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PFAS and emerging contaminants: risk, regulation and due diligence

Most people will probably need a moment to think about how to pronounce “perfluorooctanesulfonic acid.” This substance is one of numerous compounds that are referred to as Per- and Polyfluoroalkyl Substances (PFASs). The growing regulatory focus on PFASs, as “emerging contaminants” under the scrutiny of the United States Environmental Protection Agency (EPA) and state environmental agencies, poses new challenges for industries, municipalities and owners or developers of properties currently or previously involved in the manufacture, distribution or sale of PFASs or products containing PFASs.

This Godfrey & Kahn Environmental Strategies Flash provides a brief overview of what PFASs are, the recent and ongoing regulatory action related to PFAS, including a recent game-changing policy shift adopted by the Wisconsin Department of Natural Resources (WDNR) regarding the Wisconsin Voluntary Party Liability Exemption program, PFAS litigation developments and due diligence concerns.

What are PFASs and why are they considered harmful?

PFASs are a group of chemicals that have been used in many industrial applications and consumer products such as stain-proof or waterproof carpeting, clothing, leather treatment, upholstery, food paper wrappings, fire-fighting foams (commonly used at military bases, airports, fire stations, and refineries), car washing cleaners, and metal plating or cookware (such as Teflon). Some research has suggested probable links between exposure to PFASs and diagnosed high cholesterol, ulcerative colitis, thyroid disease, testicular and kidney cancers, and pregnancy-induced hypertension. As a result, the family of PFAS chemicals have been classified by the EPA as an “emerging contaminant.”

PFASs are resistant to degradation, which means they do not break down in the environment. PFASs are also resistant to heat, water and oil. They are water-soluble and bioaccumulative, meaning the amount builds up over time in the blood and organs. PFASs have been found at low levels both in the environment and in blood samples of the general U.S. population. The primary transport pathways for PFASs are groundwater migration and air deposition, and the primary exposure pathways for PFASs are through the ingestion of drinking water, fish-rich diets and dust.

The EPA has set a lifetime health advisory (LTHA) level (the level below which no harm is expected) for two PFASs in drinking water: perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS). The PFOA/PFOS LTHA level is 70 parts per trillion (ppt), which is equivalent to about three-and-a-half drops of water in an Olympic-sized swimming pool. This low threshold is a signal of the risk potential for this emerging

contaminant, as well as the difficulty in confidently investigating and analyzing soil and groundwater samples for these substances and in undertaking cost effective remediations.

Federal and state PFAS regulatory developments

Even though the EPA has established non-binding drinking water health advisories for PFOA and PFOS at 70 ppt, there are currently no federal and few state numeric standards for cleaning up PFASs in soil and water. The federal government has authority to regulate PFASs under the Safe Drinking Water Act, which requires water supply monitoring for two categories of PFASs, namely PFOS and PFOA, and the Toxic Substances Control Act, which sets manufacturing limits for PFASs. Although there are signs that regulatory focus is increasing, earlier this year, after a hearing to consider development of a maximum contaminant level, or MCL, for PFASs, EPA decided to defer to the states for individual regulation of acceptable soil and groundwater tolerances for PFAS.

PFASs are not presently listed as a “hazardous substance” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). However, other provisions within CERCLA could potentially apply, especially those regarding “substantial danger” to public health or welfare or the environment, as well as those cross-referencing the broader definition of “hazardous wastes” under the Resource Conservation and Recovery Act (RCRA).

Perhaps as a result of the increasing scientific and regulatory focus on the effects of PFASs, some states (such as Vermont, New Hampshire, Michigan, Alaska and New Jersey) have adopted standards stricter than the 70 ppt federal LTHA level. Some of these states have established binding cleanup levels for and PFAS or finalized binding drinking water standards for certain PFAS chemicals. Other states (such as California, New York and Washington) have adopted less strict standards, calling instead for warning labels on PFAS-containing products, restrictions on the sale and use of firefighting foam, and annual reporting for manufacturers.

In Wisconsin, the WDNR is communicating with the Wisconsin Department of Health Services to develop groundwater standards (Preventative Action Levels and Enforcement Standards) for PFASs. In the interim, in a direct response to the growing impact of PFASs, WDNR has implemented a significant policy change in how it administers the Voluntary Party Liability Exemption, or VPLE (Wis. Stats. §292.15). In late October 2018, WDNR adopted the position that, unlike prior practice, it will no longer issue a “Certificate of Completion”, or COC, under the VPLE program and by which the State of Wisconsin has historically assumed responsibility for all hazardous substance contamination that existed on the VPLE subject property as of the completion of the site investigation. Instead, the COC will be effective only for the hazardous substances that were investigated and, as necessary, addressed. For most sites that are in the VPLE process, this means that PFASs will not be within the scope of the VPLE COC.

PFAS litigation developments

The EPA’s announcement of health advisory levels for PFOA and PFOS in 2016, improvements in water sampling technology, and public, political and media attention have contributed to a surge in litigation against manufacturers of PFASs, as well as some secondary commercial users of PFAS. Major class action and attorney general lawsuits have been brought against PFAS manufacturers in Ohio, West Virginia, New York, North Carolina, Michigan and Minnesota.

Most notably, in February 2018, 3M agreed to pay \$850 million to the State of Minnesota in connection with contamination of drinking water allegedly caused by its manufacture of the water repellent ScotchGard. One year earlier, in February 2017, DuPont agreed to pay \$670 million to settle over 3,000 personal injury lawsuits arising from its manufacture of a key ingredient in Teflon. Finally, within the last week, Chemours Co. committed to pay the largest penalty in a PFAS related settlement that a polluter has ever paid North Carolina. Chemours will pay the state a \$12 million penalty, add \$1 million for investigative costs, sharply reduce air emissions of the nonstick compound associated with a PFAS fluoropolymer replacement known as “GenX” and spend millions of dollars to provide permanent replacement drinking water supplies to neighbors with contaminated water wells.

Municipalities have also found themselves on both sides of the litigation: some have brought suit against PFAS and foam manufacturers, while others have been brought into litigation as the result of discharges from waste water treatment plants, firefighting facilities and landfills.

PFAS and due diligence

Due to the shifting regulatory landscape with differing state standards and emerging federal standards, there are numerous due diligence-related concerns that will need to be addressed.

Some red flags for buyers acquiring operations are as follows: the seller (1) manufactured PFAS chemicals or firefighting foam; (2) supplied products containing PFAS to a third-party manufacturer; (3) processed, manufactured, or used oil or water resistant or repellent fabrics, furniture, carpets, leather goods, waxes, adhesives or other products containing PFAS; (4) disposed of large volumes of consumer or industrial products containing PFAS; (5) created construction and demolition waste; or (6) maintained bio-solid or paper composting operations.

Some red flags for real estate transactions, including for municipalities and purchasers/developers of Brownfield properties are as follows: (1) fire-training/suppression was conducted or a firefighting facility was on or near the property; (2) there was an industrial fire or major accident or near the property; (3) a manufacturer was/is located on or near the property or treated a product to make it water or oil resistant (or used products such as Scotchgard or similar materials in large volumes); (4) the property is located near a landfill, airport or military base; (5) fill or composting material containing PFAS was used at the site; and (6) there is known PFAS contamination onsite and located near municipal or private drinking water sources or surface water.

Conclusions

Because PFASs are persistent (durable in the environment, even for decades after their release or disposal), pervasive (PFASs are mobile and have several potential exposure routes), come from a narrow but widely-used manufacturing base in the United States, may have been included in products from overseas PFAS manufacturers and exporters, and are subject to different state sampling and cleanup standards, clients and counsel should appreciate the need to consider PFASs during due diligence.

Increasing federal attention and state regulatory focus on PFASs have and will have the potential to impact the regulatory climate on PFAS compliance for years to come. Parties who deal with PFAS and PFAS-related issues (especially with regards to municipalities, manufacturers, buyers acquiring operations or real-estate transactions) need to stay abreast of changes in this area of the law. Members of the Environmental Strategies and Energy Strategies Practice Groups at Godfrey & Kahn actively monitor and publish on these developments. Please free to reach out to any member of the team for more information on legal developments in this area.