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California's proposed Prop 65 PFAS listings could bring new private enforcement risks

Experts say unintended contamination and testing uncertainties may drive litigation

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California's proposed addition of three PFAS to Proposition 65 would represent a meaningful expansion of the right-to-know scheme and could open companies to litigation even when their products are not intentionally made with the substances, attorneys have told Chemical Watch News & Insight.

The state's Office of Environmental Health Hazard Assessment (OEHHA) announced in October that it intends to list perfluorobutanoic acid (PFBA), perfluorodecanoic acid (PFDA), perfluorohexanoic acid (PFHxA) and their related salts as reproductive toxicants on Prop 65.

The proposed listings are based on US EPA Integrated Risk Information System (IRIS) assessments that found that the substances are likely to cause reproductive or developmental effects in humans.

PFBA, PFDA and PFHxA are used in a variety of products including photographic film, stain- and grease-resistant coatings, food packaging, textiles and carpets, according to IRIS. They may also be found in cosmetics, cookware, cleaning products, floor care products, ski wax and other goods, according to experts.

If finalised, OEHHA's listings would require companies to provide warnings for significant exposures to the substances in California. Prop 65 allows private parties to enforce those requirements through notices of violation (NOVs), which can result in litigation if companies do not resolve the claims.

Because Prop 65 is concerned with exposure, businesses could face enforcement action whether the substances are intentionally used or unintentionally present in goods through contamination, third-party supply chains or the breakdown of other PFAS, attorneys said.

Those issues could be particularly difficult for companies to navigate where only trace amounts of the substances are present, raising questions over testing and exposure scenarios, they said.

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'A meaningful expansion'

Lynn Fiorentino, a partner at ArentFox Schiff, said the additions of PFBA, PFDA and PFHxA would be "a meaningful expansion" to California's right-to-know scheme.

PFBA and PFHxA are short-chain PFAS used in place of long-chain substances such as perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), which are already listed under Prop 65, she said. Meanwhile, PFDA is another long-chain PFAS, but it is not as widely used as PFOA and PFOS.

"When industry moved away from long-chain PFAS like PFOA and PFOS, many products shifted to short-chain chemistry like PFBA and PFHxA," she said. "Listing them takes away some of the 'we already eliminated the listed PFAS' comfort that many companies have relied on."

Products could also result in exposures to the substances even where companies have not deliberately used them. According to Fiorentino, PFBA and PFHxA may form when other non-listed PFAS break down, meaning a product could result in exposure even if neither substance was intentionally added.

Maureen Gorsen, a partner at Sidley Austin, said companies that do not intentionally use PFAS in their products may similarly face compliance challenges, especially because they may have less knowledge of or control over how the substances end up in products.

"The companies most vulnerable to this expansion are not necessarily those whose products intentionally contain PFAS, since those manufacturers generally know what is in their formulations," she said. "The more difficult situation arises for companies where PFAS is not part of their product at all, but enters through ubiquitous environmental contamination or third-party supply chains."

'Give a warning or settle'

Companies could also face costly disputes over whether detected amounts of the substances result in exposures requiring Prop 65 warnings.

Under Prop 65, companies do not need to provide warnings if exposures are significantly below levels observed to cause birth defects or other reproductive harm. OEHHA may also establish 'safe harbour' levels below which businesses are not required to provide exposure warnings.

However, no safe harbour levels have been established for any PFAS listed under Prop 65. Without them, companies that choose not to warn must demonstrate that exposures are sufficiently low to avoid the warning requirements, according to Fiorentino.

"That is expensive, and the company carries the burden of proof," she said. "In practice, many companies will either give a warning or settle."

Testing is 'contested and costly'

Determining exposure is further complicated by limitations in PFAS testing methods.

According to Fiorentino, total fluorine (TF) and total organic fluorine (TOF) screening can flag fluorinated substances, but neither can identify individual PFAS, which must instead be detected through targeted analysis.

Gorsen said that without a standardised test to measure the presence of PFAS in products, plaintiffs and defendants may rely on different screening methods and results, leading to costly disputes over exposure data.

"Until a universally accepted testing protocol is established – one that governments and courts can point to as the definitive standard – testing methodology will remain a contested and costly battleground in PFAS litigation," she said.

Consumer protection 'backstop'

Meanwhile, the Center for Environmental Health (CEH) said the proposed listings build on a broader trend of states imposing PFAS restrictions and "would be an important backstop consumer protection measure".

The environmental group said listing replacement PFAS could help curb "the cycle of regrettable substitution", as products reformulated to eliminate PFOS and PFOA may contain the chemicals now proposed for listing.

Listing degradation products such as PFBA and PFHxA also "bolsters the protection of bans and reporting requirements by looking beyond intentionally added ingredients", CEH said.

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PFHxA notice →

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