

EPA's New PFAS Drinking Water Regs: Are You Prepared?

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On March 14, 2023, the U.S. Environmental Protection Agency (EPA) proposed the first national drinking water standard for so-called “forever chemicals” including PFAS. The unprecedented move by EPA is likely to create an exponential increase in litigation.

PFAS, which stands for per- and polyfluoroalkyl substances, are a class of thousands of manmade chemicals. PFAS were created to repel water, oil, and grease, and are used in thousands of everyday products from dental floss, clothing, and foods to cookware and firefighting foams.

Data collected by federal and state governments estimates that more than 200 million Americans drink water contaminated with PFAS chemicals. The EPA set a threshold of 4 nanograms per liter for the chemicals PFOA and PFOS (types of PFAS) in drinking water. The agency also made a surprise announcement of regulations for four more PFAS together as a mixture: PFNA, GenX chemicals, PFHxS, and PFBS.

The proposed standards are much stricter than what EPA suggested in 2016, when its health advisories recommended PFAS concentrations in drinking water of no more than 7 nanograms per liter. While the price tag for these proposed federal regulations on the individual states is still unclear, implementing these regulations represents a monumental undertaking which would likely cost billions of dollars nationwide. Individual states will now have to reevaluate their own drinking water standards or begin implementing the process for adopting new standards. However, this may prove to be an impossible task.

The regulations set accepted PFAS levels so low that many of the nation's public water systems are not equipped to detect them. The net effect is likely to require the water industry to invest untold millions of dollars into updating their existing systems, leaving public utilities to pass the high cost of detection along to their customers. This, of course, would have to follow the remediation of the public water systems of PFAS contamination. The price tag for remediation could prompt public water systems to seek those costs from manufacturers.

For now, the proposed regulations will undergo a 90-day public comment period. Immediately following the public comment period, we can expect lawsuits to fall under the Administrative Procedures Act. The threshold question will be to determine whether EPA acted reasonably in its assessment of the science and the review of the public comments in setting the levels, or whether the EPA's actions were arbitrary and capricious. Another important consideration is the cost-benefit analysis employed by EPA in imposing such strict regulations.

Forward-looking manufacturers would be well-advised to begin preparing for the inevitable increase in litigation.

Manufacturers should be auditing current and historical waste streams, implementing containment and management practices for PFAS, and evaluating reporting obligations for the release of PFAS.

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