

Emerging Trends in Unregulated Contaminant Litigation: PFCs

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Introduction

Under the 1996 Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f et seq., the United States Environmental Protection Agency (EPA) is required to generate a new list of no more than 30 unregulated contaminants to be monitored by public water systems (all systems serving more than 10,000 people and only 800 systems serving 10,000 or fewer). Each iteration of this list is known as the Unregulated Contaminant Monitoring Rule (UCMR). UCMR 3 was published on May 2, 2012 and required monitoring of 30 contaminants between 2013 and 2015 [1]. The list includes six Perfluorinated Compounds (PFC), including perfluorooctanoic acid, or PFOA, which has recently become a highly litigated compound. It is likely that as more science regarding the health effects of PFOA and similar PFC exposure is published, the frequency of such litigation will increase. Currently, the EPA's minimum reporting requirements for PFOA and PFOS, considered to be indicator chemicals for the presence of other PFCs, are 0.04 µg/L and 0.02 µg/L respectively, and the combined lifetime exposure limit is 70 ppt [1],[2]. Information that has emerged from recent litigation suggests that this level may not be protective enough. As such, states are beginning to take their own close looks at PFCs and the effects they may be having on their drinking water supplies. Importantly, these suggested exposure levels are *not* binding regulations, but rather technical guidelines for state and local governments to use in determining how best to handle these persistent chemicals [3].

Expansion of State Monitoring Rules

In light of UCMR 3 and independent state testing following claims of water contamination, states are moving toward regulation of PFCs. A few states in particular have begun the process of adopting stricter standards than those suggested as an appropriate exposure level by the EPA. Many of them have faced water contamination crises largely revolving emissions from manufacturing plants. Vermont and New York have responded with tighter health advisory levels and legislation targeting polluters.

Vermont, where a Saint-Gobain fabric manufacturing plant is suspected of being the cause of significant PFOA contamination in municipal and private wells in North Bennington, decided to adopt a more stringent health advisory level of 20 ppt, much lower than the EPA's UCMR monitoring levels and the lifetime health advisory [4]. The state notes that this low exposure level accounts for the entire population, including children's exposure, over the long term. Vermont is also in the process of signing into law a bill that extends liability for contamination of potable water supplies to emitters of PFOA. Those that release PFOA into the air, groundwater, surface water, or soil will be liable for the costs of extending municipal water lines to the affected areas [6]. The legislation passed the Vermont Senate in February 2017, and was passed in the House May 4, 2017 [7].

New York has also taken steps toward regulation of PFOA, with Governor Cuomo having issued emergency regulations to classify PFOA as a hazardous substance in 2016 after severe PFOA contamination was found in Hoosick Falls, another location of a Saint-Gobain facility [8]. As of March 3, 2017, PFOA and PFOS are considered permanent hazardous substances under New York law [9].

New Jersey is currently proposing the lowest guidance level yet of 14 ppt, which is significantly lower than its current 40 ppt guidance level and the EPA's 70 ppt. The New Jersey Department of Environmental Protection issued a report in 2014 finding that PFOA and other PFCs were detected in two-thirds of the water systems sampled in 2009 and 2010 [10]. Given this information as well as the multiple exposure routes, New Jersey's Drinking Water Quality Institute, a scientific advisory council for the DEP, recommended the significantly lower guidance health advisory in 2016 [11].

California, like these states, is also taking action to curb PFC contamination in its water supply. On September 16, 2016, the California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) published a Notice of Intent to List PFOA and PFOS as known to the state to cause reproductive toxicity under California's Safe Drinking Water and Toxic Enforcement Act of 1986 [12]. This list of chemicals is known as the Proposition 65 List.

Inaction by some state regulators should not be misinterpreted to mean the current federal guideline is sufficiently protective. For example in Pennsylvania, which currently has high incidence of contamination, state regulators have stated that the EPA guideline is sufficiently protective despite the prevalence of contamination in its water supply. As such, it will be up to the states to independently monitor and regulate PFC contamination.

Recent Litigation

A few large lawsuits against prominent chemical companies have recently made national headlines as communities struggle to deal with the health effects of PFCs. These suits are unique because though dealing with water contamination, they do not use the Clean Water Act. Because PFCs, as unregulated chemicals, were essentially legally no different than water, the attorneys brought medical-monitoring claims and traditional torts such as, as well negligence and trespass.

The first personal injury class action, *In re: E.I. du Pont de Nemours and Company C-8 Personal Injury Litigation*, MDL No. 2433, was recently settled for \$671 million, and dealt with decades' worth of PFOA contamination around DuPont's Washington Works plant in West Virginia that spread to southeastern Ohio. In 2000, attorney Robert Bilott obtained copious amounts of documentation from DuPont that he pieced together to reveal that DuPont had known since as early as the 1960s that PFOA was likely dangerous to human health. Following his extensive investigation into the company's use and improper disposal of PFOA, Bilott filed a class action on behalf of all those that had consumed water laced with the chemical for medical monitoring [13]. Medical monitoring claims typically involve a class of consumers that are at higher risk for future health problems following exposure to a toxin and require the company to pay the costs associated with tests and examinations needed to detect a disease before symptoms occur.

A settlement agreement was approved on February 28, 2005, which led to the extensive Multidistrict Litigation (MDL) that was recently settled. The settlement agreement required that a scientific panel be assembled to conduct research into diseases that may be linked to PFOA exposure [14]. Those found to have a "probable link" to PFOA exposure preserved personal injury claims against DuPont. Six diseases were found to have such a probable link, high cholesterol, kidney cancer, testicular cancer, thyroid disease, pregnancy-induced hypertension/preeclampsia, and ulcerative colitis—and those diagnosed brought successful claims for negligence, negligent infliction of emotional distress, and punitive damages.

In 2005 the EPA also entered into a Consent Agreement with DuPont for its violation of the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 et seq., and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., in which DuPont paid \$16.5 million [14]. TSCA § 2607(e) provides that “any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the Administrator.” DuPont conducted extensive research on PFOA exposure, including blood tests in 1981 that showed transplacental movement of the chemical, but did not share this information with the EPA when it became available or following a 1997 request for known toxicological information about PFOA and as such violated the TSCA and its RCRA permit [15].

Saint-Gobain is in the midst of legal battles in both New York and Vermont following PFOA contamination from its Bennington, Vermont fabric plant and its Hoosick Falls, NY plastics plant. In Vermont, the plant contaminated the local groundwater aquifer, soil, and private drinking wells, which led to a class action bringing negligence, nuisance, trespass, battery, and strict liability claims and demanding the company pay for remedial measures to prevent further and eliminate current contamination in the water supplies [16]. In New York, the residents of Hoosick Falls brought a class action against Saint-Gobain, as well as Honeywell International, for medical monitoring and diminution in property values due to the stigma created by the contamination [17]. Both suits have been contentious, with Vermont facing legal challenges from the company for the low drinking water guideline and Hoosick Falls facing a stalled settlement following public outcry.

Recently, the U.S. Military, following decades of using PFC laced firefighting foam, has come under fire from communities around bases that have found large swaths of PFC contamination in their water supplies. A notable group of such cases comes out of Pennsylvania concerning contamination around the Willow Grove Naval Base. Plaintiffs in these actions have brought claims against the U.S. Department of the Navy, as well as four manufacturers of the foam and PFOA, including the original creator of the chemical, 3M. *In Giovanni v. United States Department of the Navy*, 2:16-cv-04873 (2016), the Giovanni family has raised claims for medical monitoring for themselves, as well as health assessments for themselves and other individuals exposed to the chemical. In the suits against the manufacturers, the most prominent being *Bates et al. v. The 3M Company et al.*, 2:16-cv-04961-PBT (E.D. Pa. 2016), plaintiffs brought claims for negligence, nuisance, medical monitoring, as well as two products liability claims, failure to warn and design defect. Given the number of military bases throughout the country, and even the world, lawsuits similar to these will only increase in number.

Future Litigation

Following the UCMR 3 testing of public water supplies completed between 2013 and 2015, systems across the country were found to have reportable levels of PFC contamination. Significantly, the reporting levels required by the EPA are much higher than those adopted by some states and as such, there is a high probability that many more systems are contaminated at levels lower than EPA’s advisory; levels that are likely deleterious to human health. With such broad exposure, litigation will soon begin to crop up around the country. As Robert Bilott has pointed out, people will begin to question why something wasn’t done sooner given the decades’ worth of knowledge manufacturers possessed [18]. PFCs are found in everything from scotch guard, Teflon, and importantly, firefighting foam used on U.S. Military bases around the country. With so many exposure routes, PFCs have the potential to reach the litigation levels seen in Polychlorinated biphenyl (PCB) and Methyl Tertiary Butyl Ether (MTBE)

contamination lawsuits. Many of the same plaintiffs will likely come forward, including the states, private and public water service providers, and local communities. Given their bioaccumulative and persistent nature, PFCs and their contamination problems are not going to dissipate any time soon.

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