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STATE ENVIRONMENTAL REGULATION

Expert Analysis

Addressing Concerns Over Chemicals in Drinking Water

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State and federal environmental protection agencies have taken a number of important regulatory steps this year to limit environmental and human exposure to the chemicals PFOS and PFOA in drinking water. Efforts have taken place since 2000 to phase out production of the chemicals. PFOS and PFOA nevertheless continue in limited use. The recent regulatory actions have important implications for many businesses and individuals in New York.

The Chemicals

As the U.S. Environmental Protection Agency (EPA) explained in the lifetime health advisories (HAs) it issued in May for perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA),[1] PFOS and PFOA are fluorinated organic chemicals that are part of a larger group of chemicals known as perfluoroalkyl substances. Because of their resistance to water, grease and stains, these chemicals were widely used in carpets, clothing, furniture fabric, food packaging, and other applications (e.g., in cookware). They also were used in firefighting foam used at airfields and in a number of industrial processes.

Over time, both chemicals, which take a long time to break down when released into the environment because of strong carbon-fluorine bonds, became widely distributed in the environment, including in drinking water, and were found to have accumulated in the blood of humans, wildlife, and fish. The EPA noted in its HAs announcement that studies indicate that exposure to PFOS and PFOA over certain levels may result in adverse health effects, including developmental effects to fetuses and breast-fed infants, liver disease, and cancer.

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The EPA issued its HAs under the federal Safe Drinking Water Act to provide drinking water system operators and officials with the primary responsibility for overseeing those systems with information on the chemicals' health risks so they could take the appropriate actions to protect their residents. The HAs identified the concentration of PFOS and PFOA in drinking water at or below which adverse health effects are not anticipated to occur over a lifetime of exposure at 70 parts per trillion (ppt) for PFOS and PFOA.

New York Actions

Bookending the EPA's action are a number of steps relating to PFOS and PFOA recently taken by the New York State Department of Environmental Conservation (DEC).

On April 25, 2016, the DEC enacted an emergency rulemaking and concurrently proposed formal rulemaking to include PFOS and PFOA on the list of hazardous substances. As these chemicals may be found in "Class B" firefighting foams, the rule is aimed at the storage and use of those foams. If a Class B foam contains one percent or more of these chemicals by volume and is stored in specified types of tanks or containers, it is subject to the DEC's chemical bulk storage (CBS) regulations. The CBS registration requirements are immediately applicable, with the storage and handling requirements applying on April 25, 2018.[2]

The new rule provides for a "reportable quantity" of one pound for releases of these hazardous substances into the environment. Class B foam containing PFOS or PFOA is permitted for fighting fires (but not for training) until April 25, 2017. Furthermore, a release of these substances causing environmental contamination may require cleanup under one of the DEC's remedial programs, such as the state's Superfund law or Brownfields program.

On June 3, 2016, the DEC announced that it had reached settlements holding

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Saint-Gobain Performance Plastics Corporation and Honeywell International, Inc. responsible for the PFOA contamination in the Hoosick Falls area in upstate Rensselaer County.[3]

Among other things, under the settlements, the companies must:

- Investigate the source and determine the full scope and extent of contamination at four Honeywell and two St. Gobain plants;
- Investigate the feasibility of an alternate water supply for the area;
- * Fund the installation and maintenance of temporary and full capacity filtration systems for the local municipal water supply;

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- Reimburse the state for costs incurred for response and investigation into the contamination and well sampling; and
- Continue to pay for bottled water for local residents until successful installation of the full capacity filtration system.[4]

In August, the DEC took further action. It declared municipal landfills in the Village of Hoosick Falls and in the towns of Petersburgh and Berlin to be potential state Superfund sites.[5] According to the DEC, PFOA was believed to have been disposed at both landfills. Monitoring wells at the Hoosick Falls site contained concentrations up to 21,000 ppt of PFOA, and samples from leachate on the Petersburgh/Berlin site contained concentrations up to 4,200 ppt of PFOA.

The DEC said that a site characterization investigation will be conducted to determine if there is evidence that hazardous waste had been disposed at the landfills and whether any resulting contamination posed a significant threat to public health or the environment.

In early August, the DEC named Stewart Air National Guard Base in Orange County as a New York State Superfund site based on PFOS contamination.[6] It identified the U.S. Department of Defense as a potentially responsible party for the PFOS contamination detected in the area and in the City of Newburgh's public drinking water supply. According to the DEC, preliminary data suggests that the contamination found in Lake Washington, which served as the City of Newburgh's primary water supply, is the result of the historic use of Class B firefighting foam at the base.

The DEC reported that some of the highest concentrations of PFOS detected in the Newburgh area—nearly 5,900 ppt—were found in water from the base that drained into Silver Stream, a primary tributary of Lake Washington. It is worth pointing out that, from December 2013 to October 2014, the City of Newburgh collected four samples that had detections of PFOS ranging between 140 and 170 ppt. The city reported these results to the EPA and the public. The samples were below the EPA's then existing provisional short-term HA of 200 ppt, but they exceed the level of 70 ppt announced by the EPA in its HAs in May 2016.

Conclusion

The current focus on PFOS and PFOA in drinking water supplies is likely to lead to increased testing at other sites in New York, and a resulting need for remediation. In some cases, drinking water systems may be able to reduce concentrations of PFOS and PFOA by closing contaminated wells, by changing rates of blending of water sources, or by treating source water with activated carbon or high-pressure membrane systems such as reverse osmosis to remove PFOS and PFOA from drinking water. These remedial techniques are quite costly.

Perhaps the most significant practical ramification of the focus on PFOS and PFOA results from Governor Andrew M. Cuomo's decision to sign A09568 into law on July 21, 2016. The bill, which added Section 214-f to the CPLR, extends the statute of limitations for personal injury actions alleging exposure to any substance found within an area designated as a Superfund site to three years of the site's designation. One can expect it will result in significant toxic tort litigation over PFOS and PFOA Superfund sites in New York in the future.

1. See 81 Fed.Reg. 101 (May 25, 2016), available at https://www.epa.gov/sites/production/files/2016-05/documents/2016-12361.pdf.

2. See 6 NYCRR Parts 596-599. In particular, the CBS regulations provide standards for the proper handling and storage of bulk quantities of hazardous substances, prohibit the release of hazardous substances to the environment, and require the reporting of certain releases of hazardous substances to the DEC.

3. See Press Release, "New York State Department of Environmental Conservation Secures Agreement That Holds Saint Gobain & Honeywell Responsible for PFOA Contamination in Hoosick Falls Area," available at http://www.dec.ny.gov/press/106463.html.

4. In early September, the EPA proposed to add the Saint-Gobain Performance Plastics Site in Hoosick Falls to the federal Superfund list. See, Press Release, "EPA Proposes to Add Saint-Gobain Performance Plastics Site in Hoosick Falls, N.Y. to the Federal Superfund List," available at https://www.epa.gov/newsreleases/corrected-epa-proposes-add-saint-gobain-performance-plastics-site-hoosick-falls-ny.

5. See Press Release, "DEC Declares Hoosick Falls & Petersburgh/Berlin Landfills as Potential State Superfund Sites," available at http://www.dec.ny.gov/press/107511.html.

6. See Press Release, "DEC Declares Stewart Air National Guard Base a State Superfund Site State to Hold Department of Defense Responsible for Expedited Clean Up of PFOS Contamination," available at http://www.dec.ny.gov/press/107321.html.