

Beware the Litigation Risks of Emerging Contaminants

By

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In recent years, the term *emerging contaminant* has been used to refer to a broad group of chemicals and other constituents perceived as posing heretofore unrecognized threats to human health or the environment. This group includes manmade compounds such as industrial chemicals, pesticides, pharmaceuticals and personal care products but also naturally occurring chemicals, such as nutrients, salts, and pathogens. It includes chemicals that are not yet regulated (such as many per- and polyfluoroalkyl substances - PFAS) but also regulated compounds that are being reevaluated or assessed in new regulatory programs.

In all cases, these emerging contaminants have some pathway by which they are released into the environment where people or ecological receptors may be exposed. What renders these potential threats new or “emerging” is that the knowledge regarding these contaminants is evolving. In some cases, this is because new sampling programs or improved analytical detection capabilities result in these compounds now being detected in environments in which they were previously thought not to exist. In others, it is because new science provides data indicating that the levels now being detected may pose a risk.

Much of the recent concern surrounding emerging contaminants has been the detection of these compounds in public drinking water supplies or in the groundwater near drinking water supplies. Emerging contaminants that have surfaced in this regard include a number of PFAS, 1, 4-dioxane, 1, 2,3-trichloropropane, pharmaceuticals, Fipronil and other pesticides, nonylphenol, and *Legionella*.

Perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) – two PFAS present in a wide variety of industry and commercial products including aqueous film forming foam (AFFF) widely used for firefighting at military bases, refineries, and other locations where petroleum-based fire suppression is needed – have been found in drinking water and groundwater across the US. This includes detection in public water supplies in locales such as Hoosick Falls New York, which has spawned law suits and regulatory action, and in groundwater at hundreds of military bases across the US, potentially threatening public water supplies. See, e.g., *Baker v. Saint-Gobain Performance Plastics Corp.*, 1:16-CV-0917 (N.D.N.Y. February 6, 2017) (Kahn, J.).

The presence of these compounds in the groundwater is not a new finding, but recent regulatory initiatives to establish health advisories in the part per trillion levels have prompted increased surveillance and source control actions. The challenge in assessing and communicating health risks with PFOA and PFOS (and other emerging contaminants) is that the types of effects these chemicals can cause in people and the levels at which they may cause them is not well understood. Nevertheless, the potential health threat perceived by their presence is sufficient to spur regulatory and legal action as well as concern among drinking water consumers. The uncertainty in the data, coupled with differences in regulatory positions, leads to large variation in regulatory standards across geographies. This leads to confusion and concern in the public and confounds conclusions regarding the level of threat posed.

The history of litigation related to methyl tertiary butyl ether (MTBE) is illustrative of the serious course that litigation related to so-called emerging contaminants can take. Beginning in the 1980's, MTBE was

added to gasoline to replace octane that was lost when lead was removed. In the 1990's, use of MTBE expanded dramatically as refiners used it to meet new oxygen requirements for gasoline that were imposed under the Clean Air Act. Thereafter, there were increasing numbers of instances where MTBE was found in groundwater, including groundwater that serves as sources of drinking water. A wave of litigation followed beginning in the late 1990's.

Many of the first MTBE cases were putative class actions filed by private well owners. Cases in federal court were consolidated in a multi-district litigation. The court denied class certification in those cases because of the predominance of individual specific issues. See *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 209 F.R.D. 323 (S.D.N.Y. 2002). The second wave was dozens of cases filed by public water suppliers including municipalities, water districts and privately owned water systems.

The third wave of MTBE cases, which is still ongoing, has been cases brought by sovereigns, such as states and the Commonwealth of Puerto Rico. The stakes in these cases are enormous for several reasons. First, the states are generally seeking complete restoration of their groundwater resources, meaning that they seek removal of all detectable MTBE from their waters. Claims for contamination below regulatory standards have gotten some traction in the Courts. See *State of New Hampshire v. Hess*, No. 03-C-550 (N.H. Superior Court December 11, 2009); *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 458 F. Supp.2d 149 (S.D.N.Y. 2006). Second, many states are seeking what is called compensatory restoration – recovery for the loss in theoretical economic value of their groundwater resources during the period until the last detectable MTBE has been removed. The sovereigns are being represented by sophisticated contingent fee counsel. Collectively they will be seeking well into the billions of dollars from the refining industry.

Will there be extensive litigation across the country over other emerging contaminants? The answer is yes. Will that litigation evolve over time to include massive and high risk natural resource damages cases? There is every reason to think that the answer is yes.

Businesses and their lawyers should be assessing their exposure to litigation related to the broad range of emerging contaminants now. From a scientific perspective, they should pay attention to the availability and persuasiveness of data that fairly assesses the risks to human health and the environment presented by these many chemicals. Plaintiffs will, of course, argue that the risk is great whereas in many cases, the data actually suggests that these emerging chemicals generally present no real risk at the low levels in which they are typically found. From a legal perspective, all counsel practicing in the toxic tort and environmental areas – both in corporate legal departments and in law firms – should be suggesting that their clients focus on issues related to document creation and retention, assessing the availability of witnesses related to the development of these chemicals and the products that contain them (including the need to preserve the testimony of those witnesses) and developing lists of potential experts to assist in the litigation that is inevitably going to come.

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