

PFAS: What Is It and Why Should You Care?

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Practice Area: Business and Corporate Law & Environmental Law and Litigation & County and Municipal Governance

Recent Wisconsin headlines have focused on efforts to regulate PFAS chemicals. In the coming months and years, both government entities as well as manufacturers and other industrial users will be forced to navigate what will likely be a complex bureaucratic maze. What follows is a primer that attempts to answer several questions – what exactly are PFAS compounds, why is there urgency to address PFAS contamination, and what does the regulatory framework look like?

What Are/Is PFAS?

Perfluoroalkyl and Polyfluoroalkyl substances (PFAS) are a group of several thousand human-made chemicals that have been in use since the 1940s.¹ PFAS create a grease-, water-, or stain-resistant barrier when applied to a product. They are most commonly found in paints and fire-fighting foams, carpets and upholstery, food packaging, cookware, and cleaning products. While PFAS have been phased out of production in the United States over the past two decades, they still enter the U.S. through imported goods.

Why is There Urgency to Address PFAS Contamination?

PFAS have been referred to as "forever chemicals" due to strong chemical bonds which make them incredibly stable. PFAS take decades or longer to degrade in the environment and they accumulate in the human body over time. Almost all people in the United States have some amount of PFAS in their blood. Some research suggests² that high levels of certain PFAS may increase risk of cancer, increase cholesterol, decrease response to vaccines, increase risk of thyroid disease, decrease fertility in women, increase risk of high blood pressure or pre-eclampsia in pregnant women, and lower infant birth weights.

PFAS have been detected in groundwater across Wisconsin. Sites in the Peshtigo and Marinette areas have undergone or will undergo investigation by the Wisconsin Department of Natural Resources ("DNR"). In March, Madison's well number 15 was shut down as a precaution after readings showed a PFAS concentration of 20-21 parts per trillion ("ppt"). In July, the City of Rhinelander shut down a well with a reading that the City describes as higher than what health agencies suggest. This contamination is linked to military bases, airports, and facilities that previously produced or heavily relied on products containing PFAS.

What Does the Regulatory Framework Look Like?

In 2016, the United States Environmental Protection Agency (EPA) issued a non-enforceable lifetime health advisory level of 70 ppt for two PFAS chemicals in drinking water, PFOA and PFOS. Since then, 19 states have responded by introducing health advisories, regulations, and laws. What follows is a timeline of recent events in Wisconsin that will impact the regulated community.

- On June 21, 2019, DNR announced the Department of Health Services ("DHS") had provided DNR with groundwater quality standards recommendations for 27 substances, which included PFOA and PFOS. The DNR request for recommendations was made pursuant to its periodic updates to groundwater quality standards under NR 140. DNR will submit lists, otherwise known as NR 140 "cycle" lists, of substances to DHS and request that it review available toxicologic information and provide recommendations for new and/or revised groundwater standards.
- The DHS Enforcement Standard Recommended Value for PFOA and PFAS announced on June 21, 2019 is 20 ppt, while the Preventative Action Limit Recommended Value for PFOA and PFAS is 2 ppt. The 20 ppt level suggested by DHS is similar to guidelines and standards in Minnesota, New Hampshire, New Jersey, Vermont and developing standards in Michigan. While these levels are obviously far stricter than the EPA's 70 ppt level, some argue the standard would align with recent research published by New Hampshire³ as well as the Centers for Disease Control and Prevention. Standards among states vary from 13 ppt to 140 ppt. Some states regulate the concentration of PFAS chemicals individually while others use a summed-total concentration for all PFAS. It remains to be seen whether Wisconsin will make its 20 ppt standard enforceable to just PFOA and PFOS or all PFAS combined.
- The next step in the process is the publication of the Statement of Scope, which requires approval from both the DNR Secretary as well as the Governor. According to the Statement, the DNR anticipates holding five public hearings in November of 2020. Anticipated locations include Madison, Eau Claire, Rhinelander, Oshkosh and La Crosse.⁴ Interested parties will have the opportunity to submit either written comment or to publicly testify at the aforementioned hearings (or both).
- On July 22, 2019, DNR initiated a new voluntary PFAS testing program for WPDES permittees.⁵ Specifically, DNR requested 125⁶ "municipal wastewater treatment facilities with industrial pretreatment programs or contributing industries expected to be sources of PFAS to sample their influent and effluent for PFAS compounds."
- On August 22, 2019, Governor Evers issued Executive Order #40, which orders DNR, DHS, and DATCP to:
 - establish a public information website to properly inform the public on PFAS and the risk these chemicals pose to public health and Wisconsin's natural resources,
 - collaborate with municipalities and wastewater treatment plants on screening programs to identify potential sources of PFAS into the environment,
 - expand monitoring and consideration of PFAS in the development of fish and other wildlife consumption advisories to protect human health,
 - develop regulatory standards to protect public health and the environment from PFAS contamination,
 - modify the Voluntary Party Liability Exemption Law, which provides future liability exemptions after successful completion of hazardous substance cleanup, to protect Wisconsin taxpayers from uncertain and costly liability associated with PFAS, and
 - access opportunities for using natural resources damages claims under state or federal law to address compensation for PFAS impacts to natural resources.

The Order also creates the PFAS Coordinating Council, pursuant to Wisconsin Statute section 14.019. Among other tasks, the Council will develop a multi-agency PFAS action plan, identify and prioritize known PFAS sources, develop best practices and protocols for identifying PFAS sources to ensure that the materials are managed in a way that protects natural resources and human health, and explore avenues of funding for the state, local governments, and private parties to aid their efforts to address PFAS.

In addition to the PFAS Coordinating Council, DNR has created a PFAS Technical Advisory Group.⁷ Among other things, the purpose of the Group is to share regulatory updates associated with Wisconsin's development of programs to manage PFAS. Any interested party may attend the meetings, which are held at the DNR headquarters in Madison, and are open to the public.

The Private Sector is not Exempt

In addition to contacting 125 WPDES permittees, DNR has contacted private sector entities for purposes of requesting voluntary sampling of PFAS compounds. It is believed in the event WPDES permittee testing reveals PFAS readings above the proposed 20 ppt threshold, DNR is requesting a review of nearby industrial users to identify potential PFAS sources.

Understanding the legal requirements surrounding any testing is imperative because owners of contaminated sites are not exempt from legal consequences. According to a recent DNR white paper, PFAS are subject to regulation under Wisconsin Chapter 292 and various administrative codes as hazardous substances and/or environmental pollution. On May 30, 2019, DNR referred Tyco to the Wisconsin Department of Justice for civil prosecution after the company failed to notify DNR of PFAS contamination on its property when discovered in 2013. Nationally, manufacturers of PFAS and companies that use PFAS face increasing amounts of litigation over cleanup costs, occupational exposure, product liability, and nuisance claims for personal injury and property damage. 3M, DuPont, and Chemours Co. have agreed to pay millions of dollars to municipalities and class action claimants. Municipalities and the federal government are facing litigation because of discharges from wastewater treatment plants, firefighting facilities, landfills, military bases, and airports.

Conclusion

While the above standard is only proposed and will take several years to advance through the rulemaking process, the regulated community (both the private sector as well as public entities) must remain aware of the impact the identification of PFAS can have on an organization.

¹ For a detailed chemical analysis of PFAS, read GZA GeoEnvironmental, Inc. White Paper

² <https://www.atsdr.cdc.gov/pfas/health-effects.html>

³ <https://www.des.nh.gov/media/pr/2019/20190102-pfas.htm>

⁴ <https://dnr.wi.gov/topic/Groundwater/NR140.html>

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<https://dnr.wi.gov/topic/Contaminants/documents/pfas/MunicipalPFASLetter20190722.pdf>

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<https://dnr.wi.gov/topic/Contaminants/documents/pfas/MunicipalPFASLetterRecipients20190722.pdf>

⁷ <https://dnr.wi.gov/topic/Contaminants/PFASGroup.html>

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