Controlling PFAS and Other Emerging Contaminants

by: Kenneth J. Warren / *The Legal Intelligencer*

The ability of our nation's manufacturers to identify or create new substances to benefit producers and consumers has been a hallmark of the industrial revolution. New products have dramatically increased our standard of living, and research and development teams continue to design new materials to support our economy.

Yet in our exuberance to quickly embrace innovative products, evaluation of risks to human health and the environment may take a back seat. We continue to grapple with injuries from exposure to asbestos-containing products that were touted for their fire resistance and strength, solvents important for industrial cleaning, and lead used in pipes, batteries, paints and other products. Even though the science demonstrating the hazards posed by these substances is solidly grounded, our legal system strains to limit the harms, and to compensate injured parties.

When the science related to the risks and effects of exposure to a substance is undeveloped, deciding whether to regulate the production and use of the substance and remediate or compensate for alleged harms from its use and disposal is much more challenging. Regulatory agencies may require many years to complete studies showing whether substances of potential concern, generally known as emerging contaminants, can cause injury to human health or the environment. Meanwhile, claims to redress alleged personal injuries, property damage, or cleanup costs allegedly caused by these chemicals leave courts and juries struggling to evaluate disputed scientific evidence.

A poignant example is per- and polyfluoroalkyl substances (PFAS), a class of thousands of fluorinated compounds, many of which do not readily degrade in the environment and are easily transported by surface water or ground water. PFAS is a component of a wide variety of products including non-stick cookware, food packaging, cosmetics, stain resistant carpet, and firefighting foam used at military bases, airports and other locations.

During the past decade, claims seeking damages, cleanup costs, environmental remediation or medical monitoring due to the presence of PFAS on plaintiffs' properties or exposures to PFAS have proliferated. For example, over 2000 cases have been filed alleging injuries from aqueous film-forming foams (AFFF) such as firefighting foams. These cases share factual questions concerning the use, storage, toxicity and human health effects of PFAS compounds and their chemical properties and propensity to migrate in groundwater. They are being jointly managed in multi-district litigation (MDL) pending in the U.S. District Court for the District of South Carolina.

The first cases to be tried in the AFFF MDL litigation will be those brought by water purveyors contending that their water supplies have been contaminated by AFFF. These cases were selected because they pose fewer causation complications than personal injury claims. Nonetheless, plaintiffs must show that their water sources contain concentrations of PFAS that pose an unacceptable risk to water users.

The complaint filed last month by the Massachusetts Attorney General in the AFFF multi-district litigation, like those pending from other states such as Alaska, New Hampshire, New Mexico and New York, illustrates the claims currently available to seek compensation for environmental contamination from AFFF. In *Massachusetts v. 3M Company*, the state alleges that its natural resources were damaged by manufacturers who supplied AFFF products to military bases and other locations from which PFAS migrated to soils, waters and ecosystems.

The complaint predominantly avers products liability claims including defective design, failure to warn of risks defendants knew, or should have known, negligent design and distribution, deceptive marketing in violation of the Massachusetts Consumer Protection Act, and public nuisance and trespass. The complaint also includes a federal Safe Drinking Water Act imminent and substantial endangerment claim against all defendants, and a fraudulent transfer claim against DuPont and its spinoff companies. The relief sought includes the cost of investigation and cleanup, damages and injunctive relief.

To avoid liability, manufacturers may contend that concentrations of PFAS detected in the state's natural resources and properties are not sufficient to cause injury. They may also assert they were required by military regulations to manufacture firefighting foams using PFAS. Manufacturers have filed motions in the AFFF MDL seeking judgment under the government contractor defense on the ground that the chemical composition of their AFFF products was mandated by the federal government.

While representing a significant portion of pending lawsuits, AFFF litigation is far from the only variety of PFAS claims. Individuals exposed to PFAS in the water they drink or products they purchased have asserted claims against manufacturers of PFAS and manufacturers of PFAS-containing products. Whether supplying PFAS chemicals to other companies creates a duty to third-party users of the products or to persons damaged by disposal of the products may vary depending on state law. And as in the AFFF litigation, public water companies have alleged that the disposal of PFAS-containing chemicals used by manufacturers of PFAS-containing products have caused hazardous concentrations of PFAS in their water supplies.

The absence of federal regulations limits use of many federal remedies often employed in environmental contamination cases. For example, CERCLA claims for cleanup of contaminated sites await the soon-expected EPA designation of at least two PFAS compounds, PFOA and PFOS, as hazardous substances. While this rule is being developed, last month the EPA set risk-based site cleanup values for five PFAS, which will be used to determine what cleanup is needed at Superfund and other sites.

The EPA has published a nonbinding drinking water health advisory level for two of the many PFAS compounds. The EPA is still developing an enforceable regulation, i.e., maximum contaminant levels (MCLs), for PFAS in drinking water. In the interim, some states have promulgated their own MCLs, while others, such as Pennsylvania, are completing their rulemaking processes.

A sea change in PFAS claims may be on the horizon as more about this class of emerging contaminants becomes known. In its PFAS strategic roadmap, the EPA set forth an integrated approach to PFAS, which includes research on exposure, toxicity, effects of human health and ecology, and effective interventions, and submission of studies and data by PFAS manufacturers to fill data gaps. The EPA also plans to adopt regulations under its arsenal of environmental statutes to limit PFAS releases to the environment, impose safety requirements on new PFAS uses, enhance toxic release inventory reporting, regulate PFOA and PFAS in drinking water, establish effluent limitation guidelines and permitting requirements for wastewater discharges, recommend ambient water quality criteria for two PFAS and designate certain PFAS as hazardous substances. The EPA may also regulate PFAS as hazardous waste.

In other words, the present regime in which PFAS is viewed as a class of emerging contaminants addressed primarily by state laws may be transformed to a regime in which at least certain PFAS are highly regulated by the EPA and subject to federal cleanup and cost recovery authorities. EPA actions may foster a combination of private and government litigation and regulatory actions with severe consequences. The financial solvency of some manufacturers of PFAS or PFAS-containing products may be threatened and their ongoing operations significantly curtailed. Wastewater utilities may become targets for cleanup of locations where their biosolids were placed, and more stringent discharge limits may be imposed on users of their facilities. Parties at Superfund sites may be required to undertake additional remediation. And a broad group of parties who disposed of products containing PFAS may become potentially liable for cleanup of disposal locations.

As the EPA and states codify regulations to address historic PFAS contamination and ongoing PFAS production and use, lawmakers will be asked to limit potential liabilities. Debate over who will bear what portion of the damages and costs of PFAS is far from over. Whether litigation and regulatory actions regarding PFAS will provide useful lessons on how to avoid injuries from future emerging contaminants and to allocate fairly responsibility for injuries that occur remains to be seen.

Kenneth J. Warren *is a founding partner of Warren Environmental Counsel and has been practicing environmental law for more than 35 years. He is president-elect of the American College of Environmental Lawyers. He is a former chair of the American Bar Association section of environment, energy and resources, where he led the section's 10,000 members. He can be reached at kwarren@warrenenvcounsel.com.*