

# **ENVIRONMENTAL LAW UPDATE**

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**CSEAO Winter 2024 Conference  
December 6, 2024, 11:45 am -12:45 pm  
Hilton Tower, Columbus, Ohio**

## **I. PFAS DEVELOPMENTS. 30 min**

### **A. Impact of Changes in Congress and USEPA Administration on PFAS-related Statutes and Rules.**

- 1. Multiple bills introduced in 2023-2024 in Congress to exempt local governments from CERCLA liability for the release into a waterbody or onto the ground of PFAS-containing water, stormwater, wastewater or biosolids never made it out of committee.**
  - a. Incoming Senate Env. and Public Works Committee Chair Shelly Moore (R. WV) stated at a congressional hearing during Thanksgiving week that one of the Committee's priorities is passage of a reintroduced bill early next year. With Republican control of Congress, passage is much more likely this time.**

**Action Item: CCAO, CSEAO and OML should reach out to the Ohio Congressional Delegation to urge passage of this bill. A coalition of Ohio's largest cities is finalizing a letter to go to the Delegation between now and end of 2024. If interested, CSEAO can ask to be added as a signatory to the letter.**

- 2. Impact on the CERCLA listing of PFAS.**
  - a. Uncertain, but Sen. Moore stated that the listing is important for the recovery of treatment/remediation costs due to PFAS contamination of water or soil.**
  - b. Many industry groups (including U.S. Chamber) filed a legal challenge to the PFAS listing. It is pending in the DC Circuit Court. Because of President-Elect Trump's pledge to roll back rules adverse to business, a new USEPA Administrator and new DOJ may decide not to continue to defend the listing. That is what happened in 2016 after Trump's first election, when the Agency and DOJ agreed to rescind the WOTUS rule that was being challenged.**
- 3. Impact on PFAS MCL rule.**
  - a. Uncertain. Sen. Moore stated that the Committee is looking at unspecified ways to "reduce restrictions" caused by the stringent new MCLs, including possible reconsideration of the 4 ppt standard, extending the 3-year interim and 5-year final compliance deadlines further, and providing more capital funding.**
  - b. Industry trade groups, AWWA and NACWA have a pending legal challenge to the new MCLs.**
- 4. Impact on PFAS standards for biosolids.**
  - a. Almost certain to be DOA. USEPA did not issue its planned final information and testing request to the nation's 400 largest POTWs this summer, and its ongoing risk assessment of PFAS-containing biosolids supposed to be completed by end of this year has been delayed indefinitely. Because of President-Elect**

**Trump's pledge, the odds are overwhelming that we won't see draft amended 503 rules for PFAS-containing biosolids anytime soon, perhaps not at all during the next 4 years.**

**II. IMPACT OF CHANGES IN CONGRESS AND USEPA ADMINISTRATION ON OTHER RULES IMPACTING LOCAL GOVERNMENTS. 5 min**

- A. Under the Congressional Review Act, USEPA's Proposed and Final Rules Issued within the last 60 days of a "Congressional Session" can be Rescinded with a Simple Resolution Passed by both Houses of Congress.**
  - 1. During Trump's first term, 16 proposed or final USEPA rules were rescinded by simple resolution.**
  - 2. Only rule impacting local governments appearing on a recent list of rules that may be rescinded is the amended Pb/Cu rule that shortened deadlines to replace all remaining Pb lines.**
- B. Revised WOTUS rule. New USEPA Administrator and new DOJ will Rescind the Current Rule almost Immediately, and Replace it with one that is much more closely Aligned with the USSCt's 2023 Ruling in the *Sackett* case.**
- C. The Proposed 2023 Listing of PFAS as Hazardous Constituents under RCRA is almost certain to be Withdrawn or never Finalized. This Impacts Local Pretreatment Programs that would have been Required to take certain actions for Dischargers of PFAS to Local Sewers.**

**III. LITIGATION. 20 min**

- A. All initial and supplemental claims have been submitted in the 3M (\$10.5-\$12.5 billion) and DuPont/Chemours**

**(\$1.2 billion) PFAS settlements. The Claims Administrator continues to process all claims from PWSs. Claimants receive only a notice indicating that the claims are deemed complete. There is no timeline to complete the processing of all claims or to being distributing payments to claimants, but the attorneys appointed by the MDL Court believe that the first sets of payments will be issued late winter or early spring 2025.**

- B. Final approvals will be issued in December for TYCO (\$750 million) and BASF (\$450 million) settlements. *This will trigger a new claim filing deadline for all Phase I claimants that submitted claims under the 3M and DuPont settlements. Whether entirely new claim forms will have to be submitted is currently unknown. These two settlements will use the same claim forms, so perhaps a simple letter submittal will be all that is needed.***
- C. If you were not a Phase I claimant because you had not detected PFAS in your water by the applicable deadline, but you have since detected it, or will so before January 1, 2026, you will be a Phase II claimant that can submit a claim for recovery from the 3M/DuPont settlements on or before January 1, 2026.**
- D. *City of San Francisco v. USEPA USSCt.* case. Nearly all NPDES permits contain a statement in the boilerplate that the discharger shall not cause or contribute to a nuisance condition or violation of applicable WQSs in the receiving stream. The City appealed that language, asserting that it is vague and unenforceable, and puts POTWs at risk of enforcement for stream conditions outside their control. Oral argument occurred in mid-November. Decision likely sometime late winter 2025. Based on the conservative majority, odds are that the language will be declared unlawful.**

- E. Toledo, Lucas County and ELPC filed federal lawsuit in Toledo to challenge USEPA's approval of the Maumee River Watershed Nutrient TMDL.**
- 1. Three primary claims asserted:**
    - a. CAFOs in the watershed are point source dischargers of nutrients and OEPA should have established binding nutrient reductions for them, not nonbinding recommendations.**
    - b. OEPA's margin of safety (MOS) (3%-4%) should have been increased to 40%.**
    - c. In addition to establishing binding allocations of TP reductions for NPDES permit holders (applicable in a new general permit issued to the watershed's largest discharges of TP), OEPA should also have established binding allocations for dissolved reactive phosphorus (DRP).**
  - 2. Outcome of the appeal has significant potential implications for all POTWs in Ohio, not just those discharging into a river or stream in the Maumee watershed.**
    - a. TMDL allocations and a MOS are pieces of a pie, thus a tenfold increase in MOS requires a proportional decrease in all allocations, including those that have to be met by POTWs and other point source dischargers.**
    - b. TP is much easier to treat/remove than DRP!! In addition, DRP levels in receiving streams are widely fluctuating and impacted by many causes unrelated to a discharge of DRP by a POTW.**
    - c. Having a binding allocation of TP for CAFOs would be better than a nonbinding allocation, in terms of helping the Maumee River, because OEPA determined that NPSs of TP are**

responsible for 94% of the total loading in the watershed. But the dispute is over whether CAFOs are point sources.

- d. If the Court decides that the MOS must be 40% and that OEPA must issue DRP allocations in addition to TP allocations, that precedent will almost certainly impact every future TMDL issued for other rivers and streams in Ohio to address nutrient conditions.
3. OEPA, trade groups representing CAFOs and farmers, and a coalition of permit holders (Allen County, Lima, Dayton, Delphos, VanWert, Defiance, Findlay, and PCS Nitrogen, so far) have moved to intervene on the side of USEPA to support the approval of the Maumee TMDL.
4. FBT represents the coalition of permit holders.
5. Decision on Motions to Intervene likely by sometime early in January.

**Action Item:** Other CSEAO members would be welcomed as additional members of the coalition. Costs are shared and capped at ranges from \$5K to \$20K per member roughly proportional to size of POTW and TP loadings. In addition, if coalition is granted intervention, briefs will be prepared/filed sometime late winter or early spring to support the TMDL approval. Like what happened in the Fairfield County TMDL appeal to the Ohio Sup. Ct. in 2015, it would be very helpful if CSEAO, CCAO and OML would file a short amicus (me too) brief in support of the position of the coalition and OEPA.

#### **IV. OEPA DEVELOPMENTS.**

**15 min**

- A. OEPA's November 6, 2024, ESO, on top of its May 28, 2024, ESO for potential new nutrient/phosphorus "impairment assessment rule" and new "permit

implementation rule” for all of Ohio’s large and small rivers and streams.

1. Agency is intent on moving forward with these two new rules, despite previous 2013 and 2018 ESOs issued for the same thing, which never moved forward with formal rulemaking!!!
2. *Not a new WQS for TP!* Instead, a new “impairment assessment rule” to evaluate whether discharge of TP (and N, but unlikely to be an issue) is a material cause of threatened or nonattainment of OEPA’s existing biological numeric criteria for fish and bugs, applicable to all of Ohio’s rivers and streams.
3. If a river or stream is determined to be impaired, a new NPDES permit implementation rule will decide whether numeric limits, pollution prevention/BMPs, adaptive management, and/or trading with NPSs will be required.
4. Today, November 6, is deadline for ESO comments on a potential permit implementation rule. FBT is filing extensive comments on behalf of Dayton and a coalition of GMR/LMR POTWs. Once filed later today, a copy will be emailed to CSEAO for distribution.

**Action Item:** This is a significant rulemaking that will impact all of Ohio’s POTWs. OEPA will likely issue a draft preliminary rule for comment sometime in mid to late winter 2015. We need more than just GMR/LMR POTWs to be involved in the next round of commenting. Perhaps CSEAO and OML will agree to become a commenting party?

- B. More stringent TDS limits continue to be issued and continue to present issues for POTWs.

1. Increased use of RO systems for drinking water continues to create issues with the concentrated backwash, and what to do with it.
2. Increased use of alum/ferric for TP removal adds more TDS to the effluent. Failure to monitor chemical addition adds to the problem.
3. Industry is also using more RO processes to ensure pollutant-free water for product/production processes.
4. POTWs that discharge into smaller streams hit with stringent concentration limits barely above the 1500 mg/l WQS.
5. Overly stringent limits imposed to protect aquatic life from a worst-case drought condition predicted to occur one 7-day period every ten years. More permit holders are requesting and receiving tiered flow-based limits tied to level of flow in the receiving stream. Dilution of effluent with well water also continues to be a frequent solution.

**V. ANY QUESTIONS OR OTHER ISSUES YOU WISH TO DISCUSS? 5-10 min**

**RC 307.73 (contracts between the County and a developer for construction of extensions of water/sewer lines, and impact on later parties that want to connect to the new line)**

**Any operator certification/staffing issues?**

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**Thanks Everyone and Merry Christmas!**

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