Holland & Knight

HK ON THE RISE

Hot Topics in the Environment

PFAS DUE DILIGENCE: REGULATORY UPDATE AND LEGAL PERSPECTIVE FOR MANAGING RISK

Q&A with Associate Meaghan Colligan

Holland & Knight on the Rise (HKOTR) provides business development, networking and leadership opportunities for the rising stars in the firm. As part of this initiative, we have launched the Hot Topics Series. The in-depth interviews allow for our young policy and legal professionals to offer their viewpoints, reflect on their professional experiences and examine relevant issues across the policy and legal spectrums. The Hot Topics Series will alternate monthly with a lunch series that focuses on timely and topical matters.

This month's Hot Topic features Associate **Meaghan Colligan**, whose former work educating elementary school students with Teach For America led her down the road to practice environmental law. Ms. Colligan is a Washington, D.C. attorney and member of Holland & Knight's Public Policy & Regulation Group. She focuses her practice in the areas of environmental, land use, energy and municipal law.

In the following Q&A, Ms. Colligan discusses her experience with per- and polyfluoroalkyl substances (PFAS), which are currently the subject of increasing regulatory attention, litigation, and state and federal enforcement.

Q. What led you to practice environmental law and become involved with PFAS?

While teaching elementary school as a corps member of Teach For America Miami-Dade, I learned that many of my students were living in communities that were impacted by environmental conditions. Teach For America taught me that improved reading comprehension and writing literacy could be obtained when students read and write about topics that they are experiencing in their lives. Accordingly, I began to pair students' assignments with basic chemistry, geology, physics and natural resource concepts. Following this experience and my increased interest in the environment and science, I chose to focus my career on environmental law and policy.

Prior to joining Holland & Knight, I was the lead associate for a municipality facing PFAS contamination concerns. At the time I became involved in the matter, the U.S. Environmental Protection Agency (EPA) had just issued a drinking water health advisory for certain PFAS compounds – perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS). Because PFAS are an "emerging contaminant," meaning they are just beginning to receive wide-scale state and federal regulatory attention, the municipality's legal claims and obligations were not clearly written in federal and state environmental law, nor had investigation and remediation methodologies been fully developed by the engineering and scientific communities. While working on the matter, I immersed myself in the complexities of PFAS regulations, litigation, science, investigation and remediation strategies, and led the multifaceted legal strategy for the municipality. PFAS regulations and remediation techniques are still in flux today, although, as discussed below, regulators have issued some guidance and standards over the past three years.

Since joining Holland & Knight, I continue to provide PFAS counseling to our clients, particularly focused on mitigating PFAS risks in real estate and corporate due diligence, in ongoing environmental compliance programs, at closed and active brownfield and Superfund sites, and in litigation and enforcement strategy.

Q. What are PFAS?

PFAS are a family of more than 3,000 manmade chemicals containing fluorine and carbon atoms that have been used in a variety of industries around the globe since the 1940s. PFOA and PFOS have been the most extensively produced and studied PFAS compounds. PFAS are frequently used because they have strong surfactant properties, meaning they reduce the surface tension between a liquid and another liquid or solid, and are thus effective in fire resistant products and products that repel oil, stain, grease and water. PFAS have been used in food packaging, commercial household products, petroleum and chemical firefighting foams, and workplace products. PFAS are manufactured or utilized in various secondary products and are generally more prevalent at industrial and commercial sites such as airports, military installations, petroleum refineries, bulk chemical transporters or storage facilities, landfills, and wastewater treatment plants, as well as used by textile, leather, paper and wire manufacturers.

Q. Why should clients be concerned about PFAS?

PFAS are highly water soluble and resistant to natural degradation. Thus, when PFAS are released to groundwater, their plumes typically migrate larger distances than other contaminants. PFAS' unique chemical characteristics make them particularly expensive to investigate and remediate. Increased federal and state PFAS regulations have the potential to significantly increase environmental remediation obligations for responsible parties throughout the country. Some states are already beginning to require active and closed Superfund and brownfield sites to sample for PFAS.[1] There are estimates that potential nationwide PFAS environmental cleanup liabilities will be between $40 billion and $60 billion, and that drinking water supply remediation costs are approximately $3,000 to $5,000 per customer served.

Additionally, many lawsuits have been advanced against primary manufacturers of PFAS and secondary users of PFAS during the past several years seeking damages for personal injury, property damage, and recovery of remediation costs under federal and state environmental statutes. Settlements entered to date between manufacturers and drinking water users have ranged from $1.6 million to $671 million.

The risk of toxic tort litigation, environmental litigation, enforcement and increased remediation costs will likely increase as more information about the impacts of PFAS are gathered. As a result of these potential liabilities, PFAS pose a major risk in transactions and ongoing operations that, if not managed, can result in exorbitant liabilities.

Q. What are the most important regulatory and policy developments related to PFAS?

EPA: Neither Congress nor the EPA have designated PFAS – individually or as a class – as hazardous substances. As a result, EPA's authority to clean up PFAS is limited; although EPA Administrator Andrew Wheeler recently announced that the EPA has initiated nine enforcement actions related to PFAS and supported more than 20 state enforcement actions related to PFAS.

Following the issuance of EPA's **PFAS Action Plan** in February of 2019, the agency initiated the regulatory process for listing PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). That designation would trigger liability and cleanup requirements for responsible parties at existing Superfund and brownfield sites, and it may create new Superfund liabilities at other properties containing PFAS.

[1] New York and New Jersey require all active remediation sites to sample for certain PFAS. New York requires owners or operators of sites that have already received regulatory closure to sample for PFAS. The New Jersey has expressed willingness to reopen closed sites to sample for PFAS. California is requiring a phased investigation of PFAS at sites that are potential users of PFAS. Other states may follow suit.

There is currently no drinking water standard promulgated under the Safe Drinking Water Act (SDWA), but EPA issued a drinking water Health Advisory of 70 parts per trillion (ppt) for the combined value of PFOS and PFOA. Following the issuance of the PFAS Action Plan, EPA began moving forward with developing maximum contaminant levels (MCLs) for PFOA and PFOS under the SDWA. The eight largest manufacturers voluntarily phased out production of PFOA and PFOS by 2015 through the EPA's 2006 PFOA Stewardship Program. EPA's 2019 PFAS Action Plan indicates that it may regulate production, import and use of additional PFAS compounds, which could lead to further phase out of certain PFAS.

Congress: In 2019 the House of Representatives introduced 13 bills related to PFAS. One bill seeks to require EPA to designate all PFAS, not just PFOA and PFOS, as hazardous substances. Another seeks to require the EPA to issue a drinking water standard within two years. The House Energy and Commerce Committee's Subcommittee on Environment approved these 13 bills by voice vote, but largely without support from the Republican minority. The bills await further consideration in the full Committee. House and Senate negotiations continue over inclusion of PFAS provisions in the must-pass National Defense Authorization Act (NDAA) for FY 2020.

States: Twenty-three states have issued or proposed health advisories, guidance or standards for PFAS in drinking water and/or action levels for groundwater, mostly at 70 ppt for PFOS and PFOA or above. PFNA, PFHxS and PFHp are the most regulated PFAS, other than PFOA and PFOS. New Jersey is the only state that has formally issued an enforceable MCL for a PFAS to date – 13 ppt for PFNA – and is in the process of proposing MCLs for PFOA and PFOS. The following eight additional states have promulgated or proposed standards or guidance for PFOA and PFOS below 70 ppt: California, Michigan, Minnesota, New Hampshire, New York, Pennsylvania, Rhode Island, Texas and Vermont. EPA guidance recommends that states use 70 ppt as the preliminary remediation goal for groundwater that is a current or potential source of drinking water if a drinking water standard or other applicable or relevant and appropriate requirement is not in place.

Soil screening levels indicate further investigation and potentially remediation might be necessary. Five states – Alaska, Maine, Michigan, North Carolina and Texas – have promulgated soil screening levels for groundwater protection. Ten states have promulgated soil screening levels for human health, including Alaska, Delaware, Iowa, Maine, Michigan, Minnesota, Nevada, New Hampshire, North Carolina and Texas. While water values have typically been set at parts per trillion (ppt), soil values have been set at parts per billion (ppb). In comparison to groundwater and drinking water standards, these values are significantly higher.

Manufacturing restrictions at the state level tend to focus on firefighting foams, although there is a trend toward states restricting PFAS in food packaging and other consumer products. Fifteen states have either adopted policies or initiated the adoption of policies to prohibit PFAS in firefighting foam. Additional regulatory action related to PFAS is imminent.

Q. How do you assist your clients in navigating these issues?

With the evolving regulatory landscape for PFAS, there are ways to mitigate liability risks from PFAS in a variety of contexts. I assist clients with navigating the changing regulatory requirements related to PFAS for open and closed brownfield and Superfund sites. I also ensure that PFAS are addressed during real estate and corporate due diligence and contract negotiations to minimize risks. For clients that may have manufactured PFAS or used products containing PFAS, I help with scoping companywide internal compliance audits to determine potential liability for PFAS and if adequate standard operating procedures are currently in place. Finally, I assist clients with enforcement and litigation matters, including PFAS claims or potential claims.

Contact:

Meaghan A. Colligan
Associate
Washington, D.C.
202.469.5406
meaghan.colligan@hklaw.com

Meaghan Colligan is not yet admitted to the District of Columbia Bar. She is admitted to the New York Bar only and is practicing under the supervision of lawyers licensed to practice in District of Columbia.