

WVDEP Notifies Facilities of PFAS Reporting Requirements

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At the end of August 2023, the West Virginia Department of Environmental Protection (WVDEP) began sending letters to facilities that the agency believes may be subject to new requirements to report production or use of specific per- and polyfluoroalkyl substances (PFAS). The requirements are included in the recently passed [House Bill 3189](#), also known as the PFAS Protection Act (“the Act”), which Governor Jim Justice signed into law on March 28, 2023.

PFAS have been linked to effects on the human immune system, cardiovascular problems, and cancer. They are often referred to as “forever chemicals” because of their persistence in the environment and tendency to accumulate in people and animals over time. Broadly, the Act is intended to identify sources of PFAS that are impacting drinking water sources in West Virginia.

WVDEP’s recent form letter notifies recipients that under the Act, facilities that discharge to surface water under an applicable National Pollution Discharge Elimination System (NPDES) permit or to a Publicly Owned Treatment Works (POTW) under an industrial pretreatment program, “which manufacture or knowingly use or have used” certain PFAS in their production process since January 1, 2017, are required to report such use to WVDEP on or before December 31, 2023. Specifically, the Act requires that these facilities report any PFAS that the United States Geological Service (USGS) found in its recent study of raw water from 279 West Virginia public water systems. Under the Act, facilities are also required to report their use of other PFAS that WVDEP identifies as harmful to human health and potentially present in detectable levels in West Virginia waters.

The list of 12 PFAS identified in the USGS study is included in WVDEP’s June 2022 presentation to the Joint Legislative Oversight Commission on State Water Resources, available [here](#). USGS’s complete study is available [here](#). Note, however, that WVDEP’s letter includes a list of 15 PFAS that are subject to the reporting requirement, including three additional chemicals identified by WVDEP that were not on the USGS list. Facility reports must include each chemical’s name, Chemical Abstracts Service number, and the amount used in each year from 2017 through 2022, as well as any other information requested by WVDEP to identify sources of PFAS. If a facility discharges to a POTW, WVDEP will forward the facility’s report to the POTW within 30 days of receipt.

Any facility subject to the PFAS reporting requirement under the Act must also implement, at a

minimum, quarterly monitoring for its self-reported PFAS within six months of submitting its report. How the monitoring requirement is documented will be based on the facility's applicable permit. For those facilities with a NPDES permit, WVDEP will modify the permit to include a monitoring requirement. If a facility discharges to a POTW, the entity with pretreatment authority (either the POTW or WVDEP) will modify the facility's pretreatment permit. In their monitoring, facilities are required to use sampling and analytical methods approved by the U.S. Environmental Protection Agency (USEPA) or USEPA-recommended methods (if approved methods are not available).

While West Virginia moves to regulate PFAS at the state level, the federal government continues to progress along similar lines. USEPA has proposed rules to establish a National Primary Drinking Water Regulation setting maximum contaminant levels for six PFAS. It has also proposed to designate PFOA and PFOS (the two most prevalent and widely studied PFAS) as hazardous substances under CERCLA and is considering the same action for six other PFAS. These federal developments are some of the actions cited in the "Legislative Background" portion of the Act as justification for its enactment.

On a different legal front, a large number of PFAS-based lawsuits are pending against PFAS manufacturers, distributors and users, in many cases focusing on the historical use of aqueous film-forming foams (AFFF) in fighting liquid fuel fires at airports, military bases, and other industrial sites. At least two federal Multi-District Litigation matters are currently pending, in the U.S. District Court for the District of South Carolina (AFFF Products Liability Litigation, MDL No. 2873) and in the U.S. District Court for the Southern District of Ohio (MDL No. 2433, encompassing wrongful death and personal injury actions involving discharges from Dupont's Washington Works facility located near Parkersburg, West Virginia). In June 2023, DuPont, Chemours, and Corteva reached a \$1.185 billion agreement, and 3M Company reached a \$10.3 billion agreement, to settle drinking water contamination claims by public water suppliers in the AFFF litigation.

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