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PFAS Lawsuit In New Jersey Provides Sweeping Allegations

Wednesday, September 16, 2020

On September 11, 2020, the Borough of Hopatcong, New Jersey sued 3M Company for contaminating the municipality's drinking water with perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA), which fall within a class of over 7,000 per- and polyfluoroalkyl substances (PFAS). PFAS are manmade chemicals used in numerous consumer products due to their unique characteristics, including the ability to repel oil and water in addition to their resistance to heat degradation. These same characteristics, however, make them highly persistent and mobile in the environment, which earned them the nickname "forever chemicals."

In June 2020, the New Jersey Department of Environmental Protection took action against PFOA and PFOS by setting a maximum contaminant level (MCL) for each compound. This created a legal threshold limit on the amount of PFOA and PFOS allowed in public water systems under the New Jersey Safe Drinking Water Act. New Jersey now has an MCL of 14 parts per trillion (ppt) for PFOA and 13 ppt for PFOS. In comparison, the EPA has not yet set a national MCL under the Safe Drinking Water Act; however, it has set an advisory level of 70 ppt for PFOA in drinking water. New Jersey's standard is therefore significantly stricter and provides a limit for PFOS and PFOA.

The Borough of Hopatcong brought this case because it currently has seven wells that contain PFOS and PFOA. Of those seven, five wells contain levels of PFOA and PFOS above the New Jersey's MCLs. The Borough brought claims for negligence, failure to warn, public and private nuisance, and trespass. As relief, it seeks money for the "investigation, clean-up, abatement, remediation, engineering, treatment and monitoring costs incurred" by the Borough to comply with the EPA's public health advisories, and New Jersey's soil and groundwater clean up standards and drinking water standards.

The complaint alleges that 3M "encouraged the continued and/or the increased use and release into the environment of PFAS, including into New Jersey and this District, by its customers and others despite knowledge of the toxicity, persistence, and bioaccumulation concerns associated with such activities." It indicates that PFOA and PFOA contamination occurs through releases in the air, land, and water from industrial sites, consumer and commercial products, and bio sludge from wastewater treatment plants. The complaint, however, does not cite to any specific sources of contamination within these broader

categories. Instead, the complaint relies on the allegations that “3M was the only known manufacturer of PFOS and its precursors in the United States” and “[f]or most of the past seven decades, through the early 2000s, 3M was the primary manufacturer of PFAS chemistry in the United States”; therefore, 3M should have known that its “marketing, development, manufacture, distribution, release, training of users of, production of instructional materials about, sale and/or use of PFOA and PFOS and products containing PFOA and/or PFOS, including in New Jersey, would result in the contamination of the Plaintiff’s wells and the groundwater that supplies those wells.”

It will be interesting to monitor 3M’s pushback on the broad sweeping allegations, and it is likely that the company will attempt to bring other companies into the lawsuit for either indemnification or contribution purposes. While the Borough of Hopatcong chose to only sue 3M in this instance, any company using PFAS downstream in the chain of commerce must be wary of these types of lawsuits, as it is likely that other counties, cities, and states will continue to look to all possible sources of PFAS contamination in water and soil to fund cleanup costs.

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