

CLE Session #4: 2024 Environmental Litigation and Trends Update

EPA ENFORCEMENT INITIATIVES

- Every four years, EPA identifies widespread environmental problems that could benefit from coordinated resources and federal enforcement and selects several for its National Enforcement and Compliance Initiatives (NECI).
- On August 17, 2023, EPA's Office of Enforcement and Compliance Assurance (OECA) announced its selection of six priority areas as NECIs for Fiscal Years 2024-2027.
- EPA is planning to address environmental justice across all six of its initiatives, which include:
 1. Mitigating **Climate Change** (new) - (including a focus on oil and gas and landfill methane emissions)
 2. Addressing Exposure to **PFAS** (new)
 3. Protecting Communities from **Coal Ash Contamination** (new)
 4. Reducing **Air Toxics** in Overburdened Communities (modified) (focus on large chemical manufacturing facilities?)
 5. Increasing Compliance with **Drinking Water Standards** (continued)
 6. **Chemical Accident** Risk Reduction (continued)

3M AND DUPONT WATER PROVIDER SETTLEMENTS

- Announced just before trial June 2023
- Preliminarily approved August 2023
- Resolves claims between 3M / DuPont and nationwide classes of Public Water Systems for impacts to Drinking Water
 - 3M total value between \$10.5-\$12.5B
 - DuPont total value \$1.185B
- Designed to replicate and partially compensate for costs to design, build, operate and maintain treatment systems on a per Water Source basis
- Participants won't know with certainty what they will receive until claims submitted, allocation complete
- "Opt out" settlement structure

TWO PFAS CASES TO WATCH

1. Chemours GenX request to the Third Circuit Court of Appeals to review the toxicity assessment for GenX health advisory

- Chemours position: EPA health advisory over the company's chemicals carries the same weight as the law, forcing the business into compliance with de facto regulation, to wit, while the government treats advisories purely as a recommendation, "public water systems have been forced to make permanent decisions" based on the findings; thus, Chemours said, this constitutes a final agency action under the law.

2. Michigan PFAS Drinking Water Appeal

- Michigan Supreme Court has agreed to review an appeals court decision invalidating regulations on PFAS in drinking water because of a missing cost analysis.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA/SUPERFUND)

- CERCLA hazardous substance designation for PFOA and PFOS pending, expected soon
 - EPA pushed the timeline for the final rule on PFAS CERCLA designation from August 2023 to February 2024 . . . now it's March.
- Advanced Notice of Proposed CERCLA Rulemaking for designation of seven other PFAS (PFBA, PFDA, PFBS, PFHxS, PFNA, HFPO-DA, PFHxA) and PFOA/PFOS precursors

NEW EPA PFAS RULES FOR HAZARDOUS WASTE

On February 1, 2024, EPA proposed two rules that would clear the way for extensive new regulation of PFAS substances.

- Under one proposed rule, the EPA would modify its current definition of "hazardous waste" under the Resource Conservation and Recovery Act as it applies to cleanups at permitted hazardous waste facilities to allow for more types of material to qualify for the label.
- Under the other proposal, the agency would add nine PFAS compounds as hazardous constituents that may be regulated.

A FEDERAL PFAS CLEANUP STANDARD IS NOT YET AVAILABLE

- Proposed federal (SDWA) drinking water maximum contaminant levels (MCLs) announced March 2023. No updated date for finalizing the regulation.
 - PFOA and PFOS: 4 ppt
 - PFHxS, PFNA, PFBS & HFPO-DA/GenX Chemicals: Hazard Index 1.0

TSCA REPORTING AND RECORDKEEPING REQUIREMENTS FOR PFAS

- Rule became effective on November 13, 2023
- Requires any person that manufactures (including importation) or has manufactured PFAS or PFAS-containing articles in any year *since January 1, 2011*, to electronically **report information regarding PFAS uses, production volumes, disposal, exposures and hazards**.
 - Risks for clean energy companies/ solar and wind farms: the class of PFAS chemicals found in most clean energy projects are *fluoropolymers*. They're used in coatings for solar panels and wind turbines and are prevalent in lithium-ion batteries and electrolyzers for hydrogen production.
 - Will require companies to scrutinize their equipment supply chains; could present some difficult compliance questions.
- PFAS Definition – Expands from proposed rule to focus on *chemical structure* of the substances, rather than limiting the scope of reporting to a discrete list of chemicals.
- Deadlines – One year information collection period following the effective date of the rule; followed by a six-month reporting period.
- What Must Be Reported –
 - Chemical Identity Information (special name, generic name, chemical ID number, molecular structure)
 - Volume
 - Various Process and Use information
 - Concentration of PFAS
 - Environmental and health effects

TRACKING STATE ACTION ON PFAS

- Over 30 States have passed laws addressing PFAS, they vary widely and focus on:
 - Consumer Products
 - Children's Products
 - Food Packaging
 - Rugs/Upholstery
 - Beauty/ Personal care
 - Sports, Ski wax
 - Appropriations for Remediation of Drinking Water, Air Quality or Emissions
 - Monitoring & Detection
 - Firefighting Foam or Protective Equipment
 - Agriculture, Biosolids, Pesticides
 - Disposal & Incineration of PFAS
 - Solid Waste
 - Oil & Gas

ENVIRONMENTAL JUSTICE: 2023 RECAP AND 2024 FORECAST

- Biden Administration emphasized a whole-of-government approach to Environmental Justice (“EJ”), issuing Executive Order No. 14096 on April 21, 2023
 - each federal agency to make EJ part of its mission, created performance metrics on achieving the order's goals, and dedicated staff and funding to EJ activities
 - White House Office of Environmental Justice in the Council on Environmental Quality
- EPA as lead EJ federal agency
 - July 18, 2023, the EPA announced that it was opening stand-alone EJ offices in each region and updated its screening tool, EJScreen 2.2, to include Toxic Release Inventory data, among other changes.
 - Nov. 15, 2023, the EPA issued a draft revision to its Technical Guidance for Assessing Environmental Justice in Regulatory Analysis
 - EPA's Office of Environmental Justice and External Civil Rights and Office of Land and Emergency Management approved a policy formally incorporating EJ into emergency response preparedness and management.
 - EPA also announced greater focus on EJ issues in warehouse construction and operations.
 - A lot of grant monies awarded.
- EJ Lawsuits in 2023
 - DOJ agreement re: Jackson, Mississippi water crisis
 - DOJ sued to limit air emissions at a facility in Louisiana
 - Citizen group suits in LA, CO, etc.
- 2023 federal agencies began to incorporate EJ into regulations, including proposed revisions to regulatory actions governing air quality.
 - The most important of these is the new National Environmental Policy Act (NEPA) regulations.
 - On July 31, 2023, the Council on Environmental Quality released proposed Phase 2 NEPA regulations governing how federal agencies implement NEPA that, among other things, stress the consideration of EJ in the environmental review process.

EJ PREDICTIONS

- EPA's inclusion of EJ in its technical guidance suggests that **EJ will factor into more EPA agency actions, including rulemaking**
- increased access to EJ tools + grants = **new/ renewed environmental permit application challenges** from citizen groups & NGOs, possibly also torts/injury suits
- other federal agencies will **prioritize EJ going forward**
- **heightened EJ scrutiny** in agency NEPA reviews

- regulated entities may have to undertake **comprehensive EJ analyses to obtain permits** and other approvals from a growing list of agencies, and may face an increase in enforcement actions relating to alleged EJ and civil rights impacts stemming from their operations

TRENDS TO WATCH

- **Green Amendments:** Climate change claims and constitutional amendments based on the right to clean air, water and environment.
 - A court in Montana recognized young people’s rights to protection from climate change, siding with a group who alleged state energy policy (specifically a Montana state law that prohibited the consideration of climate impacts in the process for approving energy projects) violates their rights to a clean and healthy environment. Notably, the Montana case invoked a provision in the state’s constitution that establishes a right to “a clean and healthful environment.” *Held v. State*, No. CDV-2020-307, 2023 WL 5229257 (Mont. Dist. Aug. 14, 2023).
- **Plastics Packaging Litigation:**
 - *N.Y. v. Pepsi Co.*, N.Y. Sup. Ct., Index No. 814682/2023 (alleging, inter alia, “PepsiCo’s plastic packaging contaminates the [Buffalo] river and public drinking water supplies, threatening public health, harming freshwater species, and endangering the ecosystem”). Claims under New York General Business Law § 349, which prohibits deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in the state, New York Executive Law § 63(12), as well as public nuisance.
- **ESG:**
 - Suit to defeat attempts of minority activist shareholders to impose climate change action. *Exxon Mobil Corp. v. Arjuna Capital*, N.D. Tex., No. 24-cv-00069.
 - Greenwashing suits focusing on alleged misrepresentations about “sustainable” manufacturing or sourcing and “recyclability” continue.
 - The U.S. Securities and Exchange Commission has increased enforcement of greenwashing claims made to investors by publicly traded entities and funds.
 - In January 2024, the European Parliament approved new legislation aimed at curbing greenwashing by businesses. The Directive on Empowering Consumers for the Green Transition (ECGT) will ban exaggerated and unfounded claims relating to a company’s environmentally friendly actions, including carbon neutral claims. **Will it serve as a model for U.S. regulators?**