

Important PFAS Updates from the EPA and the Wisconsin DNR

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Posted By: David P. Ruetz

Practice Area: Environmental Law and Litigation

On August 26, 2022, the United States Environmental Protection Agency (EPA) posted on their website a "Pre-Publication Notice" that discussed its intent to list two PFAS compounds as "hazardous substances" under the "Comprehensive Environmental Response Compensation & Liability Act" (CERCLA), also known as the "Superfund" law. 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 manufacture of PFAS compounds has largely been phased out in the U.S., these compounds are still used in the manufacturing of many products worldwide, and products containing PFAS are still imported to the U.S.

The two compounds that are proposed to be listed as hazardous substances under CERCLA include, perfluorooctanoic acid (PFOA) and perflourooctane sulfonic acid (PFOS), which are two of the most common PFAS chemicals that have been historically used in numerous manufactured products. The proposed listing also includes the salts and structural isomers of these two compounds.

On September 6, the EPA published a "Notice of Proposed Rulemaking" in the Federal Register (see Federal Register, Vol. 87, No. 171, September 6, 2022) which formally proposed to list these PFAS compounds as hazardous substances under CERCLA. The "Notice of Proposed Rulemaking" began a 60-day period in which the public can comment on the proposal.

One of the most immediate impacts of the adoption of these PFAS compounds as hazardous substances under CERCLA would be that detection of these compounds in the environment in excess of reportable quantities would require reporting of these compounds to the U.S. National Response Center and would give the EPA enforcement discretion under the CERCLA law to require investigation and/or cleanup of these chemicals. Another significant impact would require that Phase I Environmental Site Assessments (ESAs) that are conducted by environmental consultants pursuant to the American Society for Testing & Materials (ASTM) E1527 Standard Practice for Phase I ESAs and the EPA's All Appropriate Inquiry (AAI) Rule, include a review of whether PFAS compounds have ever been stored, used or manufactured at a property, and, most important, whether the PFAS may have potentially impacted the property. At present, because the ASTM E1527 Standard Practice for Phase I ESAs and the AAI Rule requires a review only of CERCLA-listed hazardous substances, since PFAS are not currently listed as CERCLA hazardous substances, an inquiry whether these substances were stored, used or manufactured at a property is not required to be included in the scope of a Phase I ESA. It is also anticipated that if the EPA lists these PFAS compounds as hazardous substances under CERCLA, that states that do not currently regulate PFAS (a few states, such as Vermont and Michigan, have adopted regulatory-based standards for PFAS) will adopt similar laws that address PFAS.

In a related action, the Wisconsin Department of Natural Resources (WDNR) recently adopted regulatory standards for PFOA and PFOS in drinking water and surface waters. The newly-adopted drinking water standards, set forth in Wisconsin Administrative Code Chapter NR 809, establish a "Maximum Contaminant Level" (MCL) for PFOA and PFOS of 70 parts per trillion (ppt), individually or combined. This standard applies to both "community water systems" (CWS) and "non-transient non-community water systems" (NTNCWS). A CWS is a public water system which provides at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents. Any public water system serving 7 or more homes, 10 or more mobile homes, 10 or more apartment units, or 10 or more condominium units is a "community water system," unless information is available to indicate that 25 year-round residents will not be served. A NTNCWS is a non-community water system that regularly serves at least 25 of the same persons over 6 months per year. Examples of non-transient non-community water systems include those serving schools, day care centers and factories.

In addition to the MCL, the new regulations require routine sampling of regulated water systems to test for PFOA and PFOS, and also requires that systems that exceed the MCL implement measures to return the system to compliance, which in some cases, could require installation of a new well or installing a treatment system.

For surface waters, a regulatory standard of 8 ppt has been established for PFOS in all waters in Wisconsin except those that cannot naturally support fish and do not have downstream waters to support fish. For PFOA, a regulatory standard of 20 ppt applies to all waters used as public water supplies, and 95 ppt for all other surface waters. In addition, new rules were adopted which established PFOS and PFOA requirements for dischargers of wastewater in surface waters of Wisconsin, such as sampling to determine whether the wastewater has concentrations of PFOS or PFOA that have a reasonable potential to cause or contribute to an exceedance of the PFOS or PFOA standards. Further, for those facilities that have a reasonable potential to exceed the PFOS or PFOA standards, a PFOS or PFOA Minimization Plan must be implemented, which could include source reduction actions.

Although the drinking water and surface water standards have been adopted, a previously proposed standard for groundwater was rejected by the WDNR's Natural Resources Advisory Board earlier this year. However, it is expected that the WDNR will resume its attempt to establish a groundwater standard in the near future.

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