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Wisconsin Legislative Committee will Allow PFAS Standards to Take Effect

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In late February, 2022, the Wisconsin Department of Natural Resources' (WDNRs) Natural Resources Board (NRB)—the entity that sets policy for the WDNR—took steps toward the adoption of statewide standards for PFAS compounds. First, the NRB voted to adopt a drinking water standard of 70 parts per trillion (ppt) for two of the most common PFAS compounds; perfluorooctanoic acid (PFOA) and polyfluorooctane sulfonate (PFOS). The standard, if approved by the Wisconsin Legislature, would apply to municipal water supply systems, as well as trailer parks, schools and other institutions that provide drinking water. The NRB also voted to adopt a surface water standard of eight (8) ppt for PFOS in most surface waters that can support fish. The next step after the adoption of the PFAS standards by the NRB, was for the standards to be reviewed and approved by the Wisconsin Legislature's Joint Committee for Review of Administrative Rules. This week, an aide for the Chair of the Joint Committee for Review of Administrative Rules indicated that the Committee had no objections to the standards and would allow the WDNR to implement the proposed standards.

The regulation of PFAS by the WDNR has been controversial, as the WDNR has historically taken the position that the agency has authority under Wisconsin's "Hazardous Substance Spill Act" ("Spill Act" - Wis. Stats. 292.11) to regulate PFAS even in the absence of established standards, as the Spill Act gives the WDNR broad authority to require testing and remediation of such chemicals. To date, there are no established PFAS regulatory standards in Wisconsin. In April, a Waukesha County Circuit Court judge ruled in the case of *Wisconsin Manufacturers & Commerce, Inc. and Leather Rich, Inc. v. WDNR*, (Waukesha County Case 2021CV000342) that the WDNR lacked the authority to regulate PFAS chemicals because the Wisconsin Legislature had not yet established regulatory standards. The plaintiffs in that case argued that because the WDNR had not adopted regulatory standards for PFAS through administrative rulemaking, the WDNR lacked the authority to require such testing. The judge's ruling would have required the WDNR to wait until legislators have established standards for PFAS through adoption of regulatory limits in state law or through administrative rules. Earlier this month, the judge placed on hold his April decision indicating that he anticipates that the Wisconsin Supreme Court will likely take the case on appeal rather than the intermediate Wisconsin Court of Appeals so that a decision can be made expeditiously. It is not known at this point when the decision would be reviewed by a higher Wisconsin court. However, this recent development by the Joint Committee for Review of Administrative Rules indicates that the adoption of PFAS standards could occur in the near future. The WDNR has indicated that the new standards may possibly be published this summer.

PFAS is an acronym for per- and polyfluorolalkyl substances, which are chemicals that were widely used from the 1960s to the early 2000s in the manufacture of a variety of consumer products, such as stain resistant carpets, non-stick cookware (e.g., Teflon), firefighting foam, food packaging (e.g., microwave popcorn bags/pizza boxes), water resistant clothing (e.g., pre-2000 GoreTex), water resistant repellent (e.g., Scotchgard) and dental floss. While the use of PFAS compounds has largely been phased out in the U.S., these compounds are still used in the manufacturing of many products worldwide.

These substances, known as "forever chemicals," have received considerable attention by federal and state environmental regulatory agencies because of their resistance to chemical breakdown due to the chemical bond between carbon and fluorine atoms in the PFAS compounds, which is one of the strongest in nature. Because of this, humans can still be exposed to PFAS long after the chemicals were released into the environment. Due to this resistance to breakdown, PFAS chemicals can bioaccumulate and travel upwards through ecological food chains to humans (e.g., phytoplankton to zooplankton to fish to humans) and ingestion of fish from contaminated waters is a main contributor of exposure to PFAS.

The ingestion of PFAS from food that was contained in food packaging or from contaminated drinking water also serve as major exposure sources. A groundwater study in 2016 detected PFAS chemicals in the drinking water supply in over 20 states in the U.S. Further, it is estimated that the drinking water supply of approximately 16 million Americans has been impacted with PFAS chemicals. U.S. Center for Disease Control (CDC) health studies estimate that 98% of Americans likely have detectable concentrations of PFAS in their bodies, and medical studies have suggested that PFAS can cause thyroid disease, pancreatic dysfunction, hormone disruption, kidney and liver damage, and an elevated risk of cancer.

In another timely development, after further study of the potential effects of PFAS chemicals, the U.S. Environmental Protection Agency (EPA) on June 15, 2022, issued a Drinking Water Health Advisory which recommended health advisory levels in drinking water supplies for PFOA and PFOS of 0.004 parts per trillion (ppt) and 0.02 ppt, respectively. The previously recommended EPA drinking water health advisory level was 70 ppt. To date, the EPA has not adopted regulatory standards for PFAS chemicals, but it is anticipated that the EPA will issue a National Primary Drinking Water Regulation for PFOA and PFOS, in the fall of 2022. If the EPA's standards which are ultimately adopted are lower than the WDNR's standards, Wisconsin and other states with higher standards will be required to meet the federal requirements.
