



K&L GATES

Pennsylvania Asphalt and Pavement Association
2024 Environmental Seminar

K&L Gates LLP

Environmental Policy Update

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AGENDA

- **PFAS Regulatory Update**
 - USEPA
 - PADEP
- **Municipal Stormwater Fees: Litigation Update**



Pennsylvania and Federal PFAS Initiatives

U.S. Environmental Protection Agency (EPA)





What Is the EPA Doing?



**PFAS Strategic Roadmap:
EPA's Commitments to Action
2021-2024**



- PFAS Strategic Roadmap
- Released October 18, 2021



PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024

- Lifecycle Approach
- Goals:
 - Research
 - Restrict
 - Remediate
- Key Actions:
 - Office of Chemical Safety & Pollution Prevention
 - Office of Water
 - Office of Land & Emergency Management
 - Office of Air and Radiation
 - Office of Research & Development
 - Cross-Program



National PFAS Drinking Water Standards

- Final Rule: April 10, 2024
- Establishes Maximum Contaminant Levels (MCLs) and Maximum Contaminant Level Goals (MCLGs) for 6 PFAS

Compound	Final MCLG	Final MCL (enforceable levels)
PFOA	Zero	4.0 ppt
PFOS	Zero	4.0 ppt
PFHxS	10 ppt	10 ppt
PFNA	10 ppt	10 ppt
HFPO-DA (GenX Chemicals)	10 ppt	10 ppt
Mixtures of PFHxS, PFNA, HFPO-DA, and PFBS	1 (unitless) Hazard Index	1 (unitless) Hazard Index

- Public water systems have 3 years to complete initial monitoring; 5 years to comply with standards (by 2029)
- Many water utilities will face significant compliance costs to meet these standards (EPA estimates \$1.5 billion annually)
 - Key question: Who will ultimately bear the brunt of these costs?



Key Rulemaking Status

- **Designating PFOA and PFOS as CERCLA Hazardous Substances**
 - Proposed Rule: September 2022
 - Historic releases of PFOA and PFOS to the environment would be subject to CERCLA liability and remediation requirements.
 - Potential for government and third-party lawsuits, and reopening of closed CERCLA cases
 - CERCLA liability is strict, joint and several
 - Obligation to report *new* releases of PFOA and PFOS meeting or exceeding reportable quantity
 - Final Rule anticipated: early 2024



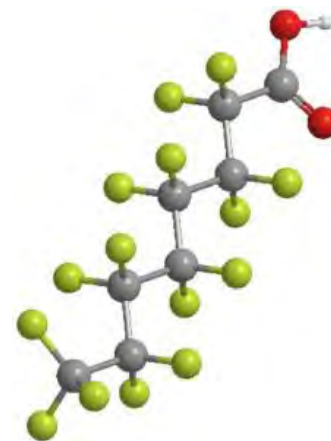
Key Rulemaking Status

- **Listing of PFAS as RCRA Hazardous Constituents**
 - Proposed Rule: February 2024.
 - Would “clarify” EPA’s RCRA **corrective action** authority with respect to PFAS under statutory definition of “hazardous waste”
 - Not intended to create new permitting or management requirements for hazardous waste generators, transporters and treatment/storage/disposal facilities.
 - Would identify 9 PFAS compounds as “hazardous constituents”
 - Listing would give EPA authority to require corrective action with regard to these substances regardless of the “clarification.”
 - Final Rule anticipated: ???



TSCA Section 8(a)(7) PFAS Reporting and Recordkeeping Requirements

- Final Rule: October 2023
- Applies to any entity which has manufactured or imported PFAS for a commercial purpose at any time on or after January 1, 2011
- PFAS is defined broadly
- Reporting requirements and standards
- Includes “articles”
- Limited exemptions
- May 8, 2025: reports due for most manufacturers



Source: www.nist.gov



Other Recent EPA Actions

- **Toxic Release Inventory (TRI) Reporting Program PFAS Updates (Oct. 2023)**
 - Note: TRI reporting only required for facilities in certain NAICS codes
 - Designates all PFAS on TRI as “chemicals of special concern” (CSC) starting with Reporting Year 2024
 - Eliminates *de minimis* reporting exemption for PFAS
 - Eliminates Form A reporting option (must use Form R)
- **TSCA New Chemical Review Framework for PFAS (June 2023)**
 - Establishes two-step review process for new PFAS and new uses of PFAS through premanufacture notices (PMNs) and significant new use notices (SNUNs)

PA DEPARTMENT OF ENVIRONMENTAL PROTECTION

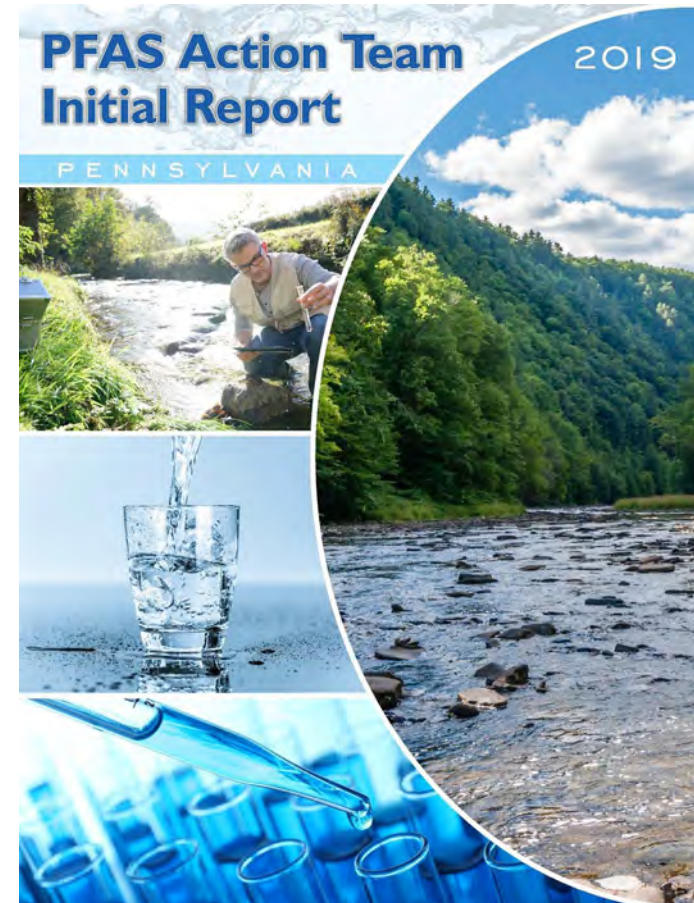


EXECUTIVE ORDER 2018-08

- September 19, 2018: Governor Wolf Executive Order establishes “PFAS Action Team”
- Consists of heads of:
 - Dept. of Environmental Protection (Chairperson)
 - Dept. of Health
 - Dept. of Military and Veteran Affairs
 - Dept. of Community and Economic Development
 - Dept. of Transportation
 - Dept. of Agriculture
 - Dept. of Labor and Industry
 - Office of State Fire Commissioner
 - Fish and Boat Commission
 - Public Utility Commission

PFAS ACTION TEAM INITIAL REPORT (2019)

- Calls for statewide PFAS sampling
- Sets in motion a process to establish PA-specific drinking water standards



PENNSYLVANIA PFAS DRINKING WATER STANDARDS

- Final Rule: January 2023
- Establishes drinking water limits for two PFAS:

	MCLG (ppt)	MCL (ppt)
PFOA	8	14
PFOS	14	18

- **Note: EPA's new MCL for PFOA and PFOS is 4 ppt!**
- Applies to all “public water systems” (those that serve at least 25 individuals), including nontransient noncommunity systems.
- Initial monitoring requirements:
 - January 1, 2024 if serving > 350 persons
 - January 1, 2025 if serving < (or = to) 350 persons

PENNSYLVANIA PFAS CLEANUP STANDARDS

- Final Rule: November 2021
- Established statewide health standard medium-specific concentrations (**MSCs**) for PFOA, PFOS and PFBS
- These standards are used to determine the level of cleanup required under the Pa. Land Recycling and Environmental Remediation Standards Act (**Act 2**)

PFAS Substance	Soil MSC (mg/kg)	Groundwater MSC (µg/L)
PFOA	4.4 (residential) 64 (non-residential)	0.07
PFOS	4.4 (residential) 64 (non-residential)	0.07
PFBS	66 (residential) 960 (non-residential)	10 (residential) 29 (non-residential)

- Note: when the new drinking water MCLs were finalized in January 2023, those MCLs automatically became effective as groundwater MSCs (PFOA: 0.014 µg/l; PFOS: 0.018 µg/l)

PENNSYLVANIA PFAS CLEANUP STANDARDS

- March 12, 2024: the Environmental Quality Board (EQB) approved a proposed rulemaking that would update the Act 2 statewide health standards for PFAS (among other substances)

PFAS Substance	Soil MSC (mg/kg)	Groundwater MSC (µg/L)
HFPO (Gen-X)	0.66 (residential); 9.6 (non-residential)	0.01
PFBA	220 (residential); 3,200 (non-residential)	35 residential); 97 (non-residential)
PFHxA	110 (residential); 1,600 (non-residential)	17 (residential); 49 (non-residential)
PFBS	66 (residential); 960 (non-residential)	2
PFOS	0.68 (residential); and 9.9 (non-residential)	0.018
PFOA	0.86 (residential); 12 (non-residential)	0.014

- This proposed rule has not yet been approved by IRRC or published in the Pa. Bulletin for public comment

NPDES PERMITS AND PFAS

- PADEP has not established numeric water quality standards for PFAS in its NPDES permitting regulations (25 Pa. Code Ch. 93)
- PADEP has included PFAS limits in individual NPDES Permits, on a case-by-case basis, to comply with “narrative” water quality criteria (e.g., no discharges that are “inimical or harmful” to water quality).
- December 2023 – PADEP releases updated NPDES Individual Permit Application Form for Industrial Wastewater Discharges that requires PFAS sampling
 - Effluent sampling now required for PFOA, PFOS, PFBS and HFPO-DA.
 - Does not apply to PAG-03, or industrial stormwater permits ... yet



Municipal Stormwater Fees: Litigation Update

WHAT ARE STORMWATER FEES AND WHY DO I HAVE TO PAY THEM?

- Faced with financial burdens stemming from their own compliance obligations under the Clean Water Act, an increasing number of municipalities and municipal authorities are seeking to collect stormwater “fees” or “charges” from property owners
- **Industrial facilities with large impervious surface areas are among those most heavily impacted by stormwater charges**
 - Despite the fact that these entities:
 - Already expend significant sums controlling stormwater pursuant to their own regulatory obligations (e.g., NPDES Permits)
 - Often do not contribute any stormwater runoff to municipally owned/operated facilities

POTENTIAL GROUNDS FOR CHALLENGING MUNICIPAL STORMWATER CHARGES

- Stormwater “**fees**” are unlawful “**taxes**”
- Stormwater charges cannot be imposed on properties that receive **no services or benefits** from the municipality
- Certain municipal entities have **limited statutory authority** to impose stormwater charges

FEES OR TAXES?

- **Pennsylvania case law indicates that ...**
 - **“Fees” have the following attributes:**
 - Proportional to a benefit or service rendered to the person paying the fee
 - Do not raise revenue in excess of program costs
 - Dedicated to cover the cost of a particular program
 - **“Taxes” have the following attributes:**
 - Benefit the public generally
 - Designed to raise revenue
 - Often transferred to general funds

BOROUGH OF WEST CHESTER V. PSSHE

- **Borough of West Chester:**
 - Owns and operates a small MS4 system
 - In 2016, Borough Council adopted a stormwater charge program based on impervious surface area
- **Pa. State System of Higher Education (PSSHE) and West Chester University (WCU):**
 - Own property in the Borough
 - Refused to pay stormwater charges (on the basis of their tax-exempt status)
- **Borough filed petition for declaratory judgment in Commonwealth Court**

BOROUGH OF WEST CHESTER V. PSSHE

- On January 4, 2023, Commonwealth Court issued an opinion and order in favor of PSSHE and WCU
 - **The Borough’s stormwater charge constitutes a tax** because it provides “***benefits that are enjoyed by the general public,***” not “individualized services provided to particular customers.”
 - “***[T]he impervious surface area of a property does not correlate to the level of benefit accorded the owner of that property.***”
- The court’s decision calls into question the legality of stormwater charges across the Commonwealth

BOROUGH OF WEST CHESTER V. PSSHE

- February 1, 2023: the Borough of West Chester appealed the decision to the Pa. Supreme Court
- November 14, 2023: Briefing complete
 - *Amicus curiae* briefs filed by PACA+Pa. Chamber, PMAA, PennFuture, Chesapeake Bay Foundation, and several individual municipalities and municipal authorities
- March 21, 2024: Pa. Supreme Court issues order to list the case for oral argument (not yet scheduled)
- Final Decision: ???

QUESTIONS?

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