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Expert Analysis

Regulation of Polyfluoroalkyl Chemicals in New York

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Perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA) are two polyfluoroalkyl chemicals (PFAS)—a class of over 7,000 compounds with unique chemical structures that repel lipids and water. As a result, PFOA and PFOS have been used in numerous household products, such as nonstick cookware and stain-resistant carpets, and commercial applications such as fire-fighting foam. PFOS and PFOA are frequently referred to as "emerging contaminants," a label with no precise regulatory definition but generally understood to refer to chemicals for which there are few published standards designed to protect human health and the environment from perceived hazards. Many PFAS compounds are also often referred to as "forever chemicals" because of their persistence in the environment.

Manufacturers started phasing out the production and most uses of PFOS in 2002. In 2012 the Environmental Protection Agency (EPA) began requiring certain public water supply systems to monitor for several PFAS chemicals pursuant to the Safe Drinking Water Act. However, federal and state environmental agencies did little to regulate PFAS for several more years. However, in the mid-2010s, New York moved on multiple fronts to regulate PFAS. The Legislature has adopted several statutes, the New York State Department of Environmental Conservation (DEC) has promulgated regulations and issued guidance, and the New York State Department of Health (DOH) has put in place Maximum Contaminant Levels (MCLs) for drinking water. All these actions are aimed at lowering exposure to PFOA and PFOS. At present, New York regulates PFAS in water, soil, air, food packaging, children's products and fire-fighting foam.

In this article we survey some of the key developments in this area and consider how these requirements are impacting site remediation, environmental permitting and environmental due diligence in New York.

Legislative Action

In 2019 the New York Legislature enacted a law, now codified in Gen. Bus. L. §391-u, that prohibits the manufacture, sale, or distribution of most fire-fighting foams that contain intentionally added PFAS after December 2021. The law authorizes regulatory exemptions where no effective alternative is available and where inclusion of PFAS is required by federal law.

In 2020 the governor signed the Child Safe Products Act. A new Environmental Conservation Law (ECL) §37-0905, requires DEC, working with DOH, to promulgate a list of "chemicals of concern" this year. DEC must at a minimum consider a statutory list of chemicals that includes PFOA, PFOS and certain other PFAS substances as well as additional chemicals that meet the statutory criteria. The law took effect in March 2020 and requires

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DEC to develop a program to require certain companies to test and report the level of chemicals of concern in their products. It applies to manufacturers and distributors of a wide range of children's products including toys, jewelry, furniture and apparel. DEC missed the deadline of March 1, 2022, but it held a series of informal public hearings during 2021 and accepted public comment on a preliminary list of chemicals under consideration and their practical quantification limits. DEC's website indicates that it intends to open a formal public comment period on the proposed rule "at a later date."

On Dec. 2, 2020, ECL §37-0209 was amended to outlaw the distribution, sale, and offer for sale in New York of food packaging containing intentionally added PFAS. This ban will take effect on Dec. 31, 2022.

Regulations

Sections 37-0101 through 37-0111 of the ECL authorize DEC to designate and regulate "hazardous substances." In 2016, after a request from DOH, DEC exercised this authority and initiated a series of steps to amend its regulations governing Hazardous Substances Identification, Release Prohibition, and Release Reporting. The key change took effect on March 3, 2017, when DEC added PFOA and PFOS to New York's list of hazardous substances at 6 NYCRR §597.3. Due to this listing, certain facilities and products immediately became subject to DEC's Chemical Bulk Storage regulations (6 NYCRR Parts 596-599). In addition, this change prohibited most releases of PFOA or PFOS and required reporting of such releases to DEC. But most importantly, this listing authorized DEC to pursue clean-up of PFOA and PFOS contamination under the Brownfield Cleanup Program, the Inactive Hazardous Waste Disposal Site Remedial Program (also known as State Superfund Program) and the Environmental Restoration Program if it concluded that the contamination presents a significant threat to public health or the environment, even if the release happened long ago.

Following DEC's action and guided by recommendations made by the newly established Drinking Water Quality Council, on Aug. 26, 2020, DOH adopted regulations for public water systems that set maximum contaminant levels (MCLs) of 10 parts per trillion (ppt) each for PFOA and PFOS. The MCL regulations, 10 NYCRR Subpart 5-1, require public water systems to monitor for PFOA and PFOS, and then notify DOH and the public of confirmed exceedances of the 10 ppt limit. Drinking water purveyors that discover MCL exceedances must also consult with DOH to develop a compliance schedule to ensure that water systems address the contamination and comply with the new MCLs.

On Dec. 22, 2021, DEC issued a Notice of Proposed Rulemaking to amend its regulations on remedial programs, 6 NYCRR Part 375. Although the changes would mostly apply to the Brownfield Cleanup Program, they also include, among other changes, soil cleanup objectives (SCO) for PFOA and PFOS that will apply across all remedial programs. As with all SCOs, the newly proposed SCOs for PFOA and PFOS include unrestricted use levels and four restricted use levels that vary depending on the type of expected land use, as well as standards based upon protection of groundwater. The rule proposal does not include SCOs based upon protection of ecological resources. DEC had previously noted that PFAS cleanup standards should provide an extra margin of safety to complement the drinking water MCLs set by DOH, and the proposed soil SCOs appear to follow this practice. DEC is accepting written public comments on these SCOs through April 21, 2022. Public hearings concerning this proposed rule are scheduled for April 5 and April 7, 2022.

Agency Guidance

In response to myriad questions from the regulated community about how and where to look for PFAS compounds during the investigation of sites covered by one or more of New York's remedial programs, in January 2020 DEC issued a new guidance document entitled "Guidelines for Sampling and Analysis of Per- and Polyfluoroalkyl Substances (PFAS) Under NYSDEC's Part 375 Remedial Programs." DEC revised and reissued this document in June 2021 as "Sampling, Analysis, and Assessment of Per- and Polyfluoroalkyl Substances (PFAS) Under NYSDEC's Part 375 Remedial Programs." These documents confirmed what had been the de facto practice since late 2017—that all sites undergoing

an investigation or clean-up pursuant to one of DEC's remedial programs would need to address PFAS. For the first time, however, these guidance documents presented interim SCOs that would be in effect until SCOs for PFOA and PFOS are formally promulgated in the upcoming revision to 6 NYCRR Part 375. The rulemaking announced on Dec. 22, 2021, and discussed above, will supersede this portion of the guidance, but the directions concerning sampling and analysis will presumably remain in place.

Then, in October 2021, DEC's Division of Water issued three guidance documents that all include new water quality analysis and modeling for PFOA and PFOS. These include (1) a draft addendum to Technical and Operational Guidance Series (TOGS) document 1.1.1: Ambient Water Quality Standards and Guidance Values and Groundwater Effluent Limitations; (2) a draft revision to TOGS 1.3.7: Analytical Detectability and Quantitation Guidelines for Environmental Parameters; and (3) a new draft document TOGS 1.3.13: Permitting Strategy for Implementing Guidance Values for PFOA, PFOS, and 1,4-Dioxane. The public comment period on these documents closed Dec. 6, 2021, and DEC could issue revised final guidance at any time. The changes ushered in by these TOGs likely will impact many companies, especially new TOGS 1.3.13, which will be applied to all State Pollutant Discharge Elimination System (SPDES) permits "to optimize environmental protection."

On Jan. 13, 2021, DEC's Division of Air Resources announced that it was amending DAR-1: "Guidelines for the Evaluation and Control of Ambient Air Contaminants" under 6 NYCRR Part 212. This guidance outlines the procedures to be used by permit applicants and Department staff for evaluating emissions of air contaminants from process operations used during most manufacturing activities in New York. This update to the 2016 version of this guidance includes newly developed Annual Guideline Concentration and Short-Term Guideline Concentration for certain PFAS compounds.

Practical Considerations for the Regulated Community

New York has taken action to address PFOA and PFOS in all environmental media and across many regulatory programs. However, the need to consider PFOA and PFOS is still expanding, and industrial operators, business owners and their counsel should continue to closely monitor developments and pronouncements from the Legislature, DEC and DOH. For example, by now most sites that are actively engaged with DEC as part of an ongoing Brownfield Cleanup Program or Inactive Hazardous Waste Disposal Site Remedial Program have probably been required to consider PFAS issues. In many cases this required additional sampling and analysis. However, sites that are inactive, under federal oversight or in long-term site monitoring and management may still need to investigate the potential presence and extent of PFOA and PFOS contamination, even at areas of concern that have, until now, been considered "closed." Likewise, PFAS sampling and other requirements will soon find their way into many industrial wastewater pretreatment programs based upon SPDES permits issued to operators of publicly owned treatment works. Although there are likely to be phase-in periods, municipal programs that apply to many industrial dischargers that use public sewers will be revised, and local wastewater pre-treatment mandates may become the primary source of PFAS limits for most wastewater dischargers. In addition, companies that rely upon site-specific beneficial use exemptions to manage or reclaim residuals that would otherwise become wastes may need to establish testing and/or quality control programs that address the PFAS content of their materials. Finally, buyers and sellers of businesses or real estate may need to update their due diligence practices and the scope of any Phase II sampling programs to address the possible presence of PFOA or PFOS. The U.S. Congress and EPA are also actively considering a number of PFAS regulatory actions that may impact stakeholders nationwide. In the meantime, New York will continue to develop and implement state requirements.