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Environmental Law Alert

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NY takes important next step in regulation of emerging contaminants

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NYSDEC's recently proposed guidance may have significant implications for industrial facilities discharging PFOA, PFOS, and 1,4-Dioxane under a SPDES permit (and others).



What's the Impact?

- / The proposed new guidance would establish human health-based guidance values for PFOA, PFOS, and 1,4-Dioxane and could bring changes to wastewater discharge limits and, potentially impact how those substances are addressed at Superfund and brownfield sites
- / NYSDEC is accepting comments on the proposed guidance until December 6, 2021

The New York State Department of Environmental Conservation (NYSDEC) recently proposed a [series of new and revised guidance documents](#) to address the discharge of certain emerging contaminants to the state's ground and surface water. The guidance—which addresses perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS and collectively with PFOA, PFAS), and 1,4-Dioxane—may have significant implications for facilities that discharge these pollutants pursuant to a State Pollutant Discharge Elimination System (SPDES) permit.

With the recent announcement, NYSDEC is proposing to update Technical Operational Guidance Series (TOGS) 1.1.1, *Ambient Water Quality Standards and Guidance Values and Groundwater Effluent Limitations* to add human health-based guidance values for the three chemicals as follows: PFOA, 6.7 parts per trillion (ppt); PFOS, 2.7 ppt; and 1,4-Dioxane, 0.35 parts per billion (ppb). Those guidance values will be used by NYSDEC to set effluent limits for facilities that discharge these contaminants to ground or surface water under a SPDES permit. The proposed guidance values are based on the New York State Department of Health's (NYSDOH's) adoption of maximum contaminant levels (MCLs) for finished drinking water of 10 ppt for PFOA and PFOS and 1 ppb for 1,4-Dioxane. According to NYSDEC, the proposed guidance values were set below the NYSDOH's MCLs to provide "an extra margin of safety." The revisions to TOGS 1.1.1 were accompanied by changes to TOGS 1.3.7, *Analytical Detectability and Quantitation Guidelines for Environmental Parameters*, which guides the selection of analytical testing methods in situations where approved monitoring methods are limited or unavailable, as in the case of emerging contaminants such as PFAS.

To ensure effective implementation of the new guidance values for PFOA, PFOS, and 1,4-Dioxane, NYSDEC also is proposing new TOGS 1.3.13, *Permitting Strategy for Implementing Guidance Values for PFOA, PFOS, and 1,4-Dioxane*. This new publication focuses on facilities in specified Standard Industrial Classification (SIC) codes considered potential sources of wastewater discharges containing one or more of the three chemicals. Existing facilities in the listed SIC codes will be asked to supply information about their use and discharge of these chemicals to NYSDEC, which will then decide whether there is cause to modify the facility's SPDES permit. The results of the information request may also be used to adjust the facility's priority ranking under NYSDEC's Environmental Benefits Permit Strategy (EBPS)—the system used by NYSDEC to prioritize existing SPDES permits for full technical review.¹

NYSDEC's draft guidance follows the United States Environmental Protection Agency's (EPA's) announcement in late 2020 of its interim strategy to address PFAS under the National Pollutant Discharge Elimination System (NPDES) permitting program. Pursuant to this strategy, EPA advised its permit writers to require PFAS monitoring in wastewater at regulated facilities where such chemicals may be present in wastewater discharges for both new and renewed permits. The strategy also contemplates the use of best management practices, where appropriate, to prevent, control, or abate the discharge of PFAS. Although EPA directly oversees the NPDES permit program in only a few states and other jurisdictions, this draft EPA guidance reflects a concern—shared by both EPA and NYSDEC—about the potential impact of PFAS chemicals on surface waters.

Going forward, if NYSDEC finalizes the new/revised guidance similar to its proposal, businesses in the SIC codes listed in TOGS 1.3.13 that discharge wastewater pursuant to a SPDES permit will be expected to provide NYSDEC with information about their use and discharge of PFOA, PFOS, and/or 1,4-Dioxane and may eventually be subject to strict discharge limits for these pollutants.

¹ If you have a SPDES Permit and do not know what its current EBPS score is, you can check the [current EBPS list](#).

The guidance values established by NYSDEC are likely to have impacts beyond just the renewal of certain SPDES permits. Once those values are finalized, it is likely that NYSDEC will also use them to develop official "standards, criteria, and guidance" that must be considered when developing remedial goals under the [state's Brownfield or state Superfund programs](#). Accordingly, responsible parties at cleanup sites where PFAS are present should also be monitoring this development very closely.

NYSDEC is [accepting comments on the draft new/revised TOGS](#) until December 6, 2021. The draft TOGS are accompanied by a series of fact sheets explaining the scientific basis for the guidance values.

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