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PFAS and Public Water Supply in Pennsylvania: Challenges & Opportunities

The Pennsylvania Department of Environmental Protection (DEP) is currently tracking approximately 19 sites with known contamination with PFOA and PFOS. Nine are federal Superfund sites and three are addressed under the state's Hazardous Sites Cleanup Act. Several involve public water authorities. These known sites, however, may presage additional future sites and many new challenges. On April 12, 2019, the DEP announced a PFAS sampling plan, targeting 300 public water supplies with elevated potential for contamination and testing for six PFAS compounds.

Challenges

Chemical — PFOS and PFOA are just two of hundreds of PFAS compounds, including precursor chemicals associated with legacy uses and multiple variations of currently used, substitute chemicals — especially GenX and PFBS.

Toxicological — While PFOS and PFOA have been studied extensively, the extent of their toxicity to humans is still subject to significant differences of opinion, although many believe that they pose risk of serious health effects ranging from low birthweights and immune system effects to thyroid hormone disruption and cancer. The toxicity of GenX and PFBS has recently been analyzed by the Environmental Protection Agency (EPA), which has published a draft reference dose. The vast remainder of the compounds generally lack robust toxicity data.

Sampling and Analytical Barriers — The EPA's published analytical Method 537 has been expanded to cover approximately 14 PFAS compounds, leaving many without an approved method. Both field sampling and laboratory analyses are greatly complicated by cross-contamination potential — everything from Tyvek suits, cosmetics, and sunscreen to packaged food containers, may contain PFAS.

Multiple and Varied Sources — Most Pennsylvania and national sites involve Aqueous Film Forming Foams (AFFF), a complex mix of known and unknown PFAS in multiple formulations used since the 1940s for fire suppression where fuels are involved, at military and non-military airports, fire training facilities, and petroleum and chemical processing and storage facilities. Other types of sources go well beyond AFFF and include PFAS manufacturing sites, railyards, plating facilities, and textiles/carpet processing.

Evolving Cleanup Technologies — A wide range of drinking water cleanup technologies are being discussed, including granulated activated carbon, single-pass ion exchange, membranes, and PFAS-selective resins. Identification of problems and limitations continue in the field and the laboratory.

Rapidly Changing Regulatory Landscape — While the EPA has not regulated PFAS with Maximum Contaminant Levels (MCLs) under the Safe Drinking Water Act, it has published "Action Levels" for PFOS and PFOA, and provided the analysis (draft RfD) to identify such levels for GenX and PFBS. The EPA's suggested action level for PFOS and PFOA, in any combination, is 70 parts-per-trillion (ppt). Many states, including Pennsylvania, follow the EPA's suggested levels for cleanup purposes, but several have set their own — sometimes much more stringent — MCLs or Action Levels. New Jersey, for example, has proposed MCLs and Groundwater Quality Criteria Standards for PFOA at 14 ppt and PFOS at 13 ppt, and has proposed adding them to the state's list of hazardous substances. This formal proposal follows an internal science and policy process and is accompanied by an extensive administrative record. Pennsylvania announced that it is starting the process of setting MCL(s) for PFAS.

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Opportunities

State Support and Funding — Pennsylvania recently provided substantial grants ($5 million and $3 million, respectively) to the Warminster Municipal Authority and the Warrington Township to fund ongoing treatment at multiple contaminated water supply wells. In announcing these funds, provided by the Commonwealth Financing Authority under the H2O PA Program, the governor's office noted that substantial additional funding will likely depend on the passage of major infrastructure legislation in Pennsylvania.

Potential Superfund Hazardous Substance Designation — Currently, no PFAS are listed as hazardous substances under the federal Superfund law. Therefore, they are not subject to the private cost recovery provisions of Section 107 (or 113). However, the EPA recently published its PFAS Action Plan, where it states that it has "initiated the regulatory development process for listing PFOA and PFOS as CERCLA hazardous substances." In addition, bipartisan bills have been introduced in the U. S. Congress that would require the EPA to act on a listing decision within two years. A listing would open the opportunity for cost recovery by those who expend funds responding to releases or threats of releases of listed PFAS.

Potential Pursuit of Cleanup and Cost Recovery Through Tort Law — Among others, the Warminster Municipal Authority and the Horsham Water and Sewer Authority have sued PFAS manufacturers in federal court, joining a substantial list of local governments and water authorities nationally who have filed such suits. The numerous plaintiffs include the City of Tucson, Ariz.; Emerald Coast Utilities Authority, Fla.; the City of Stuart, Fla.; Gadsden Water Works and Sewer Board, Ala.; Town of Barnstable, Mass.; Suffolk County Water Authority, N.Y.; City of Westfield, Mass.; Town of Southampton and Hampton Bays Water District, N.Y.; Cape Fear Public Utility Authority, N.C.; and Little Hocking Water Association, Ohio. Many of these cases involving AFFF have been consolidated with dozens of private tort suits as multidistrict litigation handled in the District of South Carolina. Transfer Order. U.S. Judicial Panel on Multidistrict Litigation, M.D.L. No. 2873.

Natural Resources — Trustees (like states and tribes) may successfully pursue natural resources damages claims as well as enforcement actions under state statutes. For example, Minnesota settled its state court action with 3M Company for an $850 million grant. And, New Jersey recently announced four complaints against multiple companies for PFAS natural resources damages claims, invoking the state's Water Pollution Act and Spill Compensation and Control Act along with a variety of state tort law claims.

References

United States Environmental Protection Agency

Pennsylvania Department of Environmental Protection's Drinking Water Guide

Northeastern University Social Science Environmental Health Research Institute

Environmental Working Group

Directive, Information Request and Notice to Insurers

Minnesota 3M PFC Settlement