

NEW YORK STATE DRINKING WATER QUALITY COUNCIL RECOMMENDS STRICTEST REGULATIONS OF PFOA, PFOS, AND 1,4 DIOXANE IN DRINKING WATER

Increased Regulatory Requirements and Water Infrastructure Investment Likely in 2019

Environmental Alert

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On December 18, 2018, the New York Drinking Water Quality Council (“DWQC”) recommended adoption of the nation’s most stringent drinking water standards related to specific types of “emerging contaminants,” - specifically, PFOA (Perfluorooctanoic acid); PFOS (Perfluorobutanesulfonic acid); and 1,4 dioxane. The DWQC proposed that the New York State Department of Health (“DOH”) adopt maximum contaminant levels of 10 parts per trillion (“ppt”) for PFOA and PFOS, and 1 part per billion (“ppb”) for 1,4 dioxane. The proposed limits are significant reductions from the United States Environmental Protection Agency (“USEPA”) guidance limit of 70 ppt for PFOA and PFOS, and the currently non-existent USEPA guidance value for 1,4 dioxane.

The USEPA defines an “emerging contaminant” as “a chemical or material that is characterized by a perceived, potential, or real threat to human health or the environment or by a lack of published health standards.” The term “emerging” is used because “a new source or a new pathway to humans” has been discovered. Emerging contaminants have become a major focus of the DOH and New York State Department of Environmental Conservation (“NYSDEC”) following high-profile drinking water contamination crises, specifically with PFOA in Hoosick Falls, PFOS in Newburgh, and 1,4-dioxane on Long Island.

PFOA and PFOS have various applications, but are frequently used to make water-resistant clothing, fast food packaging, and firefighting foam. 1,4 dioxane is used as a stabilizer in paint strippers and solvents. These contaminants have seeped into underground water supplies affecting drinking water. Once in surface or groundwater supplies, the contaminants are highly soluble, and may remain for a significant period of time unless remediated.

The DWQC recommendations are the first step towards expected new regulations. It is now up to the DOH to draft regulations based on the DWQC’s recommendations, which would create the most stringent regulation of PFOA and PFOS in the country,

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and would be the first to regulate 1,4 dioxane in drinking water. As part of the process in drafting the regulations, there will be a period for public comment, and that will likely include significant discussion on the public and private costs of compliance. The State has already created increased funding mechanisms for water quality control, and the Governor's announced 2019 agenda includes increased investment in water infrastructure as a key element.

The regulatory push is part of a broader effort at addressing emerging contaminants before they reach crisis stage. The NYSDEC is now requiring a review and/or testing of groundwater for current and past remedial sites to analyze for the presence of 1,4 dioxane and all polyfluoroalkyl substances, such as PFOA and PFAS. This has resulted in letter requests being sent to owners of known contaminated properties across the State, with the results being collected and reviewed by the NYSDEC.

The NYSDEC has indicated that new sites added to remedial programs, such as under the Brownfield Cleanup Program ("BCP") and the State Superfund Program ("SSF"), will require emerging contaminant sampling to be completed as part of the groundwater investigation process. Under current NYSDEC policy, soil samples will not be analyzed for PFOA or PFAS unless groundwater contamination is detected. This is, however, until a Soil Cleanup Objective is established for such constituents. NYSDEC Guidance will be developed concerning groundwater contamination by emerging contaminants, and that may be expedited given the DWQC's recommendations. At this point in time, since the NYSDEC's policy is limited, and guidance is still being developed about the management of emerging contaminants, it is unclear how the NYSDEC intends to fully regulate and address emerging contaminants related to groundwater moving forward.

Given that PFOA and PFOS are two chemicals that are within a family of many other such chemicals, it is anticipated that New York State may aim to eventually broaden its regulation of other chemicals that may contaminate drinking water in the near future. It is still unclear the extent to which New York State will require specific action based on emerging contaminant sampling, which is something that all regulated parties will be watching closely.