



Environment, Land Use & Natural Resources ADVISORY ■

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California Agencies Disclose Imminent Issuance of PFAS Investigative Orders

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On March 6, 2019, the California State Water Resources Control Board (SWRCB) hosted a [workshop](#) panel of representatives from various federal and state agencies and environmental advocacy organizations to present information to the SWRCB and the public regarding per- and polyfluoroalkyl substances (PFAS). PFAS consist of thousands of different fluorinated compounds that have attracted significant regulatory attention nationwide based on their widespread use and release in industrial and consumer products, their long-term persistence and mobility in the environment, their ability to accumulate and magnify within plant and animal tissue, and the potential that they may cause adverse health effects. We have previously discussed PFAS [contaminants](#), [risks](#), [liability](#), and [regulations](#).

The PFAS workshop resulted in a wide diversity of opinions and criticisms from both public and nonprofit organizations. In 2016, the Environmental Protection Agency (EPA) issued a lifetime health advisory for two chemicals in the PFAS family, PFOA and PFOS, of 70 parts per trillion (ppt) for drinking-water levels. California has adopted drinking-water notification levels of 14 ppt for PFOA and 13 ppt for PFOS. Notification levels are advisory recommendations to public water systems. There are currently no enforceable drinking water or hazardous cleanup standards for PFAS in California. In fact, the agency representatives reported to the SWRCB that there is currently no effort to move forward with an enforceable drinking water standard because the available scientific data on the toxicity of PFAS would not be able to support such a standard.

But the most notable bit of new information concerns the SWRCB's disclosure of the imminent issuance of new investigative orders against a wide variety of industry and agency entities. Darrin Polhemus (SWRCB, deputy director of the Division of Drinking Water) and Shahla Farahnak (SWRCB, assistant deputy director of the Division of Water Quality) presented a Phased Investigation Plan that will require testing of drinking water systems and site investigations at high-risk locations in California. The plan involved the issuance this month of hundreds of investigative orders against the following Phase 1 targets:

- Airports with training or fire response sites, and operators of wells within a specified radius of these airports.
- Landfills that accept municipal solid waste, and operators of wells within a specified radius of these landfills.
- Potential sources for water systems that reported exceedances of the EPA lifetime health advisory during a prior round of water quality testing that was conducted from 2013 to 2015.

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Subsequent phases of investigative orders will be issued to other small public water systems, manufacturing sites, and other potential sources of PFAS contamination.

This issuance of investigative orders will cause a significant increase in testing within the state, and recipients of these orders will have to quickly get up to speed on complicated collection and testing methodologies. Because the regulatory limits are in the minuscule parts-per-trillion range, it is quite difficult to find certified laboratories that are actually capable of conducting these tests. In fact, the Orange County Water District just recently [announced](#) that its lab was certified for detection of PFOA and PFOS. It is the first public agency in California to do so. Also, because PFAS are widely found in clothing, food packaging, office supplies, and laboratory equipment, rigorous testing protocols are needed to prevent cross-contamination when taking samples. Although there are no enforceable levels currently in place in California, state law mandates the reporting of exceedances of the notification levels for those water systems that test for and detect exceedances of PFOA or PFOS. Recipients must be particularly careful to avoid creating “false positives,” where PFAS are incorrectly reported as exceeding the notification levels.

Alston & Bird’s Environment, Land Use & Natural Resources team is on the frontlines of PFAS regulation and litigation. For years, our attorneys have closely analyzed the increasing number and variety of legal claims in courts across the country alleging PFAS contamination. We provide proactive guidance for companies looking to protect their businesses from this risk.

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