LEGAL UPDATES

EPA Unveils New Proposed National Limits for PFAS in Drinking Water

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On March 14, EPA released its long-awaited proposed rule limiting concentrations of six per- and polyfluoroalkyl substances (PFAS) or "forever chemicals," in public drinking water. The proposed rule would set a legally enforceable maximum contaminant level (MCL) for PFOA and PFOS at 4 parts per trillion or "ppt" each. EPA also proposed a health-based, non-enforceable Maximum Contaminant Level Goal (MCLG) for PFOA and PFOS of zero, consistent with EPA's controversial position that they are likely human carcinogens and there is no safe level of exposure to these two chemicals. However, EPA's proposed rule sets an enforceable MCL of 4 ppt for these PFAS, which it considers feasible to implement, using the best available laboratory testing and treatment technology, when taking compliance costs into consideration.

The draft rule also targets four other PFAS: HFPO, PFNA, PFHxS and PFBS. This part of the Rule would limit any mixture containing one of the four additional PFAS through application of a Hazard Index that adds the Health Based Water Concentrations (HBWCs) of these four PFAS when present in the sample to determine if the water is safe to drink. The Hazard Index approach is intended to address cumulative risks from mixtures of these chemicals. It is the first time a Hazard Index has been used as an MCL.

EPA's proposed MCLGs, MCLs and Health Based Water Concentrations for these PFAS are set forth in the following table:

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PFAS	Proposed MCL Goal	Proposed MCL	Health Based Water Concentration (HBWC)
PFOS	0	4 ppt	–
PFOA	0	4 ppt	–
Gen X (HFPO-DA)			10 ppt
PFNA			10 ppt
	Hazard Index of 1.0	Hazard Index of 1.0	
PFHxS			9 ppt
PFBS			2,000 ppt

If finalized, the rule would require public water systems to monitor for the six PFAS and notify the public if these PFAS are detected at levels that exceed proposed regulatory standards. Municipalities and other regulated entities would also be required to take action to reduce the levels of PFAS in drinking water if they exceed the proposed regulatory standards. Public water systems that would be regulated under the proposed rule include community water systems (for example, public and privately owned water utilities), as well as non-transient, non-community systems used to supply water to some schools, daycares, and factories. Transient, non-community public water systems that serve different individuals each day, such as restaurants, campgrounds, or highway rest areas, are not subject to the proposed rule.

PFOA and PFOS

For PFOA and PFOS, the proposed 4 ppt MCL is more stringent than any current state standard for finished drinking and is set to the lowest level detectable by most laboratories. According to the National Primary Drinking Water Regulation Rulemaking, EPA considered 4, 5, and 10 ppt limits for PFOA and PFOS but settled on the lowest presently detectable level of 4 ppt.

Hazard Index

The Hazard Index approach that EPA is taking to regulate the additional four PFAS (PFHxS, GenX Chemicals, PFNA, and PFBS) has traditionally been used in remedial and response programs to evaluate cumulative health risks of simultaneous exposure to mixtures of related chemicals. For the first time, EPA is proposing to use the Health Index as an MCL. To determine the Hazard Index for these four PFAS, water systems would monitor and compare the amount of each PFAS in drinking water to its HBWC, which is the level at which no health effects are expected for that PFAS. Water systems would add the HBWC comparison values for each PFAS contained within the sample. If the total value is greater than 1.0, the sample would exceed the proposed Hazard Index MCL for these four PFAS. This means that even if levels of PFHxS, GenX, PFNA, and PFBS are all detected below their respective HBWC, the MCL can still be exceeded if the sum total of the comparison values exceeds the Hazard Index of 1.0.

Who Would Be Affected by the New National PFAS Limits?

The regulated community has been awaiting a proposed MCL, particularly since last June, when EPA issued its non-enforceable interim Lifetime Health Advisories (LHAs) for PFOA and PFOS at orders of magnitude below the prior health advisory levels. The interim LHAs for PFOA and PFOS are so low that modern laboratory equipment cannot detect them. The current proposed MCLs for these six PFAS will at least provide some uniformity, making evaluation of risk, remediation efforts, and permit conditions more uniform across the country.

Unlike non-enforceable interim LHAs, the proposed new MCLs would be legally enforceable. And while the rule is directed at regulating public water supplies, it will undoubtedly have broad application across both the public and private sectors in a variety of regulatory and litigation contexts. For example, when PFAS are detected in public water supplies, the regulators and the affected municipalities will pursue potentially responsible parties who may have caused or contributed to the presence of PFAS contamination in the water. More class action lawsuits can also be expected to be filed on behalf of persons who consumed drinking water containing PFAS above the new MCL.

Timing and Next Steps

EPA expects to finalize the rule by the end of 2023, and, for public entities subject to the rule, it will go into effect three years after it is finalized. Compliance for those entities is measured based on how frequently a system is conducting monitoring. For example, systems with annual or more frequent monitoring will evaluate compliance based on a running annual average at any sampling point. To determine compliance with the Hazard Index, EPA requires averaging the Hazard Index for all the samples taken in the past year. If the running annual average exceeds a Hazard Index of 1.0, it will violate the proposed Hazard Index MCL.

Private entities, unless operating a public water system, would not be directly subject to the rule. However, they are likely to see state agencies, plaintiffs in lawsuits, and permit conditions citing to and effectively applying, or at least trying to apply, the proposed MCLs. Private parties with industrial discharge permits should expect their publicly owned treatment works to compare their surface water effluent discharges to the MCLs, at least in some states, and dischargers could face new PFAS monitoring or pre-treatment requirements as permits are renewed. Additionally, private parties with ongoing cleanup obligations are likely to see the MCLs added as Applicable or Relevant and Appropriate Requirements (ARARs).

Public entities should familiarize themselves with the monitoring frequency in their current permits. They should also begin to evaluate currently available treatment technologies, particularly those referenced by EPA as capable of treating drinking water for PFAS, including granular activated carbon (GAC), anion exchange resins (AIX), reverse osmosis (RO), and nanofiltration (NF).

There are significant resources available, especially for economically impacted and environmental justice communities, to seek public funding for upgrades to these treatment systems. EPA notes that the Bipartisan Infrastructure Law provides $9 billion to invest in drinking water systems impacted by PFAS and other emerging contaminants. $4 billion of that is investment through the Drinking Water State Revolving Funds, including a requirement that states dedicate 25% of these resources to disadvantaged communities or public water systems serving fewer than 25,000 people. Notably, these funds can provide funding to households served by private wells to connect to a public drinking water system or to form a new drinking water system subject to regulation under the Safe Drinking Water Act. An additional $5 billion is appropriated to communities as grants through EPA's new Emerging Contaminants in Small or Disadvantaged Communities Grant Program. Public entities are already applying for and receiving relief under these and similar programs.

EPA will host two informational webinars about the proposed rule on March 16, 2023, and March 29, 2023, and will hold a public hearing on May 4, 2023, where members of the public can register to attend and provide verbal comments to EPA on the proposed rule. There will be a 60-day comment period once the rule is officially published in the Federal Register. Comments may preview concerns with the rule related to what many view as the unproven science behind the

claimed health risks posed by PFAS and the testing and compliance cost assumptions that EPA utilized to set the new proposed limits and could be the basis for future litigation challenging the rule.

For more information, contact Bill Beck, Ally Cunningham, Rick Kubler, Jessica Rosell, Matt Walker, or your regular Lathrop GPM attorney.