

EMERGING CONTAMINANTS

Managing Legal Risks Amid Regulatory Pathwork

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Overview

1. What are emerging contaminants?
2. Federal regulatory action
3. State regulatory action
4. Pennsylvania, New Jersey, and Delaware action
5. Recent litigation
6. Due diligence considerations
7. Successor liability

Most Discussed Emerging Contaminant

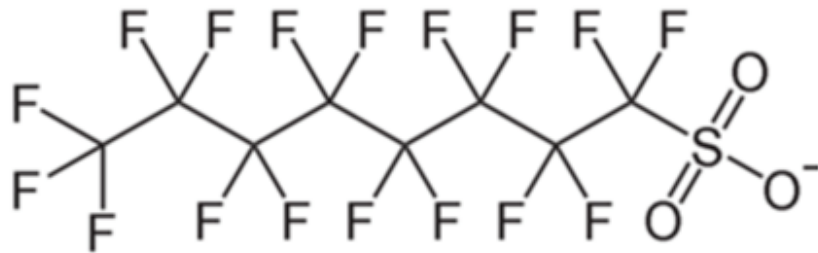
PFAS

Per- and polyfluoroalkyl substances



PFOS

perfluorooctane sulfonate



Source: EPA, *Drinking Water Health Advisory for PFOS*
(May 2016)

PFOA

perfluorooctanoic acid



Source: EPA, *Drinking Water Health Advisory for PFOA*
(May 2016)

PFAS are Ubiquitous

- PFAS are resistant to heat, water, and oil.
- Only a few compounds subject to regulatory interest, including PFOA and PFOS.
- With few exceptions, PFOA and PFOS are no longer manufactured in the United States.
- PFOA and PFOS are still detected in the environment.
- Other types of PFAS may be found in the workplace or in consumer products.

No Enforceable Federal Standard

- EPA lifetime health advisory of 70 ppt for PFOA and PFOS
- 70 ppt = 1 shot glass in the Rose Bowl filled with water



EPA Action

- February 2019: EPA announced PFAS Action Plan
 - May establish federal drinking water standard for PFOS and PFOA
 - May list PFOA and PFOS as hazardous substances under Superfund
 - Ongoing monitoring and research
 - Continued enforcement



FDA Action

- Long-chain PFAS not permitted to be applied in the United States on food contact paper.
- Other shorter-chain PFAS and PFAS-alternatives may be used subject to Food Contact Notification program.
- Studies of long-chain PFAS in fast-food packaging identified potential safety concerns, but extent of exposure and toxicity are poorly characterized.

State Actions

States With Numerical PFAS Limits

Washington

- Banned in firefighting foam and food packaging
- Proposed drinking water standard

Vermont

- 20 PPT (PFAS)
- Drinking water health advisory for 5 PFAS

Massachusetts

- 70 PPT (PFAS)
- State guidance for concentrations of 5 PFAS in drinking water

New Jersey

- Set PFNA standard at 13 ppt
- Weighing proposed standards for:
PFOA at 14 ppt
PFOS at 13 ppt

California

- 14 PPT (PFOA)
- 13 PPT (PFOS)
- Drinking water notification guidance

Colorado

- PFOA/PFAS listed as hazardous waste
- 70 PPT (Combined PFOA/PFOS)
- Groundwater quality standard for El Paso County only

Minnesota

- 35 PPT (PFOA)
- 27 PPT (PFOS)
- Health-based guidance values

Michigan

- 70 PPT (Combined PFOA/PFOS)
- State standard for concentrations in drinking water



Pennsylvania

- No state drinking water standard.
- Governor Wolf formed state action team.
- Beginning process for potentially setting state health limits for PFOA and PFOS.
- Enforcement under state Hazardous Sites Cleanup Act using EPA Health Advisory Levels for PFOS and PFOA.

New Jersey

- Proposed amendments to NJ Safe Drinking Water Act to set maximum contaminant level of 13 ppt for PFOS and 14 ppt for PFOA.
- Set MCL of 13 ppt for PFNA last year
- First state to regulate PFNA
- Issued Directive to companies to fund removal of PFAS contamination
- NRD lawsuits also filed by the State.

Delaware

- Adopted EPA Health Advisory Level for PFOA/PFOS reporting limit under state Hazardous Substance Cleanup Act.
- EPA Health Advisory used for screening values to determine if risk assessments is needed.
- Depending on prior site use, DNREC may conduct sampling.
- DNREC investigating source of groundwater contamination in New Castle.

Litigation

- *Rhodes v. E.I. DuPont de Nemours & Co.*, 636 F.3d 88 (4th Cir. 2011)
- *Giovanni et al. v. U.S. Department of the Navy*, 906 F.3d 94 (3d Cir. 2018)
- *West Morgan-East Lawrence Water & Sewer Auth. v. 3M Co.*, No. 17-12381 (11th Cir. 2018)
- *Benoit v. Saint-Gobain Performance Plastics Corp.*, No. 17-3941 (2d Cir., appeal pending)

Transactional Concerns

- Due Diligence
 - Phase I ESA Shortcomings
 - Bona Fide Prospective Purchaser Implications
- Successor Liability
 - PFAS risks related to products
 - Enforcement and Toxic Tort Liability
 - Evaluating regulations in the subject state
 - Mitigating risks in the agreement

Questions and Answers



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