

Perchlorate Controversy Heats Up: Companies Should Develop Defense and Insurance Recovery Strategies

Recent news reports have stated that perchlorate, possibly from the Colorado River, is contaminating lettuce farmed in California, Arizona, and Nevada. This "toxic produce" scare is generating headlines and causing some consumer groups and legislators to clamor for strict regulation of perchlorate across the country. Senator Dianne Feinstein, for example, reportedly has described perchlorate contamination as "a big problem" that impacts 22 states and is "moving rapidly." Another official characterized perchlorate as "one of the most massive pollution problems the water industry has ever seen." And Senator Barbara Boxer has introduced a bill to require the EPA to set a perchlorate drinking water standard by July 1, 2004. At the same time, the Department of Defense is seeking environmental exemptions in the interest of national security.

Although most often associated with rocket fuel, perchlorate may be found in products ranging from vehicle airbags to fireworks and matches. The extent to which perchlorate poses a public health risk remains open to debate. Before acting on the EPA's initial finding that perchlorate may be unhealthy in amounts over 1 ppb, therefore, the Bush administration wants input from the National Academy of Sciences. Until the NAS completes its review, the EPA has instructed its staff and scientists not to discuss the perchlorate issue. Currently, enforceable perchlorate standards do not exist for the nation's food and water supply. Given the growing concern and government interest in perchlorate, however, some regulatory response appears inevitable.

Once regulatory standards are set, companies should anticipate that government agencies will intensify nationwide efforts to remove perchlorate from soil and water. Companies that may have to pay for the cleanup costs face potentially catastrophic expense, regulatory proceedings, and individual or class action lawsuits. The Pentagon and several defense contractors, for example, reportedly could have to pay billions of dollars in cleanup costs if strict standards are adopted.

McKenna Long & Aldridge LLP is monitoring perchlorate developments. It may be appropriate to consider developing proactive strategies to minimize exposure for liability and cleanup costs. Issues to consider include government contract terms, product liability and toxic tort defenses, insurance recovery potential, environmental regulatory and litigation defenses, and public policy and regulatory affairs approaches.

- Consider government contract-based defenses, in addition to traditional tort defenses pursued in complicated toxic tort and environmental litigation filed

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against government contractors. Also consider pursuing reimbursement from the federal government for cleanup and tort defense costs.

- Consider recovery of defense, investigation, and remediation costs under liability insurance policies, including older policies or environmental impairment policies.
- Consider conducting an audit of your insurance policies regarding coverage for perchlorate liabilities.

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