

PFAS INVESTIGATIONS AT MANUFACTURING FACILITIES AND INDUSTRIAL SITES IN ILLINOIS

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Amid the current storm of news articles, regulatory updates, and seminars addressing per- and polyfluoroalkyl substances (“PFAS”), owners, managers and tenants of manufacturing facilities and industrial properties are asking whether and when to include PFAS in investigations of these properties. While the regulation of PFAS is in flux, this article summarizes the current regulatory status and anticipated regulatory actions related to PFAS, and provides guidance regarding PFAS investigations at such properties.

Two of the stated goals of USEPA’s 2019 PFAS Action Plan – designation of certain PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation and Lia-

bility Act (“CERCLA”) and issuance of interim groundwater quality standards for PFAS – have not yet been achieved. On March 3, 2021, USEPA published a final determination to regulate two PFAS compounds, PFOS and PFOA, through a National Primary Drinking Water Regulation under the Safe Drinking Water Act, within 24 months. However, federal regulatory action to designate certain PFAS as CERCLA hazardous substances has not been commenced. In 2021, the most likely vehicle for federal legislation addressing PFAS is the 2022 National Defense Authorization Act (“NDAA”), but it is not clear whether the final version of the 2022 NDAA will direct USEPA to take action related to PFAS under CERCLA. (In previous years, the NDAA was used to add cer-

tain PFAS to the Toxic Release Inventory and phase out the use of PFAS-containing firefighting foam by the Department of Defense.) Until action is taken to designate PFAS as hazardous substances, the cleanup and cost recovery provisions of CERCLA, including the “innocent landowner” defense and the bona fide prospective purchaser liability protection, do not apply to PFAS.

In the vacuum created by the lack of federal environmental regulations governing PFAS, states have emerged as the primary regulators of PFAS. Some states have attempted to pressure USEPA into moving forward on federal PFAS regulation. On June 23, 2021, New Mexico filed a petition under the Resource Conservation and Recovery Act (“RCRA”) to designate all PFAS as

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hazardous waste. Such a designation would subject PFAS to RCRA's cradle-to-grave waste regulatory scheme and would also bring PFAS under the CERCLA definition for "hazardous substances." As this article was being drafted, USEPA had not yet responded to New Mexico's petition.

Many other states have adopted their own drinking water and/or groundwater standards for specific PFAS. New Jersey was a leader among these states and, in 2020, adopted drinking water and groundwater quality standards that were significantly lower than the USEPA non-enforceable PFAS Health Advisory Level of 70 parts per trillion (ppt). However, industry groups in New Jersey have mounted a legal challenge to the adoption of the state PFAS standards, arguing that New Jersey failed to appropriately assess the costs imposed by the regulations and that the standards are "arbitrary, capricious, and tantamount to a regulatory guess."

Illinois has moved at a slower pace, but is preparing to file its first rulemaking proposal addressing PFAS. In September 2020, the Illinois Environmental Protection Agency ("IEPA") issued draft proposed groundwater quality standards ("GWQS") under 35 Ill. Adm. Code Part 620, which included proposed GWQS for five PFAS compounds: PFBS, PFHxS, PFNA, PFOA and PFOS. A public meeting on the proposed GWQS was held in May 2021, and IEPA accepted written public comments until June 25, 2021. Industry groups have questioned the IEPA regarding the availability of analytical testing methods and remediation technologies for the very conservative concentration levels proposed as PFAS GWQS, and have also questioned why Illinois needs to adopt PFAS standards ahead of the federal government. It is anticipated that IEPA will file its Part 620 rulemaking proposal with the Illinois Pollution Control Board ("Board") this Fall.

IEPA has also stated that it plans to file a rulemaking to update the Tiered Approach to Corrective Action Objectives ("TACO") regulations to add the constituents in the proposed Part 620 rulemaking to the TACO tables of regulated substances. According to IEPA, the TACO amendments will also likely include soil remediation objectives for certain PFAS compounds. Designation of PFAS as regulated substances under TACO will raise questions for sites that enroll in Illinois' Site Remediation Program, including whether PFAS can be

excluded if there is no evidence that they were manufactured or used in manufacturing processes or industrial activities at the site. (As stated in the TACO regulations, "[t]he contaminants of concern to be remediated depend on ... the materials and wastes managed at the site; ..." 35 Ill. Adm. Code 742.115.)

Meanwhile, since September 2020, IEPA has conducted sampling for 18 PFAS at the entry points to the distribution systems for 1,438 community water supply systems in Illinois. IEPA is winding down its sampling efforts, and the results of the investigation will be utilized in the development of a rulemaking proposal for establishment of maximum contaminant levels ("MCLs") for certain PFAS. A report on the IEPA investigation is expected in January 2022.

In the absence of regulatory standards for PFAS, IEPA issued Health Advisories for seven PFAS in 2021: PFBS, PFHxS, PFNA, PFOS, PFOA, PFHxA, and HFPO-DA. The health-based guidance levels established for these PFAS are not enforceable, but can be used by IEPA to establish groundwater cleanup or action levels. These health-based guidance levels are much more conservative than the current USEPA Health Advisory levels and have raised concerns among the regulated community about testing and treatment. (IEPA has acknowledged that it is not clear whether technology is available that can treat drinking water to meet the 2 ppt health-based guidance level for PFOA.)

The designation of PFAS as regulated substances under TACO and/or hazardous substances under CERCLA will be the driver for PFAS investigations at many current and former industrial and manufacturing facilities in Illinois. However, because of the unique characteristics of PFAS, including toxicity, mobility, ubiquity, as well as the substantial (and increasing) number of PFAS compounds, it will be important to ascertain whether there were any operations or activities at industrial facilities that could have been a source of PFAS before proceeding with a PFAS investigation. This is particularly the case for properties where PFAS may have been (i) produced or used in manufacturing activity, (ii) an ingredient in firefighting foam that was utilized in fire-training or fire-suppression activities, (iii) contained in wastes disposed on the property, or (iv) contained in biosolids that were land applied at the property. If it is determined that a PFAS investigation is

warranted or necessary, one of the most helpful sources of technical and regulatory guidance for PFAS investigation and remediation are the guidance documents, training videos, and data tables compiled by the Interstate Technology Regulatory Council ("ITRC") (available at <https://pfas-1.itrcweb.org/>).

Moreover, a Phase I environmental site assessment may also be an important tool for identifying the possible source or presence of PFAS at a property. However, the current ASTM E1527-13 Standard Practice on Phase I Environmental Site Assessments does not cover PFAS. The eight-year review for the ASTM E1527-13 Standard will be completed in 2021. The draft updated ASTM 1527 standard published earlier this year included proposed modifications to the definition of "Recognized Environmental Condition" ("REC"), but REC will still be defined in terms of hazardous substances and petroleum products. Therefore, until such time as PFAS compounds are designated as hazardous substances or the REC definition is revised to explicitly include PFAS, PFAS are not directly covered by the ASTM 1527 standard.

However, the draft proposed ASTM standard contained a footnote which cautioned users and environmental professionals that "[s]ubstances that are outside the scope of this practice," e.g., emerging contaminants, "may be regulated under state law and may be federally regulated in the future." The footnote goes on to note that, although the presence of such substances is a "non-scope consideration," a user may elect to include such substances in the scope of work for the Phase I. While the timing of designation of PFAS as hazardous substances is uncertain, the adoption of GWQS or TACO groundwater and soil objectives for specific PFAS compounds in Illinois may lend further support for including such compounds as a "non-scope consideration" for a Phase I investigation involving older industrial properties.

For owners, managers and tenants of manufacturing facilities and industrial properties, it is not too early to begin considering how future PFAS regulatory efforts by USEPA and IEPA may affect these properties. Any evaluation of possible PFAS presence or use at a property should be undertaken strategically, and should involve technical experts and legal support. ♦