Per- and Polyfluoroalkyl Substances: An Emerging Concern for Environmental Site Remediation and Public Drinking Water Suppliers in New Jersey

Daniel Flynn and Jay A. Jaffe

Greenbaum, Rowe, Smith & Davis LLP Client alert

October 2018

Environmental regulators on the state, federal and global levels have increasingly been scrutinizing a category of man-made chemicals known as perfluoroalkyl and polyfluoroalkyl substances (collectively referred to as PFAS), but the New Jersey Department of Environmental Protection (NJDEP) has been in the forefront of this movement in the United States. NJDEP's efforts have resulted in an expansion of remedial investigation obligations at New Jersey sites and an increase in monitoring and treatment obligations for New Jersey public drinking water systems.

For more than 60 years, PFAS have been used in the manufacture of a wide range of household, commercial and industrial products. These include non-stick cookware, waterproof/breathable clothing, chemical/heat resistant industrial products, water and stain resistant coatings for carpets and upholstery, grease-proof food packaging, metal plating, and aqueous firefighting foams. Although their impact on human health is still being debated, PFAS has been shown to produce tumors in laboratory animals. The level of concern expressed by regulatory agencies has been elevated by the fact that, according to NJDEP, PFAS has been found in the blood serum "of virtually all U.S. residents and [people] worldwide," including infants. Once in the environment, PFAS resist degradation and bio-accumulate in humans and wildlife, including fish that are consumed by humans.

With respect to NJDEP's site remediation program, the agency has declared PFAS to be "contaminants of emerging concern" that are considered "pollutants" when discharged to soil or water. As a result, every Licensed Site Remediation Professional (LSRP) overseeing the

Attorneys

Jay A. Jaffe

environmental remediation of a New Jersey site must consider PFAS for any site at which PFAS were stored, handled, or used, including the use of fire-fighting foam to address actual fires or to train firefighters. LSRPs are required to evaluate such sites for potential spills and releases of PFAS through air, water, accidents, and waste discharges. Although NJDEP has established a Ground Water Quality Standard for perfluorononanoic acid (PFNA) of 10 parts per trillion (ng/L), the remediation standards for other PFAS are otherwise not yet well defined. As a result, LSRPs are to apply their best professional judgment in setting investigation and remediation requirements and will likely seek site-specific technical guidance from NJDEP to assure agency approval of their decisions when the remediation is completed.

NJDEP has also designated PFNA as a "hazardous substance" under the New Jersey Spill Compensation and Control Act (Spill Act). Persons who discharge or are otherwise responsible for the discharge of PFNA are now strictly liable for remediation of the resulting contamination, and for reimbursing any damages to property, natural resources, income, or tax revenues paid by the fund established by the Spill Act to compensate persons harmed by the discharge of hazardous substances.

With respect to drinking water, NJDEP now requires all public drinking water systems to test the drinking water for PFNA and perfluorooctanoic acid (PFOA). A maximum contaminant level (MCL) has been established for PFOA at 14 ng/L, which is equivalent to 0.014 parts per billion (ppb). As an indication of how low this MCL is, the MCL established by EPA for benzene, a known carcinogen, is 5 ppb, which is equivalent to 5,000 ng/L. NJDEP has proposed an MCL for PFNA and pefluorooctanesulfonic acid (PFOS) of 13 ng/L, which is equivalent to 0.013 ppb.

If you have any questions regarding the issues discussed in this Alert, please contact the authors, **Daniel Flynn** and **Jay A. Jaffe**.