

NEWLY PROMULGATED REGULATIONS: PFOA AND PFOS

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Through desire a man...seeketh and
intermeddleth with all wisdom.

Proverbs 18:1



EPA certainly understand this Proverb!

“Evidence indicates [PFAS] chemicals may present substantial danger to public health or welfare or the environment when released into the environment...”

PFAS Action Plan (2019)



Consider how EPA implements the Proverb:

1. What EPA actually **issued**
2. What it **means** for Industry
3. Where do **we go** from here

Issued



1. What EPA is Doing?

Divers weights, and divers measures, both of them are alike an abomination to the Lord.

Proverbs 20:10

Issued



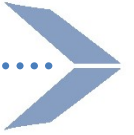
Lifetime Drinking **Water Health Advisories** for

PFOA = 0.004 ppt

PFOS = 0.02 ppt

87 Federal Register 36848 (June 21, 2022)

Issued



Lifetime drinking water health advisories?

Issued



HA Standard: Prove a Negative

Levels at which negative health affects “are not anticipated to occur....”

87 Fed. Reg. 36849

Issued



For a Health Advisory:

“[EPA] may publish health advisories (which are not regulations) or take other appropriate actions for contaminants **NOT** subject to any [MCL/MCL Goals].”

SDWA 300g-1(b)(1)(F)

Issued



So...Why did EPA not:

Maximum Contaminant Levels

Maximum Contaminant Level Goals

Even identify PFAS for listing on MCLs

Answer: Easier to “not anticipate”?



MCL and MCL Goals “shall be issued”

- “May have an adverse effect”
- “Substantial likelihood” present, and
- “Meaningful opportunity for...risk reduction”

SDWA 300g-1(b)(1)(A)

Issued



EPA has deadlines too...Every 5 years

- List Contaminants “for consideration” for MCL
- “Make determinations”
- Where criteria are satisfied

SDWA 300g-1(b)(1)(B)(I)-(III)

Pop Quiz

Question No. 1. Why are PFOS/PFOA not subject to MCL Requirements:

1. “May have an adverse effect”?
2. “Substantial likelihood” present?
3. “Meaningful opportunity for...risk reduction”?

Issued



Pop Quiz Cont.

Question No. 2. What data supports “appropriate action” levels at which health affects are “not anticipated to occur”?

Issued



But, based on the Preamble...

New HA based only on “draft analyses”

87 Fed. Reg. 36849

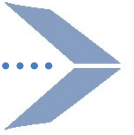
Issued



“Currently undergoing EPA Science Advisory Board review.”

Id.

Issued



Based on “preliminary findings”

Id.

Issued



And as an “Interim Health Advisory” ...

EPA will “respond to Science Advisory Board comments as [EPA] moves forward to develop [MCL] Goals...later this year.”

Id.

Issued



Indeed, it is easier to just “anticipate”

Issued



B. Proposed as **Hazardous Substances:**
PFOA and PFOS

Pre-publication Version (August 26, 2022)

Issued



Proposed Rule

- Listed as Hazardous Substances
- Reportable Quantity (RQ) of 1.0 lbs

NOTE: Includes all salts and structural isomers

Issued



CERCLA 102(a)

“[List as Hazardous Substances]...when released into the environment may present substantial danger to public health or welfare or the environment.”

Issued



Preamble concludes: Listing PFOA and PFOS

- “Does not require certainty”
- “Potential harm” enough
- “[We] will weigh information” as it comes....

Pre-publication Version, pp. 27-30.

Issued



And...

- Cost is not considered
- “Science...is still evolving”

Pre-publication pp. 30, 35-37.

Effect



Final Decision: Listing PFOA and PFOS because..

- Persistent/Bioaccumulative
- Decreased birth weights
- High cholesterol
- Hypertension

Pre-publication, pp.1-3,37-40.

Issued



And... Most Importantly

- *Potential Carcinogen (not Listed Carcinogen)*

<https://www.cdc.gov/niosh/topics/cancer/npotocca.html#p>

Issued

Pop Quiz

Given this interpretation of 102(a) CERCLA,
what other substances may not be listed?

NOTE: Does salt cause high blood pressure or
hypertension?

Issued



Could these Initiatives be...

“divers weights” and “divers measures”.



2. What does it mean?

The fear of a King is as the roaring of a lion;
whoso provoketh him to anger sinneth against
his own soul.

Proverbs 20:2

Effect



Health Advisories

- “Drinking water” contaminants
- Assist States and EPA

87 Fed. Reg. 36849

Effect



But...Questions Surround the Health Advisories

How does the Health Advisory govern “drinking water contaminants” when EPA elected not to adopt MCLs?

Effect



And how does it assist the State when the Health Advisory...

- “should not be construed as legally enforceable”
and
- “is not a regulation”

87 Fed. Reg. 36849

Effect



And how does the Health Advisory apply to cleanups when Groundwater is not within EPA jurisdiction?

Effect



Federal Rule: Final Agency Decision must not be...

- Arbitrary or Capricious
- Lack Substantial Evidence
- Violate Established Law and Procedure

CERCLA Hazardous Substances

1. Reporting Release: Party in Charge
Immediately upon Knowledge

QUESTION: How long is “immediate”?

Effect



- RQ set at 1.0 lbs
 - NOTE: Within 24 Hours to Environment
- Notifications
 - NRC– Verbal
 - LEPC/SERC—Verbal (“Beyond property”)



- Written Report: Beyond Property Only
LEPC/SERC
- Exceptions: Continuous Release Reporting/
Federally Permitted Release

Effect



Pop Quiz

- Pressure valve fails
- VOC emitted within negative pressure facility

Is notification required to NRC? LEPC/SERC?

Effect



Answer

EPA: It is assumed a release of VOC escapes to the ambient air by windows or doors.

Defense: Negative air pressure

Pop Quiz

- Forklift is moving 5% PFOA solution
- 55 gal. drum falls/spills at berm of storage area
- 1 hr. 19 min. to cleanup
- 2 hrs. 27 min. found outside berm > 1.0 lbs.
- EHS Manager Reports at 2 hours 31 minutes

Violation of Release reporting?

Effect



Answer

- No. Listing of PFOA and PFOS is “proposed”
- Maybe:

Was report by “person in charge”?

Time for hazard response?[1 hr.19 min.]

Was the report immediate?[1 hr. 9 min.]

2. Transfer of Property: Scope of Phase I

“[REC]- the presence or likely presence of any hazardous substances...in, on, or at a property.”

ASTM 1527-21, Section 3.2.78.

Pop Quiz

1. Manufacture of textiles
2. No reports of prior releases
3. Phase I states: No REC's present
4. 7 years after purchase, PFOA in GW at 1.5 ppb

Is AAI met for the site?

Effect



Answer

Maybe not be adequate AAI under CERCLA

NOTE: Do consultants contract to comply with AAI?



3. DOT Requirements Triggered

Labels, Placards, Manifests, Packaging

4. State/Federal Notifications

May require pre-sale disclosures?

- 5. Regulatory Cleanups (CERCLA)
 - Preliminary Investigations
 - Notices of Liability
 - Five Year Reviews

NOTE: 104(e) CERCLA Information Requests

CERCLA Liability: Cradle to Grave

- Release or Threatened Release
- Hazardous Substance
- Environment

NOTE: Proposal triggers PFOA and PFOS

Liability for Cleanup of Release

- Current Owner/Operator
- Owner/Operator at Release
- Arranged for Disposal
- Transported for Disposal

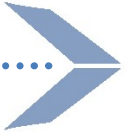
107(a) CERCLA

Pop Quiz

1. Consultant called by Facility A for stained soils
2. Sample: 2% PFOA surfactant
3. Confirmed release by prior owners
4. Consultant arranges for disposal at Facility B

Is consultant liable for release at Facility B?

Effect



Answer

Maybe.

Factors to consider (after hiring an attorney):

1. “Response action contractor” under 119 CERCLA?

Condition: Oversight of EPA/State

2. Is release at site caused by “negligence, gross negligence, or intentional misconduct” of consultants?”

Question: Site selected not suitable?

Effect



[BancorpSouth Bank v. Environmental Operations, Inc.](#), Case No. 4:11CV9 HEA (E.D. Mo. Oct. 11, 2011) allowed CERCLA claim to survive SJ against engineering firms hired to handle the remediation of an old landfill slated for redevelopment:

NOTE: Fill material caused new releases

Effect



Are these PFAS rules as “Fearful” as we
are led to believe?

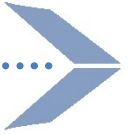


3. Where is this going?

How long, ye simple ones, will ye love simplicity...and scorners delight in their scorning, and fools hate knowledge?

Proverbs 1:22

Future



This is just be beginning...

Future



Scope of PFAS

Products:

Carpets

Furniture Fabric

Packaging

Clothing

Cookware

AFFF

Future



Scope of PFAS

Industries:

Fibers

Coatings

Polish

Chemical Mfg.

Paper Mills

Cleaning Products

Toll Processors

Pesticides

Polymers

Future



EPA PFAS Action Plan February 2019

Drinking Water

- M533/537.1 – 29 Chemicals
- Proposed Rule: PFOA/PFOS (December 2019)

[Document 1]

Future



Cleanup Levels (December 2019)

- EPA Screening Level: ?
- EPA Drinking Water Advisory:
PFOA= 0.004 ppt
PFOS= 0.02 ppt

Future



Waste Destruction standards (July 2020)

- Incineration
- MSW or HW Landfills
- Underground Injection Control (UIC)

Ancillary Actions

- Final Rule: 172 PFAS on TRI (June 2020)
- Final Rule: PFAS Products banned (July 2020)
- Proposed TSCA Notification: 10 Years for presence of “Articles” (2021)

Future



How long ye simple ones...

1. PFAS Rules are being issued
2. They have an effect
3. It is the future.