The Coming Storm, PFAS and the Future of Pennsylvania Municipal Authorities

By Michael T. Korns, Esq., Babst Calland and Amanda L. Brosy, Esq., Babst Calland

Municipal authorities and other public entities in Pennsylvania have long been familiar with the weight and burden of DEP and EPA mandates and regulations. Whether it involves issues with stormwater infiltration, erosion and sediment control, or any number of issues related to water treatment, all too often authorities must correct issues that they did not cause. Given that history, authorities should brace themselves, because new regulations will put them in the crosshairs again.

PFAS – A pollutant that means forever.

The new issue facing authorities relates to a large group of man-made chemicals known as per- and polyfluoroalkyl substances, or "PFAS" for short. PFAS are resistant to heat, oils, stains, and water, and for that reason, PFAS have been incorporated into a wide variety of consumer products and industrial processes since the 1940s. They are ubiquitous in the environment and are known as "forever chemicals" because they do not readily break down in nature. Ongoing research shows a variety of potential health risks related to PFAS exposures.

Pennsylvania has adopted PFAS standards related to drinking water and environmental cleanup, and EPA, which is working to address PFAS pollution on multiple regulatory fronts, recently finalized the first-ever national drinking water standard related to PFAS. In December 2023, DEP also updated its NPDES Individual Industrial Wastewater permit application to include PFAS sampling. Applications going forward are required to include sampling for four PFAS: PFOA, PFOS, PFBS, and HFPO-DA (commonly referred to as GenX) as part of Pollutant Group 1 sampling. Because sampling is required under Pollutant Group 1, all industrial categories are subject to the sampling requirements.

The heart of the issue for authorities is this: the elimination of PFAS in drinking water is a regulatory priority for both EPA and DEP. This is an important goal, and with appropriate grant funding, authorities could be an important partner in removing these chemicals from both the natural environment and our own drinking water, as they have done with the elimination of lead water lines. **Unfortunately, many of the existing and proposed regulations tend to take a less cooperative approach, requiring regulated entities to ensure that PFAS are eliminated from the material in their possession, regardless of whether that entity created or used the PFAS at issue.**

As is immediately obvious to anyone reading this, PFAS regulation presents a massive challenge to municipal water and wastewater authorities. Because PFAS have been used in so many different products and industries, it is very likely that wastewater treatment plants are receiving water that already contains levels of PFAS that would be in violation of the upcoming DEP and EPA standards. Water treatment facilities may also find PFAS in water sources, whether surface or groundwater. Given the ubiquity of PFAS, even water treatment plants fed entirely from natural sources may find PFAS present at unacceptable levels.

Potential Impacts

The list of potential ways in which new PFAS regulations are likely to impact authorities is numerous, but a non-exclusive list includes the following.

National Primary Drinking Water Regulation (NPDWR)

On April 10, 2024, EPA released a final NPDWR that sets legally enforceable limits (maximum contaminant levels, or MCLs) in drinking water for six different PFAS. The federal standard becomes immediately effective in Pennsylvania, replacing the prior Pennsylvania standards. Notably, the rule sets an MCL of 4 parts per trillion (PPT) for PFOA and PFOS. The NPDWR requires public water systems to complete their initial

Continued on page 44.

[1] This article was submitted for publication on April 12, 2024 and thus does not include any developments after that date.

PFAs article continued from page 21.

monitoring for the chemicals within three years and notify the public what levels are detected. Where PFAS are found at levels that exceed the new standards, systems must take steps to reduce those levels within five years. To help states implement testing and treatment at public water systems, $1 billion has been made available through the Infrastructure Investment and Jobs Act. With this new rule in place, water utilities and municipalities should begin evaluating the technical and cost implications of conducting testing and installing treatment systems to meet the NPDWR standards.

Pretreatment

The EPA is developing, or plans to develop, effluent limitation guidelines that address PFAS for multiple industries, including landfills and metal finishers. Many authorities accept wastewater from some of these industries. These guidelines are expected to include pretreatment standards that will need to be incorporated into pretreatment programs and reflected in the local limits with which all industrial users must comply.

Biosolids

Some authorities dispose of biosolids at landfills. As part of its PFAS Strategic Roadmap, EPA is currently conducting a biosolids risks assessment for PFOA and PFOS, two of the most studied PFAS. Risk assessments are used to characterize the nature and magnitude of potential harm to human health and the environment as a result of exposure to a chemical. EPA intends to finalize the risk assessment by December 2024. These risk assessments may result in additional testing requirements and/or restrictions for disposal or land application of biosolids.

Superfund Hazardous Substances Designation

On September 6, 2022, EPA published a Proposed Rule to designate PFOA and PFOS as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, aka Superfund). In the Proposed Rule, EPA identifies waste management and wastewater treatment facilities as potentially affected entities. However, EPA has said it will focus its enforcement efforts on manufacturers and other entities that have released PFOA and PFOS into the environment. To that end, EPA is also working on an enforcement discretion and settlement policy that will outline its priorities. The final rule and accompanying policy are expected to be issued sometime this spring. Meanwhile, EPA has also requested public input on whether to designate other types of PFAS, besides PFOA and PFOS, as CERCLA hazardous substances. In light of the Biden administration's commitment to addressing PFAS issues on multiple fronts, we expect EPA to finalize the Proposed Rule and take steps to develop other rules to address PFAS releases to the environment under CERCLA and other federal environmental statutes.

EPA Information Collection Request

The EPA is working to develop a study of influent to publicly owned treatment works across the nation. The goals of the study are to identify categories of industrial users discharging PFAS; collect data on PFAS in domestic wastewater influent to treatment works; characterize PFAS from industrial users and domestic sources; collect data on adsorbable organic fluorine concentrations in wastewater; and better understand PFAS pass through in treatment works to biosolids and effluent.

What Now?

It is clear that authorities will be impacted by the evolving PFAS regulatory environment in a variety of ways. If finalized, the proposed regulations could require authorities to develop and implement pretreatment protocols for industrial waste and then hold authorities responsible for the PFAS that happen to enter their systems. While the EPA claims that it does not intend to make utilities a target of initial CERCLA enforcement, its proposed "hazardous substances" rule does not absolve utilities from responsibility for the PFAS in their systems that they did not create or use. This is particularly concerning because it may not be possible in all cases to identify the origin of PFAS in the system.

Authorities in Pennsylvania should not wait for potential enforcement to assess threats to their systems. If you are able to identify sources of PFAS, consider review of applicable pretreatment requirements on industrial customers. If there are PFAS in your system that you cannot identify the source for, then your solicitor should be closely monitoring final approvals of the upcoming regulations to best understand what will be required of your authority in the months and years to come.

As the federal and state governments continue to take action to address PFAS across many program areas, Babst Calland attorneys continue to track these developments and are available to assist you with PFAS-related matters. For more information on how municipal authorities and other public entities can navigate the uncertainties and better understand the new rules and regulations, please contact Michael Korns at (412) 394-6440 or mkorns@babstcalland.com or Amanda Brosy at (202) 853-3465 or abrosy@babstcalland.com.