable conditions, including monitoring, reporting and recordkeeping requirements. Some permits also require the permittee to perform “best management practices” (BMPs), which are procedures designed to prevent or minimize the release of toxic pollutants.

Of note, EPA issued this guidance while it continues to develop effluent limitation guidelines and water quality criteria to support technology-based and water quality-based effluent limitations for PFAS in NPDES permits. The guidance describes steps that permit-writers can implement under existing authorities to reduce the discharge of PFAS now.

EPA’S RECOMMENDATIONS FOR STATE PERMIT-WRITERS

EPA’s guidance recommends that future NPDES permits require monitoring at least quarterly for all 40 PFAS parameters detectable by CWA wastewater draft analytical method 1633. EPA anticipates finalizing the draft method by the end of the year. Significantly, all PFAS monitoring data must be reported to EPA, which could have broader liability implications under [CERCLA and common law](#).

For industrial dischargers, the guidance recommends that permit-writers incorporate BMP conditions based on pollution prevention/source reduction opportunities. Examples of BMP conditions include product elimination or substitution when a reasonable alternative to using PFAS is available in the industrial process; practicing good housekeeping to minimize accidental discharges of PFAS; and decontamination or replacement of equipment that historically contained PFAS to prevent discharges of legacy PFAS.

EPA also encourages permit-writers to include site-specific technology-based effluent limits for PFAS discharges developed on a “best professional judgment” basis and water quality-based effluent limits where needed to achieve state water quality standards.

For POTWs, the guidance recommends including permit conditions that require facilities to identify all users that may discharge PFAS, implement best management practices and pollution prevention to address these PFAS discharges, and develop local limits for PFAS. Although the Bipartisan Infrastructure Law includes \$1 billion in funding to address emerging contaminants, that money can only be used for capital projects such as construction activities and equipment purchases. This means that POTWs cannot use the funds to offset the cost of increased monitoring suggested by EPA in this guidance.

IMPLICATIONS FOR PERMITTEES

Many delegated states are working closely with stakeholders to find ways to implement EPA’s guidance. We anticipate that imposing effluent monitoring or treatment conditions prior to the completion of notice-and-comment rulemaking will raise issues related to agency authority with permit holders. The availability

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of additional data through increased monitoring will also subject permit holders to closer scrutiny for increased treatment, and increases the risk of regulatory enforcement as well as claims by third parties (both environmental-specific and common law).

For these reasons, it is imperative for permit holders to work closely with their technical and legal teams to ensure that any new monitoring or treatment conditions are appropriate.

MISSOURI'S PFAS WORKGROUP

The Missouri Department of Natural Resources has formed a dedicated task force to develop policies and tools to help manage known PFAS sources throughout the state. The group is made up of wastewater and drinking water utilities, experts in the field and agency representatives from across all environmental media.

Among the agency's initial efforts is the development of NPDES monitoring and pretreatment conditions to identify and reduce PFAS found in wastewater effluent. Once finalized, these conditions will be incorporated into permits on a voluntary basis. In the meantime, the Department continues to collect data from Missouri's public drinking water supplies, which is available at [Missouri's PFAS Viewer Tool](#).

MINNESOTA'S PFAS BLUEPRINT

In February 2021, Minnesota announced its [PFAS Blueprint](#), outlining legislative and regulatory priorities to prevent, manage and remediate PFAS contamination throughout the state. The PFAS Blueprint identifies 10 regulatory priorities, including understanding risks from PFAS air emissions, preventing PFAS pollution, remediating PFAS contaminated sites and managing PFAS in waste.

In March 2022, the Minnesota Pollution Control Agency (MPCA) published the [PFAS Monitoring Plan](#), which sets forth policies and procedures for sampling PFAS data from the regulated community. MPCA has prioritized certain industries for PFAS sampling using the North American Industry Classification System (NAICS) codes, specifically including textiles, paper mills, leather and tanning, airports, and petroleum refining, among others. MPCA has also published a list of specific facilities that have been identified for PFAS Monitoring. MPCA has begun asking businesses to test for PFAS and will implement the Monitoring Plan through 2024.

In late October 2022, MPCA announced it had purchased and was piloting new surface activated foam fractionation (SAFF) technology to remove PFAS from contaminated water. Minnesota is the first state in the nation to purchase and implement SAFF technology to address PFAS contamination.

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For more information on the EPA's guidance, please contact [Brittany Barrientos](#), [Aimee Davenport](#), [Andy Davis](#), [Kyle Foote](#), [Sarah Lintecum Struby](#) or the Stinson LLP contact with whom you regularly work.

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