PFASs: STATE OF THE LAW AND TRENDS IN PRACTICE

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Overview

1. State-of-the-law governing PFASs in the environment
2. Significance of the EPA’s PFASs Summit Action Items
3. Overview of the trends we are seeing in practice
PFASs are classified as emerging contaminants at both the federal and state levels.

Chemicals or materials that:
- are characterized by a perceived, potential, or real threat to human health or the environment, and a lack of published health standards
- present real or potential unacceptable human health or environmental risks, and either: a) do not have peer-reviewed human health standards; or, b) the standards/regulations are evolving due to new science, detection capabilities, or pathways.

Theme – a lack of peer-reviewed human health standards
PFASs: State-of-the-Law

- Emerging Contaminants
- Human Health Advisory levels

- In 2016 EPA published HALs of 70 ppt for PFOA and PFOS in drinking water
- Health advisory are non-enforceable and non-regulatory and provide technical information to agencies on health effects, analytical methodologies, and treatment technologies
- Many states have adopted the EPA HALs and a small set of states have published more stringent advisory or guidance levels for PFOA and PFOS in drinking water
- Theme – Non-actionable, non-regulatory, w/ primary focus on longer-chain PFASs (6+C) w/ exception of PFBS (4C)
PFASs: State-of-the-Law

- Emerging Contaminants
- Human Health Advisory levels
- Maximum Contaminant Levels

- EPA has not set MCLs
- MCLs are standards that are set by the EPA (or state agency) for drinking water quality
- An MCL is the legal threshold limit on the amount of a substance that is allowed in public water systems under the Safe Drinking Water Act (or state equivalent)
- As for the states, NJDEP Commissioner has accepted MCLs for PFOA and PFOS, but formal rulemaking still needs to be completed
- Theme – no automatic trigger mechanism requiring public water systems to both test and treat PFASs in drinking water
PFASs: State-of-the-Law

- Emerging Contaminants
- Human Health Advisory levels
- Maximum Contaminant Levels
- Cleanup Levels

- There are no federal numeric standards for cleaning up of PFASs in soil and water
- Some states are actively setting their own binding cleanup levels for PFOA and PFOS (VT, NH, MI, AK, TX, RI, NH)
- Lack of standards leaves significant gaps for parties to fill when negotiating cleanup goals with the EPA or state agencies – increasing the time and costs, w/ unknown outcomes
- Theme – no, or very limited, established cleanup goals to apply when investigating and cleaning-up PFASs
Emerging Contaminants
Human Health Advisory levels
Maximum Contaminant Levels
Cleanup Levels
Hazardous Substance Lists

PFASs not presently defined as “hazardous” under:
- CERCLA
- TSCA
- RCRA
- EPCRA

States like Vermont, New Hampshire, Michigan, and Alaska are leading the way in state regulation of PFAS chemicals as hazardous substances

Theme – no, or very limited, trigger mechanisms to require cleanup or contribution at both the federal and state level
PFASs: State-of-the-Law

In the End ~ Assessing Health Risks with Un- or Ill-defined Variables

1. Health advisory levels indicate PFASs have the potential to cause harm to humans and/or ecological systems.

2. The numerical relationship between exposure to PFASs and effects on humans remains unclear and debated in scientific community.

3. Studies are ongoing into the magnitude, frequency, and duration of human exposure to the PFAS.
PFASs: EPA Action Items

1. Initiate steps to evaluate the need for a maximum contaminant level (MCL) for PFOA and PFOS.

2. Begin the necessary steps to propose designating PFOA and PFOS as “hazardous substances,” including potentially CERCLA Section 102.

3. Develop groundwater cleanup recommendations for PFOA and PFOS.

4. Take action to develop toxicity values for GenX and PFBS.

PFASs: EPA Action Items

- **MCLs for PFOA and PFOS**
  - EPA to “evaluate the need” to embark on rigorous process
  - To set MCL, EPA must first determine how much PFOA or PFOS may be present with no adverse effect ~ MCLG.
  - The MCL is then set as close as possible to the MCLG
  - Consideration is given to the difficulty in measuring, lack of available treatment technologies, and cost of treatment compared to the public health benefits
  - If established after public comment, PWS across the country will be required to test wells, notify the public, and install costly mitigation measures (or take wells offline).
  - Significance - settled science at federal level, adoption by states, and more litigation
PFASs: EPA Action Items

- MCLs for PFOA and PFOS
- Designate PFOA and PFOS as “hazardous substances”

- EPA taking steps to “propose” designation
- CERCLA 102(a) authorizes the EPA to designate a chemical or material as a hazardous substances if it may present substantial danger to the public health or welfare or the environment . . .
- EPA shall promulgate regulations establishing the quantity of hazardous substance the release of which shall be reported
- If designated, EPA may issue orders and seek contribution under CERCLA
- Significance - settled science at federal level, adoption by states, reporting requirements, and more litigation
PFASs: EPA Action Items

- MCLs for PFOA and PFOS
- Designate PFOA and PFOS as “hazardous substances”
- Develop gw cleanup recommendations for PFOA and PFOS

- EPA and states look to “applicable or relevant and appropriate requirements” (ARARs) to assure a remedy is protective of human health and the environment
- Risk-based goals are calculated and used to determine cleanup levels when chemical-specific ARARs are not available
- Significance – clarity in science at federal level, adoption by states, increase in enforcement actions, and more litigation
PFASs: EPA Action Items

- MCLs for PFOA and PFOS
- Designate PFOA and PFOS as “hazardous substances”
- Develop gw cleanup recommendations for PFOA and PFOS
- Develop toxicity values for GenX/PFBS

- GenX is a replacement for PFOA; PFBS is a replacement for PFOS; both have fewer carbons
- TSCA SNURs requires testing to ensure they do not “present an unreasonable risk to health or the environment”
- Examples of required testing includes bioaccumulation, fate and transport, reproductive testing, carcinogenicity testing in animals, chronic testing in aquatic organisms, and animal reproductive studies
- EPA has reviewed the studies and is preparing its position
- Significance – publicize EPA’s position on the health risks (toxicity) of short-chain PFASs
PFASs: Practice Trends

1. Litigation
2. Enforcement & Cleanup
3. Risk Assessment & Mitigation
PFASs: Practice Trends

- **Litigation**

1. Actions against primary PFOA and PFOS manufacturers (e.g. MN, WV, OH, NC)
   - Private party class actions (e.g. private wells)
   - Large, publicized settlements

2. Actions against product manufacturers (e.g. NY, GA, MI)
   - Private party actions and class actions
   - Carpet (GA, AL, NY) and shoe (MI) manufacturing
   - Wide net – pulling in PFAS manufacturers, landfills, etc.

3. Actions against AFFF manufacturers (e.g. NY, MA, PA)
   - Private party class actions
   - States attorney generals
   - Municipal water suppliers
Litigation Cont…

4. Actions against PRPs for AFFF release(s) (e.g. NY, PA, CO, Conn.)
   – Private parties, class actions, and municipal water suppliers
   – DoD sites – Peterson (CO), Stewart (NY), Willow Grove (PA), and Francis S. Gabreski (Conn) . . . more expected
   – DoD has identified ~400 sites with known or suspected releases associated with “firefighting training areas, hangars, fire suppression systems, and aircraft crash sites.”

5. Actions against GenX manufacturer (NC)
   – Private well owners
   – Rely on State health advisory levels

Trend – more litigation of toxic risks ahead of regulations with continued focus on manufacturers, AFFF sites, and alleged damage to PWSs and private wells
PFASs: Practice Trends

- Litigation
- Enforcement & Cleanup

EPA increasing enforcement
- Type of sites – high levels of PFOA or PFOS in gw
- EPA’s focus on PFAS may effect 5-year reviews
- PFOA/PFOs may be Reopeners – *e.g.* gw remedy may not be sufficient

DoD sites are leading the way and may cause ripple effect
- Voluntary investigation and cleanup w/ public data
- Using EPA HALs and CERCLA

Some states are increasing enforcement (*e.g.* NY, NJ, MN) and many are increasing monitoring at PWS

Trend – expect more enforcement
PFASs: Practice Trends

- **Litigation**
- **Enforcement & Cleanup**
- **Risk Assessment & Mitigation**

**Existing and Legacy operations**
- Know the law in your jurisdiction
- Talk to the relevant regulators re enforcement
- Understand the science and/or hire an expert
- Investigate your client’s use of PFAS
- Research replacement products

**Mergers & Acquisitions**
- Add PFAS to due diligence and ask the right questions
- Know the law in your jurisdiction
- Consider environmental insurance

Trend – increase in risk assessments concerning legacy and current PFAS use, and deals involving target’s with historical operations connected to PFAS usage
Questions

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