EPA Finalizes Controversial PFAS Maximum Contaminant Levels

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On April 10, 2024, the United States Environmental Protection Agency (EPA) announced that it has finalized the first-ever national, legally enforceable maximum contaminant levels (MCLs) for six per- and polyfluoroalkyl substances (PFAS) in drinking water. EPA has set MCLs for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), at four parts per trillion (ppt), the lowest level that current technology can reliably detect. The rule also regulates perfluorononanoic acid (PFNA), hexafluoropropylene oxide dimer acid (HFPO-DA) (commonly known as GenX chemicals), perfluorohexane sulfonic acid (PFHxS), and perfluorobutane sulfonic acid (PFBS) through the use of a Hazard Index of 1 to determine if the combined levels of these PFAS pose a potential risk to human health.

The MCLs are not only as low as can be reliably detected, but they are also lower than those enacted by every state that has regulated PFAS in drinking water. This regulation will require public water systems to monitor for these six chemicals within three years and to comply with the drinking water standards beginning in 2029. If monitoring reveal levels that exceed the regulatory standards, public water systems will be required to: (1) notify the public within thirty (30) days; and (2) reduce the levels of these PFAS below the regulatory standards. While EPA estimates that only six to ten percent of public water systems will be required to “take action” to meet the federal standard, industry groups tell a different story—they anticipate that the vast majority, if not all, water systems in the United States will require costly remediation in order to meet the EPA's new standards, potentially costing ratepayers and/or taxpayers billions of dollars.

EPA estimates that the drinking water standard will cost water utilities approximately $1.5 billion per year but points to federal funds that are available to help pay for regulatory compliance, including nearly $1 billion in new funding announced in conjunction with the new rule “to help states and territories implement PFAS testing and treatment at public water systems.” Industry groups, however, warn that compliance with the new regulation could cost in excess of $37 billion, the vast majority of which will be borne by the water providers, who will be forced to pass those costs onto ratepayers.

Given these potentially astronomical costs and critiques concerning the science that underpins the regulation, legal challenges are expected. The American Chemistry Council (“ACC”) weighed in on the regulation prior to its final enactment. Its primary critique of the regulation is that it is not based on sound science and realistic economic data. This is not surprising considering that the science behind PFAS is still emerging and at least one other federal agency, the Agency for Toxic Substances and Disease Registry, could not conclude that a cause-and-effect relationship exists between PFAS and adverse human health effects despite reviewing more than 600 studies. In addition, the World Health Organization and numerous other countries, including Canada and Australia, are at odds with EPA's MCLs. The ACC further critiques the MCLs, arguing that they: (1) are based on an assessment of potential health effects that is fundamentally flawed; (2) overstate the non-cancer risks associated with PFOA and PFOS exposure; (3) fail to demonstrate that the benefits justify the costs as required by the Safe Drinking Water Act; and (4) significantly underestimate the costs of compliance and the number of systems impacted. In addition to the ACC, more than two dozen national, state, regional, and municipal agencies and organizations have voiced concerns about the lack of scientific support for the new rule, and the economic impact that this new rule will have on local communities, small businesses, and underserved communities. These critiques are likely to become grounds for legal challenges to EPA's final rulemaking on PFAS MCLs.