

Insights

PFAS UPDATE: PFAS REGULATION UNDER THE NPDES PROGRAM

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To date, businesses have only had to contend with a handful of state laws and regulations limiting the concentration of per- and polyfluoroalkyl substances (“PFAS”) in industrial wastewater discharges.

However, on April 28, 2022, EPA issued a [guidance memorandum](#) explaining that “EPA will use the NPDES program to restrict PFAS discharges to water bodies. For federally-issued permits, EPA will include requirements to monitor for PFAS, include requirements to use best management practices like product substitution and good housekeeping practices, and establish practices to address PFAS-containing firefighting foams in storm water.” The new memorandum supersedes a November 2020 [EPA interim memorandum](#) addressing similar issues, and it reaffirms EPA’s commitment to regulate PFAS compounds as outlined in the PFAS Strategic Roadmap.

All of which means that businesses with National Pollutant Discharge Elimination System (“NPDES”) permits need to understand the new guidance, and evaluate whether PFAS discharges in wastewater are relevant to their business.

I. What is EPA Actually Requiring?

The April 28, 2022 Memorandum includes three significant requirements for all EPA-issued NPDES permits for facilities where PFAS substances are expected or likely to be present in their discharge:

- [Effluent Monitoring](#). Permits should include a requirement that facilities use the [draft analytical method 1633](#) to test for the 40 PFAS compounds detectable under that method.
- [Monitoring Frequency](#). Sampling should be conducted [quarterly](#), and all PFAS monitoring data must be reported on Discharge Monitoring Reports.
- [Best Management Practices for PFAS](#). Facilities are required to implement Best Management Practices (“BMPs”) for PFAS which can include:
 - Product elimination or substitution when a reasonable alternative to using PFAS is available in the industrial process;

- Accidental discharge minimization by optimizing operations and good housekeeping practices;
- Equipment decontamination or replacement where PFAS products have historically been used to prevent discharge of legacy PFAS following the implementation of product substitution; and
- Preparation of an annual report listing potential PFAS sources, PFAS source reduction implementation, source monitoring results, and effluent results for the previous year.

There are also additional BMPs to address PFAS-containing firefighting foams for stormwater permits, including the prohibition of the use of AFFFs in stormwater permits other than for actual firefighting.

II. What Businesses Do These Changes Apply To?

The memorandum provides guidance for EPA-issued NPDES permits for industrial users where EPA is the pretreatment control authority. EPA issues all NPDES permits in the following states and/or regions:

- Massachusetts;
- New Hampshire;
- New Mexico;
- District of Columbia;
- Territories (except the Virgin Islands);
- Certain federal facilities; and
- Tribal lands.

The other remaining states have been authorized by EPA to issue their own permits, and are not bound by the guidance. Notably, some states such as Missouri have developed guidance for how to address PFAS substances in their NPDES permits, and some states may decide to adopt EPA's new guidance.

In addition, the guidance applies to facilities where PFAS is suspected in the discharges. According to EPA's Strategic Roadmap, the following industries may discharge PFAS substances:

- Airports;

- Electric and electronic components;
- Electroplating;
- Landfills;
- Leather tanning & finishing;
- Metal finishing;
- Organic Chemicals, Plastics & Synthetic Fibers industry category (“OCPSF”);
- Paint formulating;
- Plastics molding & forming;
- Pulp, paper & paperboard industries; and
- Textile mills.

The April 28, 2022 Memorandum asserts that this may not be an exhaustive list. For example, Publicly Owned Treatment Works (“POTWs”) may receive PFAS wastes from many entities. Moreover, some remediation sites, chemical manufactures, and military bases may also be included.

You should evaluate how your NPDES permit conditions may change as a result of the guidance in the following three scenarios:

1. Your wastewater discharge is regulated by an EPA-issued NPDES permit;
2. If you are in one of the industries listed above; or
3. If you suspect that your effluent may contain PFAS substances.

III. Conclusion

The guidance provides EPA’s permit writers with broad power over the industrial use of PFAS. It will allow EPA to require that businesses conduct alternatives analyses, decontaminate or replace process equipment, and regularly report the PFAS concentration in their effluent. There are compliance and capital cost implications from these requirements, and the regular reporting of PFAS concentrations in emissions may be a driver for future contribution and tort litigation.

For more information on PFAS chemicals, and the regulatory and litigation risks that they pose, please visit our [PFAS webpage](#). If you have a question about your NPDES permits and PFAS considerations, contact Tom Lee, John Kindschuh, Emma Cormier, or any other member of our PFAS team at Bryan Cave Leighton Paisner LLP.

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