Community Lawyering for Environmental Justice Part 10: Environmental Justice Implications of PFAS

1. Introduction to the Pro Bono Clearinghouse

The Environmental Law Institute's Pro Bono Clearinghouse works to connect communities who would otherwise be unable to access legal resources with pro bono attorneys and experts to support the resolution of their environmental legal issues.

Communities who require pro bono support may reach out to the Pro Bono Clearinghouse directly. In addition, law clinics and other non-profits may submit any viable environmental matters that they are unable to take on due to resource limitations or because they are outside of their scope of work. Clinics and non-profits can also post requests for Clearinghouse member attorneys to expand their capacity or provide expertise they lack in-house. The Clearinghouse does not post criminal matters. Clearinghouse member attorneys can offer their skills and take on new matters, whether as a long-term legal ally of a community or for a discrete legal task.

Community lawyering, also known as empowerment lawyering, is key to meaningful environmental justice-oriented pro bono work. Community lawyering involves collaboration with community members as facilitative partners. As a result, it differs from the more traditional representational lawyering.

Learn more about the Pro Bono Clearinghouse here: https://www.eli.org/probono.

2. What is PFAS?

Per- and polyfluoroalkyl substances, known commonly as PFAS, are artificial chemical compounds that have been used in industry and consumer products since the 1940s.[1] Many chemicals in this group are used to make products that are resistant to heat, oil, stains, grease, and water.[2] This includes products such as clothing, furniture, food packaging, and non-stick cookware.[3] Many PFAS are a health and environmental concern because they do not naturally break down in the environment. This characteristic has earned them the nickname "forever chemicals."[4] In addition to their enduring nature, they can also move through soils, contaminate drinking water, and bioaccumulate in fish and wildlife.[5] While research is currently being

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[1] ENV'T PROT. AGENCY, PFAS EXPLAINED (2023), https://www.epa.gov/system/files/documents/2023-10/final-virtual-pfas-explainer-508.pdf.
[2] Erika Ryan et al., *PFAS 'Forever Chemicals' are Everywhere. Here's What You Should Know About Them"*, NPR, https://www.npr.org/2022/06/22/1106863211/the-dangers-of-forever-chemicals (June 23, 2022).
[3] Jeffrey Kluger, *All the Stuff in Your Home that Might Contain PFAS 'Forever Chemicals'*, TIME (May 19, 2023), https://time.com/6281242/pfas-forever-chemicals-home-beauty-body-products/.
[4] Erika Ryan et al., *PFAS 'Forever Chemicals' are Everywhere. Here's What You Should Know About Them"*, NPR, https://www.npr.org/2022/06/22/1106863211/the-dangers-of-forever-chemicals (June 23, 2022).
[5] *PFAS Transport, Exposure, and Effects*, USGS ENV'T HEALTH PROGRAM (May 19, 2022), https://www.usgs.gov/programs/environmental-health-program/science/pfas-transport-exposure-and-effects.

conducted to determine how exposure to different PFAS can lead to a variety of health effects, studies have already demonstrated that exposure may lead to increased risk of cancers, increased cholesterol levels, type 2 diabetes, weakened immune systems, and decreased fertility.[6]

3. Disparate Exposure

Most people in the United States have been exposed to some amount of PFAS.[7] However, people who live in communities with higher proportions of Black and Hispanic/Latino residents are more likely to be exposed to higher levels of PFAS in their water supplies than those living in other communities.[8] Further, there is a positive relationship between the number of PFAS sources, like major manufacturers and wastewater treatment plants, and the proportion of people of color who are served by a water system.[9] The risks posed by PFAS exposure are higher for communities of color, as studies for other pollutants have shown that marginalized populations are susceptible to greater risks of adverse health outcomes even at the same exposure levels.[10] In addition, these sociodemographic groups are often stressed by other factors that include marginalization, racism, and poverty.[11]

4. Regulatory History

EPA has the authority to regulate PFAS through the Safe Drinking Water Act (SDWA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Toxic Substances Control Act (TSCA). EPA has used a variety of regulatory tools available to them under these Acts, as well as extra-legal mechanisms, to regulate PFAS.

In 2002, EPA began to regulate PFAS by passing a Significant New Use Rule which required manufacturers to notify EPA about the manufacture or importation of specified PFAS chemicals.[12] In 2003, the EPA negotiated with PFAS manufacturers 3M and DuPont to agree to a memorandum of understanding that outlined their plans to cease their use of the chemicals.[13] In

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[6] ENV'T PROT. AGENCY, PFAS EXPLAINED (2023), https://www.epa.gov/system/files/documents/2023-10/final-virtual-pfas-explainer-508.pdf; Qi Sun et al., *Plasma Concentrations of Perfluoroalkyl Substances and Risk of Type 2 Diabetes: A Prospective Investigation Among U.S. Women*, Env't Health Perspectives (2018), https://doi.org/10.1289/EHP2619.
[7] *Id.*
[8] Jahred M. Liddie et al., S*ociodemographic Factors are Associated with the Abundance of PFAS Sources and Detection in U.S. Community Water Systems*, ENV'T SCIENCE & TECHNOLOGY (2023), https://doi.org/10.1021/acs.est.2c07255.
[9] *Id.*
[10] Maya Brownstein, *Communities of Color Disproportionately Exposed to PFAS Pollution in Drinking Water*, HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH (May 15, 2023), https://www.hsph.harvard.edu/news/press-releases/communities-of-color-disproportionately-exposed-to-pfas-pollution-in-drinking-water/.
[11] *Id.*
[12] Perfluoroalkyl Sulfonates; Significant New Use Rule, 67 Fed. Reg. 72854 (2002).
[13] Memorandum of Understanding Between the U.S. Environmental Protection Agency and 3M Company and Dyneon LLC for a Perfluorooctanoic Acid (PFOA) Site-Related Environmental Assessment Program (Oct. 25, 2004).

2006, the agency's engagement with private industry expanded when it invited eight major PFAS producers to join the PFOA Stewardship Program.[14]

EPA released provisional health advisories through the SDWA in 2009 and conducted monitoring activities in drinking water supplies between 2013 and 2015.[15] The agency then issued a lifetime drinking water health advisory level in 2016.[16] While not an enforceable standard, it was used to support federal, state, Tribal, and local efforts to protect their drinking water supplies.

5. Recent Actions

In 2019, EPA published a PFAS Action Plan,[17] and in 2021, EPA announced their PFAS Strategic Roadmap,[18] which identify key agency actions to be taken in addressing PFAS. These identified actions included (a) "establish a national primary drinking water regulation for PFOA and PFOA", and (b) "designate certain PFAS as CERCLA hazardous substances."[19]

Safe Drinking Water Final Rule

EPA's responsibility through the SDWA is to protect drinking water quality.[20] This includes setting protective drinking water standards to protect against contaminants.[21] Pursuant to this mandate, in April of 2024, EPA released its federal rule governing drinking water standards for certain PFAS variations.[22] The rule designates a Maximum Contaminant Level (MCL) and Maximum Contaminant Level Goal (MCLG) for six chemicals in the PFAS family.[23] The MCL is an enforceable standard and represents the highest level of a contaminant that is allowed in drinking water.[24] MCLGs are not enforceable but represent the level of a contaminant below which there is no known or expected health risk.[25] Two of the most prevalent PFAS chemicals

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[14] *Fact Sheet: 2010/2015 PFOA Stewardship Program*, ENV'T PROT. AGENCY, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/fact-sheet-20102015-pfoa-stewardship-program (last visited May 29, 2024).
[15] Nicole Marie Brennan et al., *Trends in the Regulation of Per- and Polyfluoroalkyl Substances (PFAS): A Scoping Review*, INT'L J. ENV'T RES. PUBLIC HEALTH (2021).
[16] Lifetime Health advisories and Health Effects Support Documents for Perfluorooctanoic Acid and Perfluorooctane Sulfonate, 81 Fed. Reg. 33250 (2016).
[17] ENV'T PROT. AGENCY, EPA 823R18004, EPA'S PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) ACTION PLAN (2019), https://www.epa.gov/sites/default/files/2019-02/documents/pfas_action_plan_021319_508compliant_1.pdf.
[18] *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024*, ENV'T PROT. AGENCY, https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024 (last visited May 29, 2024).
[19] *Id.*
[20] *Overview of the Safe Drinking Water Act*, ENV'T PROT. AGENCY, https://www.epa.gov/sdwa/overview-safe-drinking-water-act (last visited May 21, 2024).
[21] *Id.*
[22] PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32532 (2024).
[23] *Id.*
[24] 42 U.S.C. § 300f.
[25] 40 C.F.R. § 141.50-141.141.55.

addressed in this rulemaking, PFOA and PFOS, now have an MCL at four parts per trillion.[26] Their MCLG is zero.[27]

Pursuant to this new rule, public water systems[28] will need to ascertain whether, and what level, of PFAS is in their drinking water and take action to reduce levels that exceed these new standards.[29] Regulated public water systems will have three years to complete their initial monitoring; if they are not in compliance with the standards, they will have five years to implement solutions.[30] There are currently water treatment technologies, such as reverse osmosis and ion exchange systems, that utilities may use.[31] Additionally, the public must be notified if the new standards are exceeded.[32]

CERCLA Hazardous Substances Designation

On May 8, 2024, EPA designated PFOS and PFOA as hazardous substances under CERCLA.[33] "Hazardous substances" is inclusive of pollutants, wastes, and substances as defined by the Clean Air Act, Resource Conservation and Recovery Act, and the Toxic Substance Control Act.[34] In addition, CERCLA § 102(a) gives EPA the authority to designate additional hazardous substances that "may present substantial danger to public health or welfare or the environment."[35]

EPA's decision to designate PFOS and PFOA as hazardous substances was based on the evidence of adverse effects to human health and the environment, persistence and mobility through the environment, and significant potential for human exposure.[36] However, EPA went beyond the required § 102 analysis by further considering the advantages and disadvantages of designation, including quantitative and qualitative benefits and costs.[37] The agency's analysis found that the designation best serves CERCLA's primary objectives, which are the timely cleanup of contaminated sites and polluter accountability.[38] Importantly, within EPA's analysis,

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[26] PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32532, 32577-78 (2024).
[27] *Id.* at 32563-68 (2024).
[28] Different types of assistance are available for small water systems. *Small Systems*, ASDWA, https://www.asdwa.org/small-systems/ (last visited June 6, 2024). EPA may also grant variances for small drinking water systems. *Small Drinking Water System Variances*, ENV'T PROT. AGENCY, https://www.epa.gov/sdwa/small-drinking-water-system-variances (last visited June 6, 2024).
[29] *Safe Drinking Water Act Compliance Monitoring*, ENV'T PROT. AGENCY, https://www.epa.gov/compliance/safe-drinking-water-act-compliance-monitoring (last visited June 6, 2024);
[30] ENV'T PROT. AGENCY, PFAS NATIONAL PRIMARY DRINKING WATER REGULATION (2024), https://www.epa.gov/system/files/documents/2024-04/pfas-npdwr_fact-sheet_general_4.9.24v1.pdf.
[31] *Id.*
[32] *Id.*
[33] Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39124 (2024).
[34] 42 U.S.C. § 9601.
[35] 42 U.S.C. § 9602.
[36] Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39124 (2024).
[37] *Id.*
[38] *Id.*

the agency concluded that communities of color were expected to experience the greatest benefits associated with the rule because of disproportionate baseline exposure.[39]

6. Litigation Landscape

Given the risks posed by these chemicals, their pervasive nature, and our initial understanding of the extent to which the population has been exposed, experts are predicting that PFAS-related litigation could exceed that of tobacco, asbestos, and MTBE combined.[40] PFAS-related suits have already been brought on by plaintiffs ranging across individuals, public water suppliers, and states, and as our understanding of these chemicals continues to deepen, litigation is only expected to increase.

The Public: One example of a case filed by members of the public is *Hardwick v. 3M.*[41] Originally filed in 2018, this case sought to establish a case of plaintiffs that included any US citizen with detectable levels of PFAS in their blood.[42] The goal of the suit was to establish a medical monitoring program and an independent science panel to study the impact of PFAS on human health.[43] While the class was incredibly broad, that was not the downfall of the suit.[44] Rather, it was dismissed on standing because of the lack of particular allegations regarding traceability to the defendants.[45]

States: Thirty state attorney generals have sued PFAS manufacturers.[46] One such state is California, where the California Attorney General filed suit against PFAS manufacturers (namely 3M and DuPont) for "endangering public health, causing irreparable harm to the state's natural resources, and engaging in a widespread campaign to deceive the public."[47] The state's requested relief includes statewide treatment and destruction of PFAS from both public and private drinking water sources, as well as funds for mitigating the impacts to human health and the environment through testing, monitoring, and other activities.[48]

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[39] *Id.* at 32726.
[40] Combined, claims related to these three substances were in the hundreds of billions of dollars. Hiroko Tabuchi, *Lawyers to Plastics Makers: Prepare for 'Astronomical' PFAS Lawsuits*, NEW YORK TIMES (May 28, 2024), https://www.nytimes.com/2024/05/28/climate/pfas-forever-chemicals-industry-lawsuits.html.
[41] *In Re: E.I. Du Pont de Nemours and Company C-8 Personal Injury Litigation*, 87 F.3th 315 (6th Cir. 2023).
[42] Michael Robert Blumenthal, *Establishing and Challenging Standing in PFAS Litigation*, AM. BAR ASS'N (Feb. 14, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-february/establishing-challenging-standing-pfas-litigation/. It's estimated that over 95% of the US population has detectable levels of PFAS in their blood.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Combined, claims related to these three substances were in the hundreds of billions of dollars. Hiroko Tabuchi, *Lawyers to Plastics Makers: Prepare for 'Astronomical' PFAS Lawsuits*, NEW YORK TIMES (May 28, 2024), https://www.nytimes.com/2024/05/28/climate/pfas-forever-chemicals-industry-lawsuits.html.
[47] *Attorney General Bonta Sues Manufacturers of Toxic Forever Chemicals*, STATE OF CAL. DEP'T OF JUSTICE (Nov. 10, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-sues-manufacturers-toxic-forever-chemicals.
[48] *Id.*

Public Water Suppliers: A class of public water systems reached a settlement with 3M on March 29, 2024, when a federal court approved 3M's settlement offer of $10.3B to support PFAS remediation for U.S. public water suppliers across the country.[49] The class consists of active U.S. public water systems that serve more than 3,300 people and have PFAS in their water sources, as detected prior to June 2023, or who detect it in compliance with EPA's unregulated contaminant monitoring rule (UCMR-5), which requires utilities to monitor their water for PFAS.[50]

[49] Pat Rizzuto, *3M's $10 Billion PFAS Deal Approved by Court as Rule Looms*, BLOOMBERG LAW (Apr.1, 2024), https://news.bloomberglaw.com/environment-and-energy/3ms-10-billion-pfas-deal-approved-by-court-as-rule-looms.
[50] *Id.*

Notes

Presentation 1

Presentation 2

Presentation 3

Presentation 4