

# EPA'S INTERIM ACTION FACES LEGAL CHALLENGES IN RUSH TO ADDRESS PFAS IN DRINKING WATER

On June 15, the U.S. Environmental Protection Agency (EPA) announced its decision to establish significantly lower interim Health Advisory Levels or HALs for four *per-* or *polyfluoroalkyl* substances in a family of chemicals referred to generically as PFAS. This is only the latest development in the EPA's PFAS Strategic Roadmap, which aims to comprehensively address the presence of PFAS compounds in the environment, starting with drinking water supplies. In addition to the lower *interim* HALs suggested for four PFAS compounds, the EPA is inviting states and territories to apply for a share of \$1 billion in funding—the first of \$5 billion in Bipartisan Infrastructure Law grant funding—to address PFAS in drinking water, specifically in small or disadvantaged communities.

PFAS emerged onto the national stage in May 2012, with the EPA's publication of its Safe Drinking Water Act Unregulated Contaminant Monitoring Rule No. 3 (UCMR3) in May 2012. UCMR3 compelled public water suppliers for the first time to begin sampling their public water supplies for a subset of PFAS compounds, including PFOS and PFOA.

For Mark Ruffalo fans, this news may be long in coming, but for the rest of America, it is a dramatic development for this “emerging” group of contaminants referred to colloquially as “forever” chemicals. Mark Ruffalo was the co-producer and lead actor in the 2019 movie *Dark Waters*, which dramatically chronicled the efforts of one small community and its counsel to bring to light the health and environmental effects associated with their exposure to this family of chemicals, which in that case were released in association with the manufacture of Teflon® and related products at a facility in West Virginia.

PFAS compounds are a family of more than 100 chemicals which have been widely used in this country for over 40 years, with perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) being the two most studied. As described on the EPA's website and the notice posted in the Federal Register, many PFAS chemicals break down very slowly and can build up in people, animals and the environment over time after exposure through water,

## PEOPLE

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## SERVICES AND INDUSTRIES

Environmental

soil, air, food and other materials in homes or workplaces.

Under the Safe Drinking Water Act, the EPA may publish health advisories for contaminants that are not subject to any national primary drinking water regulation, although whether it can publish “interim” standards is subject to debate. In its June 15 pronouncement, the EPA reaffirmed that it is working diligently to establish by this fall formal drinking water standards, known as Maximum Contaminant Levels or MCLs for certain PFAS compounds. At the same time, and due to its concern with emerging data, the EPA announced that in the interim it was dramatically lowering certain HALs and establishing new HALs for four PFAS compounds. In this action, the interim HALs for PFOA and PFOS (originally set at 70 parts per trillion (ppt) combined) were lowered to 0.004 and 0.02 ppt, respectively. These interim HALs will be in place until the EPA publishes its PFAS National Drinking Water Regulations, expected this fall. Surprisingly, the EPA set a number of these HALs below the levels at which they can be detected by most commercial laboratories using the EPA’s approved analytical methodology, another source of concern within the regulated community.

Additionally, the EPA proposed Interim HALs for the first time for hexafluoropropylene oxide dimer acid and its ammonium salt (together, referred to as GenX chemicals) and perfluorobutane sulfonic acid and its related compound potassium perfluorobutane sulfonate (together, referred to as PFBS). Some GenX chemicals and PFBS are considered replacements for PFOA and PFOS, which were voluntarily phased out of production in the U.S. over the past decade and banned by the European Union in 2019. The interim HALs for GenX chemicals and PFBS are proposed at 10 ppt and 2,000 ppt, respectively.

### ***SOME STATES ARE ALREADY REGULATING PFAS.***

Until the EPA issues final National Drinking Water Regulations, there are currently no federally enforceable PFAS standards for drinking water. In the absence of an enforceable federal standard, many states have forged ahead on their own with standards for PFAS compounds in drinking water. As of this writing, 20 states have enacted PFAS drinking water regulations at various levels—one of the lowest allowable concentrations is 5.1 ppt for PFOA in California. Six states are in the process of establishing regulations for PFAS. These proposals underscore that state-driven PFAS drinking water regulations are developing quickly throughout the country, and the new interim HALs just released by the EPA may influence state rulemakings.

### ***TO WHOM DO THE INTERIM HALS APPLY?***

HALs are not legally binding standards but, rather, merely “advisories.” “Interim HALs” are one step removed from that and reflect a tentative

recommendation pending further scientific review. There is some question as to whether the EPA has the legal authority to propose HALs on an interim basis given the interim HALs are released prior to complete scientific testing.

In practice, many public water suppliers look to the HALs (or in this case interim HALs) as treatment *goals*, not as binding standards, and it appears that many state regulators view them in the same manner. Public water suppliers faced with PFAS detections above an established state benchmark have been setting treatment goals as “non-detect” for PFOA and PFOS, which, given the technological capabilities of most commercial laboratories using the EPA’s approved analytical method, is around 4 ppt. The EPA’s interim HALs for PFOA and PFOS are set well below the current state of laboratory technology, which means that even a “non-detect” under current EPA-approved methods cannot demonstrate that an interim HAL has been achieved.

It is important to note that the EPA’s newly released interim HALs are exclusively associated with health goals for drinking water supplies, and do not represent cleanup standards for soil or groundwater. The June 15 announcement also does not establish standards for PFAS concentrations in food products, clothing, textiles, or other commercial or consumer products.

#### ***EPA’S INTERIM ACTION FACES LEGAL CHALLENGE.***

In late July 2022, the American Chemistry Council (ACC) filed suit against the EPA in the U.S. Court of Appeals for the District of Columbia seeking to challenge the EPA’s science behind the interim HALs, along with the EPA’s authority to publish them at all based on what the challengers contend is incomplete and inadequate scientific testing and methods. In a statement made following the filing of the lawsuit, the ACC stated that the interim HALs for PFOA and PFOS “reflect a failure of the Agency to follow its accepted practice for ensuring the scientific integrity of its process.” We expect the litigation to be expanded when the EPA releases formal MCLs for these compounds, which it intends to propose this fall.