

# EPA Finalizes First-Ever Federal Enforceable Drinking Water Standard for Certain PFAS

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On April 10, in a move that is almost certain to result in legal challenges from states, utilities, and other entities charged with its implementation, EPA released its much-anticipated Final Rule limiting concentrations of certain per- and polyfluoroalkyl substances (PFAS), or so-called "forever chemicals," in public drinking water. The Final Rule, which EPA issued pursuant to the Safe Drinking Water Act (SDWA), represents the first time the federal government has set enforceable standards for any PFAS in drinking water.

The Final Rule sets a legally enforceable maximum contaminant level (MCL) in public drinking water for each of PFOA and PFOS at 4.0 parts per trillion or "ppt" and an aspirational but unachievable Maximum Contaminant Level Goal (MCLG) for PFOA and PFOS of zero, indicating EPA's position that there is no "safe" level for these PFAS.

The Final Rule also sets individual, stand-alone MCLs and MCLGs for three other PFAS - "GenX chemicals" (HFPO-DA), PFNA, PFHxS - at 10 ppt each. In addition to individual MCLs for those three PFAS, the Final Rule sets a Hazard Index of 1 as the MCL and MCLG for any mixture containing two or more of HFPO-DA, PFNA, PFHxS, and PFBS. The Hazard Index is determined by calculating a ratio for each of those four PFAS (level of the PFAS in drinking water divided by the Health Based Water Concentrations (HBWCs) for that PFAS) and adding the ratios together. The individual MCLs and Hazard Index MCLs are independently applicable for compliance purposes.

In summary, the new enforceable PFAS MCLs and MCLGs are as follows:

## **Regulated Parties**

The Final Rule applies to public water systems, including community water systems (CWSs) and non-transient non-community water systems (NTNCWSs). A CWS is one that supplies water to the same population year-round or regularly serves at least 25 year-round residents. A NTNCWS is a system that regularly supplies water to at least 25 of the same people at least six months per year (e.g., schools, factories, office buildings, and hospitals with their own water systems). Transient, non-community public water systems that serve different individuals and businesses each day, such as restaurants, campgrounds,

or highway rest areas, are not subject to the proposed rule.

### **Key Requirements**

By 2027, public water systems must conduct initial monitoring to establish baseline levels of regulated PFAS at all entry points to their distribution system. Under certain circumstances, a system can use previously collected data to satisfy the initial monitoring requirement.

Beginning in 2027, public water systems must conduct compliance monitoring at all entry points to their distribution system to demonstrate that finished drinking water does not exceed the MCLs. Compliance monitoring schedules will be determined for each entry point depending on initial monitoring results and can involve quarterly, annual, or triennial monitoring.

For systems with quarterly monitoring, compliance with the MCLs for regulated PFAS is determined by calculating the Running Annual Average. If a water system has four consecutive quarterly sample results below the MCLs, primacy agencies (i.e., agencies with primary enforcement responsibility over its public water systems) can determine an entry point is reliably and consistently below the MCLs and allow the system to conduct annual instead of quarterly compliance monitoring. If, however, a system that monitors annually identifies sample results that are greater than or equal to the MCLs for any regulated PFAS, the system must revert to quarterly compliance monitoring.

Beginning in 2029, public water systems with PFAS in drinking water that violates the new MCLs must take action to reduce PFAS levels in their drinking water. The Final Rule codifies that granular activated carbon, anion exchange resins, and high-pressure membranes (nanofiltration and reverse osmosis) are Best Available Technologies for treating PFAS in drinking water.

The Final Rule also includes public notice requirements. For example, CWSs must report detected PFAS in their annual Consumer Confidence Reports (CCR). In the event of any MCL violation, a CWS must provide language regarding health effects in its CCR and must comply with Tier 2 public notification requirements (notice as soon as practicable but no later than 30 days after learning of the violation). Monitoring and testing procedure violations require Tier 3 notification (notice no later than one year after the system learns of the violation).

### **Notable Differences Between the Proposed Rule and Final Rule**

The Final Rule differs from the Proposed Rule in at least two key respects.

First, the Proposed Rule contemplated regulation of HFPO-DA, PFNA, PFHxS exclusively through a Hazard Index rather than through stand-alone MCLs. Several commentors favored stand-alone MCLs in lieu of the Hazard Index to improve communications to their customers. In response to these comments, the Final Rule

includes individual MCLs for HFPO-DA, PFNA, and PFHxS, which were not contemplated in the Proposed Rule. At the same time, the Final Rule also sets a Hazard Index MCL for mixtures containing two or more of HFPO-DA, PFNA, PFHxS, and PFBS. EPA posits that this Hazard Index MCL is necessary in addition to stand-alone MCLs for HFPO-DA, PFNA, and PFHxS because the stand-alone MCLs do not address risks from co-occurring PFAS.

Second, the Proposed Rule would have required compliance with the new MCLs within three years after the date the regulation was promulgated. The SDWA, however, permits EPA to allow up to two additional years to comply with an MCL if it determines that additional time is necessary for capital improvements. In response to comments describing the challenges that systems will face trying to conduct initial monitoring and install treatment within three years, the Final Rule extends the compliance deadline from three years to five years.

### **Effects Beyond Regulation of Public Water Systems**

Beyond imposing new requirements on public water systems, the Final Rule will affect other parties in a variety of regulatory and litigation contexts. For example, when PFAS are detected in public water supplies, regulators and the affected suppliers may pursue parties who may have caused or contributed to the PFAS in their source water. Further, persons who consumed drinking water containing PFAS above a new MCL may file class action lawsuits against parties they believe are responsible for the PFAS in their drinking water.

Regulated parties should also expect EPA and other state and federal agencies to use the MCLs in other ways that may impact them. For example, companies with industrial discharge permits may face new PFAS monitoring or pre-treatment requirements as permits are renewed by publicly owned treatment works. Potentially responsible parties with ongoing and future obligations at Superfund sites also are likely to see the new MCLs added as Applicable or Relevant and Appropriate Requirements (ARARs) in setting cleanup goals. The impact of the Final Rule under Superfund will also be extended through EPA's anticipated issuance of a final rule designating certain PFAS, including PFOS and PFOA, as "hazardous substances" under CERCLA, rumored to be coming before the end of May 2024.

EPA estimates that compliance with the Final Rule will cost approximately \$1.5 billion annually, although some commenters predict that the cost will be much higher. With the Final Rule, EPA notes resources that are available to assist with the cost to comply, such as funds in the Bipartisan Infrastructure Law, including \$11.7 billion appropriated to the Drinking Water State Revolving Fund (DWSRF) General Supplemental; \$4 billion to the DWSRF for Emerging Contaminants; and \$5 billion in grants to the Emerging Contaminants in Small or Disadvantaged Communities.



## **Expected Litigation**

The Final Rule is expected to face legal challenges regarding its procedural and substantive legitimacy. For example, EPA justified its promulgation of the Final Rule by citing studies indicating that PFOA and PFOS exposure above certain levels may result in adverse health effects. However, many commenters to the Final Rule have called into question EPA's claims regarding these health effects. States, public utilities, and others may therefore challenge the Final Rule on the ground that the enormous cost to implement it has not been adequately supported by the existing scientific studies. The inevitable legal challenges to the Final Rule could delay its implementation. Lathrop GPM will provide updates regarding legal challenges to the Final Rule as they develop.

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