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State of PFAS in Wisconsin: Drinking Water Regulations and Testing Results

PFAS (perfluoroalkyl and polyfluoroalkyl substances) continue to make state and federal headlines as states promulgate drinking water standards, the EPA proposes federal standards, and Governor Evers and the Wisconsin Legislature both make PFAS a priority in their competing budgets, each allocating over $100 million to address PFAS.

Buried within all of this news are positive indicators for Wisconsin's drinking water utilities: initial testing shows most water utilities will be able to comply with even the most stringent proposed standards.

Background on PFAS

PFAS are a large group of widely used, long lasting chemicals, components of which break down very slowly over time. They are widely used to make various types of everyday products, such as shampoo, pesticides, and non-stick cookware. Older PFAS, including PFOA and PFOS, are no longer manufactured in the United States, but are still being produced internationally in imported consumer goods. Due to their age, PFOA and PFOS are some of the most studied PFAS. Newer PFAS, including the more commonly known GenX and PFBS, have been introduced as replacements for PFOA and PFOS.

Because of their widespread use and their persistence in the environment, many PFAS are found in the blood of people and animals all over the world and are present at low levels in a variety of food products and in the environment. Scientific studies have shown that exposure to some PFAS in the environment may be linked to harmful health effects in humans and animals.

Regulation of Drinking Water

At the end of last year Wisconsin established a drinking water standard of 70 ppt (parts per trillion) for PFOA and PFOS, separately and combined. As part of the new standards, all drinking water utilities are required to sample for PFOA and PFOS. The Wisconsin Department of Natural Resources (DNR) also requires any utility that has test results exceeding the Wisconsin Department of Health Services' (DHS) recommended health-based standard of 20 ppt, separately or combined, to provide public notice of the results.

Under the federal Unregulated Contaminant Monitoring Rule (UCMR) 3, testing was conducted between 2013 and 2015 for six PFAS, including PFOS, PFOA, PFNA, PFHxS, PFHpA, and PFBS. Under the new UCMR5, published in 2021, all public water systems serving 3,300 people or more, including 196 community systems in Wisconsin, are required to monitor for 29 additional PFAS compounds.

In March of this year and pursuant to its general directive under the Safe Drinking Water Act, the Environmental Protection Agency (EPA) announced a proposed National Primary Drinking Water Regulation (NPDWR) for six PFAS, including

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PFOA, PFOS, PFNA, HFPO-DA (GenX Chemicals), PFHxS and PFBS. Under an NPDWR, the EPA may establish numerical standards for a chemical, called a Maximum Contaminant Level (MCL).

Under the proposed NPDWR, the EPA has proposed MCLs of 4 ppt each for PFOA and PFOS, and a hazard index approach for any mixture of PFNA, HFPO-DA (GenX), PFHxS and PFBS. A hazard index approach evaluates the concentrations of the four PFAS to determine if they collectively exceed a unitless hazard index (HI) of 1. Individually, the hazard index essentially establishes a limit similar to a MCL (called a Health-Based Water Concentration or HBWC) of 10 ppt for GenX, 10 ppt for PFNA, 9 ppt for PFHxS, and 2,000 ppt for PFBS. However, where more than one of these chemicals is detected, individual levels lower than the HWBCs can collectively exceed the hazard index.

Wisconsin Drinking Water Test Results

Testing of drinking water in Wisconsin for certain PFAS is well underway and the initial results are promising for the vast majority of Wisconsin drinking water utilities and their customers. Under Wisconsin's rules, initial monitoring of PFOA and PFOS for systems serving 10,000 or more has been completed, with monitoring for systems serving between 300 and 9,999 scheduled to wrap up in June. The total number of systems that will be sampled in Wisconsin is 1,944, which includes 610 municipal community systems.

As of May 23, 2023, 340 Wisconsin systems have reported investigative or initial compliance sample results for PFAS, including 301 municipal community systems.[1] Of these 340 systems, there have been no exceedances of the 70 ppt State MCL for PFOA and PFOS. There have been only a few potential exceedances of the State Hazard Index based on DHS advisory levels.

Initial results for the other four PFAS proposed to be regulated by the federal rule are also promising, with no detects of GenX chemicals, no exceedances of the individual HBWCs for PFBS or PFNA, and only 11 systems with samples above the HBWC for PFHxS.

Of the systems which have reported investigative and initial compliance sample results, only about 6.8% (23 out of 340) have results above one or more of the proposed *federal* MCLs or hazard index. This is currently better than the DNR's projections, based on results from Michigan, that 11.5% of Wisconsin's 1,944 systems would exceed the proposed federal MCLs.

Taken together, the expectation is that more than 90% of all of Wisconsin's public water systems will be able to meet the proposed federal MCLs without additional treatment.

— Jared W. Smith & Lawrie J. Kobza

[1] *Sample results are reported by the DNR through its Public Drinking Water Data Viewer, available at https://apps.dnr.wi.gov/dwsportalpub. These results inform the calculations made for the purposes of this article.*

Wisconsin Court of Appeals Discusses Governmental Immunity for Personal Injury Claims in Non-Binding Decision

As the weather grows warmer and people spend more time outside, it is helpful to review the general rules that shield municipalities from liability for personal injuries that occur on public property. A recent decision from the Wisconsin Court of Appeals discussed this issue, and although it is not binding precedent, it serves as a good reminder of how courts analyze this issue.

In *Harris v. Village of Ridgeland*, Brandon Harris sued the Village of Ridgeland (Village) and others for personal injuries he sustained at a tractor-pull. The Village owned the property where the event occurred, and the Village's Fair Association (Association) contracted with the Wisconsin Tractor Pullers Association, Inc. (Tractor Pullers) to put on the event. Tractor Pullers appointed an event manager who supervised "the conduct of the event and other officials necessary to conduct the event." In addition, Association board members walked the grounds to monitor the event. The Association was also responsible for maintaining the grounds, but no written policies described what its obligations were. Testimony established that a few times per year, the board and other volunteers helped mow the lawn and cut weeds. For seating, the event used wooden benches that were built into a hill on the south side of the event field; there were no stairs or guard rails.

The accident happened while Mr. Harris was descending the hill after dark; the area was still wet from rain that morning. Harris filed suit and alleged that the Village was negligent in failing to properly inspect, repair, maintain, and light the aisles. The Village won summary judgment at the circuit court level because the court ruled the Village was entitled to governmental immunity under Wis. Stat. § 893.80(4). This ruling was affirmed. (Harris also brought claims against other defendants, but the discussion in this article will be limited to the Village.)

Harris appealed and argued that the "known and compelling dangers" exception to immunity should apply. This exception applies in circumstances under which an injury will almost certainly occur if the government does not act. The justification underpinning this exception is that the government has an obligation to respond to serious known dangers.

Wisconsin courts have developed a three-step test to determine whether the known and compelling danger exception applies. First, courts assess whether

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Coordinating Private Lead Service Line Replacement Programs to Maximize Impact

Over the last several years, grant funding has been available from the Wisconsin Department of Natural Resources (DNR) for private lead service line (LSL) replacements. Wisconsin communities have been able to use this funding to assist their residents in replacing their private LSLs. Because of this DNR grant funding, municipalities have not needed to rely upon utility rates to fund private replacements. As a result, few municipal utilities have sought Public Service Commission of Wisconsin (PSC) approval to use utility rates to fund their private LSL financial assistance programs.

This changed in 2023. Beginning this year, funding for LSL replacements will be handled through the Safe Drinking Water Loan Program (SDWLP) with funds from the Bipartisan Infrastructure Law (BIL). Under the BIL, $48.3 million will be provided for state fiscal year 2023 and $81.2 million will be available for state fiscal year 2024. Funding is available for public and private LSL replacements, but the BIL requires that 49% of the funding be awarded as principal forgiveness to municipalities meeting Wisconsin's disadvantaged criteria. Wisconsin's disadvantaged criteria for LSL funding is set forth in Wisconsin's draft 2024 SDWLP Intended Use Plan available on the DNR's website.

Because of this 49% requirement, most municipalities will not be able to provide financial assistance for private LSL replacements without relying upon additional municipal or utility funds. If a municipality intends to look to its water utility to help fund a private LSL replacement financial assistance program, PSC approval of the utility program will be required.

Wisconsin statute § 196.372 provides that the PSC may not approve a utility's private LSL financial assistance program unless any grants that are provided are limited to no more than one-half of the owner's total cost to replace the private LSL. If a loan is available, it may not be forgiven. The utility program must also satisfy one of the following conditions:

- If financial assistance is provided as a percentage of the cost of replacing the customer-side water service line containing lead, that percentage is the same for each owner in the customer class; or
- If financial assistance is provided as a specific dollar amount, that dollar amount is the same for each owner in the customer class.

Municipalities are faced with the challenge of meeting conflicting policy requirements. The BIL seeks to direct funding to disadvantaged residents while Wis. Stat. § 196.372 seeks to ensure a utility's program does not discriminate among ratepayers. One strategy for addressing these conflicting policies is to adopt two different financial assistance programs – a municipal program designed to meet the considerations behind the BIL and a utility program designed to meet the requirements of § 196.372.

The municipal program could be established to distribute the principal forgiveness funds received by the municipality under the SDWLP. Eligibility to participate in the municipal program could be based on justifiable public interest considerations, such as income or children in the home. A municipal program would not need to meet the legal requirements of Wis. Stat. § 196.372 and would not need PSC approval. No utility funds, however, could be used by the municipal program.

The utility program could be established to provide financial assistance funded by SDWLP loans and/or utility revenues. The utility program would need to meet the legal requirements of Wis. Stat. § 196.372 and be approved by the PSC. The same eligibility requirements would have to apply to all customers in a customer class.

To ensure that the requirements of Wis. Stat. § 196.372 are not violated, participation in the programs should be resident/customer driven. A resident/customer could choose to participate in both programs or only one program. If a participant chooses to receive financial assistance though the municipal program, the participant should be able to choose to receive less financial assistance than is available under the utility program. A utility program is not discriminatory if the program is the same for all customers, but an individual customer chooses not to participate fully in an offered program.

— Lawrie J. Kobza

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a compelling danger existed. Second, courts ask whether a government actor knew about the danger. Third, courts determine whether the government actor did anything to reduce the danger. The court of appeals Harris did not establish facts to show that the exception should apply.

The court of appeals rejected his argument, stating that there were no other reports of falls or injuries and that no complaints about unsafe conditions in the aisles had been previously raised. Furthermore, the court stated that, even assuming that the Village knew a danger existed, there was no clear response that the Village should have taken to mitigate the danger of slipping on the wet ground.

— Storm B. Larson

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Municipal Law Newsletter

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