LITIGATION MINUTE: EMERGING CONTAMINANTS: WHAT'S ON THE HORIZON?

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

Emerging contaminants are synthetic or natural chemicals that have not been fully assessed from a health or risk perspective and are reportedly finding their way into consumer products and the environment. These include chemicals that have been widely used throughout society for decades but are now being targeted due to scientific developments and public scrutiny regarding their uses. Across industries, we are seeing increased regulation of consumer products, manufacturing processes, and industrial emissions, as well as new waves of litigation against unsuspecting businesses, putting their operations and financial stability at risk.

The first edition in this three-part series underscores the impact of the regulatory regime on the legal landscape and forecasts what lies ahead with a new regime and the substances likely in line for increased scrutiny, particularly ethylene oxide (EO) and perfluoroalkyl or polyfluoroalkyl substances (PFAS), as well as other chemicals.

In a minute or less, here is what you need to know about what is on the horizon for emerging contaminants litigation and regulation.

Regulation Drives Litigation

EO is a versatile compound used to make ethylene glycol and numerous consumer products, including household cleaners and personal care items. Also used to sterilize medical equipment and other plastics sensitive to heat or steam, its uptick in litigation was largely driven by regulators' positions surrounding EO's alleged carcinogenic risk.

In 2016, the US Environmental Protection Agency (EPA) released its Integrated Risk Information System (IRIS) Assessment, finding that EO was 60 times more toxic than previous estimates and “carcinogenic to humans.”[1] Widespread litigation soon followed, despite:

- the EPA recognizing that its assessment included several uncertainties;[2]
- state agencies, such as the Texas Commission on Environmental Quality, concluding that the EPA significantly overestimated EO's carcinogenic risks;[3] and
- state agencies, such as the Tennessee Department of Health, finding no evidence for the clustering of high numbers of cancers near facilities that emit EO.[4]

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The takeaway: A lack of robust science does not minimize litigation risk. Immature and incomplete scientific information will drive early litigation, particularly when it receives regulatory attention and is widely publicized on social media and the popular press.

Where Federal Efforts Slow, States Pick Up the Slack

With Republicans taking control of the Senate, House of Representatives, and White House in November, expect that some legislation and regulation concerning emerging contaminants will be scaled back or unlikely to gain traction. This includes the EPA's regulation of EO under the Clean Air Act and requirements for the use of EO as a pesticide, as well as bills introduced in Congress to phase out certain uses of PFAS, which are used in firefighting foams, personal care products, food packaging, and other consumer product applications.

But where federal legislation and regulation slow, expect state-level efforts and private litigation such as citizen suits to increase. For example, more than 20 states identified PFAS as an immediate, mid-, or long-term focus for 2025, and President Donald Trump's first term saw a significant increase in environmental citizen suits.

The takeaway: Do not expect that the new administration will result in a lack of focus on emerging contaminants nationwide. Companies with products or intermediaries that become the focus of emerging contaminant legislation or regulation should consider whether it is appropriate to participate in legislative meetings, hearings, stakeholder sessions, and opportunities to comment and testify; meet with regulators and representatives in critical states; or contribute to the development of model legislation for use in various states.

Other Chemicals “Emerging” as Emerging Contaminants

With increased scientific scrutiny and regulatory activity acting as catalysts for litigation involving emerging contaminants, many other ubiquitous chemical substances may get caught up in the next waves of regulation and litigation—including, for example, microplastics, formaldehyde, and phthalates.

Microplastics

Microplastics can come from several sources, such as cosmetics, glitter, clothing, or larger plastic items breaking down over time. While a definitive correlation between microplastic exposure and adverse health effects has not yet been established, and the EPA states that “[m]icroplastics have been found in every ecosystem on the planet, from the Antarctic tundra to tropical coral reefs, and have been found in food, beverages, and human and animal tissue,” recent petitions to the EPA have called for increased monitoring of microplastics in drinking water. Examples of early litigation involving microplastics include consumer fraud and greenwashing claims.

Formaldehyde

Used in the production of construction materials, insulation, and adhesives, and as a preservative in cosmetics and personal care products, formaldehyde has seen an uptick in the filing of personal-injury claims and class actions alleging harm due to alleged exposure. These cases draw on the EPA's August 2024 IRIS Toxicological Review of Formaldehyde and December 2024 final risk evaluation for formaldehyde under the Toxic Substances Control Act, despite high-profile challenges to the EPA's assessments that have highlighted concerns with its scientific shortcomings.

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Phthalates

The use of ortho-phthalate plasticizers in industrial applications and consumer products such as cosmetics, plastics, and food packaging has recently diminished. However, the listing of numerous phthalates as alleged reproductive toxicants and carcinogens under California's Proposition 65, combined with Consumer Product Safety Commission restrictions on the use of phthalates in children's toys and articles and the US Food and Drug Administration's removal of 25 ortho-phthalate plasticizers from the Food Additive Regulations, are keeping phthalates in the spotlight. Recent phthalate litigation includes mislabeling and false advertising claims for food and childcare products containing trace phthalate residues.

The takeaway: Although litigation and regulatory developments related to EO and PFAS continue to capture headlines, more is on the horizon. Again, immature science can drive early litigation.

Subsequent editions will touch on what companies can do to prevent, insure, and defend against the risks emerging contaminants pose. For more insight, visit our Emerging Contaminants webpage.

FOOTNOTES

[1] U.S. Env't Prot. Agency, EPA/635/R-16/350FA, Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide (2016).

[2] U.S. Env't Prot. Agency, Frequent Questions about Ethylene Oxide (EtO), EPA.Gov (last updated 14 Jan. 2025).

[3] *See* Tex. Comm'n Env't Quality, Ethylene Oxide Carcinogenic Dose-Response Assessment (15 May 2020).

[4] *See* Potential Cancer Cluster Investigation for Sterilization Services of Tennessee located in Memphis, TN (27 Feb. 2023).

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