Natural Resources Board Rejects PFAS Groundwater Standards, Moves Drinking Water and Surface Water Standards Forward

The Wisconsin Natural Resources Board (NRB) took action on three proposed PFAS rules at its meeting on Wednesday, February 23. The Wisconsin Department of Natural Resource (DNR) proposed rules that would set standards for the two most studied PFAS compounds – PFOA and PFOS – in groundwater, drinking water and surface water.

The Groundwater rule, which proposed a 20 parts per trillion (ppt) combined standard for PFOA and PFOS, as well as limits for 14 other substances, failed to pass after a 3-3 vote (with one abstention).

The NRB amended the proposed Drinking Water rule, changing the maximum contaminate level (MCL) for PFOA and PFOS, combined, to 70 ppt to match the U.S. Environmental Protection Agency's Health Advisory Level for the same compounds. This was an upward adjustment from the 20 ppt standard initially proposed by DNR. The amended Drinking Water rule passed with a 6-1 vote.

The third rule addressed by the NRB was DNR's proposed Surface Water rule. The proposal was for a PFOS standard of 8 ppt and a PFOA standard of 20 ppt for surface water used as drinking water, and 95 ppt for all other surface water. This rule would require permitted facilities to monitor discharges, but provides up to 85 months for the facility to reach compliance through a pollutant minimization plan.

The NRB heard from several members of the public, including municipal representatives and other government officials, as well as business representatives. Concerns from supporters of the rules included the potential health impacts of the compounds. Those opposing the rules cited the limited scientific information available for the proposed standards and significant compliance costs.

The surface and drinking water rules will now move on to the legislature, where legislative committees will have an opportunity to review and potentially ask for more information and analysis, particularly related to the potential compliance costs of the rules. The action of the legislature will determine whether the rules

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are finalized, delayed, or ultimately rejected. It is unclear what further action may occur regarding the proposed Groundwater rule since the scope statement necessary for the rule's promulgation expires in March 2022. Any further rulemaking will likely require the rulemaking process to start anew, beginning with a new scope statement.

If the rules are finalized, it could have far-reaching impact on regulated entities. Real estate developments subject to DNR's Remediation and Redevelopment Program could see additional requirements for testing and remediation of PFAS prior to a site being closed. Municipalities and other facilities subject to the Drinking Water rule will be required to test and potentially treat drinking water to meet the standards. Facilities regulated under the Wisconsin Discharge Elimination System (WPDES) program will be required to test for the compounds as well, and could face significant compliance costs as well as potential additional action under the Remediation and Redevelopment Program.

The details of DNR's authority to regulate and enforce PFAS standards now, before the rules are finalized, are currently being litigated in Jefferson and Waukesha counties. In both cases, Wisconsin Manufacturers and Commerce has challenged actions taken by DNR as beyond the agency's statutory authority. The outcome could determine whether DNR has authority to force testing and treatment or remediation of the PFAS substances even if the rules are not approved by the legislature. A hearing in the Jefferson County case was scheduled for February 24, 2022, and a decision is anticipated in the Waukesha County case in early April.

We will continue to provide updates regarding these rules as more information is available. For questions, please contact your Reinhart attorney.

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