The Emergence of PFAS Related Lawsuits Against Wastewater Treatment Plants

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On behalf of Haw River Assembly, the Southern Environmental Law Center recently served a Notice of Intent to Sue ("Notice") on the City of Burlington, North Carolina. Copies of the Notice were delivered to EPA and the North Carolina Department of Environmental Quality ("NCDEQ"). The Notice alleges violations of the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA") for the City's discharge of per- and polyfluoroalkyl substances ("PFAS") and 1,4-dioxane-contaminated wastewater into local waterbodies. These waterbodies are drinking water sources for four North Carolina counties. Targeting local governments and their wastewater treatment utilities is a new trend in the litigation against potential sources of PFAS in drinking water.

Notice of Intent to Sue

The Clean Water Act and RCRA allow citizens to sue alleged violators of those Acts after first providing the alleged violator with notice of intent to sue and an opportunity to cure the alleged, ongoing noncompliance. According to the Notice, the City of Burlington operates two public wastewater treatment plants ("WWTPs") that treat industrial wastewater from at least fifteen industrial facilities, including textile manufacturing facilities, a metal finishing facility, and a manufacturer of polymer emulsions and resins. The City holds National Pollutant Discharge Elimination System ("NPDES") permits issued in 2014 for the two WWTPs, and it recently applied for renewals. The City also holds a Non-Discharge Permit for the land application of wastewater treatment sludges on local farmlands.

Haw River Assembly engaged SELC to serve the Notice after discovering through a Public Records Act request that PFAs and 1,4-dioxane were detected in the industrial wastewater received by the City. The WWTPs had been gathering the industrial wastewater data in response to a NCDEQ request for testing for PFAS and 1,4- dioxane in its influent. Haw River Assembly and nearby universities also conducted sampling in the affected water bodies and allege the sampling results confirm the WWTPs discharge large amounts of PFAS and 1,4 dioxane into the surface waters through their outfalls. Haw River Assembly further alleges sampling from a local drinking water source fed by these waterbodies – a fountain in a nearby public library – proves the WWTP discharge of PFAS and 1,4-dioxane by the WWTPs is contaminating public drinking water and causing an imminent and substantial endangerment

of public health.

PFAS and 1,4-Dioxane

PFAS are manmade substances that have been widely used by industry and in consumer products since the 1950s. Examples include nonstick coatings, plating operations, firefighting foams, and stain- and water-resistant treatments for clothing, furniture, and carpeting. Over the past few years, state and federal regulators have been struggling with how to deal with the discovery of PFAS and related contaminants in drinking water. In 2016, EPA established a lifetime health advisory of 70 parts per trillion ("ppt") for the combined concentrations of two types of PFAS (PFOA and PFOS) in drinking water. A drinking water health advisory is not a regulatory standard, but is instead information on the level of a contaminant in drinking water that EPA believes is safe to consume over a lifetime. Some states have already taken steps to regulate PFAS and other similar contaminants. Michigan, New York, New Hampshire, New Jersey, and Vermont have either proposed or finalized drinking water standards for various PFAS-related substances ranging from 6 ppt to 20 ppt. Massachusetts recommends a level of 70 ppt in drinking water for individual or combined types of PFAS and PFOS.

The chemical 1,4-dioxane was used as a stabilizer in certain chlorinated solvents, paint strippers, greases and waxes. EPA has established a drinking water health advisory with an associated estimated lifetime cancer risk of one in one million at a concentration of 0.35 parts per billion ("ppb"). North Carolina has a calculated human health criterion for 1,4-dioxane of 0.35 ppb in water supplies and 80 ppb in all other waterbodies.

In summary, regulatory standards vary significantly from state to state. This is evidence that, due to public pressure for a response to the presence of these chemicals in drinking water supplies, regulatory action is moving faster than the science. However, now that the contaminants can be detected at such small levels, more research will be done. In the meantime, lawsuits will be filed against the makers of products that once contained PFAS, users of fire-fighting foam such as airports and the Department of Defense, and WWTPs. According to online reports, class-action lawsuits have already been filed in Colorado, Michigan, New York, and Pennsylvania, and more than a dozen lawsuits – including the one filed against the City of Burlington -- have been brought against governments and public utilities seeking reimbursement for the cost of environmental cleanup and removing PFAS from drinking water.

Alleged Violations

In the Notice against the City of Burlington, Haw River Assembly alleges violations of the CWA and RCRA arising from the City's failure to disclose the discharge of PFAS or 1,4-dioxane in its NPDES permit applications and lack of authorization in its permits to discharge those contaminants. The violations are specifically stated as follows:

- Discharging PFAS and 1,4-dioxane into local water bodies without an NPDES permit from point sources, including outfalls, spray devices used to apply sludge onto fields, and ditches and drainage channels that flow from these fields into the local water bodies;
- Discharging PFAS and 1,4-dioxane in violation of its two NPDES permits, including the Removed

Substances and Duty to Mitigate provisions;

- Violating its Non-Discharge Permit by not preventing discharges to surface waters and by violating North Carolina's groundwater and surface water standards;
- Failing to properly manage its pretreatment program;
- Causing toxic PFAS and 1,4-dioxane pollution to enter surface waters from the land application of sludge in a manner that may present an imminent and substantial endangerment to health and the environment; and
- Disposing solid waste in a manner that constitutes open dumping under RCRA.

Right to Cure

Citizen suit notices under the CWA and RCRA must give the alleged violator an opportunity to cure. Here, Haw River Assembly alleges the City must immediately cure the "illegal" discharge of PFAS and 1,4-dioxane by:

- Requiring industrial facilities to disclose and remove PFAS and 1,4-dioxane before their industrial wastewater enters Burlington's treatment plants; and/or
- Installing treatment technology at its treatment plants capable of removing PFAS and 1,4-dioxane; and
- Monitoring its wastewater to ensure these chemicals are not present prior to discharge into surface waters; and
- Managing its sludge disposal so that contaminated sludge does not harm human health or the environment.

It remains to be seen what the City's response to the Notice will be. The City may ask its industrial customers to foot the bill for any pretreatment technologies needed to remove PFAS and 1,4-dioxane from their wastewater, or it may refuse to receive wastewater from certain customers. Furthermore, by serving the Notice on NCDEQ, SELC is notifying NCDEQ of its obligation to enforce NPDES permit and legal obligations on the City if the City fails to act.

Things to Come

Local governments and their wastewater treatment utilities seem likely to face more lawsuits by environmental groups for PFAS discharges. If that occurs, it's a sure bet these defendants will seek reimbursement for the costs of any necessary cleanup or pretreatment from their industrial dischargers that have PFAS in their wastewater. Accordingly, any company discharging wastewater to a WWTP that may contain PFAS or 1,4-dioxane is at risk of being named a third-party defendant in any such lawsuit.

What's in your wastewater?

33 U.S.C. § 1365

42 U.S.C. § 6972(b)(2)(A)

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- Jessica J.O. King – 803.567.4602 – jking@williamsmullen.com

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