

## Environmental, Telecomm, Utilities & Energy Law

# Emerging Contaminants Pose Legal Challenges

By Maureen D. Smith

Per- and Polyfluoroalkyl Substances, or PFASs, present the newest class of man-made chemical contaminants to stymie regulators, water suppliers and consumers. Used for decades in a variety of industrial and consumer product applications, PFASs are ubiquitous and are being found in groundwater-supplied drinking water throughout New Hampshire, sometimes at levels warranting replacement water supplies. A number of legal, practical and political hurdles have complicated efforts to tackle this newest threat to the state's groundwater, leading to regulatory uncertainty and emerging issues for attorneys.

One challenge stems from debate over how much of a threat PFASs really pose, and at what level, when compared to other water contaminants. There is increased attention to their toxicity, widespread use and worldwide presence, as well as studies suggesting adverse health effects when ingested at low levels.

The chemical industry developed PFASs decades ago for their stain-resistant, waterproofing, nonstick and friction-reducing properties. They have historically been used in the manufacture of products like stain-resistant clothing, furniture and carpets, nonstick cookware and firefighting foam. They are also a mainstay in the aerospace, automotive, construction and electronics industries, among others. Discharged through domestic wastewater, industrial water discharges, landfill leachate and even air emissions, they can eventually reach and spread through groundwater, which supplies many New Hampshire residents with drinking water. PFASs persist in the environment and in the human body.

These unique physical attributes define the regulatory complexities. The US Environmental Protection Agency (EPA) regulates the manufacture and distribution of chemicals in commerce and, although recent amendments to the Toxic Substances Control Act supplemented EPA chemical review authority, the chemical review process is cumbersome and arguably insufficient to address the consequences of introducing long-lasting compounds like PFASs into commerce. PFASs are not classified as hazardous waste, nor has EPA adopted drinking water standards,



called MCLs, that would establish limitations in drinking water.

Although US chemical manufacturers have phased out two of the most prevalent PFASs, called perfluorooctanoic acid (PFOA) and perfluorooctane sulfate (PFOS), those chemicals are still produced internationally and imported in consumer products. A new generation of replacement PFASs now being manufactured by the chemical industry is already being discovered in North Carolina, Ohio and West Virginia water resources and appears to resist removal through traditional water treatment methods.

States are trying to pick up the slack to address existing PFAS water resource contamination while preventing new contamination. In New Hampshire, discovery of PFOA and PFOS prompted the state to adopt emergency groundwater standards last year for these two compounds. Exceeding the groundwater standards can trigger response obligations for responsible parties, including provision of alternate water for impacted wells. Even though they were based on EPA's Drinking Water Health Advisory of 70 parts per trillion, the groundwater standards prompted debate over whether the state should go further to adopt drinking water MCLs that extend beyond the generally applicable statutory criteria and that impose regular testing and compliance obligations on municipal and other public water systems. House Bill 485, which was retained

this year, will likely continue to challenge policymakers in finding the right balance to address the public health and cost concerns raised by stakeholders.

In terms of preventing new contamination, state regulators have raised the possibility that they may not have sufficient authority to prevent airborne PFASs from contaminating groundwater through deposition. PFASs can be transformed into new compounds when used in local manufacturing operations and can disperse, fall to the ground and leach into groundwater. This is how the St. Gobain Performance Plastics facility allegedly contaminated public and private water supplies near its facility in Merrimack, despite having reformulated to a newer type of PFAS product as a result of a 2006 administrative consent order issued to enforce the state's air toxics rules.

Because the rules govern inhalation rather than groundwater risks, there is arguably a gap in regulatory coverage for air pollutants that cause groundwater contamination. House Bill 463 was drafted to provide regulators with authority to require installation of "best available control technology" equipment on the discrete number of sources that would present air-related groundwater risk. There will likely be opportunities for future legislative action to provide the regulatory tools that may be needed to allow local manufacturing facilities to continue to operate without risking PFAS groundwater contamination.

Concerns over compliance costs and who should pay for remedies and damages will continue to emerge, especially when expensive infrastructure may be required to address contamination. Although the state's Groundwater

Protection Fund could be tapped for necessary water line extension projects, private funding by St. Gobain has been provided so far. Besides construction costs, however, there are always long-term, incremental cost associated with new infrastructure.

For utilities regulated by the Public Utilities Commission (PUC), any new connections or rate increases would have to be evaluated first. Policy issues could emerge on whether the PUC should socialize incremental costs, such as increased property taxes, for water line extensions that address localized PFAS contamination, even if there is general precedent for blending water rates among all users. An expected PUC filing by Aquarion Water Company for approval to extend its water distribution franchise for a permanent connection to replace an arsenic-contaminated water supply in response to an environmental order may shed additional light on how the PUC will evaluate PFASs-related water line extensions going forward.

Finally, emerging litigation may well evolve alongside regulatory developments. Class action lawsuits have already been filed in New Hampshire but, even if successful, would not necessarily address the statewide groundwater resource damages that can only be sought by the state. The state successfully recovered MTBE-related damages in product liability litigation against manufacturers, but it remains to be seen whether the same approach would provide a lasting solution for PFASs in groundwater.

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