

Federal PFAS regulation and the states

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The Environmental Protection Agency kicked off 2020 by taking the first substantive steps to implement an action plan for per- and polyfluoroalkyl substances, commonly known as PFAS, including evaluation of drinking-water standards for some varieties.

New federal PFAS reporting requirements took effect as well: Federal legislation passed in December 2019 led to the agency's addition of 172 PFAS to the Toxics Release Inventory, with more to be added under a separate federal rulemaking proposal currently under consideration.

PFAS are synthetic chemicals used in a wide range of products and consumer goods, from fire retardants to nonstick cookware, stain-resistant carpets and clothing, food packaging, and cosmetics.

Because PFAS do not break down easily, they can accumulate in the environment and have been found in soil and water throughout the United States. Their effects are uncertain, but studies have linked certain PFAS to various health issues including endocrine problems, negative reproductive effects and cancer.

The EPA's recent actions constitute its most significant steps toward regulating PFAS since 2016, when the agency issued non-binding advisories under the Safe Drinking Water Act recommending maximum exposure levels for the two most-studied substances: perfluorooctanoic acid or PFOA, and perfluorooctane sulfonate or PFOS.¹

STATE ACTION, LITIGATION

Due to growing public concern over the absence of action at the federal level, states have been busy developing and implementing a wide range of new rules, policies and standards covering dozens of different PFAS based on new scientific research.

These regulations vary in substance, stringency and most of all in their potential to endure once EPA regulations are finalized.

The outcome of federal decision-making could also affect dozens of high-profile PFAS lawsuits making their way through courts around the country.

Generally, federal environmental laws establish a floor rather than a ceiling on environmental regulations.

The Clean Water Act, the SDWA and the Comprehensive Environmental Response, Compensation, and Liability Act all

have savings clauses preserving states' authority to enforce stricter standards if they do not conflict with federal regulatory schemes.

As a result, the EPA's efforts may not have direct implications for state-level regulatory programs. Still, the agency's new initiative could have important legal and political consequences for state action related to PFAS.

Some of the most significant state efforts to manage and address PFAS include adopting drinking water and groundwater standards, implementing PFAS testing and reporting requirements, setting cleanup standards, and filing litigation claims.

DRINKING WATER STANDARDS

Under the SDWA, when the EPA identifies a new candidate contaminant, it has authority to determine whether to regulate that substance and identify a maximum contaminant level goal.

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Following a review of adverse health effects, health risks, and the incremental costs and benefits associated with proposed values, the EPA adopts an enforceable national primary drinking water regulation: either a maximum contaminant level or a treatment technique based on the best available technology.

Primary standards go into effect three years after they are adopted, and they are reviewed every six years in light of new data, information and technologies. The EPA's recent proposal is the first step in that process, and it represents the agency's initial thinking on whether to regulate PFAS under the SDWA.

It is too early to predict the outcome of the PFAS drinking water rulemaking — the EPA could adopt standards that are more stringent than current health advisory levels as easily as it could ratchet down limits.

The EPA also could decline to adopt any drinking water standards after reviewing comments and considering feasibility, including cost and the efficacy of available remediation technologies.

In the meantime, the federal benchmark for PFAS in water supplies is the 2016 EPA health advisory. The advisory recommends limiting exposure to drinking water with PFAS and PFOA to a combined concentration of 70 parts per trillion, but it does not establish binding limits.

In the absence of federal limits, a handful of states have sought to adopt enforceable limits at or below the advisory levels.

In June 2019, New Hampshire adopted PFAS restrictions more stringent than EPA health advisory levels, limiting PFOA to 12 ppt and PFOA to 15 ppt, and adding limits for two more substances not regulated by the EPA: PFHxS (18 ppt) and PFNA (11 ppt).²

A municipal utility and manufacturer have challenged those standards, resulting in an injunction suspending them until a cost-benefit analysis can be completed.³

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More recently, New Jersey and Vermont both adopted enforceable interim standards for PFAS in drinking water, also well below EPA health advisory levels.⁴ New York, Massachusetts and Michigan are all in the midst of rulemakings to adopt PFAS drinking water standards.⁵

In other states, PFAS regulation in the absence of federal standards faces resistance: Alaska took the plunge in August 2018, adopting regulations that limited the combined total of five PFAS compounds in drinking water to 70 ppt. It retreated less than a year later, rescinding the standard in favor of a policy deferring to EPA standards.⁶

Several states considering PFAS limits have adopted legal mechanisms that would make it difficult or impossible to implement more stringent state limits once the EPA adopts a regulatory standard or a makes a formal determination against regulation.

Michigan, which adopted some of the strictest state water quality requirements in the country after high levels of lead were found in Flint water supplies in 2014, nevertheless passed a “no stricter standards” law in 2018 that an EPA primary drinking water standard could trigger.⁷

North Carolina, which is currently considering PFAS limits for groundwater, adopted a similar law in 2014.⁸

And even as Illinois regulators are undertaking a rulemaking to set groundwater standards, state lawmakers are considering a bill specifying that PFAS drinking water limits cannot exceed “EPA health advisory or regulatory levels.”⁹

Regardless of each state’s current status with respect to PFAS regulation, states will be tracking the timing and substance of the EPA’s rulemaking process closely to inform their own regulatory evaluations.

The EPA’s signal that it is moving forward with evaluating PFAS drinking water standards could stall or scuttle ongoing efforts to adopt state-level drinking water limits, especially in states that have prohibitions on or policies against more stringent regulations, like Alaska, Michigan and North Carolina.

It may have less of an impact in states that have already decided to move ahead, like New Jersey and Vermont. It could even spur state-level action in states that are unsatisfied with the EPA’s final determination.

REPORTING, TESTING AND MONITORING

The EPA’s recent initiatives also include ramping up data collection to better understand the scope and extent of PFAS releases.

The agency created the Toxics Release Inventory program in 1986 under the Emergency Planning and Community Right-to-Know Act to provide the public with information regarding the manufacture, use and disposal of chemicals that may pose a threat to human health and the environment.

The EPA recently added 172 PFAS to the TRI program for the 2020 reporting period, with more to be added under a separate federal rulemaking proposal also under consideration by the agency.

This data collection effort follows an earlier requirement that agency imposed on public water systems to test for six PFAS every five years as part of the unregulated contaminant monitoring rule under the SDWA.¹⁰

States also have developed PFAS data collection mechanisms, at times going much further than the EPA’s monitoring requirements.

For example, California’s program for addressing PFAS has focused heavily on testing and reporting, and it demonstrates the potential to leverage the power of reporting and notification requirements at the state level.

Legislation that took effect on Jan. 1 authorizes the state’s Water Resources Control Board to order water providers to test for PFOS and PFOA.¹¹

Water systems must report these PFAS to local governments when levels exceed the adopted notification level. If they

exceed the designated response level, water providers must either notify customers or take wells out of service.¹²

In February, California regulators announced that they were lowering response levels from a maximum of 70 ppt combined for PFOA and PFOS to 10 ppt for PFOA and 40 ppt for PFOS. State officials also requested recommendations for notification levels for six additional PFAS that had been detected in California water supplies.¹³

Water providers throughout California have removed hundreds of wells from service since the state announced reporting requirements.¹⁴

California's testing and reporting requirements are not absolute restrictions, but they may be nearly as effective at forcing change by motivating water suppliers to seek new sources that enable them to avoid customer notification and associated litigation risk.

California's strict customer notification requirements for PFAS are unique, but at least three other states also have testing and reporting requirements for PFAS in drinking water.

Connecticut required all public water systems serving more than 10,000 people to start testing for PFAS in 2013, and it set action levels at 70 ppt for the sum of five PFAS in 2016.¹⁵

As in other areas of PFAS regulation, states are taking independent action, designating PFAS as hazardous substances under state law and initiating their own cleanup actions.

Michigan initiated a statewide testing program in 2018, which includes quarterly sampling requirements for water supplies with PFAS levels greater than 10 ppt.¹⁶ And Vermont passed a law requiring 650 public water suppliers to test for PFAS by Dec. 1, 2019.¹⁷

These monitoring and notification requirements are likely to have a much more direct and immediate impact on water suppliers and the broader community than the EPA's current SDWA regulatory process, which will take several years to play out.

In addition, state-level data collection requirements will not be preempted or otherwise affected by the EPA's addition of PFAS to the TRI program.

As a result, the regulated community will be forced to comply with several different reporting requirements, each of which may have conflicting reporting methodology, potentially creating a confusing and conflicting message for the public.

Reliable data is necessary to inform appropriate action to resolve PFAS issues once scientifically based risk levels have been established.

But without a framework for interpreting and responding to that data, dissemination can raise unfounded alarm, force water providers and other businesses to modify their operations, and needlessly increase litigation risk.

REMEDIATION AND DISPOSAL

One federal-level option for addressing PFAS is hazardous substances designation under CERCLA, which would support federal investigation and remediation and potentially trigger strict liability for former and current owners and operators of facilities where PFAS were used or discovered.

To this end, the EPA issued a notice of proposed rulemaking for a CERCLA listing in 2019, as well as guidance for addressing groundwater contamination at federal cleanup sites.¹⁸

According to its 2020 PFAS action plan, the agency is moving forward with the development of a proposal to designate PFOA and PFOS as hazardous substances.

Still, the EPA is facing pressure to move more quickly after 22 state attorneys general called on Congress in December 2019 to require the agency to begin the CERCLA process.

They said such action would promote cleanup of some of the most impacted sites across the country, including hundreds of current and former military sites.

As in other areas of PFAS regulation, states are taking independent action, designating PFAS as hazardous substances under state law and initiating their own cleanup actions.

New York, which in 2016 became the first state to designate certain PFAS as hazardous substances, has included PFAS remediation requirements in consent decrees for at least three sites.

This year, New York adopted a requirement for PFAS screening at all sites undergoing investigation to inform potential cleanups or to qualify for brownfield development subsidies.¹⁹

Minnesota settled cost claims against 3M for \$850 million in 2018, based in part on the state's listing of certain PFAS as hazardous substances.²⁰

New Mexico's enforcement of its PFAS standard sparked a legal battle with the military. The Air Force has staunchly resisted the state's violations notices and demands for remediation of PFAS in water and soil.²¹

Claims for state and local cleanup costs are often unpredictable and based on state-level common law claims.

While extending strict liability and the notoriously complex rules and procedures for cleanups under CERCLA to PFAS may seem extreme, doing so could reduce the uncertainty and risk surrounding PFAS cleanup liability by providing structured procedures and resolution for investigation, remediation and cost allocation.

PENDING AND PROSPECTIVE LITIGATION

Finally, the EPA's recent regulatory efforts may have a significant impact on litigation — for good or bad. For example, the agency's recent addition of 172 PFAS to the TRI program (with further additions likely) has the potential to expose a wide range of litigation targets to potential plaintiffs.

On the other hand, once the EPA finalizes the drinking water regulatory determination, it could stymie litigation. Even if compliance with applicable regulations does not absolve defendants of liability, courts assign significant weight to standards adopted or rejected by expert agencies based on systematic review of scientific knowledge under the scrutiny associated with public notice and comment.

While adopting laws and regulations addressing PFAS has proven to be slow and difficult, the pace of new litigation involving PFAS appears to be accelerating.

Federal decisions establishing limits on PFAS — or definitively declining to do so — could slow that acceleration and support the successful resolution of many ongoing lawsuits.

Particularly in cases where courts must evaluate risks and impacts of exposure to PFAS to address common law claims such as nuisance, negligence and trespass, federal standards could be critical to resolving litigation.

VOLATILITY LIKELY TO CONTINUE

Even if the EPA moves quickly on new PFAS regulations, including drinking water standards and CERCLA listings, the volatility surrounding PFAS is likely to continue.

Dozens of states have already taken independent action on a broad range of rules and standards and have the right to continue to implement those actions in the face of EPA regulation.

And new lawsuits are being filed on a weekly and even daily basis, creating a common-law based framework for PFAS regulation by courts.

Nevertheless, federal rulemaking and legislation could result in some benefits by reducing uncertainty and providing tools to coordinate responses effectively and allocate resources.

In the meantime, due to the fractured nature of state-driven and court-driven standards, tracking and responding to important developments in PFAS regulation will continue to be a major challenge for stakeholders.

Notes

¹ EPA, *Lifetime Health Advisories and Health Effects Support Documents for Perfluorooctanoic Acid and Perfluorooctane Sulfonate*, 81 Fed. Reg. 33250 (May 25, 2016).

² N.H. Dep't of Env'tl. Servs. (NHDES), *Summary Report on the New Hampshire Department of Environmental Services Development of Maximum Contaminant Levels and Ambient Groundwater Quality Standards for Perfluorooctanesulfonic Acid (PFOS), Perfluorooctanoic Acid (PFOA), Perfluorononanoic Acid (PFNA), And Perfluorohexanesulfonic ACID (PFHxS)*, Jan. 2019.

³ *Plymouth Village Water & Sewer v. Robert R. Scott, Commissioner of the N.H. Dep't of Env'tl. Services*, No. 217-2019-CV-650, order issued (N.H. Super. Ct. Nov. 26, 2019).

⁴ Vermont limits PFOA, PFOS, PFHxS, PFNA and PFHpA, requiring water systems to issue a "do not drink" advisory and implement mitigation plans if the level is exceeded. New Jersey, which adopted an MCL for PFNA in 2018, is now considering drinking water and groundwater standards of 14 ppt for PFOA and 13 ppt for PFOS. Vermont Dept. of Health, *Memorandum regarding Drinking Water Health Advisory for Five PFAS (per- and polyfluorinated alkyl substances)*, July 10, 2018; New Jersey Water Resource Management, *Division of Water Supply & Geoscience, Notice of Rule Proposal*, PRN 2019-042, April 2, 2019.

⁵ New York's proposed drinking water regulations would limit PFOA and PFOS to 10 ppt. The public comment period ends in March. Michigan completed the notice and comment period in January for drinking water regulations that would limit seven PFAS, including PFOA to 8 ppt and PFOS to 16 ppt. The Massachusetts Department of Environmental Protection proposed a limit of 20 ppt for both PFOA and PFOS in December 2019. New York, *Notice of Proposed Rulemaking, 2020 NY Reg. Text 529245* (Jan. 22, 2020); Mich. Dep't of Env't, Great Lakes and Energy, *Supplying Water to the Public*, Pending Rule Set 2019-35 EG, March 28, 2019; Massachusetts DEP, *Technical Support Document Per- and Polyfluoroalkyl Substances (PFAS): An Updated Subgroup Approach to Groundwater and Drinking Water Values*, Dec. 26, 2019.

⁶ Alaska adopted short-lived limits for PFOS, PFOA, PFNA, PFHxS, PFHpA and PFBS in 2018. Alaska Dep't of Env'tl. Conservation (AKDEC), *Technical Memorandum: Action Levels for PFAS in Water and Guidance on Sampling Groundwater and Drinking Water*, Aug. 20, 2018; AKDEC, *Technical Memorandum, Action Levels for PFAS in Water and Guidance on Sampling Groundwater and Drinking Water*, April 9, 2019.

⁷ Michigan's law says agencies shall not adopt rules "more stringent than the applicable federally mandated standard" absent a clear and convincing need. Michigan Public Act 602 (2018); MCL 24.232, 24.245.

⁸ North Carolina G.S. 150B-19.3. The North Carolina Department of Environmental Quality Science Advisory Board recommended a combined 70 ppt limit for PFAS and PFOA in groundwater in December 2019.

⁹ Illinois Env'tl. Prot. Agency, *Proposed Changes to 25 Ill. Adm. Code 620: Groundwater Quality*, Dec. 19, 2019; Illinois HB 3982 (2020).

¹⁰ 77 Fed. Reg. 26,072 (May 2, 2012); 40 C.F.R. §§ 141.35, 141.40.

¹¹ California AB 756 (2019).

¹² California State Water Resources Control Board (SWRCB), Department of Drinking Water (DDW), *Drinking Water Notification Levels and Response Levels: An Overview*, Feb. 6, 2020; *Guidelines for Testing and Reporting PFOA and PFOS*, Aug. 23, 2019.

¹³ California SWRCB, DDW *Request to Office of Environmental Health Hazards for Notification Level Recommendations on Detected PFAS Analytes*, Feb. 6, 2020.

¹⁴ See, e.g., Orange County Water District Press Release: *Water Agencies in Orange County Initiate Steps to Protect Public Health: Dozens of Wells to be Shut Down after State Lowers Threshold for PFAS Chemicals*, Feb. 6, 2020; L.A. Times, *Hundreds of Wells Contaminated Across California*, Oct. 14, 2019.

¹⁵ Connecticut Department of Public Health, Drinking Water Section, *Strategy – PFAS in Public Drinking Water Systems*, February 2019.

¹⁶ Mich. Dep’t of Env’t, Great Lakes, and Energy, *2018 PFAS Sampling of Drinking Water Supplies in Michigan*, July 26, 2019.

¹⁷ Vermont Act 21 (2019).

¹⁸ EPA, *Interim Recommendations for Addressing Groundwater Contaminated with Perfluorooctanoic Acid and Perfluorooctanesulfonate*, Dec. 19, 2019.

¹⁹ N.Y. Dep’t of Env’tl. Conservation, *Guidelines for Sampling and Analysis of PFAS*, January 2020.

²⁰ *State v. 3M Corp.*, No. 27-cv-10-28862, order issued (Minn. Dist. Ct. Feb. 20, 2018).

²¹ *New Mexico v. United States*, No. 19-cv-178 (D.N.M.).

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