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Michigan Sues 17 Manufacturers over PFAS/Publishes Draft PFAS Drinking Water Rules



Last week, the State of Michigan joined a number of other states that have filed lawsuits against 17 manufacturers of per- and polyfluoroalkyl substances — collectively known as PFAS, which have been linked to cancer and other health problems. Scientists who study PFAS consider the substances to pose significant public health threat because they are toxic, water soluble, bio-accumulative and persist in the environment due to the strength of the fluorine-bonded, long-chain chemistry, which does not naturally degrade. These compounds relate to various manufacturing operations from fire-fighting compounds, to “scotchguard” to non-stick coatings.

PFAS have been in the news a lot recently. For instance, PFAS were detected near the former Wurtsmith Air Force Base in Iosco County and on the west side of the State from past disposal by Wolverine World Wide (manufacturer of Hush Puppies). Recent MEGLE data shows that over 1.8 million people are drinking municipal water in Michigan with some level of PFAS in it, although almost all detections are below a widely-debated federal safety threshold of 70-ppt. There are presently some 77 (a year ago it was 23) sites in Michigan with confirmed detections of PFAS compounds that have been identified as problematic by the State of Michigan.

On January 14, 2020, the State of Michigan filed suit against 17 manufacturers of PFAS asserting liability under Michigan’s:

- State superfund law to remedy and prevent releases of hazardous substances to the environment alleging these manufacturers were responsible for activities causing a release of PFAS or arranged for disposal of PFAS
- Environmental Law which allows for relief against any person for the protection of air, water or other natural resources
- Water Resources Protection Law which prohibits unpermitted discharges into the State’s waters
- Fraudulent Transfer Act, asserting that some of the companies have defrauded claimants by transferring their liabilities to other entities and shielding assets from potential claimants.
- Common law of negligence, arguing that the companies sold PFAS to downstream handlers when they knew or should have known that it would be released into, and contaminate the environment, threatening the health of the State’s residents.
- Common law of trespass, asserting that the companies manufactured PFAS and products containing PFAS with “substantial certainty” that their actions would contaminate the State’s property, waters and animals.
- Common law of public nuisance, again alleging that the companies’ acts set in motion the contamination of the State’s natural resources and property and interfering with Michigan’s residents’ rights to enjoy Michigan’s natural resources and the State’s public trust powers to manage the State’s natural resources

- ▶ Common law of unjust enrichment, alleging that the companies were unjustly enriched because they benefitted from the State's cleanup work

Boiled down to its essence, the State alleges that the manufacturers made the PFAS compounds, knew the problems they presented, distributed them in commerce anyway and should be liable for remedying the problems when others used them or disposed of them. If this sounds familiar, the public nuisance doctrine is one heavily relied on in the recent opioid litigation and in gun, lead paint, and tobacco litigation before that. The concept is that the State's police power allows the State to sue to abate a public nuisance – a threat to the public health.

The State seeks to recover a variety of damages ranging from natural resource damages to investigation and monitoring costs to remedial costs and even punitive damages. Given the magnitude of the case and the risk of further litigation in other states, it will be interesting to see if the manufacturers try to strike a deal or fight to the death.

Also, on November 21, 2019, Michigan released [a set of draft rules](#) that, among other requirements (including monitoring), set drinking water standards for seven PFAS compounds including some as low as 6 parts per trillion. The comment period on these rules closes January 31, 2020.

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