WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Committee Substitute

for

House Bill 3189

By Delegates Riley, Hansen, Westfall, Clark, Horst,

Hanshaw (Mr. Speaker), Hornby, Steele, Storch,

Hardy and Hillenbrand

[Originating in the Committee on the Judiciary,

February 20, 2023.]

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §22-11C-1, §22-11C-2, §22-11C-3, and §22-11C-4, all relating to identifying the sources of perfluoroalkyl and polyfluoroalkyl substances discharged into source waters used for public drinking water; providing legislative findings; providing state and federal regulation history, status, and future expectations; providing definitions; requiring the Department of Environmental Protection to begin identifying sources of PFAS in water sources and address sources of PFAS for certain public water systems with action plans; requiring facilities using PFAS chemicals to monitor and report their use; setting forth other duties of those facilities; providing information disclosure provisions; requiring the Secretary of the Department of Environmental Protection to propose changes to statutes and rules and to update numeric public water supply human health criteria; requiring the Department of Environmental Protection to implement permit modifications to require monitoring; and requiring legislative rule-making.

Be it enacted by the Legislature of West Virginia:

ARTICLE 11C. PFAS PROTECTION ACT.

§22-11C-1. Legislative Findings.

(a) *Legislative findings.* — (1) The Legislature recognizes the prevalence of perfluoroalkyl and polyfluoroalkyl substances, which the United States Environmental Protection Agency (USEPA) has classified as contaminants. These chemicals are used in thousands of applications throughout the industrial, food, automotive, aerospace, electronic, oil and gas, green energy, and textile industries. They are used in some fire-fighting foams, food packaging, cleaning products, semiconductors, computers, cellular phones, electric vehicle batteries, automobiles, pharmaceuticals, agricultural pesticides, oil and gas development, defense equipment, hydrogen production, and various other household items. Many are very stable, some accumulate in the environment, and many are highly water soluble, easily transferring through soil to groundwater.

(2) During the 2020 regular session, the West Virginia Legislature passed Senate Concurrent Resolution 46 (SCR 46), which requested that the Department of Environmental Protection (DEP) and the Department of Health and Human Resources cooperatively propose and initiate a public source-water supply study plan to sample PFAS substances for all community water systems in West Virginia, including schools and daycares that operate treatment systems regulated by the West Virginia Department of Health and Human Resources.

(3) In compliance with SCR 46, the DEP and the Department of Health and Human Resources contracted with the United States Geological Survey to conduct the PFAS study. The USGS study was completed in 2022, with results for 279 sampled sites.

(4) According to the USGS study, PFOA and/or PFOS was detected above the then-current USEPA drinking water health advisory in 13% (37) of the sampled raw water sources between 2019 and 2021.

(5) In June 2022, the USEPA issued updated interim or final drinking water health advisories for four PFAS: perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), perfluorobutane sulfonic acid and its potassium salt (PFBS), and hexafluoropropylene oxide dimer acid and its ammonium salt (HFPO-DA).

(6) According to the data collected for the USGS study, PFOA and/or PFOS was detected above the June 2022 drinking water health advisories in 49% (137) of the sampled raw water sources (involving 130 public water systems) between 2019 and 2021.

(7) In August 2022, the USEPA proposed to designate PFOA and PFOS as hazardous substances because, when released into the environment, these chemicals present substantial danger to public health.

(8) On December 5, 2022, the USEPA issued guidance to state permitting authorities entitled "Addressing PFAS Discharges in NPDES Permits and Through the Pretreatment Program and Monitoring Programs."

(9) The USEPA has committed to establishing drinking water standards under the Safe Drinking Water Act for PFOA and PFOS in 2023.

(10) The USEPA has committed to publishing recommended human health water quality criteria under the Clean Water Act for PFOA and PFOS in 2024.

(11) While some manufacturers have already voluntarily done so, it is imperative to identify the remaining sources of PFAS detected in the raw water sources for public water systems so that these sources of pollution can be properly addressed, minimizing the impacts to public drinking water systems. Identifying and addressing PFAS sources will also benefit people who rely on impacted private drinking water wells.

(12) It is in the public interest for West Virginia to reduce toxic chemicals in drinking water supplies to protect the health of West Virginians and strengthen the state's economy.

§22-11C-2. Definitions.

Unless the context in which used clearly requires a different meaning, as used in this article:

(1) "Perfluoroalkyl and polyfluoroalkyl substances" or "PFAS" means non-polymeric perfluoroalkyl and polyfluoroalkyl substances that contain at least two fully fluorinated carbon atoms, excluding gases and volatile liquids. PFAS includes, among other substances, PFOA and PFOS.

(2) "Secretary" means the Secretary of the Department of Environmental Protection.

(3) "USGS study" means United States Geological Survey Scientific Investigations Report 2022-5067, entitled "Occurrence of Per- and Polyfluoroalkyl Substances and Inorganic Analytes in Groundwater and Surface Water Used as Sources for Public Water Supplies in West Virginia," published in 2022.

(4) "Publicly Owned Treatment Works" means any treatment works owned by the state or any political subdivision thereof, any municipality or any other public entity, for the treatment of pollutants as well as any such treatment works that were subsequently conveyed to a private entity

which delivers wastewater treatment services under the regulation of the Public Service Commission of West Virginia.

§22-11C-3. Identification of PFAS sources where PFAS has been detected in raw water sources for public drinking water systems.

(a) To identify and address sources of PFAS in raw water sources of public drinking water systems, DEP shall:

(1) Write a PFAS action plan to identify and address sources of PFAS by July 1, 2024, for each of the 37 raw water sources for which the USGS study has measured PFOA, PFOS, PFBS, or HFPO-DA above the practical quantitation limit and above USEPA's applicable drinking water human health advisory;

(2) For each raw water source for which the USGS study has measured PFOA, PFOS, PFBS, or HFPO-DA above the method detection level, above USEPA's applicable drinking water human health advisory, and below the practical quantitation limit, DEP shall initiate a study to sample the finished water of the associated public water system, after treatment, by December 31, 2023;

(3) For each public water system for which the measured PFOA, PFOS, PFBS, or HFPO-DA in the finished water is above the method detection level and above USEPA's applicable drinking water human health advisory, whether or not the measured value is above or below the practical quantitation limit, DEP shall write a PFAS action plan to identify and address sources of PFAS for the public water system's raw water source or sources. The first 50 such plans shall be completed by December 31, 2025, and the remaining plans shall be completed by December 31, 2026;

(4) For each public water system for which a PFAS action plan is required under this section, DEP shall provide information to the public water system regarding PFAS raw water and finished water sampling results, DEP's schedule for developing any required PFAS action plan, a summary of results from any completed PFAS action plan, information about how to obtain any

completed PFAS action plan, and contact information for an appropriate person or office at DEP to which questions can be directed. Public water systems are subject to the Fifth Unregulated Contaminate Monitoring Rule (UCMR), 40 C.F.R. part 141, which are also subject to the Consumer Confidence Report (CCR) and the Public Notification (PN) rules under the Safe Drinking Water Act, 42 U.S.C. 300f *et seq*., as enacted, amended, and as may be subsequently amended, to which the public water systems are required to notify their customers of available UCMR results and report UCMR results in their annual Consumer Confidence Report (CCR) when unregulated contaminants, including PFAS, are detected;

(5) Recommend any necessary changes to West Virginia statutes or administrative rules to address the sources of PFAS chemicals; and

(6) Report annually on its activities to the Joint Legislative Oversight Commission on State Water Resources.

(7) In developing PFAS action plans, consult with other applicable units of state government, organizations representing West Virginia public drinking water systems, West Virginia public drinking water systems, and other relevant entities with knowledge related to identifying and addressing PFAS sources.

(b) The PFAS action plans, to the extent that data are available, shall identify the source or sources of PFAS in the raw water source, and regulatory and non-regulatory options for addressing each identified source of PFAS and minimizing the impacts on public water systems.

§22-11C-4. Self-reporting of PFAS manufacture and use, monitoring of PFAS discharges, and establishment of PFAS water quality criteria.

(a) No later than December 31, 2023, all facilities that discharge to a surface water under a West Virginia/National Pollutant Discharge Elimination System permit or that discharge to a Publicly Owned Treatment Works under an industrial pretreatment program, including but not limited to chemical and manufacturing facilities, which manufacture or knowingly use or have used

one or more of the following PFAS chemicals in their production process since January 1, 2017, must report the use of these chemicals to the DEP:

(1) Any PFAS chemical found in any public water system's raw water source in the USGS study; and

(2) Any additional PFAS chemicals that the secretary determines are harmful to human health and that he or she reasonably believes to be present in West Virginia waters at levels that can be detected using USEPA-approved methods; *Provided,* That if USEPA-approved methods are not yet available, USEPA-recommended methods may be used. If two or more methods have been approved by USEPA, monitoring shall use the method with the lowest detection level.

(b) This reporting shall include the chemical name, the Chemical Abstracts Service (CAS) number, the amount used in each year from 2017 through 2022, and any additional information required by the secretary to ascertain sources of PFAS chemicals in West Virginia, and shall be provided in a manner and form prescribed by the secretary.

(c) For every facility that reports the use of one or more PFAS chemicals in accordance with subsection (a) of this section, and that discharges to a Publicly Owned Treatment Works, the secretary shall forward the information provided by the facility to the Publicly Owned Treatment Works within 30 days of receipt. This reporting requirement does not change the duty or discharge permits of a Publicly Owned Treatment Works.

(d) For every facility that reports the use of one or more PFAS chemicals in accordance with subsection (a) of this section, at least quarterly monitoring of the self-reported PFAS chemicals shall be required within six months of notification by the facility; *Provided,* That the secretary may alter the monitoring frequency if monitoring results are below the method detection level for four consecutive samples, or if monitoring results show consistent results and the source or sources of the PFAS detected in the samples have been conclusively determined. This monitoring shall be implemented as follows:

(1) If the facility discharges to a surface water under a West Virginia/National Pollutant Discharge Elimination System permit, the secretary shall modify the facility's West Virginia/National Pollutant Discharge Elimination System permit to require monitoring.

(2) If the facility discharges to a Publicly Owned Treatment Works under an industrial pretreatment program and the permit holder for the Publicly Owned Treatment Works has pretreatment authority, the permit holder for the Publicly Owned Treatment Works shall modify the pretreatment permit held by the facility that reports the use of one or more PFAS chemicals to require monitoring.

(3) If the facility discharges to a Publicly Owned Treatment Works under an industrial pretreatment program and the department has pretreatment authority, the secretary shall modify the pretreatment permit held by the facility that reports the use of one or more PFAS chemicals to require monitoring.

(e) Monitoring shall use laboratory and sampling methods approved by the USEPA; *Provided,* That if USEPA-approved methods are not yet available, USEPA-recommended methods may be used. If two or more approved methods are available, monitoring shall use the method with the lowest detection level.

(f) For every facility that reports the use of one or more PFAS chemicals in accordance with subsection (a) of this section, the secretary shall modify the facility's West Virginia/National Pollutant Discharge Elimination System permit as directed by the federal Clean Water Act and State Water Pollution Control Act, after consultation with relevant USEPA guidance.

(g) After the USEPA establishes final water quality criteria under the Clean Water Act for any PFAS, DEP shall propose adopting appropriate criteria by rule as part of the next regular legislative rulemaking cycle in accordance with §29A-3-1 *et seq* of this code.

NOTE: The purpose of this bill is to create the PFAS Protection Act. The bill: requires the DEP to identify and address PFAS sources impacting public water systems; requires facilities that have recently used PFAS chemicals to report their use to DEP, requires permits to be updated to require monitoring of PFAS chemicals for facilities that report their

use; and requires DEP to propose rules to adopt water quality criteria for certain PFAS chemicals after they are finalized by the USEPA.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.