Governor DeWine Issues Order to Address PFAS in Ohio's Drinking Water

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December Deadline Provides Limited Window for Ohio's Water Utilities

Late last week, Gov. Mike DeWine took Ohio's first formal step toward addressing potential per- and polyfluoroalkyl substance (PFAS) contamination in drinking water. The Governor issued an order to Ohio Environmental Protection Agency (EPA) and the Ohio Department of Health (ODH) to develop a joint action plan by December 1, 2019, to require testing of PFAS at public and private water supply systems (PPWSs) located near known sources of PFAS, such as firefighting training sites and certain manufacturing facilities. The plan must include:

- A strategy to work with PPWSs to implement appropriate response measures if high levels are found,
- Education/outreach materials to be distributed to customers explaining health risks and practical measures to implement to reduce potential exposure, and
- Procedures to monitor technical and regulatory developments and modify the plan as appropriate.

DeWine's order builds on Ohio EPA's 2018 formation of a task force that is currently developing a "PFAS Response Strategy" to:

- Evaluate toxicity data and determine response and remediation thresholds in consultation with ODH,
- Establish sampling and analytical procedures, and
- Ensure accurate and consistent messaging and information to the public.

The December deadline for the action plan provides a limited window for Ohio's water utilities to submit comments to address

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important questions not addressed in the Governor's order:

- Testing "near known sources" is specified, but the Agencies are left to develop the details. Are known sources those where PFAS have been found at elevated levels in soils or groundwater, found at any level, or just suspected based on historical information, such as current or past firefighting training grounds, or certain industrial operations where PFAS use was widely known? Does proximity mean immediately upgradient, within 1-,3-, or 5-year times of travel, within wellhead protection zones, or some other distance from a PPWS?
- Should the Agencies expand the testing to all PPWSs in Ohio, in order to supplement limited data collected in 2013-2015 under U.S. EPA's unregulated contaminants monitoring rule?
- Should the testing be of untreated water, treated water, or both? Should it be once, monthly, quarterly, annually, or some other level, or perhaps a level tied to certain risk factors?
- Should all PFAS chemicals be tested, just the two main chemicals in the PFAS family (PFOA and PFOS), or some other subset of PFAS chemicals?
- Because of the serious potential sampling and analytical issues associated with PFAS testing, what protocols should be followed to minimize these risks to ensure accurate, representative results?
- What is a "high level" of PFAS? In the absence of regulatory standards in Ohio, is it a level above (a) U.S. EPA's 2016 recommended health advisory level, (b) ATSDR's more stringent 2019 draft risk management level, or (c) one of several, more stringent standards established by a handful of other states in the last year or so? How should Ohio's PPWSs respond, if at all, to levels found below U.S. EPA's recommended advisory level, but above one or more of these other more stringent standards?
- What are the "appropriate response measures" if a PPWS finds elevated levels? Because removing PFAS from drinking water requires complex and expensive treatment equipment,

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in the absence of binding state or federal remediation standards, what legal mechanisms are available to force sources to pay for, or at least contribute to, the costs for a PPWS to provide treatment or an alternative water supply if elevated levels are found?

Testing for PFAS can create significant technical, financial, legal, and public relations issues for Ohio's PPWSs. Because of the important unanswered questions raised by Gov. DeWine's order and the short deadline imposed for the mandated action plan, Frost Brown Todd's environmental practice group will be reaching out in the next few days to the firm's governmental clients and their trade organizations to form a coalition to submit comments to the Agencies on the proposed contents of the joint action plan.

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