Clear, Science-Based Regulatory Standards for Emerging Contaminants Are Needed

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Unregulated substances detected in a water supply in concentrations that may pose a risk to human health or the environment are often termed "emerging contaminants." By the time they come to the attention of regulators, use of these substances and their presence in the environment may be widespread. Playing catch-up, regulators commence the lengthy process of determining the safe level of exposure to the chemicals and translating scientific findings into regulatory standards. Meanwhile, persons suspecting that these contaminants may cause them physical injury or property damage commence litigation. The dual regulatory and litigation tracks present challenges for municipal and business decision-making.

Perfluoroalkyl substances (PFAS) are a case in point. Various members of this group of compounds have been used to manufacture non-stick cookware (Teflon™), stain- or water-repellant carpets, clothing and automobile interiors, aqueous fire fighting foam, food containers and other products. Chosen in part for their ability to repel water, fats and oils, these chemicals are also stable and persistent in the environment. They are now believed to cause serious health effects and are subject to increased regulatory scrutiny and litigation.

Over the past several years, monitoring of public water systems has detected PFAS in drinking water. In response to the potential threat to human health, the Environmental Protection Agency (EPA) established drinking water health advisories for two such substances, PFOA and PFOS. The EPA describes its health advisories as nonregulatory and nonenforceable. They are intended to provide technical information which states and water system operators may use to select appropriate protective actions.

Since issuing its first health advisories for PFOA and PFOS in 2009, the EPA has from time to time increased their stringency. These evolving advisories make it difficult for water providers, state regulators and the public to know what concentrations of these chemicals are safe to ingest and whether water treatment systems should be deployed to remove them. Facing concerns and uncertainties about the safety of products containing PFAS, manufacturers have responded by phasing out the production and use of PFOA and PFOS. Nevertheless, the persistence of PFAS in the environment continues to present risk.

While updating its health advisories, the EPA has not established enforceable maximum contaminant levels (MCLs) for PFAS in drinking water. Yet the EPA's own actions show that it considers exposures above health advisory levels to present serious risks. For example, after investigating the discharge of PFOA from the Saint-Gobain Performance Plastics facility in Hoosick Falls, New York, the EPA listed the facility on the national priorities list of the most serious sites in need of long-term cleanup. This site is now being addressed under the Comprehensive Response, Compensation and Liability Act (CERCLA or Superfund).

On Dec. 4, the EPA announced a "cross-agency effort" to identify near-term actions to support local communities, enhance intergovernmental coordination, and increase research and communication efforts regarding PFAS and their health effects. The EPA also committed to evaluating GenX, a PFAS used as a replacement for PFOA and detected in the Cape Fear River near the Chemours facility in Fayetteville, North Carolina. But notwithstanding its current focus on PFAS and public concern, the EPA still has not committed to establishing MCLs for any PFAS.

Absent federal regulatory standards, states have begun to fill the void. On Nov. 15, New Jersey released for public comment a proposal to establish a health-based MCL in drinking water for PFOS of 13 nanograms per liter (parts per trillion), below the EPA's current lifetime health advisory of 70 parts per trillion. New Jersey bases its proposal on evidence that PFOS causes immune system toxicity. New Jersey previously proposed a similar MCL for PFOA of 14 nanograms per liter. To achieve such low concentrations, many water systems would need to install expensive granulated activated carbon treatment systems. Opposition to the proposals from water purveyors can be expected. Similarly, effective Nov. 10, California added PFOA and PFOS to its Proposition 65 list of substances due to their reproductive toxicity.

Throughout the period that advisories and regulations continue to be studied, adopted and revised, litigation has continued apace. In a well-publicized case commenced in 2001, a class of users of public water systems withdrawing drinking water downstream from a DuPont facility in Parkersburg, West Virginia sued DuPont for injuries arising from PFOA in their water supply. At that time, the EPA had yet to issue its first health advisory for PFOA.

As part of a settlement, a health panel comprised of three epidemiologists was retained to conduct an extensive health study and evaluate the causal connection between exposure to PFOA and toxic effects in humans. The panel found a probable link between exposure to PFOA and six human diseases. As a result, DuPont is funding the medical monitoring of class members. It has also funded installation of treatment systems at the affected drinking water plants, paid settlement sums to all class members, and, together with Chemours, recently paid an additional $670 million to resolve personal injury claims.

The litigation over discharges from DuPont's Parkersburg facility spurred similar litigation throughout the country. In the Delaware Valley, releases of firefighting foams containing PFAS from military bases have contaminated certain of the public water supply wells in Horsham, Warminster and Warrington townships, forcing their closure until treatment systems are installed. The military has funded the installation of these filters only when the EPA's long-term health advisory levels are exceeded, effectively treating these advisories as the equivalent of regulatory standards. In light of the difficulties in suing the federal government, residents have brought suit not only against the Navy, but also against manufacturers of the fire fighting foams.

Proof of a causal connection between PFAS and injuries is only one of many challenges plaintiffs face. A Dec. 6, decision of the U.S. District Court in New Hampshire, *Brown v. Saint-Gobain Performance Plastics*, illustrates the additional obstacles in suits involving PFOA groundwater and soil contamination. Plaintiffs commenced a putative class action to recover

property damage and medical monitoring costs alleging Saint-Gobain's use of a PFOA derivative in coating fabric material at its facility in Merrimack, New Hampshire contaminated municipal and private water supplies.

The defendants moved to dismiss the complaint on several grounds. The defendants contended that property owners do not hold a property interest in and therefore cannot claim injury to groundwater. Although a property owner may not own the groundwater, only have an interest in its use, the court found this interest sufficient to support a claim.

The defendants further argued that plaintiffs sought only unrecoverable economic losses. Although the "economic loss" doctrine frequently bars claims, here the court concluded that allegations that PFOA was present in soils and required remediation went beyond mere economic loss and were sufficient to support the claim.

The defendants also sought to dismiss the plaintiffs' medical monitoring claim on the ground that medical monitoring is not recoverable without present injury. Whether and under what terms medical monitoring costs are recoverable varies among jurisdictions. The court noted that the law is unsettled and expressed an intent to certify this question to the New Hampshire Supreme Court.

The class' trespass count, an intentional tort, survived based on the allegation in the complaint that Saint-Gobain knew that its manufacturing processes emitted PFOA that could infiltrate groundwater. The court noted that intent can be shown from evidence that an actor knows that its conduct is substantially certain to result in an injury.

Likewise, the plaintiffs overcame challenges to their failure to warn claim by alleging that Saint-Gobain had taken the affirmative act of releasing PFOA, and consequently had the duty to protect the plaintiffs against an unreasonable risk of harm. The defendants succeeded in dismissing the unjust enrichment claim because it was improperly premised on the financial savings Saint-Gobain allegedly incurred from releasing PFOA, not any funds received.

At present, the absence of enforceable regulatory standards makes it difficult for companies, government agencies and the public to assess what levels of PFAS are safe. Without regulatory standards, these decisions may be made during litigation by judges or juries. The public would benefit, litigation would be more consistently resolved, and remediation would be more uniformly performed, if the EPA uses its new "cross-agency effort" to establish clear, science-based regulatory standards for emerging contaminants like PFAS.

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