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Kirkland Alert

PFAS Update: EPA Announces its First Enforceable and Final National Drinking Water Standards for Certain PFAS

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Introduction

On April 10, 2024, the U.S. Environmental Protection Agency (EPA) released a pre-publication copy of its final rule under the Safe Drinking Water Act (SDWA) creating a National Primary Drinking Water Regulation (NPDWR) for six types of per- and polyfluoroalkyl substances (PFAS): PFOA, PFOS, PFHxS, PFNA, HFPO-DA (known as GenX chemicals) and PFBS, as well as mixtures of certain PFAS (the “Final Rule”). The Final Rule is the first federally enforceable drinking water regulation to address PFAS. The Final Rule sets thresholds for the six compounds in drinking water, called Maximum Containment Levels (MCLs), which are more stringent than any current state standards for PFAS. The Final Rule also sets advisory Maximum Contaminant Level Goals (MCLGs) for PFAS. The Final Rule requires public water systems (which may include both smaller and larger public water systems, so long as the system provides water for human consumption to at least 15 service connections or serves an average of at least 25 people for at least 60 days a year and isn’t otherwise exempt under the SDWA), to monitor drinking water for the listed PFAS contaminants. Public water systems must work to reduce PFAS levels to mandated MCLs if PFAS are found to exceed regulated thresholds.

Once the Final Rule is published in the Federal Register, public water systems will have three years to comply with initial monitoring and public notification requirements. If PFAS are detected at levels exceeding the applicable MCLs, public water systems will have an additional two years to make any necessary capital improvements to lower PFAS levels to permitted amounts. To comply with MCLs, many public water systems

will likely make use of federal funds to pay for updated water treatment technology; however, some public water systems have also sued manufacturers or industrial users of PFAS to seek damages for the costs of testing and filtering of PFAS in drinking water.

This *Alert* provides background on EPA's PFAS NPDWR, summarizes and highlights notable components of the rule and describes what we anticipate will be the next steps in the regulatory process, industry's response to the rule and potential ramifications for the regulated community. In other recent *Alerts*, we have discussed [EPA's proposal of the now final PFAS NPDWR](#) and [EPA's proposed rule to designate PFOA and PFOS as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act \(CERCLA\)](#).

Background

The term PFAS refers to a large group of thousands of synthetic chemicals characterized by a chain of strong fluorine-carbon bonds. Since the 1940s, PFAS have been used in a variety of products due to their resistance to degradation, their stability/non-reactivity and the barrier they provide against water, oil, grease and staining. EPA has stated that individuals can be exposed to PFAS through consumer products, occupational exposure and/or by consuming PFAS-containing food or drinking water, and that consuming water containing PFAS above certain levels may potentially result in adverse health effects based on what EPA considers to be the "best available" science and information.

Under the SDWA, EPA has the authority to prescribe NPDWRs for contaminants in drinking water, and the Agency can require public water systems to monitor contaminants in drinking water. To publish an MCL (which is one mechanism used to implement a NPDWR), EPA must determine that (1) a contaminant adversely affects human health, (2) the contaminant is "substantially likely" to be present in public water systems at heightened levels and (3) the EPA Administrator determines that a NPDWR for a contaminant "presents a meaningful opportunity for health risk reduction." EPA determined that all three statutory requirements were met for certain PFAS compounds and, on March 24, 2023, the Agency issued its proposal to create NPDWRs for PFHxS, PFNA, HFPO-DA, PFBS and mixtures of any one or more of these PFAS. Since issuing the proposed rule, EPA has added MCLs for three more types of PFAS to the Final Rule.

A NPDWR may also establish Maximum Contaminant Level Goals (MCLGs), which are non-enforceable health-based goals, representing the maximum level of a contaminant in drinking water at which there is no known or expected risk to human health. MCLGs are based solely on public health, and disregard limitations of detection and treatment technology effectiveness. MCLs are enforceable and, although set as close as feasible to an MCLG, also take into account technical feasibility and cost. Here, the Final Rule also sets advisory MCLGs for the six types of PFAS, which for PFOS and PFOA are stricter than the MCLs, but these MCLGs are not enforceable.

Summary of the Rule's Requirements

In the Final Rule, EPA set MCLs for PFAS near or at the lowest levels detectable by existing technology. EPA set MCLs for PFOA and PFOS at 4 parts per trillion, and it set MCLs for PFHxS, PFNA and HFPO-DA at 10 parts per trillion. The Final Rule also establishes a Hazardous Index (HI) of 1 for mixtures containing two or more of PFHxS, PFNA, HFPO-DA and PFBS. To determine the HI, public water systems must monitor and compare the amount of regulated PFAS in drinking water to the level below which no health effects are expected for that contaminant. A formula is used to calculate an aggregate ratio, and if the aggregate ratio exceeds 1, action is required. EPA determined that the types of PFAS subject to the HI approach “co-occur as mixtures in drinking water” and can have dose-additive effects from continued exposure. In the proposed rule, EPA planned to use the HI approach for PFHxS, PFNA and HFPO-DA; in the Final Rule, EPA instead set individual MCLs for these compounds and will apply the HI approach for mixtures of PFHxS, PFNA, HFPO-DA and PFBS. EPA deferred its decision to regulate PFBS individually but is continuing to evaluate the compound for a potential MCL in the future.

Regulated public water systems will have three years from the date of the Final Rule's publication in the Federal Register (which should be forthcoming in the coming days or weeks) to complete initial monitoring of PFAS covered by the rule. If a public water system detects PFAS above the listed final MCLs (or HI for certain mixtures), then it must notify the public no later than 30 days after discovering the MCL exceedance, and the public water system will have five years after the date of the Final Rule's publication to implement capital improvements or methods that draw down the levels of PFAS to meet the listed MCLs. The compliance timeline in the Final Rule offers an extension to the three years originally contemplated in the proposed rule.

While EPA highlighted four different technologies that public water systems could use to meet MCLs – granular activated carbon, anion exchange resins, reverse osmosis

and nanofiltration – the particular methods that a public water system uses to reduce PFAS levels are not prescribed by the Agency. It is expected that certain public water systems will need to invest in water treatment technologies to remove the specified types of PFAS at the required levels to comply with the MCLs. Public water systems may be able to access funding from a \$10 billion government fund, created by the Infrastructure and Jobs Act, intended to address PFAS and other contaminants.

Looking Ahead

Expected Challenges to the Final Rule

It is likely that industry opposition against the Final Rule will lead to legal challenges, including on the bases summarized in greater detail below.

- EPA projected that compliance with the Final Rule will cost approximately \$1.5 billion annually. By significant contrast, the American Water Works Association estimated that the Final Rule “could cost water utilities nationwide up to \$40 billion in capital investments and \$3.8 billion annually to comply with the standards.” Industry trade groups commented on the proposed rule that EPA is significantly underrepresenting the costs of compliance with its rule, and that the benefits do not outweigh the costs of compliance. Such groups may bring challenges under the SDWA, arguing that the SDWA’s requirement for EPA to consider cost when setting an MCL and to issue a cost/benefit determination requires EPA to conduct another cost/benefit analysis that accurately reflects the compliance costs.
- Trade groups also noted that water monitoring requirements will overwhelm water sampling laboratories, and supply constraints will prevent many water utilities from obtaining necessary technological equipment to comply with the MCLs. Industry groups expressed these concerns in comments on the proposed rule, when public water systems were required to comply in three years with MCLs. Now, the Final Rule creates a five-year compliance timeline. Still, challengers may argue that implementation is still impractical under a five-year timeline, and therefore the MCLs conflict with the SDWA as “more stringent than is feasible.”
- Some commenters argued that EPA does not have authority under the SDWA to regulate PFHxS, PFNA, HFPO-DA and PFBS using its HI approach. Commenters asserted that the studied health effects underpinning the HI approach were not based on the best available science, nor is EPA permitted to create unitless thresholds under the HI approach for co-mixed contaminants. The Final Rule may

therefore be challenged on the basis that EPA can only set MCLs and MCLGs for individual contaminants.

- The U.S. Chamber of Commerce, among other industry groups, argued that EPA bypassed procedural requirements under the SDWA by issuing a preliminary regulatory determination of PFHxS, PFNA, HFPO-DA and co-occurring PFAS in the proposed rule and then regulating MCLs for these types of PFAS in the Final Rule. Groups asserted that EPA, under the SDWA, must first issue a preliminary regulatory decision on a contaminant prior to proposing an MCL for that contaminant. Moreover, parties may argue that EPA did not seek comments from the Science Advisory Board before proposing a MCLG or NPDWR for PFNA, PFHxS, PFBS and HFPO-DA, nor did EPA's procedure provide sufficient time or opportunity to comment on EPA's regulation of these four classes of PFAS.
- The American Chemistry Council challenged EPA's June 2022 interim Health Advisory Levels for PFOA and PFOS, arguing that the advisory levels were impossible to implement and enforce, as they were well below technical detection limits established by the EPA. Although the D.C. Circuit dismissed that particular case for lack of standing, it is possible that similar arguments may be made to challenge the MCLGs set in the Final Rule.

Litigation Expected to Result from the Final Rule

Beyond direct legal challenges to the Final Rule, it appears likely that the Final Rule (if implemented in its current form) could ultimately lead to litigation by public water systems against industrial sources of PFAS. The Final Rule's monitoring requirements are expected to affect approximately 66,000 public water systems, and EPA expects that between 4,100 to 6,700 water systems (serving roughly a third of the United States) will need to invest significant resources to bring levels of certain PFAS into compliance with the MCLs. Public water systems are already increasingly bringing lawsuits against current and past manufacturers and users of PFAS for purposes of recovering costs associated with compliance with stringent environmental standards. With EPA's Final Rule, the uptick in litigation by public water systems against industry may continue – even against companies that have phased out the manufacture or use of PFAS – in an attempt to shift costs for compliance and related technological updates away from ratepayers.

Broader Regulatory Implications

At the state level, states must adopt MCLs that are at least as stringent as EPA's MCLs; otherwise, the states would lose primacy to enforce the SDWA. The SDWA permits EPA

to delegate primary enforcement responsibility for public water systems to a state, so long as that state's NPDWRs are "no less stringent than the regulations promulgated by EPA," among other requirements. The ten states that currently have enforceable drinking water standards for PFOS and PFOA do not have standards as stringent as EPA's final MCL for those compounds of 4 parts per trillion. Therefore, states such as New York, Pennsylvania and Michigan will need to submit revised programs to EPA within two years of the publication of the Final Rule to keep their primacy under the SDWA. States may, however, request an additional two-year extension under certain circumstances. The practical timeline and implementation complications posed by the Final Rule are likely to create a period of regulatory uncertainty for ongoing monitoring and remedial actions.

In addition, EPA is expected to announce its final rule listing PFOA and PFOS as "hazardous substances" under CERCLA, a separate federal statute, in the coming days or weeks, as previously discussed in our earlier [Alert](#). The new PFAS MCLs established under the SDWA will affect ongoing, new and potentially previously closed-out CERCLA remedial actions triggered by other contaminants, as MCLs are considered "applicable or relevant and appropriate requirements" for purposes of Superfund remedy design. Consequently, once listed as "hazardous substances" under CERCLA, the Final Rule may significantly affect Superfund investigations, response actions, costs and liability.

This latest action by EPA underscores the importance of evaluating PFAS regulatory compliance obligations and attendant litigation risks for many industries, as well as in connection with corporate and real estate transactions. In evaluating business operations and transactional opportunities, there will be a continued need to identify the avenues and costs of potential PFAS liability and develop creative risk solutions. The Kirkland environmental team continues to monitor regulatory, legislative and policy developments related to PFAS to provide updates and business guidance as needed.

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