

PFAS – California Regulatory Momentum Continues to Grow...Now with Active Investigation

March 11, 2019

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Overview

On March 6, 2019, environmental regulators representing US Environmental Protection Agency (USEPA), US Navy, California Office of Environmental Health Hazard Assessment (OEHHA), California Department of Toxic Substance Control (DTSC), and California State Water Resources Control Board (SWRCB) assembled at CalEPA headquarters in Sacramento for a lengthy public meeting to address a group of chemicals commonly referred to as per- and poly-fluoroalkyl substances (PFAS). The focus of the public meeting was to consider potential sources of PFAS impacting the environment and particularly how those sources could potentially impact drinking water.

Regulatory interest in PFAS is nothing new, USEPA issued a health advisory for the group of chemical back in May 2016, but the regulatory attention paid to the chemicals has been growing significantly in recent months. In November 2017, OEHHA issued interim notification levels for two types of the most common chemicals in the group of chemicals, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS). Then, in February 2019, USEPA issued its own Action Plan for PFAS. Most recently, on March 6, 2019, the SWRCB rolled out its own PFAS Phased Investigation Approach."

The SWRCB's investigation centers around USEPA's established health advisory level of 70 ppt for PFAS in drinking water. Notably, the SWRCB does not consider USEPA's health advisory level as a notification or detection level; rather, the SWRCB sees that level as a response level, i.e., detections at that level result in a recommendation to remove the drinking water source from use. These facts alone are not particularly revelatory; however, the active investigation plan announced by the SWRCB is.

Phase I of the investigation plan is targeted at those facilities that are perceived as presenting the greatest impacts to groundwater based on historical PFAS usage. Airports are targeted based on their historical use of aqueous film forming foams (AFFF), which contain PFAS, and municipal solid waste (MSW) landfills due to the presence of waste materials containing PFAS (e.g., AFFF, carpets, etc.). Under Phase I of the investigation plan, the SWRCB is targeting 31 airports with training/fire response sites and is in the process of issuing investigative orders to those facilities. The SWRCB will also issue similar investigative orders to evaluate the 578 drinking water wells within a two-mile radius of those airports for sampling. For landfills, the SWRCB will target 252 MSW landfills and issue similar investigative orders to those facilities. The SWRCB has identified 353 drinking water wells within a one-mile radius of those landfills that will also be subject to similar investigative orders.

Effective immediately, the SWRCB is issuing its investigative orders, which contain a 30-day deadline to respond to the questionnaire included in the orders. Then, by April 2019, following receipt of the responses to the questionnaires, the SWRCB expects to begin receiving workplans from the investigative order recipients that will take another 30 days to review and ultimately be approved by the SWRCB. According to the SWRCB timeline for Phase I, it expects to have workplans in place by early July 2019 and start to see results from those workplans by the end of September 2019. It is safe to say that the SWRCB's timeline for Phase I is objectively considered aggressive.

Phase II of the investigation plan envisions targeting manufacturing facilities known to have used AFFF as part of their firefighting training operations, i.e., refineries, bulk terminals, non-airport fire training areas, and urban wildlife areas. Like the airports and landfills targeted in Phase I, these Phase II facilities are primarily targeted based on their use of AFFF. Details of the Phase II investigation plan were not provided by the SWRCB; however, expectations are that facilities subject to the Phase II investigation plan will be subject to the same investigation orders issued to facilities in the Phase I investigation plan as well as the same expedited timeline.

Federal and State environmental regulators have widespread activity underway to investigate and remediate PFAS. Many efforts by regulators to investigate and subsequently enforce remediation of soil and groundwater impacted by PFAS are only in the earliest stages of development. Facilities known to have used one of the most common source of PFAS – AFFF – are the obvious starting point, but investigation and subsequent enforcement likely will extend as additional regulations are promulgated.

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