

STATE ENVIRONMENTAL REGULATION

Expert Analysis

State's Battle Against Firefighting Foam Intensifies

A new lawsuit, letters from the New York State Department of Environmental Conservation (NYSDEC) to Superfund and brownfield sites across the state, and a bill awaiting the governor's action all seem to have at least one thing in common. They are targeting the existence of the chemicals perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA) in the environment, with important implications for businesses and individuals in New York.

As I explained in my State Environmental Regulation column, "Addressing Concerns Over Chemicals in Drinking Water," published in the *New York Law Journal* on Sept. 12, 2016, PFOS and PFOA are fluorinated organic chemicals that are part of a larger group of chemicals known as perfluoroalkyl substances. Resistant to water, grease and stains, these chemicals were

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widely used in carpets, clothing, furniture fabric and food packaging—and in firefighting foam used at airfields. Although PFOS and PFOA are no longer in widespread use, environmental regulators in recent years have paid particular attention to their accumulation in drinking water supplies. For example, in May 2016, the U.S. Environmental Protection Agency indicated 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. *See*, 81 Fed.Reg. 101 (May 25, 2016), available at <https://www.epa.gov/sites/production/files/2016-05/documents/2016-12361.pdf>.

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regulatory focus on these chemicals has moved to the state.

The Lawsuit

On June 19, 2018, the New York State Attorney General's Office filed a lawsuit in the Supreme Court, Albany County (Index No. 904029/20018), against six companies—3M Company, Tyco Fire

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Products, Chemguard, Buckeye Fire Equipment Company, National Foam, Inc. and Kidde-Fenwal—alleging that they designed, manufactured, marketed and sold foams used to extinguish aviation fires and fires in aircraft hangars, to train firefighters and to test firefighting equipment at a number of military and civilian airports across the state. The complaint contends that the firefighting foams contained PFOS or PFOA or compounds that degraded into PFOS or PFOA.

According to the complaint, using the products as intended resulted in the release of PFOS and PFOA into the surrounding environment, contaminating drinking water, surface water, soil and fish. For example, the state alleged that the NYSDEC found concentrations of PFOS and PFOA in Lake Washington—one mile from Stewart Air Base and Stewart Airport and the primary drinking water supply for the City of Newburgh—as high as 282 parts per trillion (ppt), well over the EPA's recommended concentration of 70 ppt. Samples of runoff from the airbase were found to contain concentrations as high as 6,080 ppt, surface water concentrations as high as 8,470 ppt, and groundwater samples as high as 3,640 ppt.

The complaint asserted state law causes of action for the creation of a public nuisance and strict products liability for defective design and for failure to warn. According to the complaint, the state's response to PFOS and PFOA contamination from the airports already has cost the government an estimated \$38 million, and it is seeking damages consisting of costs incurred and to be incurred by the state in investigating, monitoring, remediating and otherwise responding to injuries or threats to the public health and the environment caused by the defendants' firefighting foam products, and damages arising from harm to the state's natural resources.

The state also is seeking punitive damages.

The Letters

In announcing the lawsuit, the Attorney General's Office indicated that it was the first-ever lawsuit brought by a state against the makers of firefighting products containing PFOS and PFOA seeking to recover costs incurred in the cleanup of the release of these chemicals from airports into the environment. If letters the NYSDEC recently sent to parties responsible for, investigating or remediating Superfund and brownfield sites across the state are any indication, other PFOS- and PFOA-related lawsuits and proceedings may be in the offing.

Last December, the NYSDEC sent emails requiring that Superfund and brownfield sites test their groundwater for PFOS and PFOA regardless of whether groundwater testing otherwise had been required or had been terminated in the past by the NYSDEC.

The agency followed up in March 2018 with letters that explained that it is undertaking a "[s]tatewide evaluation of remediation sites to better understand the risks posed to New Yorkers" by PFOS and PFOA (and also by another chemical, 1,4-dioxane). According to these follow-up letters, the NYSDEC is undertaking this initiative as a result of these "emerging contaminants" having been found in a number of drinking water supplies in the state.

The NYSDEC acknowledged that PFOS and PFOA historically had not been evaluated at remediation sites (and that 1,4-dioxane had not been evaluated at the levels "that are now thought to represent a health concern"), but it declared that sampling for these compounds "has been integrated into standard practice for all environmental site investigations going forward."

The letters said that the NYSDEC required the groundwater testing to be completed by the end of 2018. The letters recommended the laboratory test methods to be used and provided information on the analytical methods, reporting requirements and special precautions to be considered when sampling for these compounds.

The NYSDEC said that it might waive sampling on a "site-specific basis" if sampling is not feasible because a site no longer has any monitoring wells in place or for other reasons. In these situations, the NYSDEC added, it would first consider potential sources of these chemicals and whether there are nearby water supplies. It would appear, however, that no site is guaranteed a waiver, even if it has no monitoring wells.

The new testing requirement is for groundwater only, except if contamination is detected. In that case, the NYSDEC said, soil samples would need to be analyzed for PFOS and PFOA. The NYSDEC letters also suggest that soil sampling ultimately might be required when

soil clean-up objectives (SCOs) are established for PFOS and PFOA.

As described in the NYSDEC letters, the required analysis is quite comprehensive and must be conducted by a certified environmental laboratory. The reporting rules are similarly detailed. To say the least, these new requirements are imposing significant costs for these sites across the state.

The Bill

As of this writing, Senate Bill 6655, which overwhelmingly passed the Senate and Assembly, awaits action by Governor Andrew M. Cuomo. The bill, which would take effect immediately, would amend certain subsections of Sections 1112 of the Public Health Law (PHL) with the goal of providing information about PFOS, PFOA and other chemicals to the public.

PHL Section 1112(6) currently requires the commissioner of the New York State Department of Health (NYSDOH) to promulgate regulations establishing notification levels for emerging contaminants such as PFOS and PFOA. Senate Bill 6655 would amend subsection (6) to provide for public access to those notification levels. In particular, the bill provides that the notification levels “shall be made easily accessible to the public through a link that is posted on the department’s website and updated regularly.”

PHL Section 1112(7) currently authorizes the NYSDOH commissioner, by declaration, to add a

substance to the list of emerging contaminants, establish a notification level, and require testing for the substance if the commissioner determines that the substance poses or has the potential to pose a significant hazard to human health when present in drinking water; the substance recently was detected in a public water system and has the potential to be present in other public water systems; and the delay to prepare and file regulations would appear to be prejudicial to the public interest. Senate Bill 6655 would

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amend this subsection to provide that, until these notification levels are posted on the department’s website, the commissioner must post the notification levels established by such a declaration on the website so that they are “easily accessible through a link to the public.”

Finally, PHL Section 1112(7) currently states that the NYSDOH commissioner, working with the commissioner of the NYSDEC, must develop educational materials explaining how to reduce exposure to these chemicals. The bill would amend this subsection to provide for these materials to be made available through an “easily accessible” link on the NYSDOH website. It also

would require that the website contain “basic water system information” including system identification number, name and type, NYSDOH contacts, public notices, and violations and enforcement actions taken by the state and federal government. The website and all links would have to be monitored and updated regularly by the NYSDOH.

Conclusion

As these developments suggest, New York officials are seeking ways to deal with environmental contamination from PFOS and PFOA. It seems reasonable to assume that their efforts will continue to intensify. Businesses operating in the state, and individuals who live here, should take note.

Updates

On June 27, the NYSDEC finalized regulations I discussed in my March 23, 2017, column, “New SEQRA Regulations Finally Appear On the Horizon.” See <http://www.dec.ny.gov/permits/83389.html>. They become effective on Jan. 1, 2019.

My May 23, 2018, column asked, “So, Where Is the Promised Disclosure Program for Household Cleaning Products?” We now know the answer. Two weeks after that column was published, the NYSDEC finalized the program. See <https://www.dec.ny.gov/chemical/109021.html>