



THE CUBICAL

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How Low Can You Go? **EPA Lowers PFAS Drinking Water Health Advisories**

On June 21, 2022, EPA issued new health advisories for four per- and polyfluoroalkyl substances (PFAS). EPA significantly lowered the health advisory for perfluorooctanoic acid (PFOA) from 70 parts per trillion (ppt) to 0.004 ppt, and for perfluorooctane sulfonic acid (PFOS) from 70 ppt to 0.02 ppt. In addition, EPA established new health advisories for hexafluoropropylene oxide dimer acid and its ammonium salt (also known as GenX) and perfluorobuic sulfonic acid (PFBS) at 10 ppt and 2,000 ppt, respectively.

Health advisories are not regulations. They are not intended to be construed as legally enforceable standards. Rather, health advisories are designed to assist federal, state, and local officials, as well as public water supply managers, in their efforts to protect public health. EPA does plan to publish proposed rules for enforceable national drinking water standards for these (and possibly other) PFAS soon - possibly as soon as this Fall. So, lowering existing health advisories by several orders of magnitude may presage very strict drinking water standards for these compounds. Given the fact that PFOA and PFOS are expected to be designated as hazardous substances in the near future, this in turn may lead to more CERCLA clean-ups and related response cost litigation.

Often, when health advisories and regulatory limits with extremely low values are announced, attention seems to turn to the fun analogy of a part per trillion (or part per quadrillion) being the equivalent of one drop of water in however many Olympic-sized swimming pools. A more important issue though is the prospect of such low thresholds running up against the technical limits of analytical detection and quantitation. The new health advisories for PFOS and PFOA are now approaching

the part per quadrillion level, despite the fact that challenges remain to develop reliable and accurate test methodologies with detection and quantitation limits at the part per trillion level. This issue will become even more pronounced for the regulated community as these extremely low health advisory levels begin to form the basis for similarly low regulatory thresholds.

The Nuclear Option: An Introduction to *FUSRAP*



The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund) has been in existence for over 40 years. Since that time, an entire infrastructure devoted to the cleanup of contamination and assignment of liability has evolved through litigation, amendments to legislation, and the enactment of cleanup and liability laws at the state and local level. By now, this "cleanup infrastructure" is familiar to most environmental professionals - even those who don't deal with the remediation of contaminated sites on a regular basis. However, even within such a familiar and well-understood infrastructure, there is always the possibility of finding unexpected and unusual surprises.

One such possible unexpected and unusual surprise is the Former Utilized Sites Remedial Action Program, or FUSRAP. FUSRAP actually pre-dates CERCLA. It was enacted by Congress in 1974 to identify, investigate, and clean up or control sites that were contaminated as a result of the nation's early atomic weapons and energy program. The activities that led to such contamination were conducted by, or under the supervision of, the Manhattan Engineer District (the U.S. Army Corps of Engineers district that had responsibility for the Manhattan Project) and the Atomic Energy Commission (AEC). AEC - and then its successor agency, the U.S. Department of Energy (DOE) - was initially assigned with responsibility for conducting investigation and remediation under FUSRAP. However, Congress amended the law in 1997 to transfer such responsibility from DOE to the U.S. Army Corps of Engineers.

FUSRAP's scope is more limited than CERCLA's in a number of respects. For starters, FUSRAP is strictly a cleanup statute. It does not address liability and compensation for costs associated with investigation, remediation and natural resources damages in the way that CERCLA does. Moreover, under FUSRAP, there are jurisdictional limitations on the scope of the investigation and remediation activities that may be undertaken by the Corps of Engineers. Namely, the contamination must have resulted from activities associated with the nation's early atomic weapons and energy programs in order for the Corps of Engineers to have jurisdiction over remediation activities.

FUSRAP may seem like an esoteric piece of legislation that is unlikely to come into play in the real world. However, it is important to understand that AEC and the Manhattan District conducted or supervised activities at many different sites across the country. The private sector - including companies with familiar names such as W.R. Grace or Dow Chemical - was significantly involved in these activities. Currently, there are 21 active FUSRAP sites located across eight states.

Moreover, while the remediation of nuclear materials and radiological contamination has always been a significant focus of activities conducted under FUSRAP, government and private sector facilities involved in the nation's early atomic weapons and energy program engaged in ordinary manufacturing operations such as electroplating or etching. Over time, these operations resulted in releases of heavy metals, organic solvents, and other hazardous and toxic materials. For this reason, FUSRAP sites are similar to typical CERCLA sites in many respects.

Even if one never encounters a FUSRAP site, the existence of this program is illustrative of the sorts of unusual and unexpected surprises that might arise when dealing with contaminated sites. Two other possible surprises potentially impacting the allocation of liability or the availability of funds for cleanup at a particular site might be federal appropriations legislation or a "sweetheart" settlement between government entities and a select group of PRPs. These types of surprises are also relatively unlikely, but perhaps less so than the possibility of encountering a FUSRAP site. Moreover, these types of surprises are much more likely to strike closer to the core concern of allocation of liability at a particular site. Regardless of the type of surprise, it never hurts to be prepared for them, even within the confines of the familiar and well-understood infrastructure of federal, state, and local remediation, compensation, and liability laws.

EPD's Industrial Stormwater General Permit: Does Benchmark Monitoring Require Good AIM?

One of the more important features of EPA's Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (the EPA General Permit) is its approach to so-called benchmark monitoring. Under the EPA General Permit's benchmark monitoring provisions, the permittee is required to monitor for certain parameters such as total suspended solids (TSS) and chemical oxygen demand (COD). The EPA General Permit contains numerical threshold values for these parameters, and while exceedances of these limits do not constitute permit violations, they do trigger the initiation of a process wherein the permittee must assess the need for, and possibly implement, "additional interim measures" (or *AIM*). This process is detailed and structured. Depending on their severity and persistence, exceedances of these threshold values would require a permittee to navigate its way through a tiered series of assessment and implementation of AIM options, including but not limited to, changes to the permittee's Stormwater Pollution Prevention Plan (SW3P) and Stormwater Control Measures (SCM).

It is important to remember that the EPA General Permit only applies to a handful of states, territories, and districts. Most states, including Georgia, are authorized to implement their own respective stormwater management programs, and issue their own industrial stormwater general permits. While these states are not obligated to adopt the EPA General Permit wholesale, many states follow EPA's approach to a significant extent. Historically, Georgia has been one such state. (For more on the EPA General Permit see *EPA's New Industrial Stormwater General Permit and How It Might Impact Your State's Program* by Stephen B. Ellingson, Ph.D. which can be accessed by clicking [here](#).)

In Georgia, the Environmental Department of Environmental Protection (DEP) recently renewed its General Permit for Stormwater Discharges Associated with Industrial Activity (the EPD General Permit). The renewed EPD General Permit went

into effect on July 1st. This recent renewal raises an interesting question for industrial stormwater permittees in Georgia. Does the EPD General Permit follow the EPA General Permit's approach to benchmark monitoring and AIM? The answer to this question is a very lawyerly one: "*Yes and no.*"

The EPD General Permit does contain provisions that require benchmark and establish numerical threshold values for benchmark monitoring parameters. In addition, exceedances of these thresholds do require a permittee to evaluate, and modify as necessary, the SW3P and SCM. Finally, as with the EPA General Permit, exceedances of benchmark monitoring parameters in the EPD General Permit are not considered to be permit violations.

However, the EPD General Permit does not adopt EPA's tiered AIM approach for evaluating and modifying stormwater control plans and measures. In contrast to the EPA General Permit, wherein AIM and corrective action are treated as two separate and distinct concepts, the actions required to be taken pursuant to the EPD General Permit in response to exceedances of benchmark monitoring parameters are considered to be part of the permittee's corrective action obligations. Under Section 3.2 of the EPD General Permit, an exceedance of an applicable benchmark is considered to be a condition requiring review of the SW3P to determine whether any modifications are necessary.

So, are EPA's and EPD's differing approaches to benchmark monitoring likely to result in real differences in terms of practical application? The benchmark monitoring provisions for both permits have more "teeth" than many of the other provisions of the respective permits. Nonetheless, the simpler, more straightforward language in the EPD General Permit may very well provide the permittee with more flexibility and space within which it can exercise engineering judgment and discretion.

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