Insurance Recovery for Forever Chemical Liabilities

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USI

First Environment

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Scott Green is an accomplished environmental consultant, licensed Professional Geologist, A&B UST Operator, and the Market Area Director for Specialty Consulting Services at First Environment, where he supports insurers and insured for pollution claims.

With 30 years as a consultant focused on NJ and NY, he has expertise in the pollution insurance industry, including 13 years at AIG providing in-house technical consultation and remediation services for claims nationwide.

He currently serves as an expert and provides testimony for UST and PFAS matters. Specifically, he develops detailed cost estimates and allocations for pollution events, offering technical support to claims analysts during coverage determination.

Scott has evaluated hundreds of claims, ensuring incurred pollution costs are reasonable, customary, and consistent with industry standards, and verifying work compliance with environmental law. He works closely with claims analysts and insured parties to provide closure option evaluations, including site and remedial options assessments, feasibility analyses, and detailed cost estimates for site exit strategies, aiding stakeholders in selecting the best closure approach.

Robin Kelliher

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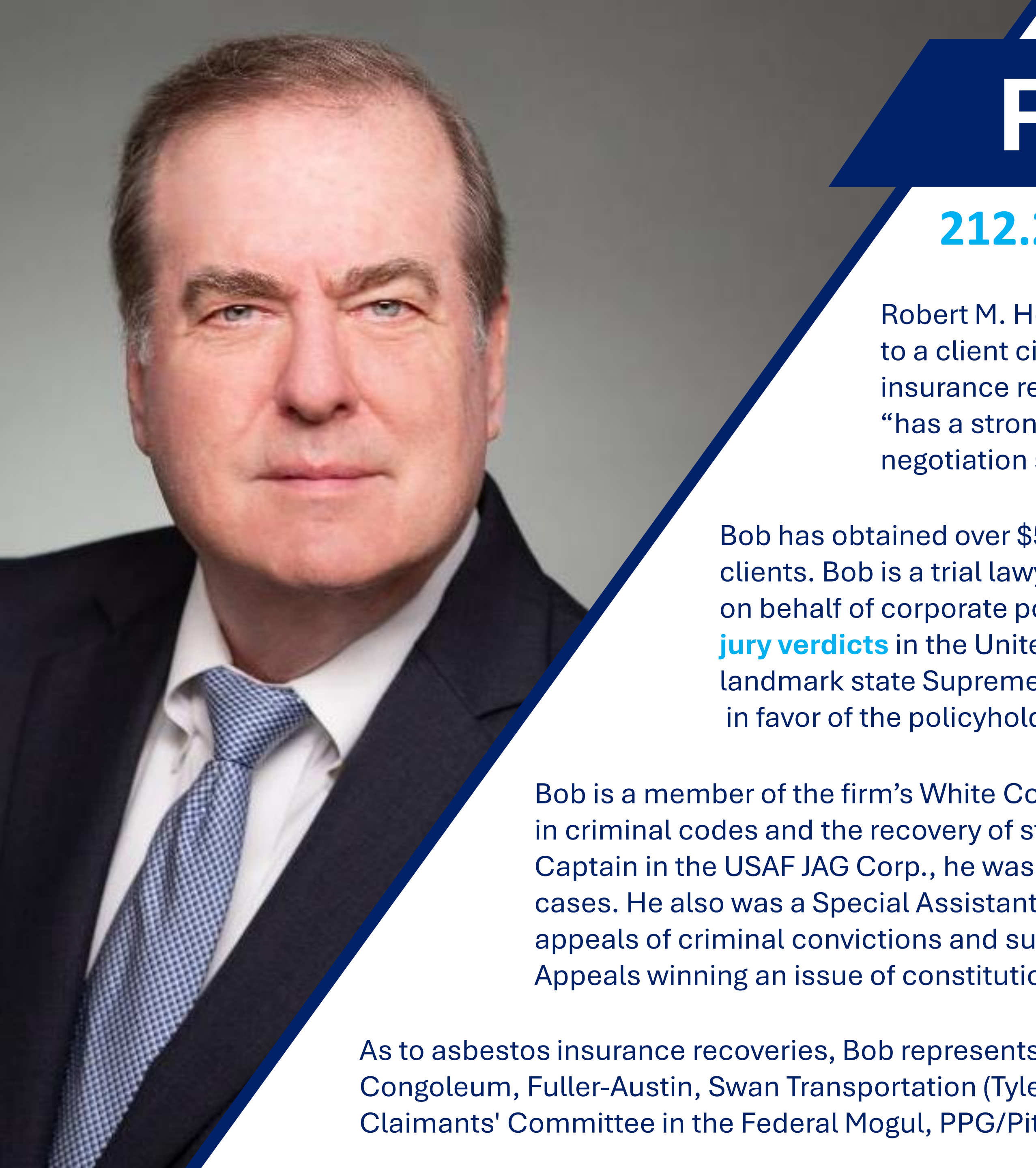
Robin Kelliher is Group Counsel, Environmental Services at USI. She began her insurance career as a client manager in a large regional insurance brokerage. After several years in client management, Robin became a producer – focusing on New Jersey based environmental service firms. Prior to joining USI, Robin spent 25 years at global insurance brokerage firm – most recently as the National Environmental Claim Director, leading a team of environmental claim advocates.

Understanding that insurance companies often attempt to limit exposure by narrowly interpreting its policies, Robin collaborates closely with brokers and policyholders to develop and negotiate policy language to enhance coverage and address any potential gaps. In addition to developing "best practice" policy language, Robin also assists clients in preparing, modifying, and negotiating insurance and indemnification language in master service agreements, leases, and other contracts

Robin actively speaks at various industry conferences and events, such as those for the American Bar Association, Perrin Conferences, CLM, New Jersey Institute for Continuing Legal Education, and others.

Robin earned her J.D. from Rutgers School of Law – Newark, and graduated Phi Beta Kappa from Rutgers College. Robin is admitted to practice law in New York and New Jersey; and maintains insurance licenses in all 50 states.



Robert M. Horkovich

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Robert M. Horkovich is **"the 'go-to person' in the area of insurance recovery,"** according to a client cited by **Chambers USA**, which has recognized Mr. Horkovich as a leading insurance recovery attorney every year since 2005. According to *Chambers*, Mr. Horkovich "has a strong 'client-first' attitude" and "is recognized in the market for his leading trial and negotiation skills, with an undisputed national presence."

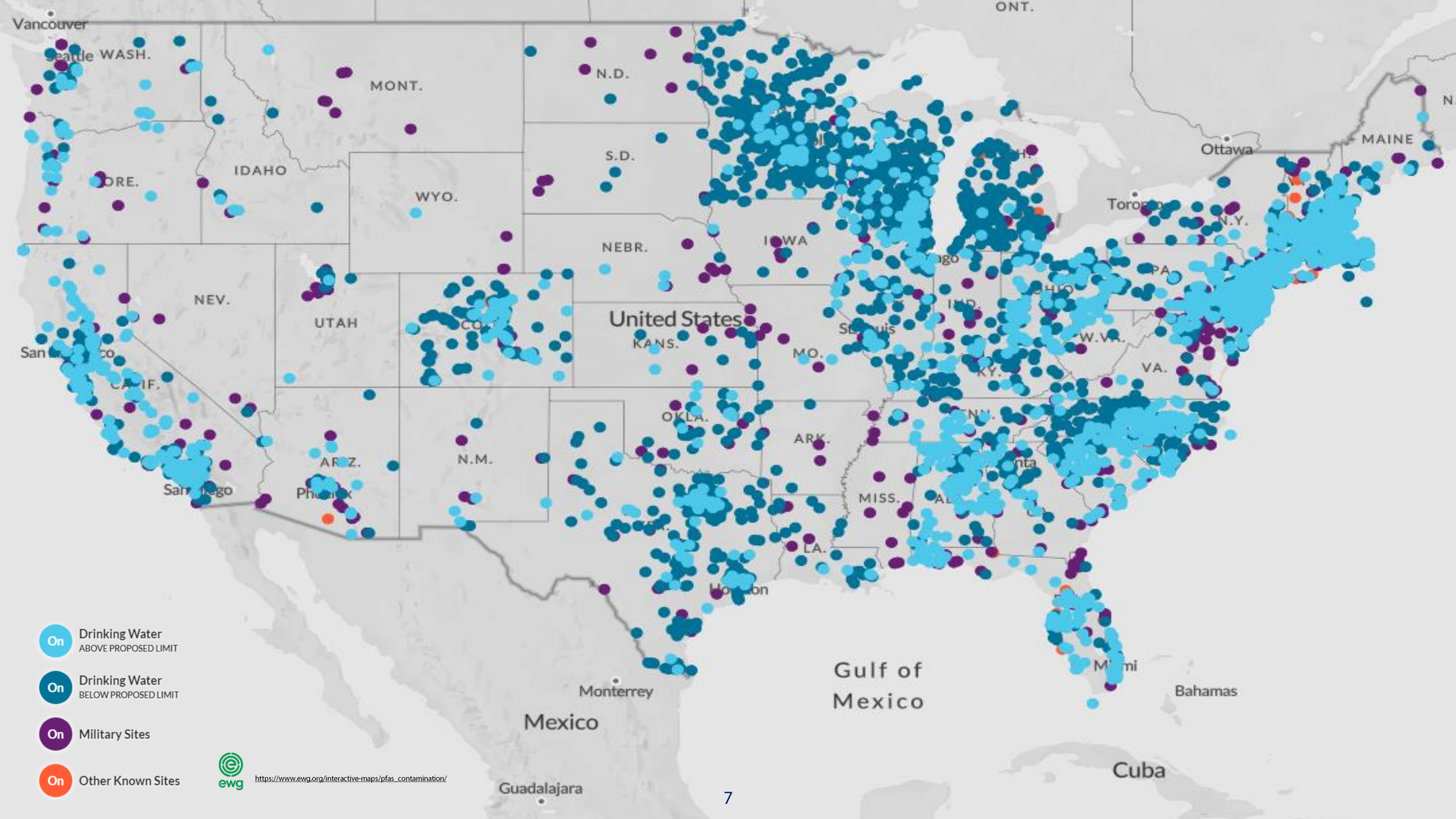
Bob has obtained over $5 billion in settlements and judgments from insurance companies for his clients. Bob is a trial lawyer with substantial experience in trying complex insurance coverage actions on behalf of corporate policyholders and governmental entities. His victories include one of **the top 10 jury verdicts** in the United States, the top insurance recovery jury verdict in the United States, seven landmark state Supreme Court decisions, eight jury verdicts and nine bench trial decisions in favor of the policyholder.

Bob is a member of the firm's White Collar Defense Group. He has extensive experience in antitrust matters, as well in criminal codes and the recovery of stolen assets, and has published extensively on antitrust matters. As a Captain in the USAF JAG Corp., he was a Special Assistant U.S. Attorney and in that role prosecuted more than 200 cases. He also was a Special Assistant District Attorney for Manhattan for the purposes of handling and arguing appeals of criminal convictions and successfully argued *People v. Octavio Peck* before the New York Court of Appeals winning an issue of constitutional law of first impression.

As to asbestos insurance recoveries, Bob represents the Trusts in the Kaiser-Gypsum, W.R. Grace, Owens Corning, Congoleum, Fuller-Austin, Swan Transportation (Tyler Pipe), and Asarco cases, and represented the Asbestos Claimants' Committee in the Federal Mogul, PPG/Pittsburgh Corning, and A.P. Green (GIT) bankruptcies.

OVERVIEW

- PFAS Overview
- State & Federal Regulations
- PFAS Claim Sites



https://www.ewg.org/interactive-maps/pfas_contamination/

PFAS OVERVIEW

Dover Air Force Base

Per & Polyfluoroalkyl Substances (PFAS)

- PFAS used in non-stick coatings, textiles, paper products, some firefighting foams, and many other products
- 4,500-5,000 PFAS chemicals suspected
- Small number of regulatory concern
  - (PFOA, PFOS, PFNA, PFHpA, PFHxS, & others)

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Major Sources of PFAS

» Fire training/fire response

» Production & manufacturing

» Landfills

» Wastewater treatment plants/biosolids

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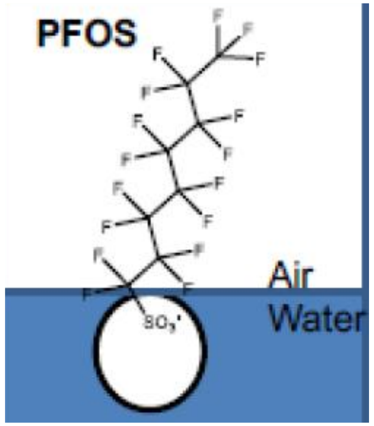
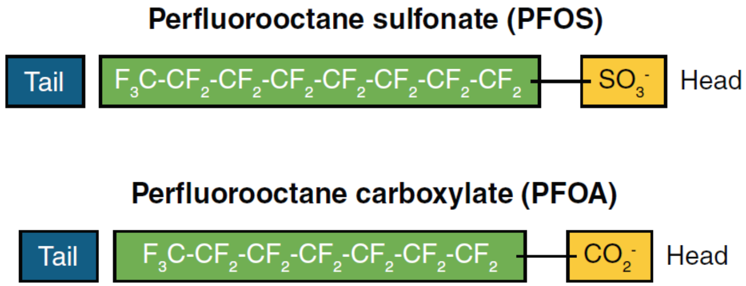
Problematic PFAS Qualities

- » Ubiquitous
- » Migrates slowly through soil
- » Highly stable & mobile in Groundwater
- » Capable of traveling long distances
- » Does not degrade
- » Costly to clean up
- » Toxic even at low concentrations
- » Bioaccumulates in humans





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State & Federal Regulations

- Safe Drinking Water Act **(SDWA)**
- Comprehensive Environmental Response, Compensation, and Liability Act **(CERCLA)**

PFAS Maximum Contaminant Levels (MCLs)

On April 10, the Biden- Harris Administration finalized the first-ever national drinking water standard. The final rule went into effect on June 25,2024

PFOA, PFOS, PFHxS, PFNA, HFPO-DA:

Regulate PFOA and PFOS at 4 ppt and PFHxS, PFNA & HFPO-DA at 10 ppt.

PFNA, PFHxS, PFBS, and HFPO-DA:

Limit any mixture containing one or more of these chemicals using a hazard index calculation.

$1 billion in newly available funding:

To help states and territories implement PFAS testing and treatment at public water systems

Hazard Index Calculation

H.I. = (GenX / 10ppt) + (PFBS / 2000ppt) + (PFNA / 10ppt) + (PFHxS / 10ppt)

Divide the measured concentration by the health-based value

Repeat calculation for each sample collected in the past year for that entry point and calculate the average H.I. for all samples taken in that year.

If the running annual average H.I. is > 1, it is a violation of the H.I. MCL.

https://www.federalregister.gov/documents/2023/03/29/2023-05471/pfas-national-primary-drinking-water-regulation-rulemaking

https://www.epa.gov/newsreleases/biden-harris-administration-proposes-first-ever-national-standard-protect-communities

CERCLA – For PFOS & PFOA the EPA has the authority to:

1. Order the investigation and remediation of these chemicals, including cost recovery;
2. Re-open closed sites;
3. Private parties will have a cause of action for cost recovery; and
4. PFOA and PFOS will be included in the scope of Phase 1s to satisfy the All Appropriate Inquiries Rule

CERCLA Hazardous Substances

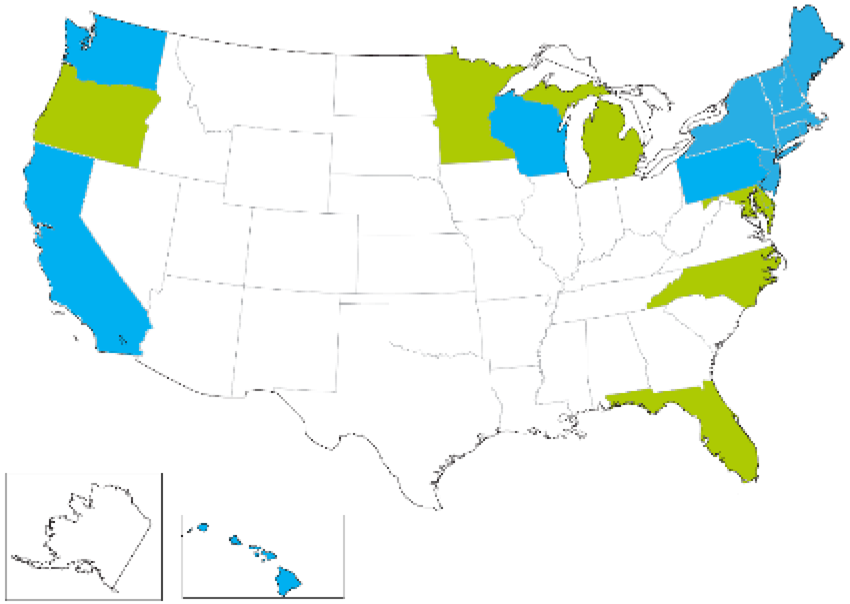
"CERCLA does not impose liability on manufacturers of hazardous substances, potentially leaving water suppliers, landfill owners, local fire departments, farmers, and other municipal entities to bear the entire costs associated with investigation and remediation of PFAS contamination."

› Final rule took effect on July 8, 2024

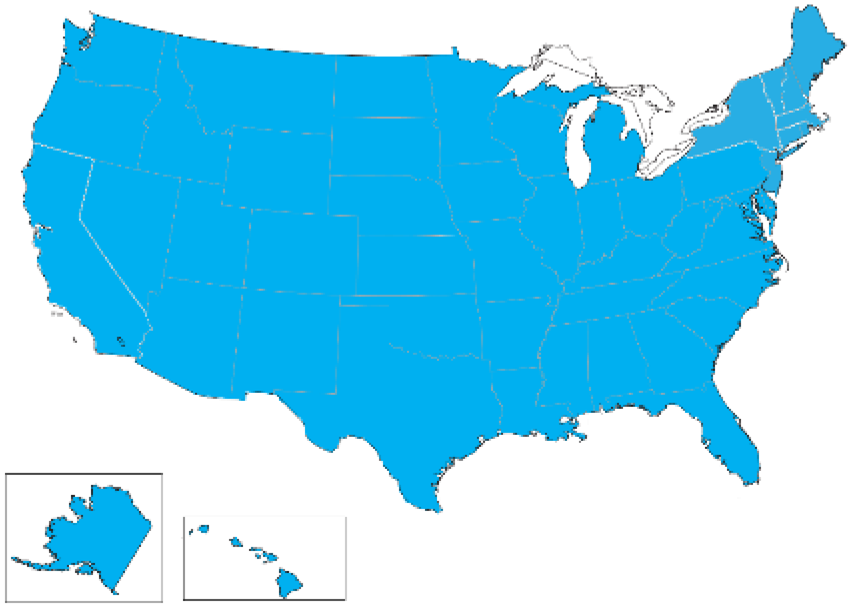
https://www.epa.gov/hw/proposal-list-nine-and-polyfluoroalkyl-compounds-resource-conservation-and-recovery-act

PFAS Drinking Water Standards

PFAS State Drinking Water Standards



PFAS Federal Drinking Water Standards

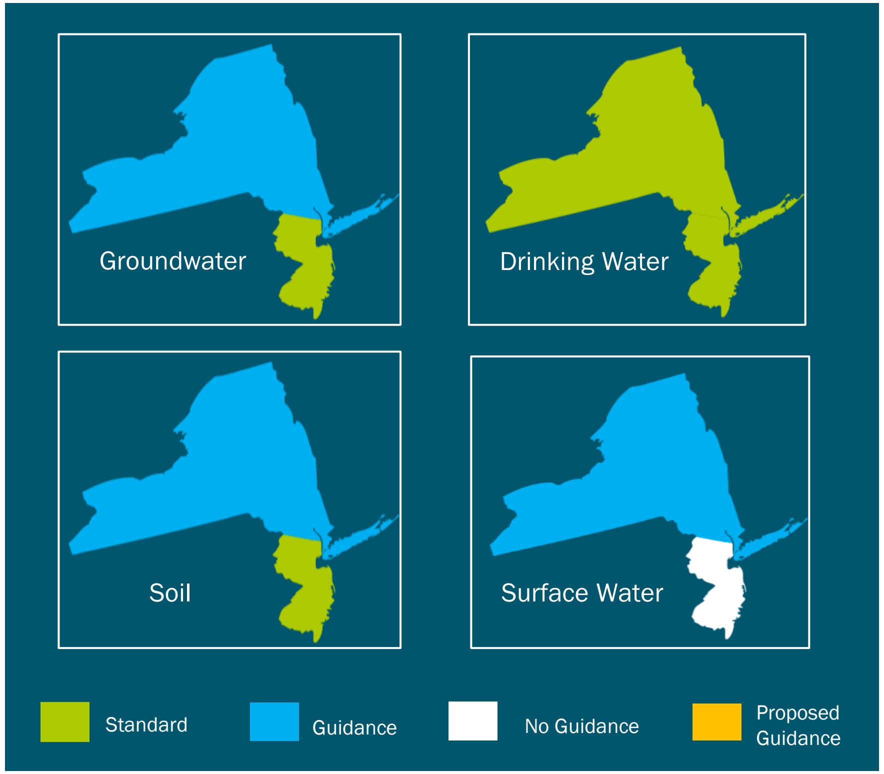


Status:

- Enforceable
- Guidance / Advisory

PFAS NY & NJ Regulations

Component	NJ	NY
Reporting Required	✓	✓
Enforceable Drinking Water Standard	✓	✓
Enforceable Groundwater Standard	✓	
Water Guidance		✓
Soil Standards	✓	
Hazardous Substance Classification	✓	✓



PFAS Claim Sites

Dover Air Force Base

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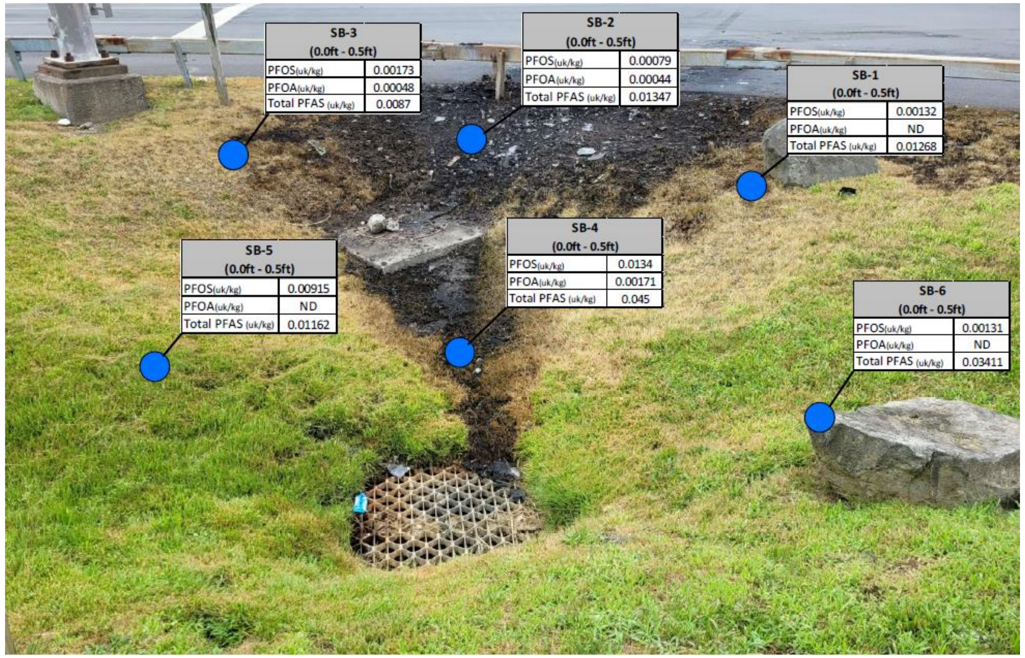
AFFF Claims Often Look Like This



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PFAS Impacted Soil Removed

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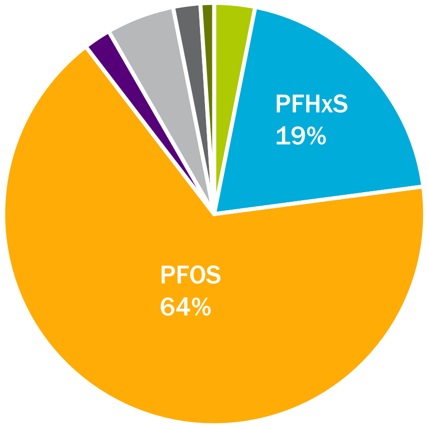
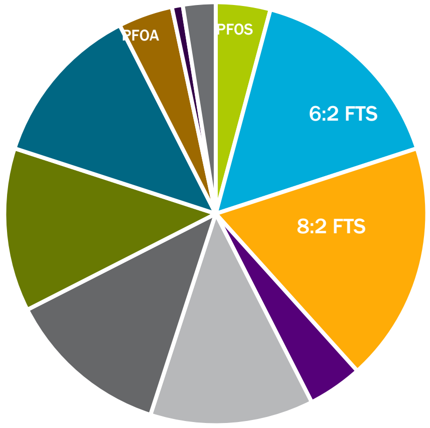
Legacy PFOS AFFF



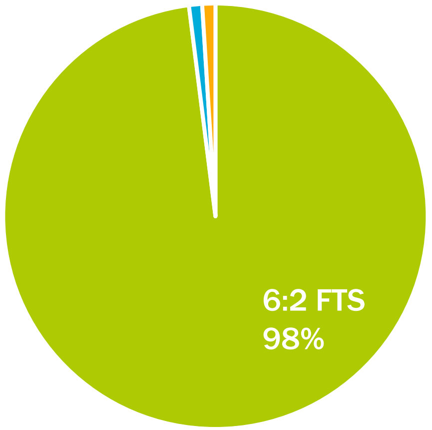
- 1966 Patent Granted to U.S. Navy
- 3M "Light Water" High PFOS
- 1970 Toxic effects to Marine Life
- Production ended in 2002
- Inventory remains
- Highest Impacted site

Legacy Fluorotelomer AFFF



- 1970s - 2016
- Mixture of 6:2 FTS and 8:2 FTS
- Fluorotelomer sulfonates can break down to PFCAs (PFBA, PFPeA, PFHxA, PFHpA, PFOA, PFNA)
- Long-chain fluorotelomers (8:2 FTS) can breakdown to PFOA

Modern Fluorotelomer AFFF



- 2010 - Present
- Short-chain fluorotelomer sulfonates (6:2 and 4:2 FTS)
- Can breakdown to shorter chain PFCAs (PFBA, PFPeA, PFHxA, 5:3 FTCA)
- Does not contain PFOS and no breakdown to PFOS or PFOA
- May contain trace amounts of PFOA

Sources: Swedish Chemicals Agency, 2015. Chemical Analysis of Selected Firefighting Foams on the Swedish Market 2014
D Herzke et al., 2009 Survey screening and analysis of PFCs in consumer Products swerea IVF report 09/47; TRC, 2022

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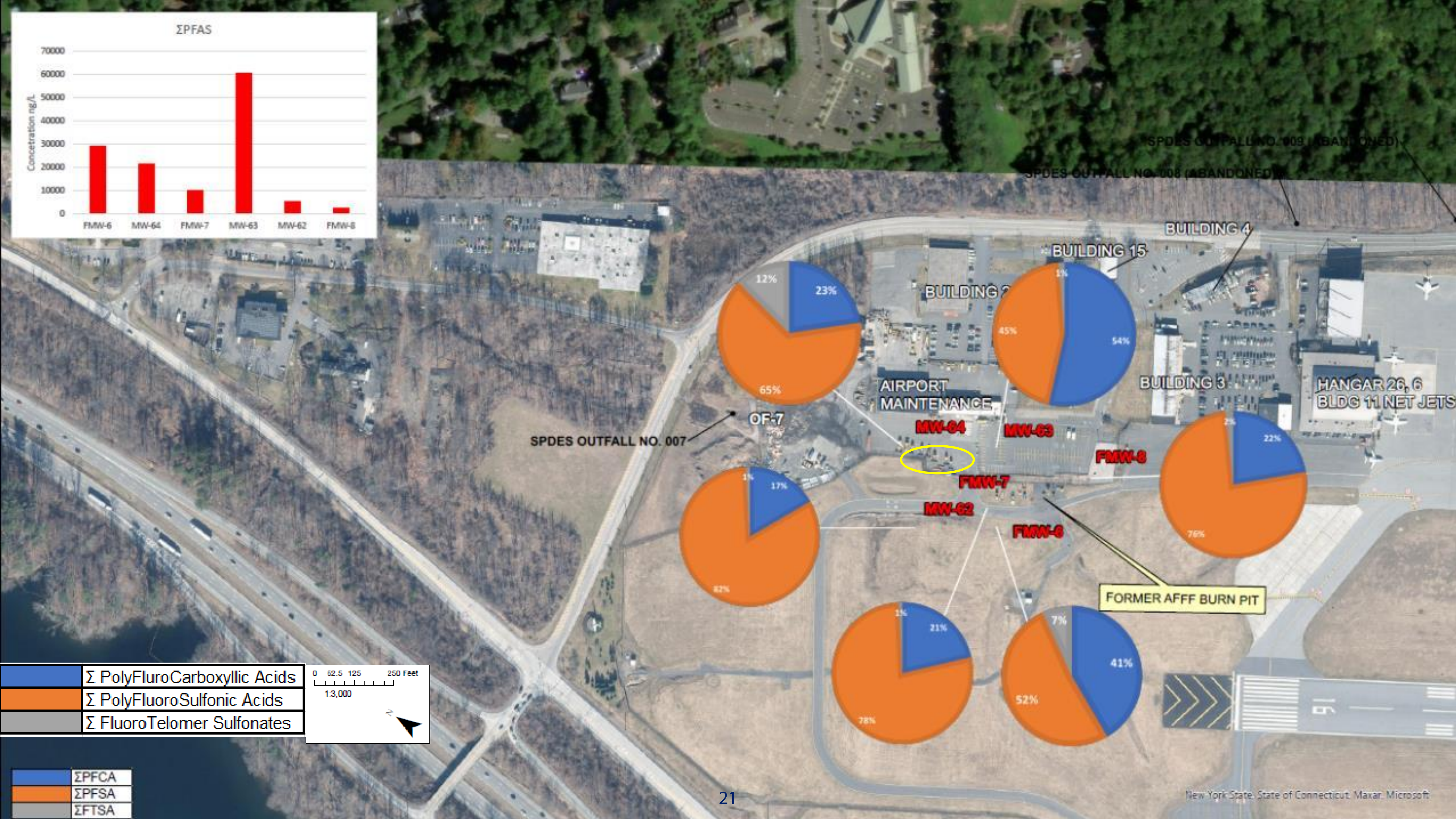
ΣPFAS
Concetration ng/L
70000
60000
50000
40000
30000
20000
10000
0
FMW-6
MW-64
FMW-7
MW-63
MW-62
FMW-8
SPDES OUTFALL NO. 009 (ABANDONED)
SPDES OUTFALL NO. 008 (ABANDONED)
BUILDING 4
BUILDING 15
BUILDING 2
BUILDING 3
HANGAR 26, 6
BLDG 11 NET JETS
AIRPORT
MAINTENANCE
OF-7
SPDES OUTFALL NO. 007
MW-64
MW-63
FMW-8
FMW-7
MW-62
FMW-6
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23%
65%
1%
45%
54%
2%
22%
76%
1%
17%
82%
1%
21%
78%
7%
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Σ PolyFluroCarboxyllic Acids
Σ PolyFluoroSulfonic Acids
Σ FluoroTelomer Sulfonates
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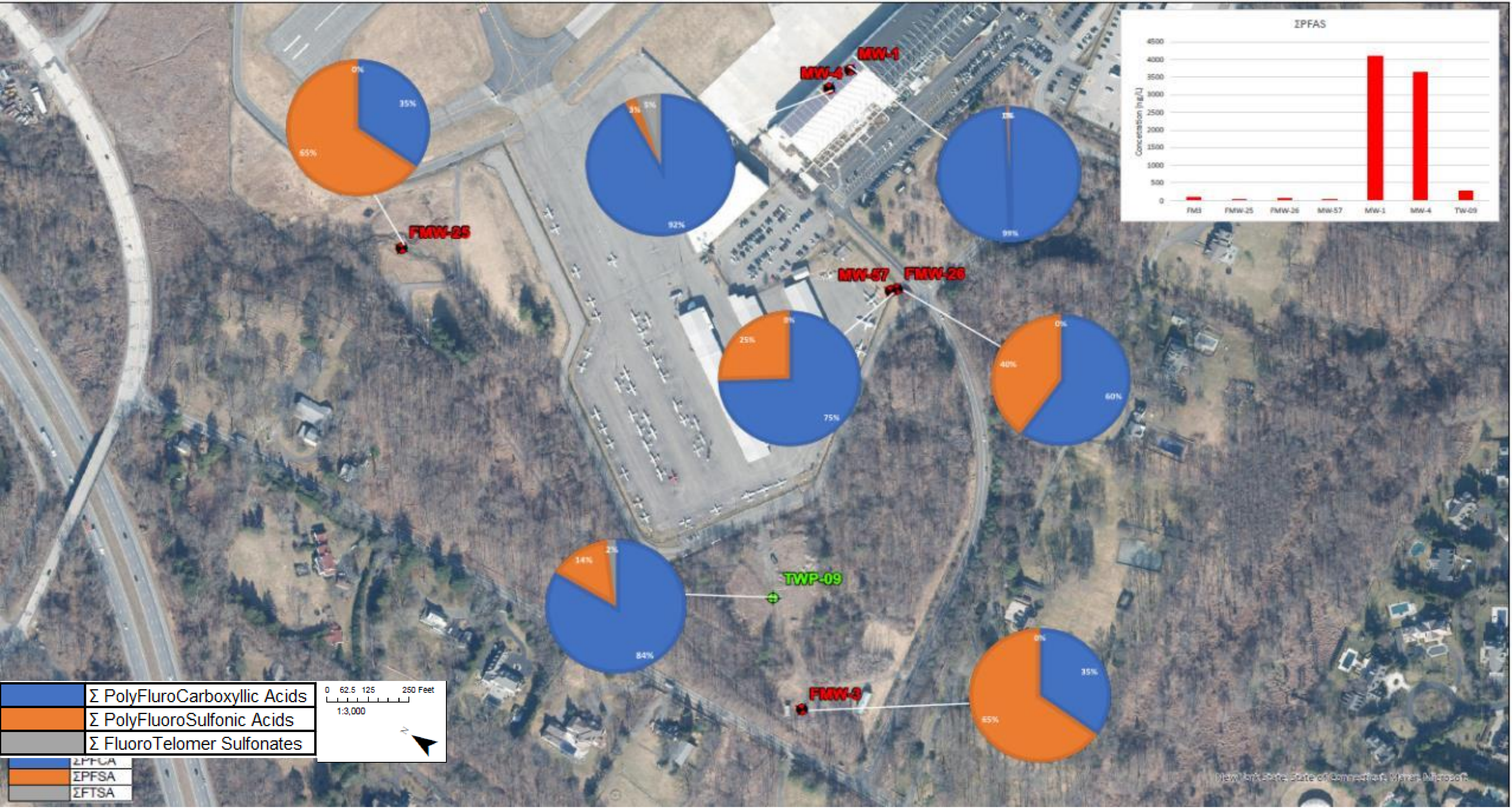
New York State, State of Connecticut, Maxar, Microsoft


MW-1
MW-4
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New York State, State of Connecticut, Maxar, Microsoft

Insurance Industry Response

Current P&C Marketplace

- **ISO published PFAS Exclusion starting early 2023**
  - Commercial General Liability, Umbrella, Excess, BOP
    - PRODUCTS LIABILITY
  - Property
  - Industry-specific underwriting for products exposure

Insurance Industry Response

Current P&C Marketplace

- **Combined CGL/Pollution Policies available through the “Current Pollution Liability Marketplace”**

- **“Greenwashing” Litigation**
  - D&O
    - What did you know and when?
    - Common law claims versus Consumer Fraud/Unfair Competition laws

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Insurance Industry Response

Current Pollution Liability Policies

» **Can we still get coverage under Pollution Policies?**

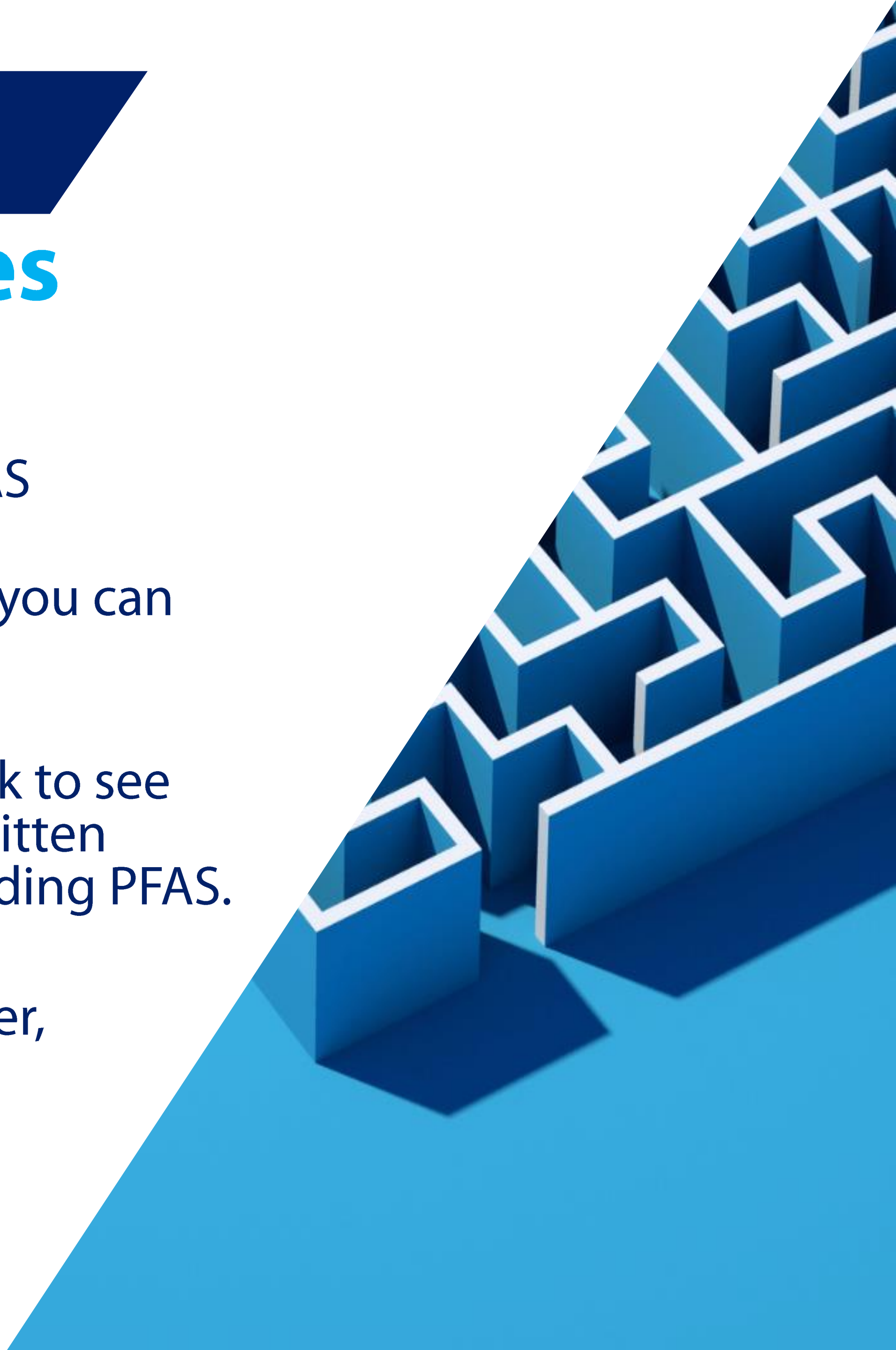
- Operational exposures versus real estate transactions
- Carrier applications include questions regarding PFAS
- Short leash as respects Underwriting (red flags = Exclusions)
  - **Industry** – Airports/Aviation industry is "red flagged"
  - **Location** – for Airports, it doesn't matter…..
  - **Environmental history of the Property** – if you have recent testing that shows no PFAS contamination, let's talk…..

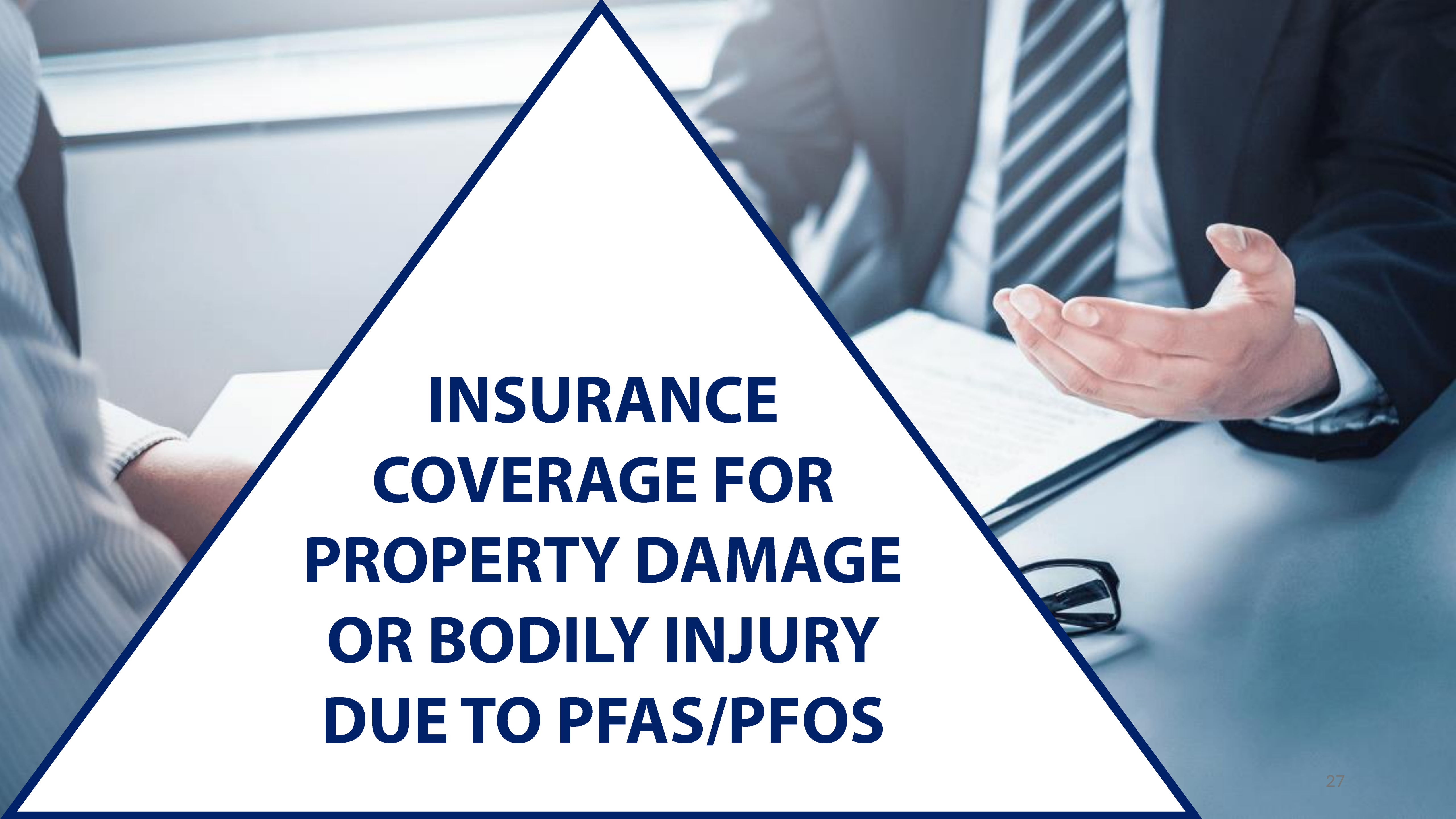
Insurance Industry Response

Current Pollution Liability Policies

» **Help…my policy is renewing in 2024…**

- Review the application carefully for disclosures and PFAS questions
- Considering marketing the renewal to see how narrow you can get the exclusions
- Get creative on sublimits and retentions
- These are Claims made and Reported policies – so check to see whether you've tested for PFAS or have received any written communication from any third parties/regulators regarding PFAS.
- Report, report, report…
- If there have been any PFAS issues reported to the carrier, even if you have competitive quotes – consider staying with the same carrier if that's an option





INSURANCE COVERAGE FOR PROPERTY DAMAGE OR BODILY INJURY DUE TO PFAS/PFOS

Potential Insurance Coverage:

Pre-1986 CGL Insurance Policies May Cover Today's Problem

- » Liability Insurance Policies (General, Umbrella, etc.).
- » "Additional Insured" Under Other Entity's Insurance Program
- » Post-1985 EIL or Pollution Liability Insurance Policies

› The Policies in Effect When the Personal Injury or Property Damage Occurred May Provide Coverage for Liabilities Imposed Today

Potential Liability Insurance Benefits

- Defense (Pays Fees of Lawyers Defending Lawsuits or Dealing With Environmental Authorities) (Also May Pay For Investigation: RI/FS Costs).
  - Test is Whether There is Any Possibility of Coverage.
  - Defense can be in addition to policy limits.
  - Usually primary policies. Maybe umbrella or excess policies.

PFA Lawsuits Must Be Defended

» Insurance companies ordered to defend 3M in PFA lawsuits. 3M's motion for summary judgment granted re: insurance company breach of contract.

› *Wolverine World Wide Inc. v. American Ins. Co.*, 2021WL 5548103 (W.D. Mich. 2021)

» Insurance company ordered to defend PFA lawsuits against policyholder.

› *James River Ins. Co. v. Dalton-Whitfield Regional Solid Waste Management Authority,* (N.D. Ga. 2022)

» Manufacturer of firefighter foam was owed duty to defend hundreds of cases brought by firefighters.

› *Colony Ins. Co. v. Buckeye Fire Equipment Co.*, 2020 WL 152381 (WDNC 2020); aff'd.; 2021 WL 5397595 (4th Cir. 2021)

Potential Liability Insurance Benefits

» Indemnity (Pays Settlements, Judgments and Clean-Up Costs).

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Find Pre-1986 Insurance Policies

» Own Insurance Files (Insurance - Risk Management Department/Comptroller/GC/ (Storage)

» All Brokers/Agents (Existing and Old)

» Outside Accountants (Policy Premium Payments)

» Outside Counsel (Who Paid Defense Costs?)

» U.S. Navy (Maryland Warehouse)

» Insurance Archeologists

Find Pre-1986 Insurance Policies

» Determine whether that coverage has been settled and released or eroded or exhausted.

» No need to have actual policy if you can prove existence, limits, time period and level.

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Post-1985 CGL Coverage Post

- **Analyze** exceptions to post 1985 "absolute" pollution exclusions:
  - Product/Completed Operations Exceptions to Exclusions.
  - Suits that seek damages for bodily injury and not property damage remediation.
  - Reimbursement sought for costs beyond testing, monitoring, cleaning up or removing the chemicals.
  - Application at locations not owned or occupied by the policyholder or its subcontractors.

NOTICE

- **Notice of An Occurrence** (An Event or Happening That Might Result in a Claim Against the Policyholder).
- **Notice of A Claim** (Claim or Threat Against Policyholder).

- **When?** Now.
- **To Whom?** Everyone.
- **How?** In Writing.

What’s Next?

» Identify/Collect/Preserve Records

» Determine Policy Erosion/Settlement/ Release

» Provide Reasonable Cooperation (to Assist Reinsurance Claim If Nothing Else)

» Provide Updates

» Value Claim

» Discuss Settlement

» Cost/Benefit Analysis of Pursuing Coverage

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Choosing Your Battleground

- Analyze which state’s law will apply to insurance coverage for its PFAS exposure.
- Each of the 50 states differs on key insurance coverage issues.
  - In some states, the law is based on where the hazardous waste site is located (“most significant interest”).
  - In other states, it is determined by the policyholder’s principal place of business or where the state received the policy (lex loci contractus).

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Choosing Your Battleground

- Once notice is given, a policyholder can expect a denial or reservation of rights from its insurance company.
- This is when the company should consider if it is worth pursuing the matter.
- Companies should look to valuable pre 1986 general liability or later policies to ameliorate this exposure.

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Thank You!

Questions?

Robert M. Horkovich

Robin Kelliher

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