

Practice Update

EPA's Proposed Rules Would Severely Limit PFAS Levels Permissible in Drinking Water

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Last month, the U.S. Environmental Protection Agency (EPA) published a new proposed rules under the Safe Drinking Water Act that will severely limit the levels of certain substances of a man-made family of chemicals, collectively known as “PFAS,” permissible in drinking water. PFAS National Primary Drinking Water Regulation Rulemaking, 88 FR 18638 (March 29, 2023).

PFAS (per- and polyfluoroalkyl substances) are a group of synthetic chemicals that have been linked to serious conditions such as cancer, thyroid disease, fertility issues, and liver damage. They are commonly known as “forever chemicals” because their chemical and physical properties allow them to accumulate over time and make them resistant to degradation. They break down very slowly in the environment and in the bodies of humans and animals. PFAS have been used since the 1940s and are commonly found in consumer and industrial products, such as clothing, cookware, cosmetics, food packaging, carpeting, and fire-fighting foam. Aside from direct exposure to PFAS via a consumer or industrial product, humans may be exposed to PFAS in drinking water. The high prevalence of PFAS in the environment has led them to be found in the blood of 98% of people in the U.S., according to the CDC.

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The EPA's proposed rules would limit the levels of certain PFAS in drinking water, setting the maximum contaminate level (MCL) at four parts per trillion (ppt) for two types of PFAS--PFOA and PFOS (perfluorooctanoic acid and perfluorooctane sulfonic acid, respectively). This equates to a mere 4 drops of water in an Olympic sized pool. In addition to setting the MCLs, the EPA has also proposed maximum contaminant level goals (MCLGs), which unlike MCLs, are aspirational and are not enforceable limits. MCLGs are based solely on the levels that are safe for the public's health, representing the level at which no known or anticipated adverse effects on the health of persons is expected to occur and allows an adequate margin of safety, without consideration for the feasibility and technological limitations of testing and treatment. For PFOA and PFOS, the EPA has stated that the MCLG should be zero parts per trillion, *i.e.*, there is no safe level for humans.

Several states have already implemented limits on the amount of certain PFAS in drinking water; however, most states have not yet enacted any binding regulations. Regardless, the new EPA limits are more stringent than any current state limits. Therefore, all states will be required to take action to come into compliance with the EPA's proposed regulations once finalized.

The proposed rules will directly apply to public water facilities, requiring them to monitor for the specified chemicals, to notify the EPA and the public if the maximum permissible levels are exceeded, and to treat water to reduce exceeded levels or alternatively find a new supply of uncontaminated water. But the effects of the new rules will extend beyond just public water companies, however. Because the costs of testing and treatment to meet the new limits would be considerable, many public utilities will likely need to seek additional funding from federal programs in order to meet the new standards. Increased compliance costs would no doubt be passed on to customers.

Manufacturers of PFAS have long been targets of tort litigation, including claims for contamination and products liability, and there have been significant damage awards made in some of those cases.

Plaintiffs in PFAS cases likely will argue that the new lower limits provide evidentiary support for toxicity. Moreover, it is predicted that more lawsuits will be filed, including claims by water utilities seeking to recover the costs of treatment and/or replacement of water sources from the manufacturers of the now-regulated substances.

Previous actions have challenged the EPA's interim health advisories for PFOA and PFOS, as well as the EPA's advisory on Gen X chemicals (hexafluoropropylene oxide dimer acid and its ammonium salt). The American Chemistry Council (ACC) sued the EPA last year, arguing that the advisory levels of PFOA and PFOS in drinking water were set below reasonable detection limits (0.004 and 0.02 ppt, respectively), making them impossible to implement, and based on "flawed" science. The case was dismissed for lack of standing. *Am. Chemistry Council v. EPA*, 22-1177 (D.C. Cir. 2022). In a separate suit, The Chemours Co., a manufacturer of PFAS, challenged the EPA's advisory on GenX compounds, citing a flawed and scientifically unsound toxicity assessment. This case is still pending. *The Chemours Company FC, LLC v. EPA, et al.*, 22-2287 (3d Cir. 2022). Given the high costs of compliance and the industry claims referred to above, it is anticipated that there will be litigation surrounding the science behind the EPA's proposed drinking water limits.

The proposed rules are currently in the 60-day comment period. On May 4, 2023, a public hearing will be held virtually and the EPA will take public comments on the proposed rule. A final decision will then be issued, which the EPA has indicated is likely to occur late this year.

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