ENVIRONMENTAL

EMERGING CONTAMINANTS: LITIGATION FILLS THE REGULATORY GAP

The issue of emerging contaminants in the environment, particularly in drinking water, has made headlines over the past year, but there are still no binding federal regulatory standards for most of these chemicals. However, that has not deterred states and private entities from suing to stop the release of these contaminants and to seek compensation. It appears that this trend will continue—and expand—in the coming year.

"Emerging contaminants" are chemicals that have been detected in water supplies but whose impact on human health and the environment is not yet fully understood because the science is still evolving. Perhaps the best known of these are the per- and polyfluoroalkyl substances (PFAS), a category that includes chemicals such as PFOA and PFOS, among others. PFAS have been used for decades and are found in products ranging from non-stick cookware and stain-resistant fabric and carpet to shoes, paint, and firefighting foam, and they have been found at sites and in drinking water systems across the U.S. In 2016, the EPA established health advisories for PFOA and PFOS in drinking water—but not enforceable regulatory standards.

Nevertheless, courts are seeing a growing number of PFAS-related suits "based on traditional tort theories such as negligence, nuisance, and failure to warn," says David Chung, a partner in Crowell & Moring's Environment & Natural Resources Group. For example, property owners, states, and environmental groups have sued manufacturers for releasing PFAS into the environment. Plaintiffs often follow the playbook established in MTBE gasoline-additive litigation by bringing a variety of claims in numerous venues. In 2017, two chemical companies, facing multidistrict litigation involving thousands of personal injury cases related to discharging PFAS into the Ohio River, reached a $671 million settlement with plaintiffs. And in early 2018, a large manufacturer agreed to an $850 million settlement in a PFAS suit that had been brought by the state of Minnesota.

THE NEXT WAVE

As significant as such cases are, "those tort suits seem like just the tip of the iceberg," says Chung. With a lack of enforceable federal PFAS standards, he explains, "a number of states are filling the gap and moving under their own laws to enact binding standards that they can then enforce via litigation." California, Colorado, Massachusetts, Michigan, Minnesota, New Jersey, New Hampshire, and Vermont, among others, have established or have proposed establishing standards or guidelines for PFAS in water—and some of these standards are much stricter than the federal advisory limits of 70 parts PFOA and PFOS per trillion. Other states are exploring similar measures. And after July 2019, California businesses will be prohibited from discharging *any* amount of PFOS or PFOA into drinking water.

For states worried about safety and cleanup costs, such regulation is prompting action. In a recent case, the state of Michigan finalized residential drinking water cleanup criteria for two common types of PFAS chemicals under its Natural Resources and Environmental Protection Act. The same day, the Michigan Department of Environmental Quality filed suit under that law against a footwear manufacturer to ensure that the company continued its investigation and cleanup of PFAS-contaminated water. A few months later, Michigan Governor Rick Snyder asked the state's attorney general to immediately file PFAS suits against a major PFAS manufacturer and "other responsible parties." With the growing patchwork of PFAS regulations across states, says Chung, "it's likely that the situation we're seeing play out in Michigan will be replicated elsewhere in the near future—and the number of state statutory PFAS suits could explode."

Chung also expects to see more emerging-contaminant suits based on federal statutes—primarily the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act. "RCRA suits have been brought by state governments and environmental groups, and more could come," he says. "The plaintiffs in those suits are saying that industrial wastes that contain these emerging contaminants are 'solid waste' under RCRA, and that the defendant industrial facilities have caused or contributed to a condition that presents or may present an imminent and substantial endangerment to health or the environment."

Meanwhile, an emerging-contaminant suit filed under the Clean Water Act's citizen suit provision against a chemical company in the Eastern District of North Carolina in August 2018 by the Southern Environmental Law Center on behalf of Cape Fear River Watch, an environmental group, argues that PFAS emissions into the air, soil, and groundwater from a company plant in North Carolina constitute unauthorized discharges from a point source under the Clean Water Act. Among other things, the suit alleges that air emissions from stacks either land directly into jurisdictional surface water, or fall onto land and then infiltrate the

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groundwater before migrating over to jurisdictional waters. "This lawsuit builds upon the voluminous body of litigation involving indirect discharges, e.g., via groundwater or air dispersion, to jurisdictional waters, and begins a new chapter of Clean Water Act litigation over emerging contaminants," says Chung.

HOW FAR DOES GROUNDWATER GO?

At the same time, the question of whether the Clean Water Act imposes liability for pollution from point sources that reach jurisdictional waters via groundwater migration, whether it involves emerging contaminants like PFAS or more conventional pollutants, is rapidly evolving. "Does groundwater migration cut off liability? When, if ever, are discharges via groundwater covered by the Clean Water Act? What about air emissions from stacks that eventually reach jurisdictional water via wind dispersion? Those are all questions being litigated in courts nationwide," says Chung. Even septic systems have become the target of groundwater migration suits. "All of these suits, and the conflicting judicial decisions, draw further attention to the need for some kind of clarity from the Supreme Court and/or the EPA about the reach of the Clean Water Act.

"There are new suits filed seemingly every month on the indirect discharge/groundwater migration theory and the Clean Water Act," Chung continues. "And we now have squarely conflicting decisions from courts of appeals. There are now two cases where parties are seeking Supreme Court review of this theory." One of these was filed by the County of Maui in Hawaii after an unfavorable decision from the Ninth Circuit in a case involving treated sewage injected into wells that eventually reached the Pacific Ocean through groundwater. The other was filed by Kinder Morgan Energy Partners, challenging a loss in the Fourth Circuit in a case involving a pipeline leak in South Carolina. If the Supreme Court weighs in, its ruling will have a significant impact on Clean Water Act citizen suits, including those involving emerging contaminants.

Equally significant would be the impact of any action taken by the EPA on setting enforceable standards for PFAS. The agency has signaled that this is an area of interest, but it is not clear how quickly it will move or whether it has the resources to create and enforce such standards in the near future. But doing nothing may become increasingly difficult. State and federal politicians have urged the EPA to take action, and at least one group, the Ohio Environmental Council, has submitted a petition for rulemaking on PFAS to the agency. "Once you're talking about the potential shutdown of drinking water supplies, the issue and the concern cross party lines," says Chung.

If the EPA continues not to take action, environmental groups are likely to sue, for example, by arguing that the agency is taking too long to perform its duty to respond to rulemaking petitions. And if the agency does establish enforceable standards, litigation is likely to follow. "If and when the EPA is ready to do something in the form of regulatory standards, that's going to lead to both rulemaking challenges and governmental and citizen-suit enforcement actions," Chung says. "If this follows the typical high-profile rulemaking path, the end of the tunnel is litigation in one form or another."

THE SHIFTING EPA BATTLEGROUND

Under the Trump administration, the EPA has been working hard to roll back regulations, but many of the agency's key priorities have not been finalized.

That does not mean that there has been no activity or no litigation. But a great deal of the litigation to date has focused on delay rules—postponing the application of a number of Obama-era rules. Many of the lawsuits challenging delay actions have led to rulings against the agency because it hadn't followed the correct procedures in its delaying actions.

"We are still waiting on final high-priority rulemakings by the Trump EPA," says Crowell & Moring's David Chung. For example, a proposed Affordable Clean Energy plan, designed to replace the previous Clean Power Plan, was just proposed in August 2018. Other expected actions have yet to be proposed.

But that may be about to change. "In the coming year, we are probably going to see the rubber hit the road, with more final actions of substance," says Chung. In part, that's because the EPA has now had time to develop new rules.

"As the agency moves closer to final actions on its highest priorities, litigation will shift from the largely procedural to the substantive," says Chung. "That litigation could have significant ramifications for years or decades to come."