Environmental watch groups, legislators, the media, and litigators have all squarely focused on PFAS contamination in one primary source – water. More specifically, drinking water. Environmental groups test local water supplies and report PFAS counts, politicians introduce bills at the state and federal levels to regulate the amount of PFAS permitted in drinking water, the media gives citizens daily news updates on PFAS in drinking water, and lawsuits are increasingly filed for both personal injury and remediation costs. Yet, often lost in the discussion and thus far largely flying under the radar is one party that has unquestionably contributed to the issues that exist today with respect to PFAS in water systems – the United States military. Involving the military in lawsuits or enforcement actions, though, often leads to a dead end due to the doctrine of sovereign immunity. It is that same protection afforded to the government, though, that will ultimately result in significantly increased costs to property owners, manufacturer, and water treatment facilities alike.

The U.S. military has several thousand military bases in every state in the country. For decades, on many of the military bases, PFAS-containing aqueous film-forming foam (AFFF) was used in fire suppression drills and service members were trained to put out jet, ship, and fuel depot fires. One of the more prolific examples of this type of training was found at the Tustin Marine Corps Air Station in Tustin, California,
which closed in 1999. At a site on that base, over the course of several years, 350,000 gallons of jet fuel and other liquids were ignited and then extinguished using PFAS-containing AFFF. Abutting the military base and the drill site was Peters Canyon Channel, a waterway that discharges into local streams and rivers, which ultimately provide drinking water to Californians. One drinking water well located in the vicinity of the Tustin Base has PFAS levels of 770,000 parts per trillion (ppt). For reference, in August of 2019, the California State Water Resources Control Boars set new drinking water notification levels of 5.1 ppt for PFOA and 6.5 ppt for PFOS, the two most prevalent types of PFAS.

California’s story is not unique. Many states, including Michigan, Pennsylvania, New Mexico, New York and Massachusetts, have begun to look to military bases and their use of AFFF as contributing factors to local PFAS drinking water issues. Yet, time and again, the states’ efforts to try to force the government to contribute to the cleanup or monitoring of local drinking water is met with refusal and a reference to the government’s sovereign immunity protection. With significant pressure to hold someone responsible and clean up citizens’ drinking water, state agencies are forced to look to other parties that may be responsible for some portion of the PFAS found in drinking water supplies. State environmental agencies look to property owners, commercial sites, and industrial sites abutting or near local waterways to identify likely or possible users of PFAS, and issue violation notices seeking penalties and cleanup costs. In some instances, states pursue companies through civil litigation. The most recent example of this was Michigan’s pursuit of Wolverine World Wide – a tannery that disposed of waste, including PFAS materials, in a landfill dating back to the 1960s. The case ultimately settled for $69.5 million in early 2020. While there is no evidence that the PFAS involved in the Wolverine litigation were the result of a military base, the case is nevertheless relevant in showing companies the risks involved in becoming embroiled in PFAS litigation.

In Orange County, California, the local water boards in the area just announced a proposed lawsuit against companies that, if successful, would force various companies to pay for the costs of cleaning up the local drinking water sources. The water board estimates that those costs would exceed $1 billion. The involvement of the water boards shows another interesting dynamic in the PFAS litigation – as more and more attention is focused on drinking water issues, water utilities find themselves susceptible to potential lawsuits for providing PFAS-containing drinking water to citizens and allegedly not taking adequate measures to remediate the problems that might exist. In a pro-active measure, water treatment facilities are now contemplating actions that the Orange County water boards publicly discussed – litigating against property owners and companies in the vicinity of water sources in an effort to have other parties pay for or conduct remediation of drinking water.

While PFAS use in manufacturing and presences in products is sometimes known, with over 7,000 PFAS chemicals in existence, it is often not possible for manufacturers and distributors to know whether a PFAS chemical is in fact used in its products. Diligent steps must be taken by all manufacturers and distributors to determine the exact contents of products as nations across the globe increase efforts to regulate PFAS, or else companies will be faced with significant litigation woes or last-minute compliance initiatives that can be significant in cost. Hopefully that the government steps in and contributes to some degree to the cleanup costs
would be poor planning on the part of any company, as there is no sign that the
government plans to consent to waive sovereign immunity with respect to PFAS
issues any time soon.

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