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EPA Listing of PFAS is the First Step on a Long Road to Drinking Water Regulations

by Jim Wedeking

The EPA has listed, per- and polyfluoroalkyl substances, known as "PFAS," on a draft version of its fifth Chemical Candidate List ("CCL 5"). 86 Fed. Reg. 37,948 (July 19, 2021). PFAS, a grouping of over 4,000 synthetic organofluourine chemicals, were used in hundreds of products since the 1940s due to their ability to repel water and oil, reduce friction, and their temperature resistance. *Id.* at 37,962. At their zenith, PFAS chemicals could be found in firefighting foams, clothing, cosmetics, furniture, and food packaging among other products. Dubbed "forever chemicals," PFAS chemicals resist natural breakdown and can accumulate over time. PFAS chemicals migrated from landfills, manufacturing plants, firefighting foam uses, or other sources to drinking water. *See generally*, EPA, Basic Information on PFAS. Lawsuits against PFAS manufacturers allege that that long-term exposure to PFAS chemicals may lead to health problems. As a result, these once obscure industrial miracle additives have led to a litany of state attorney general and personal injury suits.

Although U.S. companies voluntarily phased out PFAS production in the late 2000s, their multitudinous uses over approximately 60 years means that they are commonly found in the environment. Environmental groups and members of Congress have criticized EPA's delay in regulating PFAS chemicals, especially the chemicals perfluorooctane sulfonic acid ("PFOS") and perfluorooctanoic acid ("PFOA"). Formal regulation under several environmental statutes has inched along, partly due to the complex statutory processes for studying and listing substances for regulation. On July 19th, EPA took another small step towards regulating PFAS by including it in the draft of CCL 5.

How the Chemical Candidate Lists Work

The Safe Drinking Water Act ("SDWA") authorizes EPA to establish binding limitations for contaminants in public drinking water systems called maximum contaminant levels and non-binding maximum contaminant level goals. 42 U.S.C. § 300g-1(a). But the SDWA does not specify what substances are regulated; that is EPA's job.

Listing decisions begin, in part, with the Unregulated Contaminant Monitoring Rule. SDWA requires EPA to issue a list of no more than 30 unregulated contaminants to be monitored by public drinking water systems serving more than 10,000 people and, under certain circumstances, smaller public drinking water systems serving between 3,300 and 10,000 people. 42 U.S.C. §§ 300j-4(a)(2), (j)(1)(A). Even smaller public water systems—those serving less than 3,300 persons—are sampled on a nationally representative basis. *Id.* § 300j-4(j)(1)(B). The results are then considered in generating

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the Chemical Contaminant List. *Id.* § 300g-1(b)(1)(B). Of the 30 contaminants monitored under the fourth Unregulated Contaminant Monitoring Rule (called UMCR 4), 17 were included in CCL 4 and 13 in the draft CCL 5. The most recent proposed Unregulated Contaminant Monitoring Rule, published on March 11, 2021, 86 Fed. Reg. 13,846, would include 29 PFAS substances to be monitored from 2023 through 2025.

The SDWA requires EPA to publish a Chemical Contaminant List every five years. 42 U.S.C. § 300g-1(b)(1)(B)(i)(I). The CCL includes unregulated chemical or microbial contaminants that are typically known to be present in public drinking water systems regulated under the SDWA, such as through the Unregulated Contaminant Monitoring Rule. Potential candidates include hazardous substances listed under Section 101(14) of the Comprehensive Environmental Compensation Response and Liability Act (commonly known as "CERCLA") and registered pesticides that are not regulated under the SDWA. *Id.* § 300g-1(b)(1)(B)(i)(II).

Once listed on a Chemical Candidate List, the candidates are evaluated based on their potential health effects and their occurrence in public water systems. 42 U.S.C. § 300g-1(b)(1)(B)(ii)(II). EPA must identify those chemicals or microbial contaminants of the greatest public health concern from exposure through drinking water. *Id.* § 300g-1(b)(1)(C). This includes an evaluation of sensitive populations that face greater risks from exposure, such as infants and children, pregnant women, and those with suppressed immune systems. *Id.* Based on this review, EPA must select at least five contaminants from the list and make a determination, positive or negative, as to whether it will begin the process of regulation. *Id.* § 300g-1(b)(1)(B)(ii)(I). A positive determination means that EPA must begin the process of creating maximum contaminant levels and maximum contaminant level goals for the contaminant. *Id.* § 300g-1(b)(1)(E).

What Inclusion on the Draft CCL 5 Means for PFAS

PFAS is only one group of chemicals on a draft list that includes two other chemical groups, 12 microbial contaminants, and 66 individual chemicals. 86 Fed. Reg. at 37,948. EPA's proposal seeks comments on the draft CCL 5 listings, meaning that the inclusion of PFAS for further evaluation is *not yet final*. Once finalized, and assuming that PFAS stays on the CCL 5 list (which is likely), the chances of any particular contaminant being selected for regulation is relatively low. The CCL is only a screening tool intended to prioritize EPA's research. *Id.* at 37,950. The inclusion of a contaminant on the CCL does not mean that it will be regulated, only that it will be studied. *Id*. Once EPA studies the listed contaminants, it must make a positive or negative determination for only five of them. The chances of PFAS receiving a positive determination is not very high based on the history of the CCL program. And even if EPA issued a positive determination, it would be several years before any PFAS regulations are final.

The first CCL, designated CCL 1 in 1998, included 50 chemical and 10 microbial contaminants or groups based on recommendations by the National Drinking Water Advisory Council. 63 Fed. Reg. at 10,274 (Mar. 2, 1998). After five years of study, EPA only had sufficient data to make a regulatory determination for nine of the 60 candidates. 68 Fed. Reg. at 42,897 (July 18, 2003). It issued a negative determination for all nine, although EPA issued non-binding guidance documents or health advisories for four of the candidates. The remaining 51 contaminants were carried over to CCL 2, released in 2005. 70 Fed. Reg. at 9,071 (Feb. 24, 2005). After three years of additional study, EPA issued another seven negative determinations with five non-binding health advisories. 73 Fed. Reg. 44,251 (July 30, 2008).

CCL 3, released in 2009, listed 104 chemical contaminants or contaminant groups and 12 microbial contaminants. 74 Fed. Reg. 51,850 (Oct. 8, 2009). EPA issued a single determination in

2011, finding that it would regulate perchlorate—the first since the CCL process began. 76 Fed. Reg. 7,762 (Feb. 11, 2011). However, the rulemaking process for regulating perchlorate inched along, culminating in a proposed rulemaking, 84 Fed. Reg. 30,524 (June 26, 2019), that was ultimately withdrawn. 85 Fed. Reg. 43,990 (July 21, 2020). As for the CCL 3, EPA had only made one out of the statutorily required five determinations. In 2016, seven years after EPA issued CCL 3, it made four negative determinations to complete the cycle. 81 Fed. Reg. 13 (Jan. 4, 2016). The remaining 99 contaminants from CCL 3, with some exceptions and new additions, carried over to CCL 4, released later in 2016. 81 Fed. Reg. 81,099 (Nov. 17, 2016). Five years later, EPA issued positive determinations for PFOA and PFOS and negative determinations for six other candidates. 86 Fed. Reg. 12,272 (Mar. 3, 2021). EPA will now embark on formulating a proposed rulemaking for public comment.

The history of the CCL illustrates how slowly EPA can move and how rarely it will determine to regulate any particular drinking water contaminant. Should EPA decide to keep PFAS on the draft CCL 5 list, the issuance of final drinking water standards, if any, are still several years away.

PFAS Drinking Water Regulations More Likely to Come from Elsewhere

Although EPA may eventually regulate PFAS under the SDWA, others will likely beat EPA to the punch. The SDWA does not preempt state drinking water standards. In fact, states are free to issue drinking water regulations more stringent than federal regulations. 42 U.S.C. § 300g-2(a)(1). Several have already set their own PFAS standards. New Jersey was the first state to do so, imposing a maximum contaminant level of 13 parts per trillion ("ppt") for perfluorononanoic acid ("PFNA"), 14 ppt for PFOA, and 13 ppt for PFOS. Since then, Massachusetts, Michigan, New York, New Hampshire, and Vermont imposed enforceable drinking water limitations for one or more PFAS substances. Other states may also pass their own PFAS drinking water standards before EPA completes its CCR 5 review and any regulations it may undertake thereafter.

Congress may also resort to legislative action before EPA issues PFAS drinking water regulations. It already revamped SDWA in 1996 after a perceived lack of administrative action. In the intervening 25 years, EPA has made a total of three positive determinations, none of which have resulted in any actual drinking water regulations to date. H.R. 3684, a transportation spending bill called the INVEST in America Act, includes provisions that would not only award states grant money to treat PFAS contamination (Sec. 13109), but would amend the SDWA to mandate that EPA set maximum contaminant levels for PFOS and PFOA within two years and other PFAS chemicals within 18 months thereafter (Sec. 13202). This is just one of several bills in the 117th Congress that would regulate PFAS in drinking water.

Conclusion

The inclusion of PFAS on the draft version of CCL 5 is the first step on a long road. Should EPA eventually prescribe drinking water standards for PFAS, whether through the existing SDWA process or one amended by Congress, it would likely serve only to fill gaps where states have not already issued their own PFAS regulations. Should EPA issue its PFAS drinking water limitations, several years from now, the list of states with their own standards will likely have grown.

