Articles + Publications | April 7, 2023

Locke Lord QuickStudy: How Low Can Regulatory Standards ?Go? EPA Proposes the First Federally ?Enforceable Drinking ?Water Regulation to Address PFAS

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Background

Per- and poly-fluoroalkyl substances (“PFAS”) are in the crosshairs of the Environmental Protection Agency (“EPA”). PFAS are substances that have been used heavily in manufacturing and are prevalent in many common products, such as cookware and packaging. As a result of their long-term heavy use in manufacturing, PFAS’ presence in the environment is pervasive. As a frame of reference, the ?Texas Water Conservation Association has advised that PFAS are believed “to be in the ?bloodstream of 95% of all Americans.”

On March 14, 2023, EPA issued proposed national primary drinking water standards for six PFAS compounds in public water systems. Earlier, in August 2022, the EPA proposed to list two common PFAS, namely perfluorooctanoic acid (“PFOA”) and perfluorooctane sulfonic acid (“PFOS”), as CERCLA hazardous substances. This regulatory focus is part of a “whole-of-agency approach” to regulating PFAS, which EPA set forth in its 2021 PFAS Strategic Roadmap. This QuickStudy provides background on PFAS, recaps key aspects of the proposed rule, and identifies several potential consequences for the regulated community.

Understanding PFAS

PFAS include thousands of diverse chemicals, many 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. In the early 2000’s, U.S. manufacturers phased out domestic production of two substances known as PFOS and PFOA—the two most frequently detected PFAS. EPA states that PFAS “persist” in the ?environment and for this reason are bioaccumulative in humans and animals.? Moreover, many studies purport to show a correlation between PFAS ?exposure and a host of health problems, including kidney and testicular ?cancer, thyroid disease, ?high cholesterol, and suppressed immune response to vaccines. For these reasons and others, the detection and clean-up of PFAS will be a key issue in myriad situations, including groundwater clean-ups, wastewater discharge standards, potable water standards, and even air emissions requirements.

The Proposed Rule

EPA's proposed drinking water rule would directly regulate PFOS and PFOA. The proposed rule establishes numeric Maximum Contaminant Levels ("MCLs") and Maximum Contaminant Level Goals ("MCLGs") under the Safe Drinking Water Act. Generally, an "MCL" is the maximum concentration of a contaminant allowed in water delivered to users of a public water system and a MCLG is the concentration of a contaminant in drinking water, below which there is no known expected human health impact. Importantly, and in addition to being a drinking water standard, MCLs are typically used as generic groundwater clean-up standards in many states.

EPA proposes to set the MCL for PFOA and PFOS at four parts per trillion (4 ppt). If adopted, the MCLs for PFOA and PFOS would be the most stringent drinking water standards in the nation and will require states, tribes, and U.S. territories to adopt MCLs equal to or less than 4.0 ppt within two years. In addition, EPA is proposing to set the MCLG for PFOS and PFAS at zero, based on EPA's determination that PFOA and PFOS are likely carcinogenic and may cause or contribute to other adverse health effects.

Also, under the proposed rule, a risk-based standard would apply to mixtures of four additional PFAS in drinking water: perfluorohexane sulfonic acid ("PFHxS"), hexafluoropropylene oxide dimer acid ("HFPO-DA") and its ammonium salt; perfluorononanoic acid ("PFNA"); and perfluorobutane sulfonic acid ("PFBS"). For these compounds, EPA intends to use a formula to determine if any mixture of these chemicals, taken together, has a "Hazard Index" score of 1.0 or greater under the formula.

The Proposed Rule's Impacts

A. Water Treatment Systems.

If finalized, the proposed rule will require public water systems across the country to conduct monitoring, notify the public if they detect PFAS at levels above the MCLs, and reduce PFAS to allowable levels—a task that may require installation and use of costly detection and treatment technologies. Compliance costs, even by EPA's estimates, are extremely high. For those businesses that supply potable water through private water well systems, the listing of PFAS as subject to drinking water standards will bring added cost, complexity, and risk to providing that service. While public (and even private) water systems will feel material impacts of the rule if adopted, other industries and businesses will also face significant legal and financial consequences.

B. Revitalization of the Superfund Program and Other Clean-up Regimes.

EPA's National Enforcement and Compliance Initiatives for 2024-2027 indicate that EPA intends to use multiple statutory authorities to identify releases of PFAS at facilities where PFAS were used, manufactured, disposed, or released. While some of these sites may not be in use, others are likely resident to ongoing businesses. It is certainly possible that scoping and clean-up activities could disrupt businesses both financially and operationally. It is also reasonable to consider that "closed" Superfund/state superfund sites could be reopened, as could sites closed under other federal or state programs based upon theories of changed circumstances, significant differences, etc. Under federal and state statutory authority, EPA, public water systems, and other third parties will likely seek cost recovery or contribution for clean-up expense from generators of PFAS whose raw materials, finished products, or waste may have contributed to the presence of PFAS in water systems, soil, or groundwater,

or other environmental media, as well as other statutory responsible parties. In ?addition to the potential for reopening formerly closed sites, scoping activities at most sites ?will necessarily broaden, become more time consuming, and likely more expensive.

C. Real Estate Industry.

Given the presence of PFAS in a host of industrial applications, materials, and consumer products, these substances could be identified as a potential chemical of concern at thousands of current or historical commercial/industrial and other properties across the country. At this time, when conducting pre-acquisition diligence, samples for PFAS in soil and groundwater should be considered. Further, parties should ?expect clean-ups to be costly and time consuming. Thus, a notable impact of these proposed rules will be the need for heightened diligence. In addition, negotiation of indemnities, representations and ?warranties, schedules, and like provisions will take on heightened importance. As stated before, these substances were ?widely used and until recent years were not a material focus of site risk allocation.

D. Mergers and Acquisitions.

In the transactional context, given the likely prevalence of these substances and the current uncertainty ?involving the cost and time associated with cleanup, there should be an even greater ?emphasis on diligence and ?greater scrutiny of risk allocation provisions in M&A transactional documents. Definitions of environmental terms, the ?coverage of indemnities regarding preexisting conditions, and drafting nuances as ?to covered substances will be important, as will language contained in disclosure ?schedules. Also, drafting should consider that these PFAS substances, while not currently listed under CERCLA or the Clean Water Act, will be at some point soon. So, for example, definitions merely tied to current CERCLA “hazardous substances” may not cover PFAS (though notably, some states already list PFAS as hazardous substances). Moreover, many pollution legal liability policies are excluding PFAS, which means that insurance products will be readily available to bridge transactional risk allocation gaps relating to potential PFAS liability. Longtime owners of older legacy industrial/commercial sites may consider reviewing files to determine if any pre-1972 CGL policies may exist that could offer some potential coverage. And in asset–type deals, buyers should seek to acquire rights to these older policies, which even if not found in files can sometimes be discovered through insurance policy archeology. Generally, 1972 is the time period where underwriters began inserting broad pollution exclusion language into policies. Finally, as new investigations identify PFAS and related clean-up liability, there is little doubt that older agreements will scrutinized to determine the availability of indemnity and/or statutory claims. Litigation should be on the rise.

EPA published the proposed rule in the Federal Register on March 29, 2023. Following publication, EPA will accept comments on the proposed rule during a 60-day period (Docket: EPA-HQ-OW-2022-0114), meaning comments must be submitted by May 28 EPA currently plans to finalize the rule by January 2024.

If you have any questions about the proposed rule, or seek assistance in drafting a comment for the proposed rule, please reach out to a member of Locke Lord’s environmental group.

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