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PERSPECTIVE

Agencies finally begin to address dangers of PFAS

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Federal and state agencies are responding to public pressure to study and regulate per- and polyfluoroalkyl substances (PFAS) in drinking water supplies, and potentially in groundwater. The U.S. Environmental Protection Agency recently announced its “PFAS Action Plan” and the State Water Resources Control Board is initiating a statewide investigation of PFAS at airports, landfills, manufacturing facilities, bulk terminals, and wastewater treatment facilities. Several states outside California have developed or are developing state-specific contaminant levels for PFAS including New Hampshire, New Jersey, Vermont and Pennsylvania. Last September, New Jersey adopted the nation’s first maximum contaminant level at 13 parts per trillion for perfluorononanoic acid (PFNA), and groundwater quality standards of 10 ppt for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) — all common PFAS compounds.

Part one of this two-part series provides some background on PFAS, highlights recent regulatory developments and raises, as yet, unanswered questions about what the PFAS landscape will look like in the next few years. Part two will look at the wave of PFAS litigation claims pending, mostly outside California, but still foreshadow what is likely to emerge in California.

What Are PFAS?

PFAS are highly fluorinated man-made compounds that are resistant to heat, water and oil and used in a wide-range of products designed to be waterproof, stain-resistant or non-stick, such as carpets, furniture, cookware, clothing and food packaging. PFAS also are used in fire retardant foam at military bases and airfields and industrial processes involving flammable and combustible liquids. PFAS are resistant to chemical breakdown, soluble and highly mobile in soil and groundwater. PFAS are reported to have a variety of adverse health effects, which are the driving factor behind public

pressure for regulators to take action.

EPA’S Approach to PFAS

Before last month, the EPA had only set a Health Advisory Level of 70 ppt for PFOA and PFOS. The advisory level is nonenforceable and was not adopted as a rule. Last month the EPA announced its PFAS action plan. Two key measures in the plan are the EPA’s decision to move forward with listing PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response Cleanup and Recovery Act — aka CERCLA — and with the maximum contaminant level process outlined in the Safe Drinking Water Act.

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trigger reopener clauses in cleanup settlements. The EPA has already begun to add requirements pertaining to PFAS to existing cleanup orders at sites without evidence of PFAS use or contamination. It also opens the door for private CERCLA actions amongst entities that share responsibility for PFAS contamination.

A maximum containment level establishes the legal limit for the amount of a particular substance that is permissible in public water systems. And while the EPA’s decision to develop a maximum level for PFOA and PFOS is part of its action plan, it is likely to take several years.

California’s “Action Plan”

Various regulatory agencies within California have taken actions related to PFAS, but until March of this year most have been limited in scope. On Nov. 10, 2017, the Office of Environmental Health Hazard Assessment added PFOA and PFOS to the Proposition 65 list as chemical substances that

cause reproductive toxicity, such that Proposition 65 warnings for consumer products causing exposures to PFOA and PFOS are now required. The office is currently developing a maximum allowable dose level for the compounds, after recommending interim notification levels in June 2018.

The Water Board Division of Drinking Water’s established notification levels for PFOS at 13 ppt and PFOA at 14 ppt, and a single health advisory response level of 70 ppt. It recommends, but does not require the removal of a drinking water source from service when the concentration of a contaminant exceeds a notification level, and cannot be reduced below the response level of 70 ppt. The California Department of Toxic Substances Control’s and various regional water boards have required sampling for PFAS, mostly at active or inactive military facilities on a site by site basis.

But the Water Board recently announced an aggressive state-wide phased investigation of PFAS using its authority under Section 13267 of the Water Code. Phase one, expected to commence by the end of March will require 31 airports where fire training or fire response sites may have used fire retardant foam containing PFAS and 252 municipal solid waste landfills across the state to sample and test their sites along with approximately 931 nearby drinking water wells.

Phase two, expected to commence this summer, will require primary manufacturing facilities, refineries, bulk fuel storage terminals, non-airport fire training locations, and recent urban wildlife areas to conduct sampling and testing. Finally, in phase three, expected to commence this fall, the Water Board will target wastewater treatment and pre-treatment plants, and domestic wells.

The Water Board’s phased investigation strongly indicates that it will take more concrete steps to start regulating PFAS. The Water Board likely anticipates that these investigations will show PFAS are present in drinking water in many areas of the state due to their widespread use and persistence. With supporting data, the Water Board, and other California agencies will be able to justify developing enforceable standards for PFAS including potentially a public health goal, a maximum containment level, a response strategy to PFAS detections at sites, and cleanup goals for remediation of PFAS in groundwater. California has lagged behind other states on PFAS, but that could change in 2020. For now, unanswered questions remain about the future of PFAS enforcement, site cleanup requirements, and potential lawsuits. This landscape is reminiscent of methyl tertiary butyl ether contamination sites and related litigation for the last 20 years.

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