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Navigating Evolving Regulations for Emerging Contaminants

A broad range of industrial companies should be aware of how regulators are increasing scrutiny on widely used chemical substances.

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State and federal regulators are increasing scrutiny on a range of chemical substances that are widely used in consumer products for their heat and chemical resistant properties. Known as per- and polyfluoroalkyl substances (PFAS), these substances are used in waterproof and stainproof fabrics and carpets, non-stick cookware, leak-proof coatings on packaging materials, firefighting foam, and many other products.

PFAS can cause concern in a broad range of industrial operations, including chemical and textile manufacturing plants, chrome plating operations, and refineries. They have been found at such wide-ranging locations as landfills, airports, military and other firefighting training facilities, and wastewater treatment plants. In certain cases, PFAS investigations have resulted in scathing media coverage, multimillion-dollar fines, and third-party lawsuits. Some manufacturers may not even realize these substances are in their raw products, operations or waste streams – most states do not require manufacturers to test or have permits for them.

There are thousands of PFAS compounds, but a few that are getting particular attention are known by the names PFOA, PFOS, and GenX. In 2006, the U.S. Environmental Protection Agency (EPA)

began a voluntary program to phase out the manufacture of PFOA and PFOS and in 2016, established non-binding drinking water health advisories for them. The agency has stopped short of declaring those or other PFAS compounds "hazardous substances" under various environmental laws or requiring their cleanup as it continues investigating their potential impact on human health and the environment. EPA did announce in February more details on its plans to further evaluate regulation of these compounds.

Many state regulators, on the other hand, are moving faster. One of the most high-profile examples is in North Carolina, where state regulators fined a chemical company $12 million (plus repayment of another $1 million in state investigative costs) and required it to provide a permanent drinking water solution to residents impacted by the company's emissions of GenX to the air and in its wastewater. In May, the North Carolina Department of Environmental Quality (NCDEQ) sent letters to all wastewater treatment plant operators in the same river basin as the chemical company, asking the treatment plants to sample for PFAS. In addition, NCDEQ has considered evaluating PFAS in landfill leachate. Similarly, California has sent letters to all landfills in the state and asked them to test their runoff for certain of these compounds. Michigan is one of the first states to introduce legislation to define PFAS as a hazardous waste, which would trigger a variety of enforcement mechanisms.

States also are starting to regulate PFAS as a condition of environmental permits. Most industrial operations across the country currently have permits that do not place limits on these substances, so those companies are not operating out of compliance by discharging or using them. However, as air permits and other types of environmental permits come up for renewal, state regulators may use that opportunity to add in restrictions around PFAS. Manufacturers and other industrial companies should not be afraid to question the legal and technical authority under which regulators are adding such restrictions to their permits.

Partnering with legal counsel can be extremely valuable in understanding the rapidly shifting regulatory landscape and when state or federal regulatory involvement is justified. Manufacturers also should be wary of the sampling methodology for detecting these compounds, which can be complicated (and expensive) because of the pervasiveness of PFAS compounds. Many everyday products, such as food wrappers, makeup, and stain-resistant clothing may contain PFAS, which can interfere with sampling results if the sampling scientist has eaten fast food or is wearing certain types of clothing. In addition, companies may need an entirely separate set of PFAS-free sampling equipment, since monitoring wells and other equipment are frequently coated with Teflon, which contains PFAS.

Even if industrial companies are not yet required by their states to test for PFAS, they may be required to do so by their business partners. Some lenders have begun adding PFAS sampling as part of their checklist in assessing the risks of a loan for certain industry segments. It also is possible that this type of testing could become necessary to procure environmental insurance, or that PFAS could become a blanket exclusion for pollution policies. Evaluating PFAS also may become a standard component of due diligence review in property transactions and corporate

acquisitions. These potential roadblocks are areas that legal counsel can help companies navigate.

One preventative step that manufacturers and industrial companies can take regarding PFAS is to ensure they are using industry-standard housekeeping practices. Establishing environmental compliance plans that include housekeeping and preventative maintenance procedures helps ensure that companies remain in compliance with environmental laws and permit standards. In particular, companies should conduct a thorough review of their discharge, emissions, and permit compliance with these issues in mind.

Another risk to be aware of is the growing number of lawsuits over PFAS contamination, involving a wide range of parties from manufacturers to public drinking water utilities and wastewater treatment plant operators. If industrial companies find themselves facing a lawsuit, they should keep in mind that liability can be hard to pinpoint because of the prevalence of PFAS compounds. Again, understanding your facility's discharges and having strong materials-handling compliance are key.

Last, it is worth noting that the risks to industrial companies related to PFAS are likely to keep growing. Regulations and policy on this topic are in their early stages, at least at the federal level. EPA is in the process of deciding whether to designate PFOA and PFOS as hazardous substances and require their cleanup nationwide. Technology also plays a key role. Improvements in technology are what enabled the identification, testing and assessment of PFOA, PFOS, and other emerging compounds like GenX. Additional technological advances and consistent regulatory progress likely will result in the detection of other PFAS compounds that will one day draw their own scrutiny. By partnering with experienced environmental counsel, industrial companies can be proactive and stay educated in navigating these trends.

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