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## Water & Energy



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# PFAS is lining up to be the biggest and costliest environmental hazard in history

By MICHAEL DIGIANNANTONIO | Attorney at SL Environmental Law

**The Environmental Protection Agency (EPA) released the first-ever proposed regulations for per- and polyfluoroalkyl substances (PFAS). The proposed maximum contaminant levels (MCLs) for PFOA and PFOS are 4 parts per trillion (ppt), and the EPA is proposing that PFNA, PFHxS, PFBS and GenX be regulated to limit any mixture containing one or more of the substances using a hazard index calculation. The proposed rule is expected to be finalized near the end of 2023 or early 2024.**

Public water systems across the country will have to monitor for these six chemicals and respond if concentrations are found in excess of these levels by either taking the contaminated sources out of service or treating the contaminated sources. PFAS is so ubiquitous that water systems that test for it tend to find it—this has proven to be the case in states that already have PFAS MCLs, such as California, Massachusetts and New York. As water providers across the nation discover these contaminants in relative unison, the demand for treatment technologies and infrastructure upgrades is likely to rise.

“We haven’t really seen a contaminant with such a combination of dangerous attributes before. It is scientifically established that exposure is dangerous even at very low concentrations. The contaminant is incredibly widespread because it has been used in so many different products for decades and PFAS does not break down naturally. The new MCLs

are a clear indication of these facts,” said Ken Sansone, partner at SL Environmental Law Group.

If a chemical is toxic, persistent and bioaccumulates, meaning the body’s tissue absorbs the substance faster than it can be eliminated, it fits the criteria for a hazardous substance. The EPA has already announced a proposed designation for two of the most common PFAS compounds, PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Handling and disposing of hazardous substances is costly and requires a certain level of expertise.

On Jan. 6, 2023, the EPA announced the automatic addition of nine (PFAS) to the Toxics Release Inventory (TRI) list, another indication that the regulatory process for these chemicals is ramping up and there is more to come. UCMR 4 already required testing for a number of PFAS substances, but under

**ABOVE:** PFAS used in firefighting foam has resulted in water contamination. (Peter Togel/Shutterstock.com)

UCMR 5, 29 more PFAS substances will need to be tested. This means that water providers who tested last time and didn’t have contamination above the level may now find other compounds at higher levels.

## Who is responsible for the cleanup?

Unless the manufacturers responsible for this pollution are held accountable for the cleanup, the billions of dollars to remove PFAS will be a burden borne by water systems and their ratepayers, who have also likely been exposed to the toxic chemical. There is ample evidence that PFAS polluters have been aware for decades of the dangers of PFAS, resulting in a number of plaintiffs filing suits seeking to hold these companies accountable for the harm caused by these chemicals. This includes water providers seeking to recover the expenses of removing these chemicals from public water supplies. Many of these water providers, who have played no role in producing the PFAS contaminating their water, believe that they should not face the burden of removing these contaminants from their water supply alone. Nor do they think such costs should be incurred by their ratepayers.

Due to the large number of lawsuits that have been filed against PFAS manufacturers in recent years, with respect to water

contamination caused AFFF containing PFAS, such as those used previously to extinguish fires, many of the cases have been transferred to a multidistrict litigation (MDL). MDLs are used to coordinate complex litigation filed in multiple federal district courts by similar parties. By consolidating the discovery and pretrial motions, both sides save time and money. The new MCLs are likely to give rise to more water providers joining the MDL that is being heard in the United States District Court for the District of South Carolina. The first trial, or “bellwether,” is scheduled to go to trial in June 2023. Bellwethers serve as test cases, helping the parties assess liability theories, defenses and damages. If these early cases yield favorable results for the plaintiffs, the larger pool of plaintiffs can often proceed forward more efficiently, and sometimes create a “domino effect” of settlements or court judgments.

Given the progress that has already been made, this MDL may provide water providers their best chance of recovering the costs of PFAS cleanup. There is still time to file a claim and join this MDL. It is a streamlined legal process and, if water providers chose a law firm that works on contingency, fees are only paid if their case receives a successful outcome.

### **Protect yourself against rising treatment cost and tightening regulation**

While 3M recently announced that it will stop making PFAS by 2025, an indication that legal efforts to expose the harm of these chemicals has finally caught up to the company, many water providers still must contend with how to remedy contamination that has already occurred. Even if a water provider does not exceed MCL limits today, that may change as these chemicals are still making their way through the environment.

“Water providers in states with no PFAS regulatory standards are likely to find PFAS, and even if they are below the MCL now, they are not necessarily in the clear as federal regulation can often trigger stronger regulation at the state level. Water providers need to consider the statute of limitations that varies from jurisdiction to jurisdiction, but generally begins once the discovery of the contaminants has been identified in the water supply or when the provider takes some action in response to the awareness of the contaminant. Claims brought after the statute of limitations has



*To keep up with federal regulations, municipalities will need to invest in new treatment facilities. Water providers can file a claim to get ahead of the statute of limitations, even if they detect these chemicals below the MCL. (Shutterstock.com)*



*U.S. public water systems will have to monitor for six per- and polyfluoroalkyl substances and respond if concentrations are found in excess of set levels by either taking the contaminated sources out of service or treating the contaminated sources. (APChanel/Shutterstock.com)*

run out cannot be brought, no matter how valid — or valuable — they are. Therefore, there is no benefit to waiting,” said Sansone.

Water providers can file a claim to get ahead of the statute of limitations, even if they detect these chemicals below the MCL. This gives a time period of protection if things change and investment in new treatment facilities is required.

“We have never had a contaminant so dangerous and yet so widely used for such a long period of time — there is no

comparison. Unfortunately, this is shaping up to be an expensive environmental disaster of historic proportion, both in terms of total cost of damages and number of people exposed to it. It is going to take everyone’s participation, including the polluters, to right this wrong,” concluded Sansone. **M**

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