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What's All the PFAS About?

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Per- and polyfluoroalkyl substances (PFAS) are a hot topic in the manufacturing and environmental arenas because litigation involving the environmental harm and alleged health effects of these substances is culminating in aggressive federal and state regulatory activity and large verdicts for plaintiffs. PFAS are a group of man-made chemicals that includes PFOA, PFOS, GenX, and many other chemicals. PFAS have been manufactured and used in a variety of industries around the globe, including in the United States, since the 1940s. PFOA and PFOS have been the most extensively produced and studied of these chemicals. Both chemicals are persistent in the environment and in the human body – meaning they don't break down and they can accumulate over time (i.e., the chemicals bioaccumulate). There are nearly 5,000 variations of PFAS and they can be found in food in PFAS-containing materials, such as pizza boxes; commercial household products, such as stain- and water-repellent fabrics, nonstick cookware (e.g., Teflon), and fire-fighting foams (a major source of groundwater impacts at airports and military bases where firefighting training occurs); workplace, including production facilities or industries such as chrome plating, electronics manufacturing or oil recovery; drinking water, typically localized and associated with a specific facility (e.g., manufacturer, landfill, wastewater treatment plant, firefighter training facility); and in living organisms, including fish, animals, and humans, where PFAS have the ability to build up and persist over time.

It's no surprise then that most people have been exposed to PFAS. Indeed, PFOA can be found in the blood of more than 95 percent of Americans. Research suggests that PFOA and PFOS cause reproductive, developmental, liver, kidney, and immunological effects in laboratory animals. Both chemicals are alleged to have caused tumors in animals. The most consistent findings are increased cholesterol levels among exposed populations, with more limited conclusions related to low birth weight; effects on the immune system; cancer (for PFOA); and thyroid hormone disruption (for PFOS). Reported non-cancerous health effects are increased serum cholesterol, liver changes, and uric acid levels; delayed mammary gland development; decreased immune response; delayed skeletal ossification; potential reduced fetal growth from prenatal exposure; and potential immune hazard to humans. Reported cancerous effects include cancers of the liver, testes, mammary glands, and pancreas in animals; and suggested links to testicular, kidney, and thyroid cancers in humans.

The United States Environmental Protection Agency (EPA) has set a health advisory level (HAL) at a combined 70 parts per trillion for PFOA and PFOS, which is equal to approximately one grain of salt in 1,000 gallons of water. The EPA is moving to develop a rule-based PFAS concentration for drinking water, which the states are likely to adopt as a primary standard. States such as Florida, California, New Hampshire, New Jersey, Vermont, Minnesota, Idaho, Maine, Alaska, and Texas are beginning to adopt their own advisory levels for PFAS in drinking water and other mediums.

PFAS has costly legal implications with lawsuits being filed across the country and culminating in verdicts reaching nearly a *billion* dollars in some cases. Three notable cases are *State of Minnesota, et al v. 3M Company*, which was filed in state court; *In re E.I. DuPont Nemours and Company C-8 Personal Injury*, filed in federal district court for the Southern District of Ohio; and the recently filed *State of New York v. 3M Company, TYCO, et al*, filed in state court.

In 1998, *Tennant v. E.I. du Pont de Nemours & Co., Inc.* was filed in the Southern District of West Virginia. Eventually, after thousands of similar cases were filed in various federal district courts, DuPont moved the Judicial Panel on Multidistrict Litigation (JPML) for pretrial consolidation. Through direct filing, removals, and Conditional Transfer Orders from the JPML, the federal district court for the Southern District of Ohio ultimately had more than 3,500 cases before it as part of this MDL. The plaintiffs alleged that DuPont was liable under a variety of West Virginia common law tort theories including negligence and seeking equitable, injunctive, and declaratory relief, along with compensatory and punitive damages, as a result of contaminating with C-8 the drinking water supplies of the communities surrounding Washington Works. In 2017, DuPont and its spinoff, Chemours, settled a suit with some 3,500 residents in Ohio and West Virginia, agreeing to pay $671 million for polluting an area around a manufacturing plant in Parkersburg, West Virginia. In addition to the $670.7 million settlement costs, DuPont and Chemours could pay up to $25 million per year for the next five years or an additional $250 million. If all of the $250 million is paid out, plaintiffs will receive roughly $259,000 per claim, including attorneys' fees.

In 2010, the Attorney General of the State of Minnesota filed a Natural Resource Damage lawsuit alleging damages under MERLA (Minnesota Environmental Response Liability Act) for the release or threatened release from a facility is strictly liable for damages; damages under MWPCA (Minnesota Water Pollution Control Act) for any loss or destruction to wildlife, fish, or the aquatic life and for actual damages as a result of unauthorized discharge of pollutants into the waters of the state; trespass; common law nuisance; statutory nuisance; and negligence. Nearly a decade later in 2018, the State of Minnesota came to a settlement agreement which included an $850 million grant to the State to be held in the State's remediation fund.

Very recently, on November 4, 2019, the State of New York filed an action against 3M Company, TYCO Fire Products, ChemGuard, Buckeye Fire Equipment, National Foam Inc., DuPont, Chemours, and others in the state supreme court (trial court). The complaint contains claims of strict liability for public nuisance; strict products liability for defective design; strict liability for failure to warn; and for restitution on the basis that these manufacturers designed, manufactured, marketed, and sold aqueous film-forming foams and related products that were discharged into the environmental sites throughout New York. The complaint seeks relief in the form of a declaration that defendants are strictly, jointly, and/or severally liable to the State; injunctive and equitable relief in the form of a monetary fund for the State's reasonably expected future response costs plus damages for injury to and destruction of the State's natural resources; performance of investigative and remedial work by defendants; and punitive damages. If this case ends like the Minnesota case or the Multidistrict Litigation cases above, the verdict could cost these defendants hundreds of millions of dollars.

In Florida, the Sanford Municipal Airport recently filed a case against the manufacturers and distributors of PFAS containing foam to recoup past and future damages. More suits like this are expected. In addition, the Florida Legislature 2020 session began on January 14 and there are several bills pending to address the issues of regulatory enforcement and liability.