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POTW Alert! U.S. EPA's Upcoming Information "Request" for PFAS Information and Potential Sampling Warrants Careful Review and Consultation with Legal Counsel

Over the last 6-7 years in the emerging "PFAS world," most sewer authorities did not sample wastewater or biosolids for PFAS due to (1) no requirement to do so, (2) no U.S. EPA-approved analytical test method, (3) no enforceable standards to guide next steps, and (4) no assurance that the results would not create a risk of future lawsuits or other liabilities. This decision is understandable due to the regulatory uncertainties and the thousands of lawsuits being filed against members of every sector of the U.S. economy connected in some way to these compounds.

U.S. EPA recently took steps to eliminate two of these reasons for owners of about 400 of the nation's publicly-owned treatment works (POTWs). First, at the end of January 2024, the Agency issued final approval of Method 1633, which tests for 40 PFAS compounds in wastewater, surface water, soil, biosolids, sediment, and landfill leachate, and Method 1621, which is a prescreening test for PFAS in wastewater. Thus, final approved methods are now available to analyze PFAS in wastewater and biosolids.

Second, on March 26, 2024, the Agency issued a notice in the Federal Register that it will send a multi-phase written information "request" under Section 311 of the Clean Water Act (CWA) to about 400 POTWs with the highest average daily flow rates. The first phase will require the completion of a questionnaire to provide information about potential PFAS sources in the collection system, PFAS-related information about wastewater/biosolids management practices, current PFAS monitoring requirements (if any), and lab capabilities. Responses will be used to select a subset of 200-300 for one- or two-part supplemental sampling, the first to analyze a grab sample of POTW influent and effluent, residential wastewater

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influent to the POTW, and up to 10 industrial users' wastewater, and the second an unspecified number of "selected" POTWs also required to analyze a grab sample of biosolids. While termed a "request," compliance is mandatory. The request will likely be sent this summer or early fall, after the deadline to comment (May 28, 2024) expires and the Agency creates an electronic Puversion of the questionnaire.

Unfortunately, this request will arrive at a time when there are no federal standards for POTWs to use to (1) evaluate the significance of the information provided, (2) assess potential risks of third-party claims or other liabilities, or (3) guide next steps to reduce potential risks. U.S. EPA's statement that absent a legitimate claim of confidentiality, all responses will be publicly available makes the lack of standards more problematic. The Agency's April 19, 2024 listing of two PFAS compounds (PFOA and PFOS) as CERCLA hazardous substances and its April 10, 2024 issuance of stringent drinking water standards for these and four other PFAS compounds, add additional areas of potential liability to consider. While the Agency stated that it will use its discretion not to pursue POTWs under CERCLA for releases to waters, into soils at application sites, or in leachate at landfills, third-party claims are the primary threat. All potential risks associated with PFAS in wastewater or biosolids should be evaluated ***now***, as part of an internal discussion guided by legal counsel, ***before*** the upcoming information request arrives.

While POTWs have so far not been besieged with PFAS-related claims, the risk is very real. For example, among the early lawsuits were dairy and crop farmers in Maine that sued local governments because PFAS, which biodegrade in the environment at incredibly slow rates, had accumulated to levels that made their milk and crops unusable after years of biosolids application. Subsequent testing caused Maine to pass a law in 2022 banning land application of PFAS-containing biosolids, forcing many local governments to landfill them or ship them to application sites in Canada and surrounding states at great cost. A similar situation in 2022 in Michigan led to the shutdown of several cattle farms, and to revisions last year to its biosolids program to impose new restrictions and notices to land owners, and in some cases an application ban, depending on the PFAS level.

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Last summer Burlington, North Carolina settled a threatened CWA citizen-suit for unpermitted discharge of PFAS to the Haw River, requiring it to undertake a detailed program to identify and eliminate sources in the collection system. And two months ago, Synagro, which is the nation's largest contract manager of biosolids, was sued by Texas farmers, alleging that it falsely advertised that its application of biosolids (from the City of Fort Worth) was safe, but instead allegedly caused widespread contamination of their crop and livestock farms.

Due to the substantial uncertainties and potential risks, managers of POTWs need to consult with legal counsel before (1) completing the upcoming questionnaire, (2) disclosing PFAS-related information for their plants or collection systems, or (3) deciding to sample potential sources in the collection system or the POTW's influent, effluent or biosolids. Issues to discuss include:

- A single grab sample is unlikely to be representative of actual concentration or to accurately reflect trends or removal rates, and thus could lead to nonrepresentative data that may increase future exposure risks. Preparation of a written sampling plan involving multiple grabs spread over a single or several days (composite sampling is discouraged due to PFAS' surfactant properties) should be considered to minimize this risk.
- If no previous sampling has been done, preliminary internal sampling under the attorney-client privilege to identify potential sources and exposure risks in advance of the information request should be considered.
- U.S. EPA recommended using the two new methods while still in draft. Thus, there are labs that are experienced in both, so now is the time to interview/select a lab, review its SOP/QA-QC procedures, and if appropriate, engage it for confidential internal sampling or for the response to the upcoming request.
- The entire biosolids management program, including contracts, landfills, and land application history, sites, and application rates, should be reviewed to assess potential risks, and begin evaluating steps to take to reduce them.

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The Agency's information request authority has been used since the 1970s to gather data to develop pretreatment and effluent limits for industry. The upcoming request will generate important information to evaluate whether limits are needed for municipal wastewater or biosolids. However, the duty to comply with the request must be tempered by the realization that uncertainties and potential risks abound that require careful consideration under the guidance of legal counsel.

Members of Frost Brown Todd's Environmental Practice Group have been representing local sewer authorities for almost four decades. If POTWs or their in-house counsel would like assistance evaluating PFAS sampling or reporting for wastewater or biosolids, evaluating biosolids programs and potential risks, evaluating action steps to minimize risks, or weighing responses to the upcoming questionnaire, please contact the authors or another member of Frost Brown Todd's Environmental Practice Group.

Want more PFAS coverage?

Explore the articles below tracing the EPA's evolving position and enforcement agenda for these "forever chemicals."

- ***Congress Following States' Lead to Phase Out PFAS***
- ***Seven More PFAS Added to Toxic Release Inventory (TRI) Reporting by U.S. EPA***
- ***PFOA and PFOS Are "Hazardous Substances" Under CERCLA: Key Takeaways and Questions for Real Estate Transactions***
- ***Local Sewer Authorities and Biosolids Management Companies Need to Work Together***
- ***U.S. EPA Surges Forward with Its "PFAS Strategic Roadmap" in the First Quarter, Changing the Scope of PFAS Regulation in Several Ways***
- ***U.S. EPA Issues "Game Changing" Listing of PFOA and PFOS Under CERCLA***
- ***U.S. EPA Finalizes Drinking Water Limits for PFAS***

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