

Locke Lord QuickStudy: EPA Sets Stricter Health Advisory Limits for PFAS – a Harbinger of More Regulation?

Locke Lord LLP

WRITTEN BY

Gerald J. Pels | Gerald D. Higdon | M. Benjamin Cowan | Jordan A. Rodriguez

RELATED OFFICES

Houston

On June 15, 2022, the U.S. Environmental Protection Agency (EPA) dramatically lowered its lifetime health advisories levels (HALs)^[1] for two per- and polyfluoroalkyl substances (PFAS). EPA previously established a combined HAL for two chemicals, PFOS and PFOA, of 70 parts per trillion (ppt) in 2016. The new advisory limits are stringent. Revised HALs are 0.004 ppt for PFOA and 0.02 ppt for PFOS. Additionally, EPA issued first-ever HALs for two other PFAS compounds—perfluorobutane sulfonic acid (PFBS) and GenX, also called hexafluoropropylene oxide dimer acid (HFPO-DA), recommending 2,000 ppt for PFBS and 10 ppt for GenX. Although HALs are not enforceable, they could have sweeping effects on state drinking water regulations, clean up levels for remediation programs, and lawsuits involving PFAS relating to legacy industrial uses of the chemicals.

Contaminant	2016 EPA Health Advisories (ng/l)	2022 EPA Health Advisories (ng/l)
PFOA	70 *	0.004
PFOS	70 *	0.02
PFBS	N/A	2000
Gen X	N/A	10
	*Combined for both contaminants	

PFAS are ubiquitous and include thousands of diverse chemicals, some of which have been used for decades. The chemical characteristics of PFAS led to their use in a wide range of industrial, commercial, and U.S. military applications. U.S. manufacturers phased out domestic production of PFOS and PFOA—the two most frequently detected PFAS—in the early 2000s. But due to their remarkable biopersistence, they remain in the environment. Moreover, many studies have shown a correlation between PFAS exposure and a host of health problems, including kidney and testicular cancers, thyroid disease and high cholesterol, and suppressed immune response to vaccines.

EPA's announcement signals that it is one step closer to proposing a PFAS National Primary Drinking Water

Regulation (NPDWR) for PFOA and PFOS, which the agency expects to release in fall 2022. Unlike HALs, NPDWRs are legally enforceable maximum contaminant levels that apply to public water systems. A PFAS NPDWR would force many public water systems to perform monitoring to determine the level of PFAS in their systems, and some systems may have to modify or install and maintain costly treatment systems based on the monitoring results.

Moreover, in October 2021, EPA announced that it intends to add PFOA, PFOS, PFBS, and GenX to the list of “hazardous constituents” under the Resource Conservation and Recovery Act (RCRA), which would expand remedial obligations to include these chemicals at RCRA corrective active sites. RCRA corrective action can be onerous compared to other environmental remedial programs in terms of the performance standards that responsible parties must meet, the length of time necessary to achieve closure and complete post-closure obligations, and the amount of financial assurance that must be retained during the line of a project. Once integrated into RCRA corrective action requirements, it is likely that many state cleanup programs would follow suit.

EPA has *not* indicated that it intends at this time to list the four chemicals as “hazardous wastes” that would be subject to the full suite of “cradle-to-grave regulations” under RCRA Subtitle C, which governs hazardous waste generation, management, and disposal. Although such a listing is unlikely to occur in the near-term, an eventual hazardous waste listing would have major legal ramifications for other remediation programs. Because the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) definition of “hazardous substance” includes by reference all RCRA “hazardous wastes,” listing PFAS under RCRA would mean that sites containing the four PFAS would fall within the ambit of CERCLA’s joint, several, and strict liability scheme.

Given the presence of PFAS in a host of applications, materials, and consumer products, businesses that use, handle, or dispose of PFAS should closely monitor EPA’s regulatory efforts as they progress. Further, in the transactional context, PFAS should receive heightened scrutiny in diligence and drafting considerations and be considered in any risk profile analysis. Businesses should also consider whether to offer public comments and engage in the regulatory process to identify problematic language and ensure that EPA has accurately considered the costs of any proposed regulations.

—

[1] The federal Safe Drinking Water Act (SDWA) authorizes EPA to issue health advisories for contaminants that are known or expected to occur in public water systems and may warrant regulation under the Act. Advisories provide information on health effects, testing methods, and treatment techniques for contaminants of concern. They also include non-enforceable levels to help water suppliers and other to address contaminants that

protection, over a lifetime of daily exposure.

RELATED INDUSTRIES + PRACTICES

- Corporate
- Energy
- Environmental + Natural Resources