

EPA CWA Permitting Guidance for PFAS

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December 7, 2020

On November 30, 2020, the United States Environmental Protection Agency (EPA) Office of Water recently issued a memorandum to the Regional Administrators entitled: *Recommendations from the PFAS NPDES Regional Coordinators Committee Interim Strategy for Per- and Polyfluoroalkyl Substances in Federally Issued National Pollutant Discharge Elimination System Permits* (hereafter, Memorandum).

Developed by a workgroup comprised of EPA Headquarters and Regional personnel, the Memorandum explains EPA's plans for addressing Per- and Polyfluoroalkyl Substances (PFAS) in National Pollutant Discharge Elimination System (NPDES) permits issued under the Federal Water Pollution Control Act (Clean Water Act).

PFAS comprise a large group of synthetic chemicals marked by their resistance to heat, water, and oil, and which are considered harmful to human health and the environment in myriad ways. They are remarkably persistent in the environment and resistant to degradation. These compounds have been used in various industrial applications and consumer products such as:

- Furniture fabrics;
- Paper packaging for food and other water-, grease-, or stain-resistant materials;
- Firefighting foams used at military bases, and industrial and training facilities;
- Other industrial processes, including the Teflon® manufacturing.

Human beings can be exposed to PFAS through water, air, or food. Moreover, PFAS contamination is at the center of state and federal lawsuits pending across the country. This includes numerous claims related to the use of firefighting foam – aqueous film-forming foam (AFFF) – and other products that contain PFAS compounds. Hundreds of cases from across the nation involving AFFF claims, have been consolidated in a multi-district litigation in the U.S. District Court for the District of South Carolina (AFFF MDL). Many other cases, particularly those related to PFAS contamination that is not directly tied to an AFFF source or sources, are proceeding outside of the AFFF MDL.

The regulated community has expressed concerns that publicly owned treatment works (POTWs) may receive discharges that contain PFAS from commercial and industrial sources. Moreover, conventional POTW wastewater treatment does not effectively remove PFAS, and may pass the compounds through treatment to waterbodies or interfere with management of solids from the treatment process. California, Michigan, Massachusetts, North Carolina, New Jersey, and other states have started addressing PFAS in their NPDES permitting programs.

The Memorandum states that the Office of Water is leading actions that include:

- developing analytical methods for detecting PFAS in drinking water and other environmental media;
- evaluating PFAS treatment techniques;
- understanding PFAS exposure from various environmental media; and
- evaluating statutory and regulatory mechanisms to manage adverse human health and environmental impacts from PFAS exposure.

Beyond these actions, the Memorandum stresses the need for an “interim strategy” to address point source discharges of PFAS in EPA-issued CWA Section 402 permits. To that end, the EPA established a workgroup in February 2020 charged with “exploring options on how to address these pollutants while the Clean Water Act framework for potentially regulating PFAS discharges pursuant to the NPDES program is under development.” The workgroup aims “to develop a strategy that would serve to guide the Agency’s Clean Water Act NPDES permitting approach on an interim basis across the EPA Regions as informed by input from our state partners.”

To date, the workgroup has recommended:

- Including permit requirements for phased-in monitoring and best management practices, as appropriate, taking into consideration when PFAS are expected to be present in point source wastewater discharges;
- Including permit requirements for phased-in monitoring and municipal separate storm sewer system (MS4) and industrial stormwater pollutant control, when deemed appropriate by the permit writer, taking into consideration when PFAS are expected to be present in stormwater discharges;
- Sharing information on permitting practices and the development of a permitting compendium, an information sharing platform, and continuation of the workgroup.

The PFAS workgroup will continue to develop “communication, knowledge sharing, capacity-building, and training opportunities” through the first three quarters of 2021.

The Memorandum comes about 18 months after the Trump Administration released a broader PFAS Action Plan. Despite EPA’s progress during this period, the incoming administration will likely explore several more regulatory actions, including:

- *Setting a legal limit for PFAS in drinking water.* Although the EPA has issued a preliminary determination to set limits for PFOA and PFOS, the task of enacting enforceable limits will likely take many years.
- *Remediating existing PFAS pollution.* Despite a pledge by former EPA administrator Scott Pruitt and ongoing staff efforts to develop a formal rule, the agency has not designated PFOA and PFAS as hazardous substances, which would drive the cleanup process at contaminated sites.
- *Reducing ongoing release of PFAS.* By some estimates, more than 2,500 industrial facilities may still be discharging PFAS into the air and water.

A copy of the memorandum can be found [here](#).

Kelley Drye & Warren LLP has a team of experts with extensive experience in complex environmental contamination and natural resource damages matters, including on behalf of states and private businesses, and are applying that experience to PFAS regulation and litigation throughout the country, including the AFFF MDL. In addition to litigation services, Kelley Drye counsels clients with internal investigations into PFAS risks and liability, how to mitigate those risks, and represents them in actions to recover costs they incur to address PFAS contamination. If you have further questions or require assistance navigating these challenges, please let us know.