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MassDEP imposes strict standards for PFAS in industrial surface water discharges - by Ricciardi and Durning

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In the past month, the Massachusetts Department of Environmental Protection (MassDEP), has issued surface water discharge permits to private industries/companies that imposed monitoring regulations for Polyfluorinated Alkylated Substances (PFAS) without regulatory standards for such discharges. Absent a formal public rule-making process, MassDEP included new PFAS monitoring obligations in recent draft surface water discharge permits issued to Shire Human Genetic Therapies and Genzyme Corporation. This action should alert all industrial actors and permittees in the Commonwealth that they may be subject to these stringent PFAS requirements. Though the draft permits acknowledge that “Massachusetts Surface Water Quality Standards do not include numeric criteria for PFAS,” the Department cites 314 CMR 4.05(5)(e) for the “narrative” criteria that “[a]ll surface waters shall be free from pollutants in concentrations or combinations that are toxic to humans, aquatic life or wildlife.” Relying on this provision essentially requires that PFAS not be present in any industrial discharges. Typically, these types of permits include requirements on Best Available Technology for contaminant removal and reference lowest analytical detection limits. However, this language was not present in these draft permits and the permittee must determine the course of action for demonstrating the discharge is free from PFAS.

To be sure, PFAS in surface water discharges is a serious issue that should be addressed by MassDEP. Recently, there have been several articles highlighting discharges to surface water

bodies and their potential to contain PFAS. Last fall, there was heightened scrutiny regarding industrial disposal of PFAS containing liquid waste at a publicly owned treatment plant that discharges to the Merrimack River. An article appeared in the Boston Globe detailing the issue and potential risks. Since the Merrimack River provides source drinking water for several downstream communities, there was heightened scrutiny of the facility and their acceptance of this waste. Within days of the Boston Globe article, the treatment facility publicized that they no longer would be accepting the waste. Several similar stories have played out in Michigan, New Jersey and other states as they grapple with PFAS discharges.

While MassDEP's use of regulatory authority to address the prevalence of PFAS in the environment is certainly understandable, using the Office of Research Standards' Guidelines rather than a full rule-making process as a means to impose stringent effluent standards on NPDES permittees places huge burdens on individual industrial facilities without the benefit of public notice of a changed regulatory landscape. While Massachusetts Administrative Procedures Act, M.G.L. c. 30A, does not impose a formal requirement that MassDEP perform a full cost-benefit analysis before promulgating regulation, M.G.L. c. 30A, § 5 directs agencies to state the fiscal impact of the proposed regulation on the public and private sector for the first and second year as well as the first five years. Rolling out new regulatory initiatives in permit renewals side-steps this requirement to disclose the direct expense of imposing stringent PFAS monitoring criteria on industrial facilities. It also limits a permittee's time and ability to plan for capital allocations that might be necessary to address or abate otherwise permissible discharges.

Given the prevalence of PFAS, which is now nearly ubiquitous in stormwater and human waste, and the broad utilization of PFAS pre-cursors in a great range of industrial applications, the likelihood that any specific discharge may exhibit some concentration of PFAS is extremely high. That the discharge levels can be mitigated or eliminated either through changed industrial processes or at the discharge point is unknown. Advancing regulatory programs in a public and orderly fashion, not only allows industry to understand what risks and costs they may face, it also spurs innovation in remedial technologies. In contrast, MassDEP's approach may cast permittees into stringent monitoring requirements and eventually noncompliance for exceedances that do not have proven cost-effective treatment alternatives at this scale. While the regulatory limits for surface water discharges have not been established, the only allowance the draft permits provides for terminating the monitoring requirement is four (4) consecutive quarterly samples being measured at the nano-gram per liter sensitivity "reported as non-detected for all six PFAS compounds." That is an infinitesimally low bar that few facilities will be able to meet. The one immediate reprieve is the lack of a public EPA multi-lab validated method for testing wastewater.

During the Trump administration, environmental concerns have been given short-shrift at the federal level and inter-governmental cooperation is at a low ebb. Earlier this summer, Massachusetts submitted a public comment letter to EPA on the proposed 2020 Multi-Sector General Permit requesting that EPA add a requirement for annual PFAS monitoring for 13 industrial sectors regulated by the MSGP, which will likely be rebuffed as the two regulatory agencies struggle to find common ground on the administration of CWA NPDES permits. While MassDEP is probably correct to hedge its bet that EPA is not going to salute its proposal to include PFAS monitoring in the

MSGP, the Department should not attempt to achieve the same aim by surprising permittees seeking routine renewals.

If MassDEP has science-based regulations it wants to promulgate regarding PFAS in surface water bodies, it should harness its strong internal expertise and publish its regulatory framework with proper technical support and with proper administrative procedure. The regulation will likely be upheld under the Department's discretion, but the rulemaking process will promote better dialogue among MassDEP and the regulated community while helping to foster strategies for achieving compliance rather than fear of enforcement.

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