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Breaking Down EPA's Rule On PFAS In Drinking Water

By **Stephanie Feingold, Drew Cleary Jordan and Spenser Jaenichen** (April 29, 2024, 5:26 PM EDT)

On April 10, the U.S. Environmental Protection Agency finalized its highly anticipated new rule aimed at reducing the level of certain perfluoroalkyl and polyfluoroalkyl substances in drinking water.


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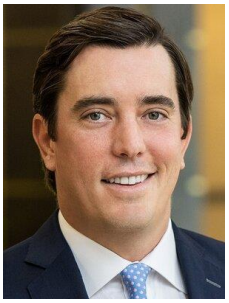
The final rule is not only the first enforceable federal drinking water regulation for PFAS, but also the first National Primary Drinking Water Regulation under the Safe Drinking Water Act in decades. While the final rule largely tracks the 2023 proposed rule, there are many changes to be aware of and next steps to consider.

In addition to the new reporting and compliance requirements for directly regulated entities, there will be a number of indirect effects on a broad range of parties, particularly taken together with the recently finalized designation of perfluorooctanoic acid, or PFOA, and perfluorooctanesulfonic acid, or PFOS, as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act.


Drew Cleary Jordan

These include preparing for increased cleanup costs and the possible expansion of existing Superfund sites to include new contaminants and potentially responsible parties, as well as developing solutions, if needed, to address levels of PFAS that exceed the amount enumerated in the new rule.

Consistent with the proposed rule published in 2023, the final rule includes maximum contaminant levels, or MCLs, for PFOA and PFOS.


Spenser Jaenichen

In the proposed rule, perfluorononanoic acid, perfluorohexanesulfonic acid, and hexafluoropropylene oxide dimer acid and its ammonium salt, more commonly known as GenX chemicals, along with perfluorobutane sulfonic acid, were to be regulated solely using the agency's novel hazard index MCL calculation.

The final rule, however, sets newly introduced numerical MCLs for PFNA, PFHxS and GenX chemicals, while retaining the controversial use of a hazard index calculation to limit levels of PFNA, PFHxS, HFPO-DA and PFBS as a mixture.

The EPA states that the hazard index provides an indication of overall potential risk of a mixture as well as individual PFAS that are potential drivers of a risk. The hazard index of 1.0 is the level in which no known health risks could be anticipated.

The final maximum contaminant level goals, or MCLGs, and MCLs for each of the six regulated PFAS under the final rule are summarized below.

Final Rule MCLGs and MCLs

Chemical	Maximum Contaminant Level Goal (MCLG)	Maximum Contaminant Level
PFOA	0	4.0 ppt*
PFOS	0	4.0 ppt
PFNA	10 ppt	10 ppt
PFHxS	10 ppt	10 ppt
HFPO-DA	10 ppt	10 ppt
Mixture of two or more of PFHxS, PFNA, HFPO-DA, and PFBS	Hazard index of 1 unitless	Hazard index of 1 unitless

* parts per trillion

The final rule will take effect 60 days after its April 26 publication in the Federal Register.

MCL and MCLGs

In addition to the enforceable MCLs set by the final rule, the rule sets health-based, nonenforceable MCLGs for the six regulated PFAS.

MCLGs are levels in which there is no known or expected risk to public health, and are not enforceable standards. MCLs are the highest level of contaminants allowed in drinking water, and are set as close as possible to the MCLGs while also taking technical feasibility and cost into account. Exceedances of the MCLs can be enforced once the compliance period takes effect.

The EPA's MCL of 4 ppt for PFOA and PFOS is equivalent to the practical quantification level, which is "the lowest level that can reasonably be reliably achieved within specified limits of precision and accuracy."

The EPA's final individual MCLGs and MCLs for PFNA, PFHxS and GenX chemicals are equivalent to their respective health-based water concentrations set out in the final rule. Of note, the health-based water concentrations for PFHxS was revised from 9 ppt in the draft rule to 10 ppt in the final rule.

Implementation

The rule requires public water systems to continuously monitor for each of these PFAS. Those systems

have by 2027 to complete initial monitoring, followed by ongoing compliance monitoring and public reporting of the PFAS levels in drinking water starting in 2027.

Public water systems have until 2029 to implement solutions that reduce PFAS if monitoring shows that the levels of chemicals in drinking water exceed the aforementioned MCLs. Starting in 2029, public water systems that contain PFAS in drinking water and violate one or more of the MCLs must provide notification to the public and take immediate action to reduce levels of PFAS. This five-year compliance period is a change from the three-year compliance period published in the proposed rule last year.

Public water systems subject to the rule generally must monitor quarterly, and the monitoring requirements are triggered by levels set at one-half of the MCL for each regulated PFAS chemical — a slight increase from the one-third MCL level proposed in the draft rule — based on a running annual average. In other words, a system is not necessarily in violation of the rule until the annual average exceeds the applicable MCL.

Funding

The EPA concludes in its final rule that the costs and benefits are "nearly at parity" with estimated quantifiable annual benefits of $1.549 billion annually and quantifiable costs of $1.548 billion annually, at a 2% discount rate.

The Biden administration has emphasized the availability of funding available to public water systems to help implement PFAS treatment measures.

The EPA announced roughly $1 billion in funding through President Joe Biden's Investing in America agenda to assist 56 states and territories to allow for PFAS testing and treatment at both public water systems and privately owned homes and wells.

The rule also points to the Bipartisan Infrastructure Law as another source of funding over a five-year period through appropriations of over $11.7 billion in the Drinking Water State Revolving Fund General Supplemental, $4 billion to the DWSRF for emerging contaminants; and $5 billion in grants to the emerging contaminants in small or disadvantaged communities.

Effects and Next Steps

While the final rule largely tracks the 2023 proposed rule, there are a number of changes, with the most notable departures being (1) the promulgation of separate numeric MCLGs and MCLs for PFNA, PFHxS, and HFPO-DA, and (2) the extension of the compliance period from three to five years.

The final rule directly applies only to public waters systems classified as community water systems and nontransient noncommunity water systems — excluding fuel or gas stations and shopping centers. While there's no immediate public reporting, regulated entities need to be mindful of the monitoring period to comply with the reporting requirement in 2027.

Further, public water systems need to begin developing solutions, if needed, to address levels of PFAS that exceed the amount enumerated in the new rule.

The new rule's reach will also extend well beyond the directly regulated entities. For example, once the rule takes effect, the new MCLs will become applicable, relevant and appropriate requirements at

Superfund sites. As such, they will likely result in increased cleanup costs, and possible expansion of existing Superfund sites to include new contaminants and potentially responsible parties.

These effects will be felt immediately, once the MCLs become effective — and possibly even sooner, as "to be considered" requirements. These effects will not be limited to Superfund sites, but can be expected generally for all contaminated site response actions where MCLs are typically used as groundwater cleanup criteria.

And notwithstanding the availability of federal funding, parties may see an increase of litigation brought by water districts as those entities seek to defray the costs of compliance with the new regulations. Similarly, the plaintiffs bar will likely point to the MCLs and MCLGs in toxic tort suits.

The establishment of federal MCLs for the six PFAS covered by this rule will help address the current patchwork of state-issued MCLs. Once the rule takes effect, it will preempt any state-issued regulations, so no state can have an MCL for a covered PFAS that is less stringent than the federal MCL. It also would require any state with primary enforcement responsibilities that does not have a drinking water standard to implement regulations that are at least as strict as the federal MCL.

In short, states will have to align existing MCLs with the new federal standard.

Following the EPA's announcement of the proposed rule in 2023, the agency received over 120,000 comments during its public comment period. Of these comments, many questioned the science behind the EPA's calculation of these new levels, and to what extent these standards will be enforced.

Others challenged the EPA's estimated implementation costs as being far too low. While the EPA endeavored to respond to those comments in the final rulemaking, it is expected that the final rule may be subject to challenge by various groups.

Indeed, shortly after the EPA announced the new rule, states began to voice their criticism, and their plans to contest the new rule. As required by the Safe Drinking Water Act, Title 42 of the U.S. Code, Section 300j-7, any legal challenges must be filed in the U.S. Court of Appeals for the D.C. Circuit within 45 days of the rule's publication in the Federal Register.

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