With its decision to list per- and polyfluoroalkyl substances (PFAS) as hazardous substances under Washington’s cleanup law, the Model Toxics Control Act (MTCA), the Department of Ecology ushers in a new era of uncertainty, and potential liability, at cleanup sites across the state. Ecology’s decision followed on the heels of the Washington Department of Health’s August 2021 proposed rule to set State Action Levels for five PFAS compounds in drinking water. The announcement, which was short on details, raises a host of compliance and liability questions:

- Will detection of any PFAS compounds at a facility be sufficient to trigger the reporting requirements under the state cleanup law?
• Are all PFAS compounds now subject to MTCA?
• What cleanup levels will apply to PFAS compounds?
• Do parties need to address PFAS compounds in cleanup actions before Ecology has developed cleanup levels?
• Will Ecology “re-open” sites with potential PFAS issues if they have received no further action determinations?

Stakeholders should track both the Department of Health’s PFAS rulemaking and Ecology’s efforts to develop guidance for PFAS cleanup levels and, where appropriate, look for opportunities to engage in both processes.

Ecology’s PFAS Announcement

On October 21, 2021, Ecology announced that PFAS compounds qualify as a Dangerous Waste and therefore are hazardous substances under MTCA. MTCA specifies that hazardous substances include “hazardous substances as defined” by the Washington Hazardous Waste Management Act and the related Dangerous Waste Regulations.[1]

The Dangerous Waste Regulations define a hazardous substance as “any liquid, solid, gas, or sludge, including any material, substance, product, commodity, or waste, regardless of quantity, that exhibits any of the physical, chemical, or biological properties described in WAC 173-303-090 or 173-303-100.”[2] The regulations for state-only wastes include “persistent constituents” that “are chemical compounds which are either halogenated organic compounds or polycyclic aromatic hydrocarbons.”[3] Halogenated organic compounds (HOCs) are further defined as “any organic compounds which, as part of their composition, include one or more atoms of fluorine, chlorine, bromine, or iodine which is/are bonded directly to a carbon atom.”[4] Ecology concluded that because “PFAS compounds all have multiple carbon-fluorine bonds, they meet the definition of an HOC” and “are hazardous substances under [MTCA].”[5]

Ecology has promised to issue guidance on cleanup levels for the five PFAS compounds that will be subject to the State Action Levels for drinking water. [6] Ecology indicated that it will apply PFAS cleanup levels derived from the drinking water regulations on a “site-by-site basis,” which is “a different process” than for other hazardous substances.

Although Ecology has not yet identified cleanup levels for PFAS compounds, it stated that releases of PFAS compounds must be reported within 90 days of discovery.

Implications of a PFAS Listing Under MTCA

The implications of Ecology’s announcement are significant. Its cursory announcement leaves open critical questions. Salient issues include:

• **Scope of PFAS regulation is unclear.** Ecology currently intends to develop cleanup levels for only the five PFAS compounds with proposed State Action
Levels. But Ecology’s announcement indicates generally that “PFAS compounds are hazardous substances.” There are thousands of PFAS compounds, many of which have not been studied extensively.[7] The announcement does not clarify whether Ecology intends for MTCA to address all these compounds.

**Reporting requirements are uncertain.** Because Ecology has not confirmed whether all PFAS compounds are “hazardous substances,” it is unclear whether reporting is expected for discovery of all PFAS compounds or only a subset. In addition, releases at sites with potential PFAS issues may already have been reported to Ecology. Ecology has not clarified whether facilities that are already on Ecology’s Confirmed and Suspected Contaminated Sites List need to report again if PFAS compounds are discovered after an initial report.[8]

**Cleanup levels.** Until Ecology issues guidance, parties may not have a clear path forward for addressing the PFAS compounds at cleanup sites. A Draft PFAS Chemical Action Plan (CAP) developed by Ecology and the Department of Health recommends setting cleanup levels for PFOA and PFOS (and additional PFAS as appropriate) in soil and groundwater. The CAP explains that using “existing authority under MTCA, Ecology will use the [State Board of Health’s] drinking water standards or other advisories adopted in rule to develop these cleanup levels.” If Ecology adheres to the approach in the CAP, its guidance will address soil and groundwater cleanup levels for the five PFAS compounds with proposed State Action Levels.[9] Cleanup levels to protect drinking water supplies are often set with reference to applicable laws, such as maximum contaminant levels, which do not currently exist for PFAS in Washington or at the federal level.[10] And, even when Ecology issues guidance, Ecology’s intent to apply cleanup levels on a “site-by-site basis” may still result in some uncertainty for parties pursuing cleanups.

**Technical feasibility.** There are few validated and published analytic methods currently available for evaluating PFAS in the environment.[11] The lack of methods may slow regulatory progress on setting cleanup standards, because regulators and responsible parties must be able to detect and sample PFAS. Parties performing cleanups also need to have technically viable and cost-effective cleanup options.[12] EPA is devoting resources to support PFAS remediation efforts, but studies are ongoing.[13]

**Possible site reopeners and periodic reviews.** Ecology’s announcement did not address whether it had plans to “re-open” sites with potential PFAS contamination if those sites had already been remediated based on the presence of other chemicals or whether Ecology would examine potential PFAS contamination during its periodic review process for sites with institutional controls.[14]

**Expanded liability for potentially liable parties.** By confirming that PFAS compounds are subject to MTCA, in addition to agency enforcement actions, Ecology has opened the door for contribution litigation under the state law for remedial action costs to address PFAS.

The significance of Ecology’s decision cannot be understated. Cleanups in Washington will be working through related issues for decades. The announcement
sets the stage for increases in the number of cleanup sites, in cleanup costs, and in cleanup liabilities under state law.

[6] The five PFAS compounds are perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), perfluorohexane sulfonic acid (PFHxS), perfluorononanoic acid (PFNA), and perfluorobutane sulfonic acid (PFBS).
[8] The state cleanup regulations include several exemptions from the reporting requirement, including releases previously reported to Ecology. WAC-173-340-300(3).
[9] State Action Levels (SALs) may be set for contaminants in public water systems that “occur ... at levels of public health concern” and have “a possible adverse effect” on people exposed to those contaminants. Proposed WAC 246-290-315 (August 3, 2021). The Department of Health has stated that the SALs “define a level in daily drinking water expected to be without appreciable health effects even in sensitive populations.” Wash. DOH, DOH Approach to Developing PFAS State Action Levels, at 2 (August 2021). Exceeding a SAL would not necessarily require a water system to treat PFAS. Instead, it would require follow-up actions including monitoring and public notification. According to the Department of Health, a SAL is comparable to a health advisory level or a maximum contaminant level goal. Id. However, in the proposed rulemaking, the department is planning to replace the term “State Advisory Level” with the term “State Action Level,” which also includes a new definition explicitly indicating that State Action Levels are intended to “protect public health.” Proposed WAC 246-290-010(238).
[10] See, e.g., WAC 173-340-720(3)(b)(ii), (4)(b)(i), (5)(b)(i); WAC 173-340-900 (Table 702-1); see also Ecology, Notes on Applicable State and Federal Laws (ARARs) – Potable Groundwater (2019). However, the state cleanup regulation also provides for setting cleanup levels even in the absence of an applicable state or federal law.
[12] RCW 70A.305.030(10)(b) (requiring that Ecology “give preference to permanent
solutions to the maximum extent practicable”) (emphasis added).


[14] See, e.g., WAC 173-340-420 (allowing periodic reviews to consider “[n]ew scientific information for ... hazardous substances ... present at the site” and “[n]ew applicable state and federal laws for hazardous substances present at the site”).

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