BICK LAW LLP
exclusively environmental

PROPOSED PFAS REGULATORY DETERMINATIONS PUBLISHED BY EPA

Wed Mar 11th, 2020 | Categories: Rulemaking and Legislative Practice |

Yesterday, March 10, 2020, pursuant to the Safe Drinking Water Act (SDWA), the US Environmental Protection Agency (EPA) published its first proposed Preliminary Regulatory Determinations for per- and polyfluoroalkyl substances (PFAS) compounds in drinking water, specifically the two most common long chain compounds, perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA). The comment period ends May 11, 2020.

PFAS Regulation and CERCLA

A federal drinking water standard would support EPA's ongoing quest to list PFOS and PFOA as Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) hazardous substances, which it began in 2018. This could result in EPA listing Superfund sites and reopening existing sites to study PFOS and PFOA through focused feasibility studies. It is likely EPA will amend Records of Decision (RODs) or issue Explanations of Significant Difference (ESDs) to add treatment for PFOS and PFOA if such contaminants are found at existing Superfund Sites.

If PFOS and PFOA become CERCLA hazardous substances, there will be private cost recovery actions under CERCLA for response costs related to PFOS and PFOA. In particular, we would expect to see complaints filed by water purveyors against potentially responsible parties (PRPs) under CERCLA. Because the courts have found liability under CERCLA to be strict, joint & several, and there will likely be a multitude of potential sources of PFOS and PFOA at any given site, the environmental regulatory lawyers and Superfund lawyers at Bick Law LLP anticipate CERCLA litigation will be on the rise and will present interesting challenges.

This is the first step towards setting a federal drinking water standard. A regulatory determination under the SDWA is a decision about whether or not to begin the process to propose and promulgate a national primary drinking water regulation (NPDWR) for an unregulated contaminant. A preliminary regulatory determination lays out and takes comment on EPA's view about whether certain unregulated contaminants meet three statutory criteria. After EPA considers public comment, EPA makes a final determination. The unregulated contaminants included in a regulatory determination are chosen from the Contaminant Candidate List (CCL), which EPA updates every five years. There are currently 109 contaminants listed on the CCL.

Yesterday's Preliminary PFAS Regulatory Determination made by EPA was for eight contaminants: PFOS, PFOA, 1,1-dichloroethane, acetochlor, methyl bromide (bromomethane), metolachlor, nitrobenzene, and Royal Demolition eXplosive (RDX). The Agency is making preliminary determinations to regulate two contaminants (PFOS and PFOA) and to not regulate six contaminants (1,1-dichloroethane, acetochlor, methyl bromide, metolachlor, nitrobenzene, and RDX).

After the comment period ends, EPA may propose a Maximum Contaminant Level Goal (MCLG), which is a non-enforceable reference goal, and a NPDWR, which is an enforceable standard. Then, the agency has up to 2 years to publish a final MCLG and promulgate a final NPDWR. In the alternative, EPA may decide not to propose or promulgate regulations after the May 11 comment deadline. Regardless of EPA's decision, whether there is a rule or no rule, there is likely to be a challenge brought, which could delay its impact.

States Have Pushed EPA to Address PFAS Regulation

State attorneys general have sought to require that EPA take steps to address PFAS. In July 2019, the New York Attorney General led a coalition of 20 attorneys general in sending a letter to Congress discussing states' immediate legislative needs to respond to PFAS contamination. It urged Congress to take legislative steps similar to many of the PFAS-related legislative provisions, including DOD authorization legislation. In August 2019, Pennsylvania Attorney General Joshua Shapiro sent a letter to congressional leaders to urge Congress to move quickly to enact legislation to address the critical need to regulate PFAS chemicals. The letter requested that Congress support several provisions in the Senate and House versions of the National Defense Authorization Act, including research on the health and environmental impacts of all PFAS chemicals, listing all PFAS chemicals as a hazardous substance under Superfund, and listing PFAS as a toxic pollutant or hazardous substance under the Clean Water Act.

Already, eleven states have set or proposed drinking water standards, notification levels or response action levels, including New York (10 ppt PFOA and PFOS), New Hampshire (11 ppt PFNA, 12 ppt PFOA, 15 ppt PFOS, 18 PFJxS), New Jersey (13 ppt PFNA and PFOS, 14 ppt PFOA), California (6.5 ppt PFOS, 5.1 ppt PFOA), Minnesota (15 PFOS, 35 ppt PFOA, 47 ppt PFHxs), Vermont (20 ppt PFHpA, PFHxS, PFNA, PFOS and PFOA), Rhode Island (20 ppt PFHpA, PFHxS, PFNA, PFOS and PFOA), Massachusetts (70 ppt PFHpA, PFHxS, PFNA, PFOS, and PFOA), and Connecticut (PFHpA, PFHxS, PFNA, PFOS, and PFOA). The following states are following the EPA HA standard of 70 ppt for notification levels: Colorado, Delaware, Maine, Michigan, New Mexico, and North Carolina. The following states do not have any regulations to date: Alabama, Arizona, Arkansas, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

In 2016, EPA established a lifetime Health Advisory (HA), also a Health Reference Level (HRL) of 70 ppt total combined concentration of PFOA and PFOS. Currently, the HA is not an enforceable standard; however, most commentators agree that an anticipated MCLG ultimately resulting from this rulemaking would initially align with the HA level of 70 ppt total combined for PFOA and PFOS. The question remains whether EPA will consider going lower given the trend among the states.

To establish the HA level of 70 ppt, EPA relied on UCMR 3 sampling between 2013 and 2015. EPA also supplemented its UCMR data with data from states that have sampled for PFAS, including New Hampshire, Colorado, Michigan, and New Jersey. EPA noted that it will consider additional data submitted by other states during the Preliminary Regulatory Determination comment period. This is particularly important because the State Water Control Board of California is in the third and final phase of its PFAS groundwater sampling program and it will have ample sampling data to provide to EPA for its rulemaking.

EPA is Not Done Yet — Action Plan has More to Come

There is more to come from EPA concerning PFAS. In February 2019, EPA issued a new PFAS Action Plan, which included the next steps for EPA. EPA accomplished one of those steps yesterday: evaluate the need for a maximum contaminant level (MCL) for PFOA and PFOS. The remaining steps in the Action Plan include:

- Beginning the necessary steps to propose designating PFOA and PFOS as "hazardous substances" through one of the available federal statutory mechanisms, including CERCLA, RCRA, TSCA, CWA, and CAA;
- Developing groundwater cleanup recommendations for PFOA and PFOS at contaminated sites;
- Developing toxicity values or oral reference doses (a reference dose is an estimate of the amount of a chemical a person can ingest daily over a lifetime or less that is unlikely to lead to adverse health effect) for GenX chemicals and perfluorobutane sulfonic acid (PFBS);
- Developing new analytical methods and tools for understanding and managing PFAS risk;

- Promulgating Significant New Use Rules (SNURs) that require EPA notification before chemicals are used in new ways that may create human health and ecological concerns; and
- Using enforcement actions to help manage PFAS risk, where appropriate.

California is the Strictest of any State

In addition to lowering its Notification Levels for PFAS in drinking water to 5.1 parts per trillion for PFOA and 6.5 parts per trillion for PFOS (the lowest levels at which PFOA and PFOS can be reliably detected in drinking water using available and appropriate technologies), the California Water Board also announced on August 23, 2019 that it has begun the process of establishing regulatory requirements, or maximum contaminant levels, for PFOA and PFOS, and may add requirements for other PFAS substances in the future. Water systems that test and find PFAS that exceed the Notification Levels are required to report these to their governing boards and the State Water Board, and are urged to share this information with their customers. Assembly Bill 756, requires that California water systems report any detected levels of PFAS in their annual consumer confidence reports and report detections above Response Levels to their customers if a water source remains in service.

Other Emerging Contaminants Will Not Go to Rulemaking

Importantly, EPA included in its announcement that it has made negative determinations for six other chemicals: 1,1-dichloroethane, acetochlor, methyl bromide, metolachlor, nitrobenzene, and RDX. EPA has not made a regulatory determination regarding 1-4 dioxane yet.

The Military is Taking Action Via the National Defense Authorization Act

The National Defense Authorization Act (NDAA), which annually authorizes DOD programs, included several PFAS-related provisions because of PFAS contamination at or around a number of military installations. The 2020 legislation will: (1) phase out the military's use of firefighting foam containing PFAS chemicals; (2) provide PFAS blood testing to military firefighters; (3) address the contamination of water supplies with PFAS from military activities; (4) promote cooperation on and monitoring of PFAS contamination in water supplies; (5) require the EPA to take action on PFAS chemicals under the Toxic Substances Control Act (TSCA); and (6) prohibit the use of PFAS chemicals in military food packaging containers.

Comments to EPA Due May 11

If you have comments to submit, remember the deadline is May 11, 2020. The Federal Register provides information on comment submittals (ADD LINK). The environmental regulatory lawyers at Bick Law LLP are also ready to assist and will stay abreast of all things PFAS.