



West Virginia Passes the PFAS Protection Act

West Virginia is one among many states developing new laws and regulations related to per- and polyfluoroalkyl substances (PFAS). On March 28, 2023, Governor Jim Justice signed [House Bill 3189](#), also known as the PFAS Protection Act (the Act), into law. Broadly, the Act is intended to identify sources of PFAS discharged into waters used for public drinking water and sets forth certain duties and obligations related to public water systems, water treatment systems, and facilities that use PFAS compounds.

The Act is a direct response to [Senate Concurrent Resolution 46](#), passed in 2020, which required the West Virginia Department of Environmental Protection (WVDEP) and the West Virginia Department of Health and Human Resources to initiate a public source-water supply study to sample PFAS for all community water systems in the state. Community water systems are public water systems that pipe water for human consumption to at least 15 service connections used by year-round residents or that regularly serve at least 25 residents. Subsequently, the state agencies contracted with the United States Geological Survey (USGS) to sample and analyze for 26 PFAS compounds from 279 sites consisting of public water systems, including schools and daycares that operate their own water systems. USGS published the [final report](#) summarizing the study in July 2022.

PFAS Study Results and Contemporary Federal Actions

The study found that 13 percent of the sampled sources (37/279) exceeded 70 parts per trillion (ppt) for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) combined, the then-current health advisory established by the U.S. Environmental Protection Agency (USEPA) in 2016. PFOA and PFOS are the most studied PFAS chemicals. Health advisories are unenforceable, non-regulatory thresholds below which adverse health effects are not anticipated to occur over a lifetime of exposure. In June 2022, USEPA published updated interim health advisories for PFOA (0.004 ppt) and PFOS (0.02 ppt) and final health advisories for hexafluoropropylene oxide dimer acid and its ammonium salts (HFPO-DA, commonly known as GenX; 10 ppt) and perfluorobutane sulfonic acid (PFBS; 2,000 ppt). When compared to the updated, interim PFOA and PFOS health advisories, 49 percent (137/279) of sampled sources exceeded these thresholds. Such exceedances on their own do not create obligations for drinking water systems to take action to address PFAS.

At the same time that the West Virginia legislature was developing House Bill 3189, USEPA was moving to regulate PFAS compounds in drinking water at the federal level. For example, on March 14, 2023, USEPA announced a proposed National Primary Drinking Water Regulation setting maximum contaminant levels for six PFAS compounds. More information about the proposed regulation is available at USEPA's website [here](#). In August 2022, USEPA proposed designating PFOA and PFOS as hazardous substances under CERCLA and the agency is considering applying the same designation to six other PFAS compounds. The West Virginia legislature cited these and other actions as background to passing the Act.

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WVDEP and Facility Obligations Under the PFAS Protection Act

The Act obligates WVDEP to take certain actions based on the presence and concentration of PFAS compounds in raw and/or treated water. For every raw water source where USGS detected any of four listed PFAS (PFOA, PFOS, PFBS, or GenX) above the practical quantitation limit (PQL) and above EPA's applicable health advisory, WVDEP must write a PFAS action plan to identify and address the PFAS sources. The PFAS action plans are due by July 1, 2024. For each raw water source where USGS detected any of the four listed PFAS above the method detection level (MDL), above EPA's applicable health advisory, and below the PQL, the Act requires WVDEP to sample the finished, treated water at the associated public water system by the end of 2023. For each public water system where any of the four listed PFAS is detected in finished water above the MDL and above EPA's applicable health advisory, regardless of the concentration in relation to the PQL, the Act requires WVDEP to prepare a PFAS action plan to identify and address sources of PFAS for the public water system's raw water source(s). For these, the first 50 plans must be completed by the end of 2025 and the remaining plans must be completed by the end of 2026.

As set forth in more detail in the Act, developing the PFAS action plans requires WVDEP to coordinate with affected public water systems and consult with applicable governmental agencies, organizations representing West Virginia public drinking water systems, and other entities with knowledge applicable to identifying and addressing PFAS sources. The Act also directs WVDEP to recommend changes to applicable statutes and/or rules to address the sources of PFAS compounds and to report on its activities annually to the Joint Legislative Oversight Commission on State Water Resources.

The general PFAS approach for federal and state agencies is to obtain the occurrence and exposure data from drinking water systems and take action to reduce and eliminate the sources of PFAS to such systems. The latter component can be seen in the second part of the Act, which requires all facilities that discharge to a surface water under a West Virginia/National Pollutant Discharge Elimination System permit, or to a Publicly Owned Treatment Works under an industrial pretreatment program, and that manufacture or knowingly use or have used one or more PFAS chemicals in their production process since January 1, 2017, to report such use to WVDEP by no later than December 31, 2023. Facilities subject to the reporting requirement must begin quarterly monitoring of the self-reported PFAS chemicals within six months of notification to WVDEP. The Act also requires WVDEP to modify a facility's applicable permits to require monitoring for the self-reported PFAS chemicals.

The Act does not create any new obligations for either public water systems or publicly owned treatment systems. Looking toward the future, after USEPA finalizes Clean Water Act water quality criteria for any PFAS, WVDEP must propose criteria no more stringent than USEPA's established criteria in the next regular legislative rulemaking cycle. The Act will be effective on June 8, 2023.

As the federal and state governments continue to take multiple actions to address PFAS across many program areas, Babst Calland attorneys continue to track these developments and are available to assist you with PFAS-related matters. For more information on this development and other remediation matters, please contact Matthew C. Wood at (412) 394-6583 or mwood@babstcalland.com, or Mackenzie M. Moyer at (412) 394-6578 or mmoyer@babstcalland.com, or any of our other [environmental attorneys](#).

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