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Biden EPA Moving Forward with National Drinking Water Regulations for PFOA and PFOS

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Indicating its intention to move forward aggressively to address growing legacy chemical concerns, the U.S. Environmental Protection Agency in February took two steps towards regulating certain per- and polyfluoroalkyl substances (PFAS) in drinking water.

First, the EPA re-proposed the Fifth Unregulated Contaminant Monitoring Rule (UCMR5) to collect data on 29 PFAS in drinking water. *Second*, the agency reissued the final regulatory determinations for perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) under the Safe Drinking Water Act (SDWA), confirming that it will move forward to develop enforceable drinking water standards (Maximum Contaminant Levels (MCLs)) for those two legacy PFAS.

UCMR5

On March 11, 2021, the proposed UCMR5 was published in the Federal Register, 86 Fed. Reg. 13846. The EPA monitors unregulated contaminants under section 1445(a)(2) of the SDWA to determine, among other things, whether the agency should develop enforceable limits for previously unregulated contaminants.

Congress amended the SDWA in 2020 to specifically require that the agency include in UCMR5 certain PFAS with validated methods of measurement. The EPA estimates the total average national cost of implementing the UCMR will be $21 million per year over the five-year period (2022-2026). Whereas UCMR3 collected data for only six types of PFAS, UCMR5 proposes to require public water systems to collect data for 29 different types of PFAS and lithium. The publication of the UCMR5 commences a 60-day public comment period, and numerous comments are anticipated.

Final Regulatory Determination

The EPA's reissuance of the final regulatory determination for PFOA and PFOS – published in the Federal Register on March 3, 2021 – not only signals that the EPA is moving forward with a regulation, but also provides the framework for evaluation of additional PFAS. 86 Fed. Reg. 12272. The EPA received public comments from over 11,000 organizations and individuals after publishing

its proposed regulatory determination in 2020.

The EPA relied on data collected under UCMR3, in determining that PFOA and PFOS *may* have adverse health effects and the presence of PFOA and PFOS occurs at levels of public health concern. Toxicology studies remain ongoing.

Potential Significance

Establishing MCLs for PFOA and PFOS may impact site cleanups and remedy selection, in addition to its direct impact on public water systems that will be responsible for meeting the new standards.

Section 121 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) governs remedy selection, which requires consideration of protectiveness and applicable or relevant and appropriate requirements (ARARs). For groundwater, the ARARs are the Maximum Contaminant Level Goals or the Maximum Contaminant Levels. If there is a federal MCL, then the MCL is the ARAR under CERCLA, and therefore, part of the CERCLA remedy selection. (A state standard may be an ARAR if certain conditions are met.)

Overall, EPA has signaled its intent to develop drinking water standards for the two most common legacy PFAS, both of which are no longer manufactured in the United States. Additionally, monitoring of a larger group of PFAS proposed in UCMR5 – many of which are still in production and use – suggests this is only the beginning of a long story on federal data gathering and research – and, potentially, greater regulation – of PFAS.

In a related regulatory development, also mandated by Congress in 2020, the EPA added 172 PFAS to the list of toxic chemicals that must be reported in the annual Toxics Release Inventory (TRI) under the Emergency Planning, Community Right-to-Know Act (EPCRA). These programs and other agency initiatives will result in a large body of new information about the presence of PFAS in the environment that will inform the Agency's future regulatory decisions.

Meanwhile, the quickly growing patchwork of state regulations for PFOS and PFOA, and certain other PFAS, with different regulatory triggers, creates a significant degree of uncertainty for private parties. The broadest definition of PFAS includes over 4,700 chemicals that have different applications and uses and fall under different subcategories. Not all 4,700 PFAS have the same toxicological profile or chemical properties.

Practically, parties may wish to consider PFOA and PFOS during due diligence activities even in states without regulations depending on the site's prior use, the surrounding area, and the future intended use. Likewise, expressly identifying broader coverage for emerging contaminants – not merely PFOA and PFOS – in environmental indemnifications might be worth considering and carefully crafting. Environmental insurance remains another viable risk mitigation tool.

The petty pace of tomorrow, and tomorrow, and tomorrow

Despite the momentum for quick action on certain types of PFAS, past history with high-profile chemicals may suggest that the public recalibrate its definition of "quick." The protracted battle over setting an MCL for perchlorate, a rocket and missile propellant, may serve as a lesson here. Calls to set an MCL for perchlorate began in earnest in the 1990s.

At the time, analytical methods for detecting perchlorate were limited, proposed remediation

technologies were scarce and expensive, and some of the biggest manufacturers and users of the chemical, including the Department of Defense, were unconvinced by studies suggesting adverse health effects from perchlorate at extremely low levels. In other words, the perchlorate debate echoed many of the same dynamics at play with certain types of PFAS.

The perchlorate debate stirred intense political interest and prompted a review of the epidemiology and toxicology by the National Academy of Sciences, which published its analysis in January 2005. The EPA then took 14 years to propose an MCL for perchlorate in 2019, only to withdraw the regulatory determination that prompted the proposal in July 2020.

While there is no way to predict whether or when enforceable, federal regulations of certain PFAS will be put into place, the chemicals are the subject of considerable political, public, and scientific interest and will likely remain so for a long time to come.

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