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In the Absence of Federal Standards, States Step in to Regulate PFAS

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On July 30, 2020, New York state joined the growing ranks of state and local governments directly regulating PFAS. The newly established maximum contaminant levels (MCLs) will eventually require all public water systems in the state to test for additional contaminants and, if detected above the new regulatory limits, to report the presence of the compounds to impacted customers and develop strategies to address the exceedances.

PFAS, an acronym for per- and polyflouroalkyl substances, is the catchall name for a family of chemical compounds used extensively in numerous industries since the 1940s. PFAS comprise thousands of individual chemical compounds that have been used in cookware and other nonstick products, stain repellants, fire suppressant foam, food packaging and various other products. Because of its decades of use and widespread applications, and because the chemical family is highly persistent in the environment and in the human body, PFAS chemicals are now ubiquitous and are commonly detected in source waters globally. More concerning to state and federal regulators is the increasing frequency with which PFAS is detected in drinking water.

Studies have demonstrated that PFAS compounds are detectable at some level in the blood of most U.S. residents. Humans can be exposed a number of ways. Aside from occupational exposure in settings that use PFAS compounds directly and use of contaminated drinking water, exposure can occur by consuming food grown in contaminated soil or with contaminated water, or which was packaged with PFAS compounds, or prepared or processed on equipment using PFAS compounds.

The health impacts of PFAS compounds are the subject of ongoing study, but the extent and severity of effects on humans remain largely unknown. EPA has stated that some PFAS chemicals have been shown to cause adverse effects on reproductive functions, liver and kidney functions, and development in laboratory animals. Other studies have made limited findings related to low infant birth weight, increased cholesterol, cancer, and immune system impacts among human populations related to PFAS exposure. Currently there is no enforceable federal standard regulating PFAS in groundwater or drinking water.

EPA has issued non-enforceable health advisories addressing two of the most common PFAS compounds, perflourooctanoic acid (PFOA) and perflourooctanesulfonic acid (PFOS). Additionally, EPA

published interim recommendations for groundwater remediation related to PFOA and PFOS in late 2019, and announced its intention to directly regulate the two compounds in February 2020. Nonetheless, EPA's efforts are still in their infancy, and even if successful the end result will leave thousands of less common PFAS compounds without a federal standard that assures the protection of human health. In this regulatory vacuum, a number of states have taken direct action to monitor, report, and respond to the presence of PFAS compounds in groundwater or drinking water.

According to the Association of State Drinking Water Administrators, seven states have adopted or begun the process of formulating an action level, MCL, or other regulatory limit more stringent than EPA's health advisory limits to address compounds within the PFAS family. Three other states, including North Carolina, have issued their own health advisories for certain PFAS compounds at levels lower than EPA's. These efforts are not without controversy however. New state standards place greater burdens on drinking water systems that are frequently without the resources to address existing maintenance and infrastructure improvement needs. The tradeoff for these new burdens is viewed by some as an uncertain benefit when so little is known about the risks of PFAS exposure. Where states are unable to provide grant funding or other assistance for the newly imposed financial burdens of PFAS regulation, many are left wondering whether ratepayers will be left holding the bag, or if a new niche of PFAS litigation between drinking water systems and the industry that utilized the compounds will be the funding mechanism of choice.

To date, North and South Carolina have not promulgated regulatory standards for PFAS, although bills were proposed in both state's general assemblies which would direct the state environmental regulator to undertake a rulemaking and establish an MCL for drinking water. North Carolina also has a bill pending which would require any entity with a National Pollutant Discharge Elimination System (NPDES) permit who receives industrial user waste that includes PFAS to eliminate the PFAS prior to discharge. At present, the bills are being considered in various committees, and their likelihood of success in a legislative year interrupted by a pandemic is unclear. Nonetheless, momentum for the new standards is growing nationwide. Regulated businesses are well-advised to watch closely and consider their options for funding potential PFAS obligations within the next five years, whether dictated by a federal regulation or more stringent local standards.