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PFAS: Not Your Typical Emerging Contaminants — Part 1

By **Jeffrey Dintzer and Nathaniel Johnson** (May 30, 2018, 12:31 PM EDT)

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This article is part one of a two-part series addressing the growing risk posed by perfluoroalkyl or polyfluoroalkyl substances, or PFAS, regulation and litigation throughout the country. Part one analyzes the possible legal consequences for businesses that manufacture, sell or consume PFAS products, or did so in the past. Part two will consider actions those businesses can take now to head off potentially significant legal liabilities.

In March, the U.S. Environmental Protection Agency announced that it was convening a National Leadership Summit on May 22 and 23, 2018, meant to "take action" on the emerging contaminants known as PFAS. By announcing the summit, the EPA seemed to be signaling its clear commitment to continued PFAS regulation, especially two common kinds of PFAS: perfluorooctanoic acid, or PFOA, and perfluorooctane sulfonate, or PFOS. But now that the summit has come and gone, that signal is anything but clear.

On the one hand, the EPA announced[1] at the summit that it would begin taking steps to designate PFOA and PFOS as "hazardous substances" under federal law and evaluate the need for a "maximum contaminant level" for PFOA and PFOS. The EPA also declared it would continue development of groundwater cleanup recommendations for PFOA and PFOS and develop toxicity values for certain next-generation PFAS substitutes. These moves supplement ongoing research[2] by the EPA into the toxicity information for up to 75 different PFAS compounds.

On the other hand, one week before the summit, reports surfaced that the EPA sought to block publication of a different federal health study that allegedly showed PFOA and PFOS endanger human health at levels lower than the EPA had previously determined. Ostensibly, according to emails among White House officials, the study was blocked to avoid a "potential public relations nightmare." The irony, of course, is that the "potential" has been realized now that the existence of the study is public knowledge. Facing intense scrutiny on the eve of the summit, the EPA temporarily barred media and the public from attending, before reversing course shortly thereafter. Even then, the EPA only permitted certain media to attend the morning session on May 22, which did not include the Associated Press, CNN, E&E News and others. The EPA did relent and allow those media members to participate in the summit that afternoon, but barred them again from the May 23 sessions.

Given growing public scrutiny — seemingly amplified by its own missteps — the EPA will likely face increasing pressure to take serious action on PFAS soon. State regulators, in the meantime, will not wait for consistency from the EPA. They are already imposing significant regulations on PFAS in a myriad of ways. Additionally, there are an increasing variety of state and federal legal claims alleging PFAS contamination in courts across the country. No matter how the EPA handles the fallout from its National Leadership Summit, the time has come to start taking actions now to protect your business from serious risk.

PFAS are ubiquitous in modern life. While their most famous form is probably Teflon, PFAS come from a plethora of sources and have been used in a wide variety of ways, ranging from firefighting at airports and military bases to carpet manufacture to wastewater treatment. PFAS are also highly prevalent in food packaging, especially fast food.

In addition to their breadth of uses, PFAS are remarkably persistent organic chemical compounds; even those PFAS that do break down only do so into more persistent PFAS chains. Some form of PFAS is present in almost all biological tissue in the U.S., including humans. Because PFAS are not chemically treatable or biodegradable — and are present in so many different products — any plan to remediate PFAS contamination will invariably pose an enormous (and costly) challenge.

Complicating matters, our scientific knowledge of most PFAS chains is relatively limited. PFAS are an extremely diverse family of hundreds of thousands of synthetic organic compounds. The best toxicology data covers PFOA and PFOS, two of the most common kinds of PFAS. Based on that data, in May 2016, the EPA set "health advisory" levels of PFOA and PFOS at 70 parts per trillion in drinking water.[3] Even though health advisory levels are not enforceable on their own — and are ostensibly limited to drinking water concentrations — that determination has set the stage for state regulators to ride the coattails of EPA science in unpredictable ways. And given the recent reports that the EPA is hiding its PFAS science, state regulators will probably become even more aggressive in the near future.

In November 2017, for example, the New Jersey Department of Environmental Protection set maximum contaminant levels for PFOA and PFOS at 14 parts per trillion[4], five times more stringent than the EPA health advisory. The state of Washington took a different approach in late February 2018 when it added[5] PFAS to its list of chemicals prohibited from intentional use in food packaging. That ban goes into effect in 2022 at the latest, and even earlier if state regulators can find safer alternatives. One month later, Washington also banned[6] the use of PFAS in firefighting foam. Washington regulators are also aggressively testing public water systems[7] to determine whether action is necessary to address PFAS contamination.

Predictably, some of the most aggressive state-level regulation of PFAS is occurring in California. In November 2017, the California Office of Environmental Health Hazard Assessment, or OEHHA, added PFOA and PFOS[8] to "the list of chemicals known to the state to cause reproductive toxicity (developmental endpoint) for purposes of Proposition 65." This means that, starting November 2018, companies doing business in California with 10 or more employees will be required to provide a "clear and reasonable" warning before knowingly and intentionally exposing anyone to PFOA or PFOS.[9] And starting July 2019, California businesses will be prohibited from discharging PFOA or PFOS into drinking water sources.[10]

Civil penalties can run as high as $2,500 per violation per day, with private enforcement mechanisms. As demonstrated by California's recent experience with coffee retailers and Proposition 65,[11] violations can existentially threaten business operations statewide. Adding up $2,500 per violation per day can quickly amount to millions (and even billions) of dollars of potential legal liability. You can be sure the healthy Proposition 65 plaintiffs bar in California will soon be analyzing the chemistry of common consumer

products to determine whether PFAS are present, if they have not started doing so already.

Despite the substantial risk its listing decision poses to California businesses, the OEHHA has not even established maximum allowable dose levels for PFOA or PFOS. The OEHHA added PFOA and PFOS to its Proposition 65 list by invoking the "authoritative bodies" mechanism and relying on EPA science. But unlike the EPA, which limited its health advisory levels to 70 parts per trillion for PFOA and PFOS to drinking water, the OEHHA has stated that its own "listing is not specific to any route of exposure" or even to established maximum allowable dose levels. Adding to the confusion, it is not clear whether the OEHHA will impose legacy warning requirements for products that contained PFOA and PFOS before they were listed — such as carpeting installed decades ago. Lacking any regulatory guidance, the OEHHA declared[12] it "remains the responsibility" of regulated parties "to determine if a warning is necessary or a discharge is prohibited."

As in other states, the recent listing action by the OEHHA complements a variety of new regulatory programs in California focused on PFAS. The Department of Toxic Substances Control has instituted an environmental investigation and cleanup program — directed principally to federal military sites — as well as initiatives to promote consumer products without PFAS and robust environmental chemistry. Similarly, regional water boards throughout the state are conducting water-well sampling and inviting voluntary PFAS monitoring. California regulatory bodies have demonstrated concern with the entire breadth of potential PFAS exposure, and businesses must start taking notice.

Alongside the increasing regulatory scrutiny paid PFAS throughout the country, state and federal courts are being forced to address difficult factual and legal issues involving this emerging contaminant. Claims have been brought for violations of the federal Resource Conservation and Recovery Act, or RCRA, which allows any person to commence a civil action for imminent or substantial endangerment caused by disposal of hazardous or solid waste.[13] Even though certain forms of PFAS are emitted into the air, it can become a hazardous or solid waste subject to the RCRA once the chemicals fall to the ground. The RCRA allows courts to impose injunctive relief, in addition to attorneys' fees and expert cost recovery. The specter of civil penalties follows.

Furthermore, PFAS contamination also could implicate liability under the federal Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA. While PFAS are not currently listed as a "hazardous substance" under CERCLA, that could soon change. And the EPA already treats PFAS standards as "applicable or relevant and appropriate requirements"[14] for deciding whether and how to remediate PFAS contamination. Given the ubiquitous nature of PFAS, the emerging contaminant will pose trouble for courts deciding whether the injury caused by PFAS contamination can be traced to any particular source. But that same ubiquity promises unique risk for businesses under CERCLA: Because CERCLA can require joint and several liability among all potentially responsible parties, litigants will be hard pressed to establish that they did not contribute to any PFAS contamination. Lacking such negative proof, the expense for protracted PFAS remediation could be recovered from any minimally responsible party able to pay, no matter their actual contribution to the contamination.[15]

In addition to statutory claims, PFAS contamination has been challenged under the traditional toxic tort rubric. Plaintiffs alleging contamination have argued that businesses manufacturing or disposing PFAS knew or should have known that their PFAS-related activities were potentially hazardous to human health and the environment.[16] According to these plaintiffs, businesses should be strictly liable for the harm caused by PFAS contamination because of the abnormally dangerous quality of the chemicals. Or, at least, these plaintiffs allege the manufacture and distribution of PFAS was conducted negligently, and liability should flow accordingly. Courts have also considered whether PFAS contamination constitutes a public nuisance or trespass upon private water wells. Given the difficult evidentiary issues at play with PFAS, the variety of

toxic tort claims available in PFAS litigation will magnify the difficulties for businesses named in toxic tort actions.

Fortunately, there are steps your business can take now to prepare for the growing wave of PFAS regulation and litigation. Check back tomorrow for an analysis of how to head off potential PFAS liability for your business.

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[1] www.epa.gov/newsreleases/administrator-pruitt-kicks-national-leadership-summit-pfas

[2] www.epa.gov/sciencematters/epa-toxicologists-focus-innovative-research-pfas-compounds

[3] United States Environmental Protection Agency, Drinking Water Health Advisories for PFOA and PFOS, 81 Fed. Reg. 101, 33250 (May 25, 2016).

[4] www.nj.gov/dep/newsrel/2017/17_0104.htm

[5] apps2.leg.wa.gov/billsummary?BillNumber=2658&Year=2017&BillNumber=2658&Year=2017

[6] apps2.leg.wa.gov/billsummary?BillNumber=6413&Year=2017&BillNumber=6413&Year=2017

[7] www.doh.wa.gov/CommunityandEnvironment/Contaminants/PFAS

[8] oehha.ca.gov/media/downloads/crnr/listingnotice111017.pdf

[9] California Health & Safety Code, § 25249.6.

[10] California Health & Safety Code, § 25249.5.

[11] www.law360.com/california/articles/1041858/starbucks-fails-to-sway-judge-in-calif-cancer-warning-case?about=california

[12] oehha.ca.gov/media/downloads/proposition-65/crnr/comments/responsecomments110917docx.pdf

[13] 42 U.S.C. § 6972(a)(1)(B).

[14] www.epa.gov/pfas/pfas-laws-and-regulations

[15] City of Lake Elmo v. 3M Co., No. CV 16-2557 ADM/SER, 2017 WL 630740 (D. Minn. Feb. 15, 2017).

[16] Baker v. Saint-Gobain Performance Plastics Corp., No. 116CV0917LEKDJS, 2017 WL 486939, at *11 (N.D.N.Y. Feb. 6, 2017).