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EPA Sets First-Time Limits for Six PFAS in Drinking Water

Alert

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On April 10, 2024, the U.S. Environmental Protection Agency (EPA) released its final "PFAS National Primary Drinking Water Regulation Rulemaking" (the Rule). This marks the first time the EPA has set enforceable limits for per- and polyfluoroalkyl substances (PFAS) in drinking water, which the EPA estimates will reduce PFAS exposure for approximately 100 million people.

The Rule specifically applies to certain public water systems, but will significantly impact companies responding to groundwater contamination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or the Resource Conservation and Recovery Act (RCRA) once the EPA finalizes proposed rules under those statutes.[1]

The EPA released a pre-publication version of the final Rule. The final Rule will take effect 60-days after publication in the *Federal Register*.

OVERVIEW OF THE RULE

The Rule applies to community water systems (CWS)[2] and non-transient non-community water systems.[3] Transient non-community water systems are not covered by the Rule.

The Rule sets maximum contaminant limits (MCLs), which are enforceable limits,[4] and maximum contaminant level goals (MCLGs),[5] which are non-enforceable public health goals, for five individual PFAS: perfluorooctanoic acid (PFOA), perfluorooctanesulfonic acid (PFOS), perfluorononanoic acid (PFNA), perfluorohexane sulfonic acid (PFHxS), and hexafluoropropylene oxide dimer acid (HFPO-DA) and its ammonium salt (commonly known as GenX chemicals).

In addition, the Rule sets a Hazard Index (HI) limit for mixtures containing two or more of four specific PFAS: PFNA, PFHXS, HFPO-DA (GenX) and perfluorobutane sulfonic acid (PFBS). Under the HI mixture approach, if any two or more of PFNA, PFHxS, HFPO-DA (GenX chemicals) and PFBS are in a water system, the HI limit is 1.[6] A summary of the MCLs and MCLGs is below.

The EPA initially proposed to regulate only PFOA and PFOS as individual substances. Because individual MCLs are easier to track and because a mixtures formula is harder to calculate, adding individual MCLs for other chemicals may ease implementation as well as the ability of utilities to show compliance.

COMPLIANCE TIMELINE

Drinking water systems must meet the new standards within five years. Regulated drinking water systems have three years to complete initial monitoring for the targeted PFAS. At the conclusion of this monitoring, they must inform the public of the level of PFAS measured in their drinking water. Where PFAS is found at levels that exceed the standards, regulated water systems must implement solutions to reduce PFAS in their drinking water by 2029, which is two years beyond the deadline set forth in the proposed rule.

The EPA estimates between 6% and 10% of the 66,000 public drinking water systems subject to the Rule may need to reduce PFAS to meet the new standards. The agency believes the new limits are achievable using a range of available technologies including granular activated carbon, reverse osmosis and ion exchange systems.

IMPLICATIONS

MCLs set under the Safe Drinking Water Act and National Primary Drinking Water Regulations can have impacts on other Clean Water Act requirements, and on facilities in the CERCLA and RCRA processes. For example:

- The final MCLs may change the analysis for direct and indirect dischargers to determine whether PFAS is present in their waste streams. Through its Effluent Guidelines Program Plan 15, the EPA will collect data this year from publicly-owned treatment works as a key step in identifying PFAS sources. The EPA also plans to collect samples of PFAS and adsorbable organic fluorine from industrial sources upstream of publicly-owned treatment works, before mixing and dilution from other waste streams make it difficult to identify the source of PFAS. The EPA's national sampling initiative under Plan 15 is expected to begin in fall 2024.
- Federal MCLs for PFAS could impact remedy selection under CERCLA section 121. Remedy selection under CERCLA requires consideration of protectiveness and applicable or relevant and appropriate requirements, and the applicable or relevant and appropriate requirements for groundwater include the federal MCLs.

- Under RCRA, federal MCLs frequently serve as alternate concentration limits used in groundwater monitoring. States and the EPA may adopt these PFAS MCLs in non-drinking water contexts, which could expand the number of facilities that must conduct groundwater monitoring as these MCLs are stricter than many current state MCLs for PFAS.

Facilities should evaluate potential impacts from the new MCLs on other programs. While a proactive approach presents risks, it also allows regulated entities to assess exposure, mitigate risks, control the scope and cost of sampling and remediation, and evaluate insurance coverage. Due to increasing PFAS-related regulation and associated liability risks, regulated entities should work with counsel to develop prudent sampling plans and review their existing and legacy policies to identify potential coverage.

NEXT STEPS

The Rule will likely be challenged in federal court, as industry groups have cited legal and scientific issues with the proposed rule. For example, some groups argued that the EPA deviated from statutory procedures under the Safe Drinking Water Act or that the EPA's scientific findings are inconsistent. Parties wishing to challenge the Rule will have 60 days from the date the Rule is published in the *Federal Register* to do so. [7]

Stinson attorneys are actively tracking the evolving regulatory landscape around PFAS. For more information on the evolving regulatory landscape around PFAS, please contact Brittany Barrientos, Aimee Guzman Davenport, Andrew Davis, Kristen Ellis Johnson, Kyle Foote, Betsy Smith, Sarah Lintecum Struby, Claire Williams, Zachary Wright or the Stinson LLP contact with whom you regularly work.

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1. We have previously written about EPA's efforts to regulate PFAS under CERCLA and RCRA.
2. Defined as a public water system that serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents. 40 C.F.R. § 141.2.
3. Defined as a public water system that is not a CWS and that regularly serves at least 25 of the same persons over six months per year. *Id.*
4. MCLs are the highest level of a contaminant that is allowed in drinking water. MCLs are set as close to MCLGs as feasible using the best achievable treatment technology and taking cost into consideration. MCLs are enforceable standards.
5. MCLGs are the level of a contaminant in drinking water below which there is no known or expected risk to health. MCLGs allow for a margin of safety and are non-enforceable public health goals.
6. The HI approach is designed to account for exposures occurring to multiple PFAS at once. It draws from a Superfund concept, using a ratio to develop a health-based water concentration for each individual PFAS that can be added together to determine the total HI. An HI greater than 1 indicates exposure exceeds the health protective level for two or more of the individual PFAS mixture components, and therefore indicates health risks. An HI of less than 1 indicates the occurrence of these four PFAS in

drinking water is regarded as unlikely to result in any appreciable health risk.

7. 28 U.S.C. § 2344.

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