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Live Webinar
February 11, 2021
1:00 pm – 2:00 pm

NEW DEVELOPMENTS IN ENVIRONMENTAL AND ASBESTOS INSURANCE COVERAGE

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The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

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SPEAKER:

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Scott Green is the director of First Environment's environmental insurance service group and has more than 30 years of experience, including 13 years managing an in-house consulting group at AIG. In this role he evaluated hundreds of pollution claims across the U.S. with regard to technical review of environmental conditions, cause and origin, cost allocation and whether incurred pollution costs were reasonable and customary as well as whether work performed was required by environmental law assisting the insurer with technical information to support coverage decisions to specific pollution policies. A professional geologist, and UST A/B operator, Scott also provides expert testimony as well as project management for hydrogeologic and hazardous waste projects, most recently working on PFAS contamination sites. He is also a member of ASTM's D18 soil and rock subcommittee.

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PFAS -Technical & Regulatory Update
with Claim Examples

February 11, 2021

Scott Green, PG
Director, Insurance Consulting Services

FIRST ENVIRONMENT

OVERVIEW

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

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PFAS OVERVIEW

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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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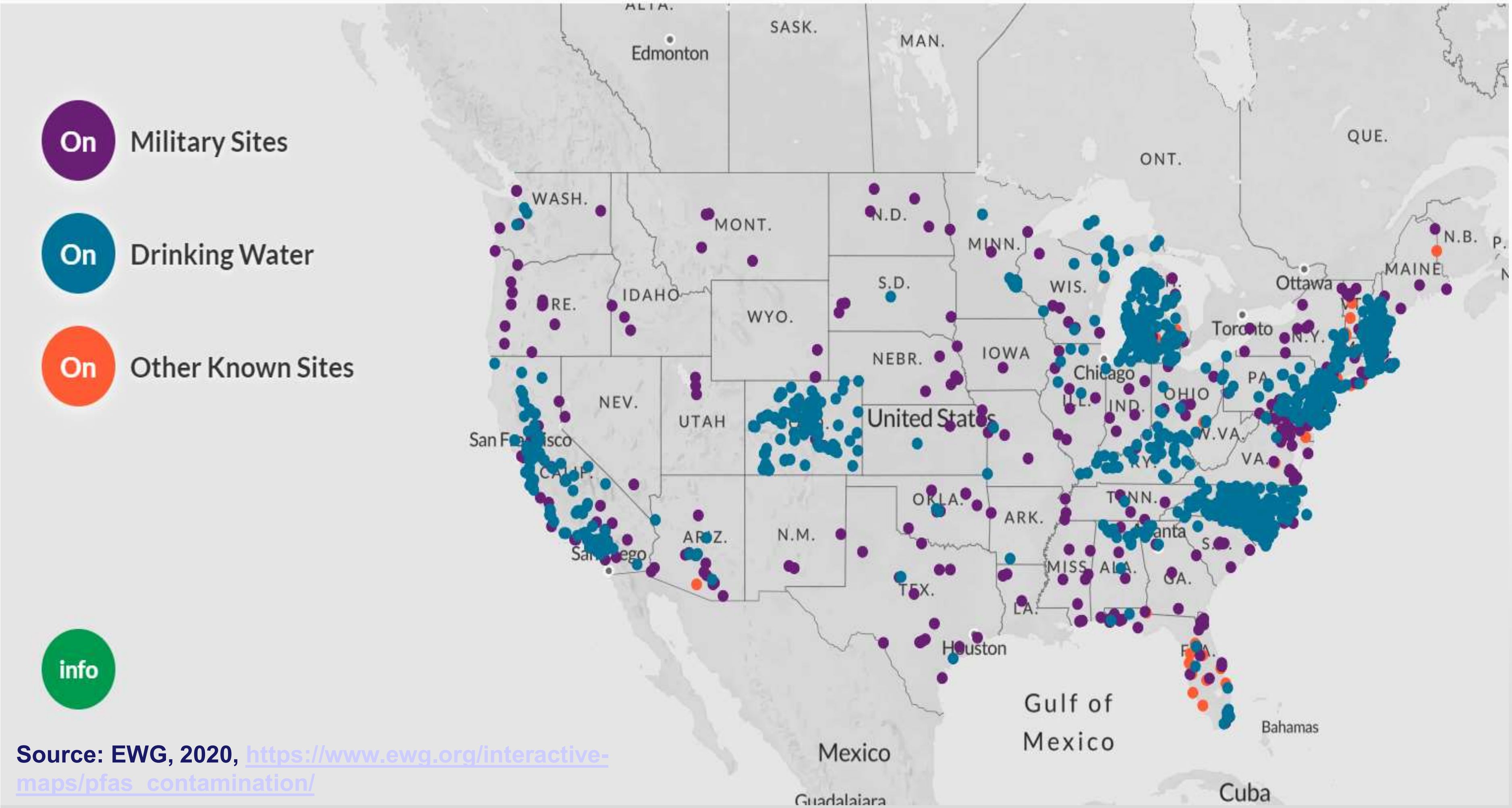
PFAS Contamination in the U.S. (July 20, 2020)



Source: EWG, 2020, https://www.ewg.org/interactive-maps/pfas_contamination/

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MAJOR SOURCES OF PFAS

- Fire training/fire response
- Production & manufacturing
- Landfills
- Wastewater treatment plants/biosolids

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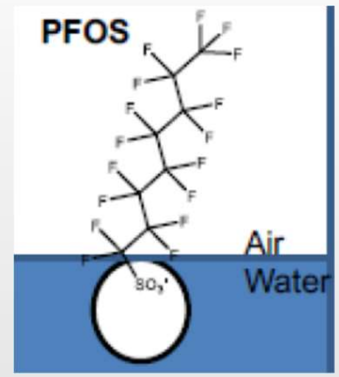
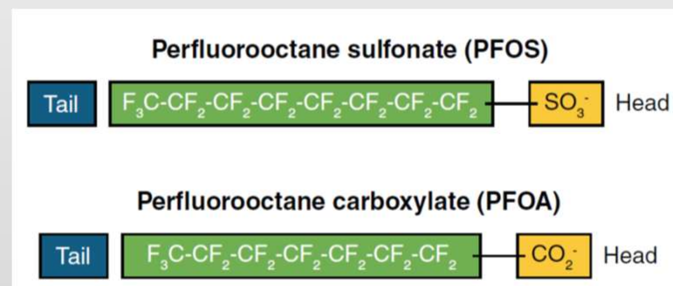
PFAS PROBLEMATIC QUALITIES

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





Source: ITRC

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STATE & FEDERAL REGULATIONS

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SITE POLLUTION

Are PFAS Chemicals Pollutants?

Pollution condition means discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, fumes, alkalis, toxic chemicals, medical waste, and waste products into or upon land, or any structure on land, the atmosphere, or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment.

Is Clean up Required by Law?

Some policies qualify further by specifying that “cleanup” relates to the investigation, removal, remediation, or disposal of contamination—to the extent required by environmental law; (or directed by consultant who is licensed (i.e., LSP, LEP LSRP).

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FEDERAL REGULATIONS - PFAS

EPA: No Enforceable Regulations

- May 2016 - Non-Enforceable Health Advisory
  - 70 ppt (combined PFOS/PFOA) in drinking water
- Feb. 2019 - PFAS Action Plan
  - Responded to public's request for immediate action to address potential human health & economic impacts from PFAS
  - Establishes priority, short- & long-term actions
- Feb. 2020 – Update to PFAS Action Plan
- Dec 2020- EPA offers Interim Guidance for Destruction/Disposal
- Jan 2021 – Advanced Notice of Proposed Rulemaking PFOA/PFOS

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Bloomberg Law News 2021-02-08T11:29:10995-05:00

States Clash With Pentagon on PFAS Water Limits, Polluted Sites

By Emily C. Dooley 2021-02-08T05:31:21000-05:00

If PFAS are hazardous substances under CERCLA, the EPA would then be in position to force parties to clean up PFAS — or pay the EPA to do so — which would in turn lead to CERCLA cost recovery or contribution suits to allocate cleanup costs, implicating numerous parties that may have manufactured or used PFAS or PFAS-containing substances across the country over the last eight decades. This would have particularly significant implications for the U.S. Department of Defense, which has used aqueous film-forming foam made with PFAS for firefighting at hundreds of military installations in the U.S.

Bloomberg Law News, 2012-02-08; , Law 360, Dintzer & Carlin, 2021-02-08

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How Will the Biden Administration Tackle 'Forever Chemicals'?

By Scott Faber, Senior VP, Government Affairs

MONDAY, NOVEMBER 9, 2020

No candidate for president has ever pledged to make the toxic "forever chemicals" known as PFAS a priority – until now.

In his environmental justice plan, President-elect Joe Biden pledged to set enforceable limits for PFAS in drinking water and to designate PFAS as a hazardous substance under the Superfund cleanup law.

Here's why that matters.

PFAS chemicals are building up in the blood of every American, posing the risk of serious health problems. PFAS makes vaccines less effective and are linked to cancer, harm to the reproductive system and other health hazards.

Five states VT, NY, NJ, CO and AL considers various PFAS chemicals hazardous substances.

EWG, November 9, 2020, by Scott Faber, Senior VP, Government Affairs

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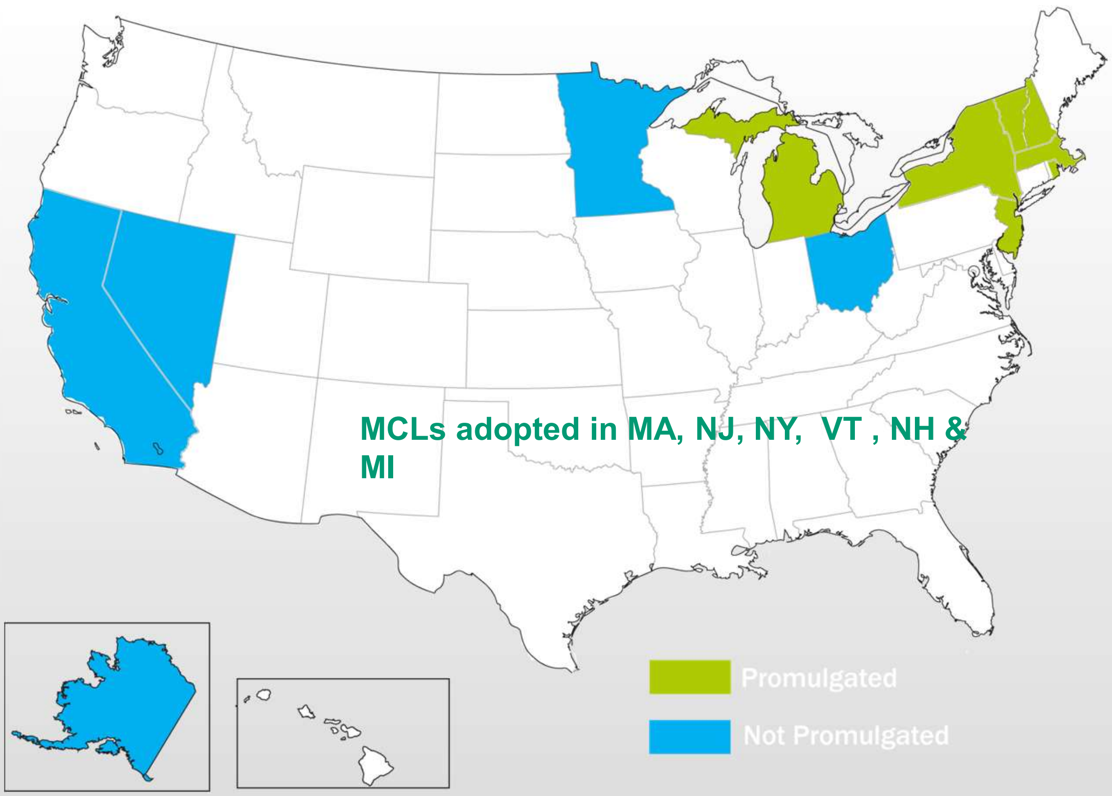
STATE REGULATIONS - DRINKING WATER

State	PFAS Type
AK	PFOS, PFOA
CA	PFOS, PFOA
MA	PFOS,PFOA, PFHxS,PFHpA,PFNA,PFSA
MI	PFOS,PFOA, PFHxS,PFHpA,PFNA,PFBS
MN	PFOS,PFOA, PFHxS,PFHpA,PFNA,PFSA
NV	PFOS,PFOA, PFNA
NH	PFOS,PFOA, PFHxS, PFNA
NJ	PFOS, PFOA, PFNA
NY	PFOA, PFOS
OH	PFOS,PFOA, PFHxS, PFNA,PFBS
RI	PFOS, PFOA
VT	PFOS,PFOA, PFHxS,PFHpA,PFNA



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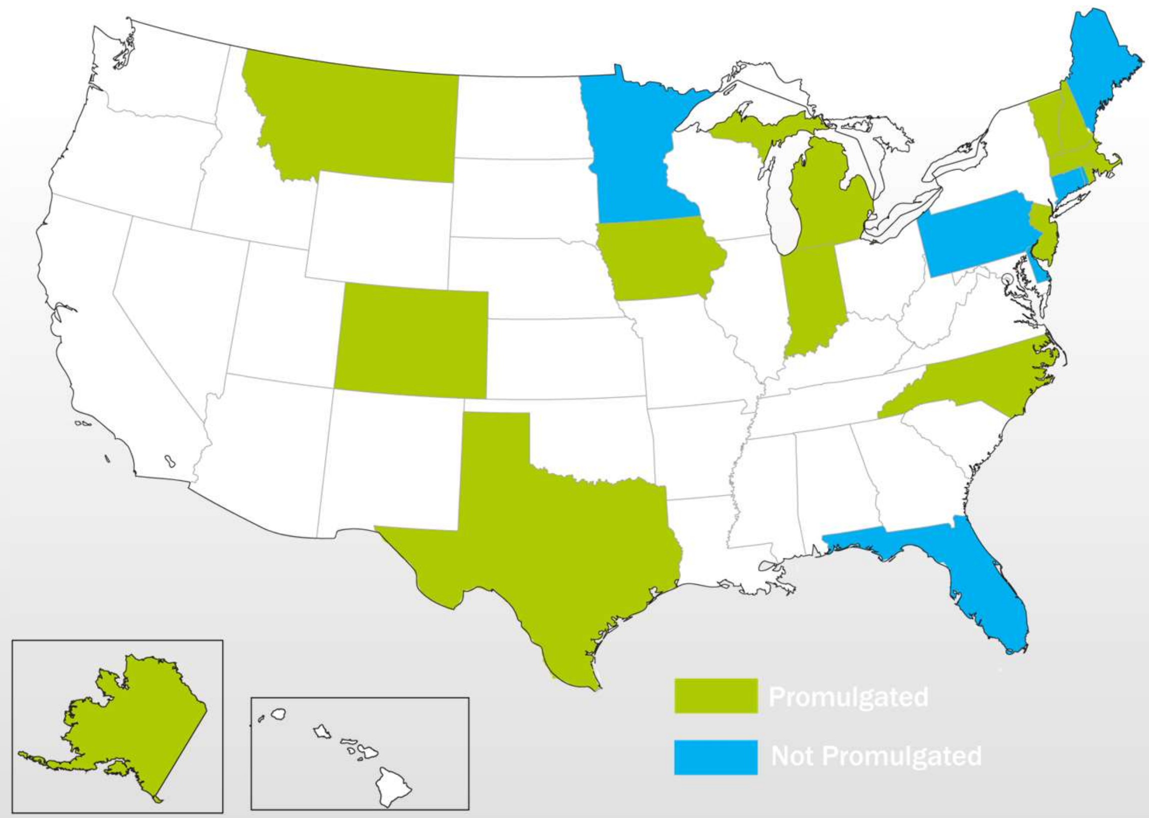
STATE REGULATIONS – GROUNDWATER

State	PFAS Type
AK	PFOS, PFOA
CO	PFOS, PFNA, PFOA,,PFBS, PFHxS
CT	PFOS,PFOA, PFHxS,PFHpA,PFNA
DE	PFOS, PFOA
FL	PFOA
IN	PFBS
IA	PFOS, PFOA
ME	PFOS, PFOA, PFBS
MA	PFOS,PFOA, PFHxS,PFHpA,PFNA,PFDA
MI	PFOS, PFOA
MN	PFOS,PFOA, PFBA,PFBS
MT	PFOS, PFOA
NH	PFOS,PFOA, PFHxS, PFNA
NJ	PFOS,PFOA, PFNA
NC	PFOA
PA	PFOS, PFOA
RI	PFOS, PFOA
TX	12 PFAS listed
VT	PFOS,PFOA, PFHxS,PFHpA,PFNA



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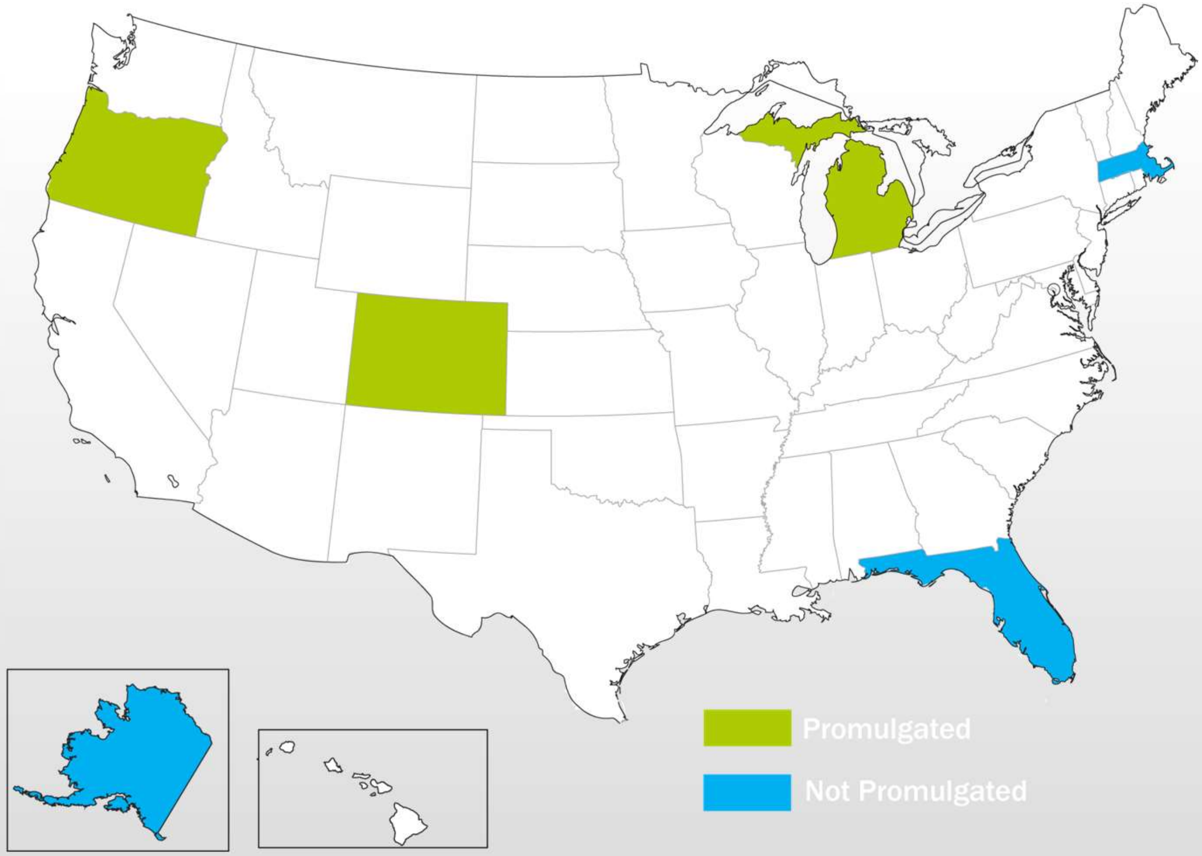
STATE REGULATIONS – SURFACE WATER

State	PFAS Type
AK	PFOS, PFOA
CO	PFOS, PFNA, PFOA,PFBS, PFHxS
FL	PFOA
MA	PFOS,PFOA, PFHxS,PFHpA,PFNA,PFDA
MI	PFOS, PFOA
OR	PFOS,PFOA, PFOSA,PFHpA,PFNA



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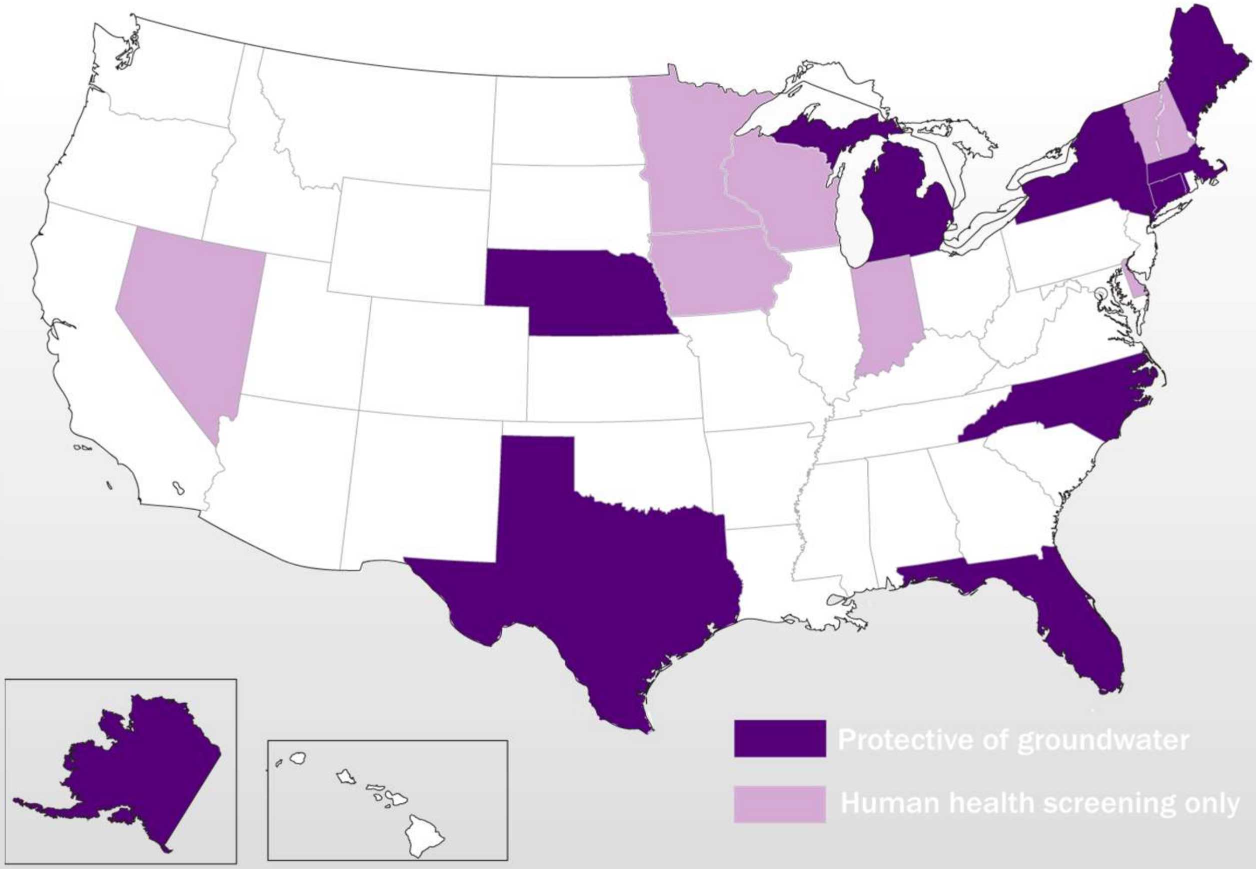
STATE REGULATIONS - SOIL



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NEW JERSEY, NEW YORK & CONNECTICUT

			
Reporting Required	✓	✓	
Enforceable Drinking Water Standard	✓	✓	
Enforceable Groundwater Standard	✓		
Soil Standard/ Guidelines		✓	✓
Hazardous Substance Classification	✓	✓	

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PFAS CLAIM SITES

Royal Air Force Lakenheath

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1976 AERIAL PHOTOGRAPH

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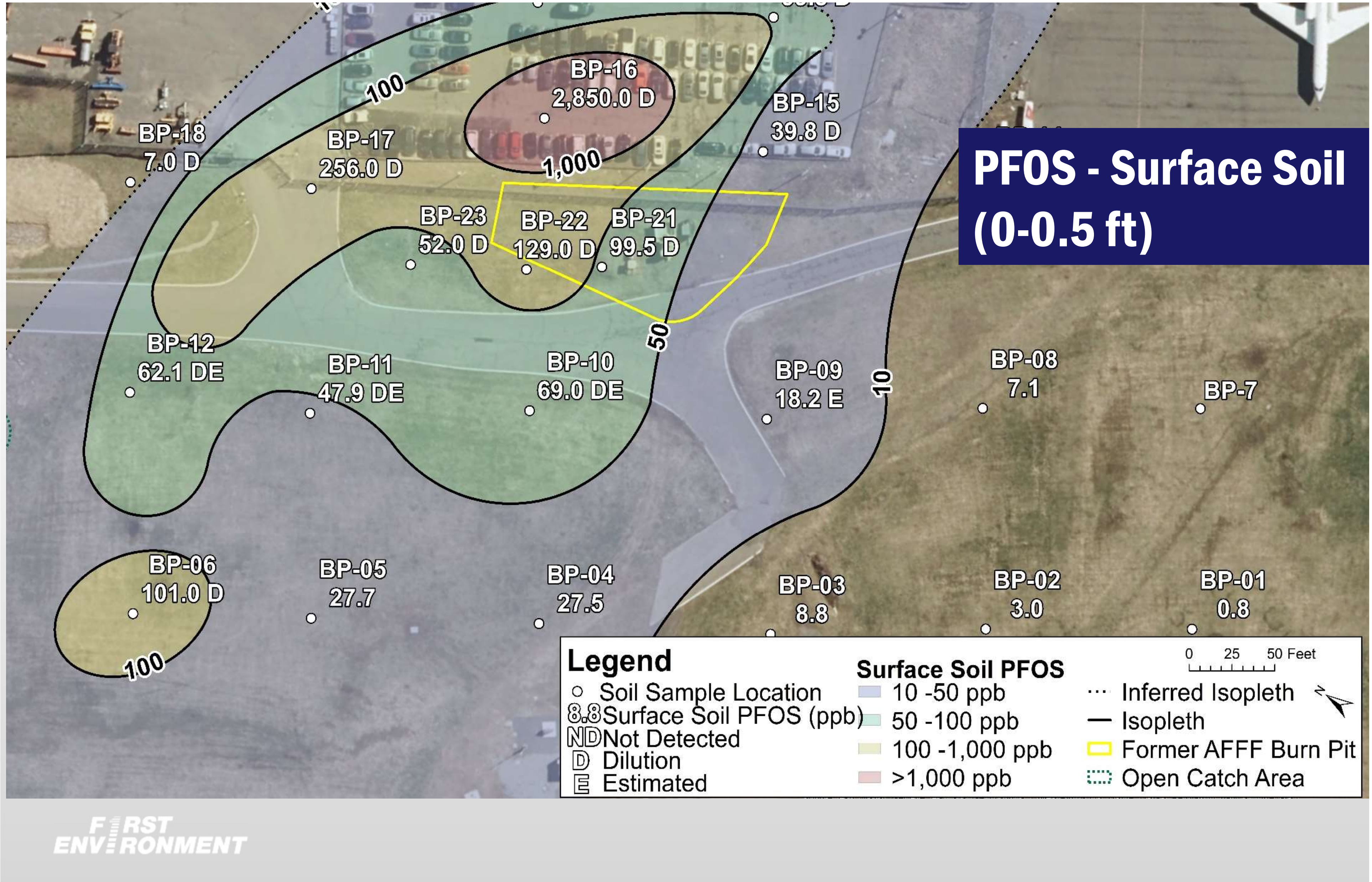

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CONNECTICUT AIRPORT

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CONNECTICUT AIRPORT

Foam surfaces downstream from B-17 crash at Bradley International Airport

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KEY TAKEAWAYS

- NJ regulations leading PFAS clean up
- State PFAS regulations growing, clean up standards on the way
- Federal regulation expected to increase with Biden in office
- Airports and fire training facilities are leading source
- Michigan has most impacted sites
- New AFFF is less now less toxic, and use of 1968-80s AFFF foams are worst PFAS impacted sites
- Be careful underwriting in NJ, NY, MI, NC, CA, MA, and VT
- Limited and costly clean up strategies

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SPEAKER:

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Robert D. Chesler is a shareholder in Anderson Kill's Newark office. Bob represents policyholders in a broad variety of coverage claims against their insurers and advises companies with respect to their insurance programs. Bob is also a member of Anderson Kill's Cyber Insurance Recovery group.

A leading participant in the birth of modern insurance law in the early 1980s, Bob has earned the reputation as "The Insurance Guru" for exceptional insurance coverage knowledge, and has emerged as a leader in such new areas of insurance coverage as cyber-insurance, D&O, IP, and privacy insurance.

Bob has served as the attorney of record in more than 30 reported insurance decisions, representing clients including General Electric, Ingersoll-Rand, Westinghouse, Schering, Chrysler, and Unilever, as well as many small businesses including gas stations and dry cleaners. He has received numerous professional accolades, including a top-tier ranking for Insurance Litigation: New Jersey in Chambers USA: American's Leading Lawyers for Business, which dubs him a "dominant force in coverage disputes" and cites a client who calls him "a dean of the insurance Bar; one of the brightest in writing about and analyzing insurance coverage."

He is also listed in The Legal 500, The Best Lawyers in America, Super Lawyers and Who's Who Legal in the Insurance and Reinsurance section of the publication.

Bob is a relentless advocate for his clients in their efforts to obtain coverage from their insurance companies. He has strength in creatively analyzing complex insurance coverage disputes and rapidly driving towards resolution. He has spent his entire career obtaining settlements from insurance companies. He can speak "insurancese" as well as the insurers, and knows how to approach insurance companies, when to talk to them and when to litigate. His depth of experience enables him to distinguish a bad insurance claim from a good one, and understand and implement best strategies for obtaining money for his clients quickly and cost-effectively.

Bob taught history at the State University of New York at Purchase and Legal Methods at Harvard University. He currently teaches insurance law at Rutgers Law School. He holds a Ph.D. in history from Princeton University and maintains a scholarly interest in insurance. He is co-author of the seminal article Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability, 18 Rutgers L.J. 9 (1986), which has been cited by numerous courts, including seven state supreme courts and the Second Circuit, along with dozens of other articles on insurance issues. He is co-author of Insurance Coverage for Intellectual Property and Cyber Insurance Claims, published by Thomas West, and is former co-editor in chief of the Environmental Claims Journal. Bob is also co-editor of Coverage, the ABA Insurance Journal. He has chaired seminars on the new cyber-policies and food insurance issues for the ABA and NJSBA, and is currently Chair of the Insurance Sub-Committee of the American Intellectual Property Law Association.

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GENERAL LIABILITY POLICY

- Provides insurance coverage for claims because of bodily injury or property damage.

- Groundwater pollution is covered property damage.

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WHICH GL POLICY APPLIES – THE 'CONTINUOUS TRIGGER'

- In most states, all GL policies from first date that contaminant enters groundwater until manifestation of groundwater contamination apply.

- If contaminant enters groundwater in 1980 and contamination is discovered in 2020, all GL policies from 1980 to 2020 potentially implicated.

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ABSOLUTE POLLUTION EXCLUSION

- Usually inserted in GL policies in 1986.
- No coverage under GL policies after 1986.
- Some absolute pollution exclusions may provide coverage for product pollution liability claims.

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QUALIFIED 'SUDDEN AND ACCIDENTAL' POLLUTION EXCLUSION

- Usually inserted in GL policies in 1973.
- Allows for coverage if discharge is 'sudden and accidental.'
- States differ on whether 'sudden' has a temporal connotation, or just means 'unexpected and unintended'.
- In states that enforce sudden and accidental exclusion, no coverage after 1973 for pollution, except for 'boom' events.
- Question – is use of foam to put out a fire 'sudden and accidental?'
- In states that do not assign temporal connotation to 'sudden,' coverage exists under all GL policies until 1986.

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HOW DO COMPANIES FIND EVIDENCE OF PRE-1986/PRE-1973 INSURANCE POLICIES?

- Company may have insurance file.
- Broker may have evidence of historic coverage.
- Many companies use ‘insurance archaeologists,’ specialists with expertise in finding old insurance policies – can be very effective.
- Companies do not need their actual insurance policies but only secondary evidence of those policies.
- In some cases, very little secondary evidence is needed to prove policies.

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HOW DO COMPANIES PROVE POLLUTION COMMENCED PRE-1986?

- Sometimes, operational history will demonstrate when pollutant was used.
- Otherwise, expert testimony
  - Length that plume has traveled
  - Degradation chemicals
- Policyholder has burden of demonstrating that groundwater contamination occurred during the policy period by a preponderance of the evidence.

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MUST THE COMPANY BE SUED TO HAVE COVERAGE?

- No – except perhaps in California.
- In most states, regulatory and administrative actions are covered claims.
- In most states, if company is statutorily strictly liable, coverage exists.
- Coverage exists for ‘voluntary’ cleanups.

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NOTICE TO INSURANCE COMPANY

- GL policy requires prompt notice of claim to insurance company.
- In most states, late notice only forecloses coverage if insurance company can demonstrate ‘appreciable prejudice’ – very difficult burden for insurance company.
- In minority of states, late notice forecloses coverage as a matter of law.
- Companies should give notice early and broadly.

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WHICH STATE'S LAW APPLIES?

- There is no federal insurance law.
- Each state has its own insurance law.
- Insurance law differs dispositively on multiple issues from state to state.

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WHICH STATE'S LAW APPLIES? (CONT'D)

- In some states, law of location of hazardous waste site controls.
- In other states, law of company's headquarters usually controls.
- In a few states, law of state where company receives the insurance policy applies.
- Choice of law analysis is necessary.

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WHICH STATE'S LAW APPLIES? (CONT'D)

- In one case, Texas company had hazardous waste site in New Jersey.
- New Jersey court would apply New Jersey law – coverage would exist.
- Texas court would apply Texas law – no coverage.
- Insurance company sued insured in Texas – no coverage.
- In some cases, company needs to sue insurance company quickly to obtain favorable forum.

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SOIL AND GROUNDWATER

- Cleanup of contaminated soil because of soil contamination is not covered.
- Cleanup of contaminated soil because it is the source of existing groundwater contamination is covered.

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SPEAKER:

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Raymond A. Mascia Jr. is a shareholder in Anderson Kill's New York office and a member of the firm's Insurance Recovery Group. Ray represents corporate and governmental policyholders in all types of insurance recovery matters, including matters involving D&O coverage, professional liability coverage, general liability coverage, environmental and asbestos claims, commercial crime insurance, and first-party property and business interruption losses arising from natural disasters and other perils. Over the course of his career, Ray has recovered hundreds of millions of dollars in insurance proceeds for policyholders.

In 2020, Law360 recognized Ray as a Rising Star in the practice area of Insurance, selecting Ray as 1 of 176 attorneys nationwide. The award recognizes those "attorneys under 40 whose legal accomplishments transcend their age." In addition, The Legal 500 USA recognized Ray as a Next Generation Partner in 2020 and as a Rising Star in 2019 while ranking Anderson Kill's Insurance Recovery Group as one the nation's top practices in the category of Insurance: Advice to Policyholders.

Ray regularly writes on insurance topics and is a frequent lecturer on insurance coverage issues nationwide, including at insurance conferences and meetings convened by the Risk and Insurance Management Society and the New York City Bar Association.

Ray also has made significant contributions to public service during his career. He left the firm briefly in 2013 to serve a two-year clerkship for the Honorable Joanna Seybert of the U.S. District Court for the Eastern District of New York. Prior to joining the firm, he served as a judicial intern to the Honorable A. Kathleen Tomlinson of the U.S. District Court for the Eastern District of New York and the Honorable Daniel A. Angiolillo of the New York Appellate Division, Second Department.

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REVIEW OF KEY ISSUES AFFECTING COVERAGE

- Trigger
- Allocation
- Exhaustion

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DISTINGUISHING TRIGGER THEORIES

- Which policies will respond?
- Nature of long-tail and latent-injury claims.
- Trigger Theories:
  1. **First Exposure:** Policy in effect at time of underlying injury-causing event: *Ins. Co. of N. America v. Forty-Eight Insulation, Inc.,* 633 F.2d 1212 (6th Cir. 1980).
  2. **Injury-In-Fact:** Policy in effect when damage or injury in fact occurred. *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760 (2d Cir. 1984).
  3. **Manifestation:** Policy in effect at time damage or injury "manifested" or was discovered (diagnosis). *Forty-Eight Insulation Inc.*, 633 F.2d at 1216.
  4. **Continuous Trigger:** All policies in effect during periods of bodily injury or property damage. *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (DC Cir. 1981).

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RECENT DECISIONS AFFECTING TRIGGER OF COVERAGE

Choice of Law

- *Textron Inc. v. Travelers Cas. & Sur. Co.*, 45 Cal. App. 5th 733 (Cal. Ct. App. 2020).

Trigger for Asbestos Personal Injury

- *Carrier Corp. v. Allstate Ins. Co.*, 187 A.D.3d 1616 (4th Dep’t 2020).

Importance of Policy Language

- *Am. Home Assur. Co. v. Port Auth. of N.Y. & N.J.*, 166 A.D.3d 464 (1st Dep’t 2018).

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DISTINGUISHING ALLOCATION APPROACHES

Where multiple policies are triggered, how is loss spread among the triggered policies (and the policyholder)?

- Three allocation approaches:
  1. **Pro Rata:** Each insurer's respective share of indemnity (and sometimes defense) costs are allocated on a pro rata, time-on-the risk basis, eliminating the need for contribution actions among insurers.
  2. **All Sums:** All triggered insurers are jointly and severally liable for "all sums," up to policy limits, of the policyholder's loss.
  3. **Proration (New Jersey):** proration on the basis of policy limits, multiplied by years of coverage.

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VIKING PUMP

- New York is one example of a state that previously favored pro-rata allocation with policyholder absorbing gaps. *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 687 (N.Y. 2002).
- In *In re Viking Pump, Inc.*, the Court of Appeals rejected the insurance companies' argument that "pro rata" allocation applies and instead adopted the "all sums" rule based on policy language.
- *Viking Pump* considered "whether 'all sums' or 'pro rata' allocation applies where the excess insurance policies at issue either follow form to a non-cumulation provision or contain a non-cumulation and prior insurance provision."
- It ruled pro rata allocation could not apply in either circumstance.

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DECISIONS FOLLOWING *VIKING PUMP*

- Following the ruling, many attorneys and commentators focused on *Viking Pump*’s holding that only the specific language before the Court mandated all sums.
- Did Viking Pump opens the door to all sums coverage whenever a loss could be covered under a policy in another year?
- In *Polar-Mohr*, the court held that all sums allocation was required under the reasoning of *Viking Pump* when a policy’s definition of “bodily injury” contained such language. *Polar-Mohr Maschinenvertriebsgesellschaft GMBH, Co. KG v. Zurich Am. Ins. Co.*, No. 17-CV-01804-WHO, 2018 WL 1335880, at *1 (N.D. Cal. Mar. 15, 2018).

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RECENT ALLOCATION DECISIONS

Adopting All Sums

- *Duke Energy Carolinas, LLC v. AG Ins. SA/NV*, No. 17 CVS 5594, 2020 WL 3042168, at *8 (N.C. Super. June 5, 2020).
- Case of first impression in North Carolina.
- Court held that "the non-cumulation provisions make plain" that all sums allocation applied.

Preserving All Sums

- *Lubrizol Advanced Materials, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 161 Ohio St. 3d 1 (Sup. Ct. 2020).
- Certified question - Whether all sums applies to a single policy providing coverage for "those sums" that the insured becomes legally obligated to pay because of property damage that takes place during the policy period, when the property damage occurred over multiple policy periods.

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RECENT VERTICAL EXHAUSTION DECISION

- *Montrose Chem. Corp. v. Sup. Ct.*, 9 Cal. 5th 215, 234, 460 P.3d 1201, 1212 (2020).
- "In the absence of any more persuasive indication that the parties intended otherwise, the policies are most naturally read to mean that Montrose may access its excess insurance whenever it has exhausted the other directly underlying excess insurance policies that were purchased for the same policy period."

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SPEAKER:

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Robin is the National Director for Environmental Claims with the Environmental Practice. As National Director of the Environmental Claims Practice, Robin leads a team of claim professionals responsible for delivery of technical and strategic consulting services designed to assist our clients in managing environmental loss and claims. This includes senior level advocacy and consulting on high severity or otherwise critical claims, including exposure analysis, disposition strategy and coverage dispute resolution. Robin has assisted clients in maximizing outcomes on a variety of complex environmental claims – not only within the environmental product line, but also finding coverage within the standard general liability and property policies.

Prior to her role as National Director for Environmental Claims, Robin was an environmental coverage expert working with clients in addressing their environmental exposures within the Northeast Region. Robin has worked with clients to analyze their risks and negotiate the most competitive and comprehensive risk management programs available. While obtaining her Law Degree, Robin completed an internship with the New Jersey Department of Environmental Protection's Site Remediation Program Division, working within the Assistant Commissioners office on the LSRP program.

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

Robin earned her Juris Doctorate from Rutgers School of Law – Newark and graduated Phi Beta Kappa from Rutgers College with a BA in Political Science. Robin is currently admitted to practice law in New York and New Jersey.

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New Developments in Environmental Insurance

PFAS – Per and Polyfluoroalkyl Substances

February 11, 2021

ENVIRONMENTAL INSURANCE & PFAS

WHAT INSURANCE IS AVAILABLE TO COVER CLAIMS INVOLVING PFAS?

Historic CGL …………………APE… Current Environmental Insurance

PFAS[1]	Development Time Period							
	1930s	1940s	1950s	1960s	1970s	1980s	1990s	2000s
PTFE	Invented	Non-Stick Coatings			Waterproof Fabrics			
PFOS		Initial Production	Stain & Water Resistant Products	Firefighting foam				U.S. Reduction of PFOS, PFOA, PFNA (and other select PFAS[2])
PFOA		Initial Production	Protective Coatings					
PFNA					Initial Production	Architectural Resins		
Fluoro-telomers					Initial Production	Firefighting Foams		Predominant form of firefighting foam
Dominant Process[3]		Electrochemical Fluorination (ECF)						Fluoro-telomerization (shorter chain ECF)
Pre-Invention of Chemistry /			Initial Chemical Synthesis / Production			Commercial Products Introduced and Used		

Notes:
1. This table includes fluoropolymers, PFAAs, and fluorotelomers. PTFE (polytetrafluoroethylene) is a fluoropolymer. PFOS, PFOA, and PFNA (perfluorononanoic acid) are PFAAs.
2. Refer to Section 3.4.
3. The dominant manufacturing process is shown in the table; note, however, that ECF and fluorotelomerization have both been, and continue to be, used for the production of select PFAS.

Sources: Prevedouros et al. 2006; Concawe 2016; Chemours 2017; Gore-Tex 2017; US Naval Research Academy 2017

From the ITRC website

While Bob covered historic CGL as a source of coverage….

What about environmental insurance policies available today?

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ENVIRONMENTAL INSURANCE & PFAS

- The current Environmental Insurance marketplace has been around since the mid-late 1990's.
- In essence, these policies 'fill the coverage gap" created by the pollution exclusions in standard P&C coverage lines.
- There are two different categories of pollution policies –
  - Site Pollution Liability Policies: These policies provide coverage for bodily injury, property damage, remediation costs arising from pollution conditions on, at or from a fixed site;
  - Contractors Pollution Liability Policies: These policies provide coverage for bodily injury, property damage, environmental damage that results from contracting operations.
- While PFAS related matters can implicate both types of pollution policies – for this discussion, we're focusing on Site Pollution Liability Policies
- Site Pollution Policies have both "first party" and "third party" components to the coverage.
- We refer to "first party" coverage - where the policies can be triggered by the Insured's discovery of a pollution condition, with the Insured incurring costs for remediation expenses; and business interruption/extra expense coverage if the insured suffers lost income due to the pollution condition
- "Third Party" coverage – where the insured receives a claim for bodily injury, property damage, or cleanup from a third party (i.e., neighboring property owner/regulator)
  - There are over 25 different insurance carriers that provide coverage for environmental risks.

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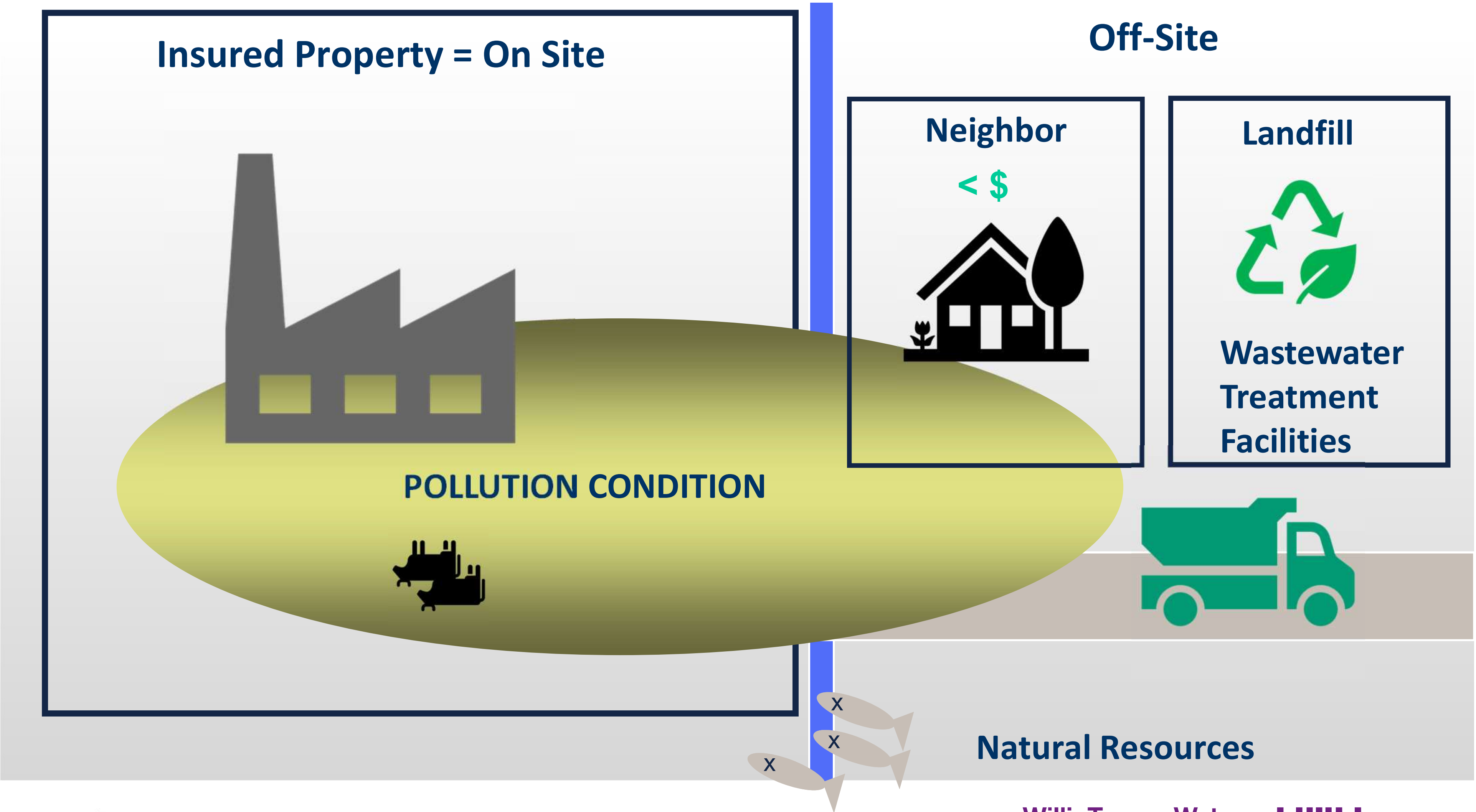
ENVIRONMENTAL INSURANCE – SITE POLLUTION LIABILITY POLICY “FUN WITH DICK AND JANE” VERSION



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TYPES OF PFAS CLAIMS WE ARE SEEING TO DATE….

State Water Resources Control Board

WATER CODE SECTIONS 13267 AND 13383 ORDER FOR THE DETERMINATION OF THE PRESENCE OF PER- AND POLYFLUOROALKYL SUBSTANCES AT CHROME PLATING FACILITIES

ORDER WQ 2019-0045-DWQ

Pursuant to Water Code sections 13267 and 13383, The State Water Resources Control Board (State Water Board) requires you to submit information as described below. Failure to comply with this Order may subject you to civil liability of up to $5,000 per day for each day in which the violation occurs.

Your site is identified in **Attachment 1** as a chrome plating facility that has stored and/or used fume suppressants or other substances that may contain per- and polyfluoroalkyl substances (PFAS). Therefore, you are required to submit the information in **Attachment 2** to the appropriate Regional Water Quality Control Board (Regional Water Board) identified in the cover letter.

Attorney General, DEP Commissioner Announce Two New Natural Resource Damage Lawsuits over Contamination of Riverfront Sites

Suit Against [redacted] Demands Accountability for Company's PFAS Chemicals Found in Public and Private Water Sources

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF NEWBURGH,

Plaintiff,

vs.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES AIR NATIONAL GUARD BUREAU, UNITED STATES AIR FORCE, STATE OF NEW YORK, NEW YORK AIR NATIONAL GUARD, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, PORT AUTHORITY OF NEW YORK AND NEW JERSEY, NATIONAL EXPRESS GROUP, PLC, SWF AIRPORT ACQUISITION, INC., FEDERAL EXPRESS CORPORATION, THE 3M COMPANY (f/k/a MINNESOTA MINING AND MANUFACTURING, CO), TYCO FIRE PRODUCTS L.P., Successor-In-Interest to the ANSUL COMPANY, BUCKEYE FIRE EQUIPMENT COMPANY, CHEMGUARD, INC., FIRE SERVICE PLUS, INC., UNITED TECHNOLOGIES CORPORATION, KIDDE PLC INC., KIDDE FIRE FIGHTING, INC., ANGUS INTERNATIONAL SAFETY GROUP, LTD., ANGUS FIRE ARMOUR CORPORATION, NATIONAL FOAM INC., CHUBB FIRE, LTD., and JOHN DOES 1-10,

Defendants.

Applicability

All work plans submitted to DEC pursuant to one of the remedial programs under Part 375 shall include PFAS sampling and analysis procedures that conform to the guidelines provided herein.

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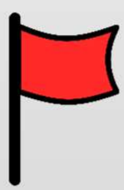
ENVIRONMENTAL INSURANCE UNDERWRITING – CIRCA 2020 AND BEYOND…..

PFAS Claims are running the full spectrum and have been made under Environmental Insurance policies, GL, and Excess policies

In response Environmental Insurers are evaluating their exposures, understanding the science behind it, and modifying their underwriting processes and risk appetite accordingly. What does that mean to a Policyholder?

<u>Changes in Underwriting Guidelines</u>:

Red Flags and watchlists based for certain industries
Accounts that are "iffy"
No red flags



- Airports
- Fire Academies
- Certain type of Manufacturers: PFAS, AFFF, Carpet, Metal Plating, Plastics, Petro-chemical facilities
- Wastewater Treatment Plants
- Landfills
- Facilities with fire suppression systems

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ENVIRONMENTAL INSURANCE UNDERWRITING – CIRCA 2020 AND BEYOND…..

Applications

PER/POLYFLUOROALKYL SUBSTANCES (PFASs)

1. Have any PFASs[1], or any materials or products that may have contained any PFASs, ever been manufactured, used or stored at any Covered Property? ____YES____NO. If yes, please provide details.____________________

AQUEOUS FILM FORMING FOAM (AFFF)

1. Do any operations conducted, or any materials stored used or manufactured at any Covered Property have fire suppression requirements other than water? ____YES____NO If yes, please provide details. ____________________
2. Have any AFFF fire suppressants ever been used or stored at any Covered Property? ____YES____NO. If yes, please provide details. ____________________
3. Have there been any fires at a Covered Property that used an AFFF based fire suppressant to extinguish the fire? ____YES____NO If yes, please provide details. ____________________
4. Are there any mutual aid groups or third-party contracts utilized for fire response at any Covered Property? ____YES____NO If yes, please provide details. ____________________
5. Have there ever been any fire training exercises that used AFFF performed at any Covered Property? ____YES____NO If yes, please provide details. ____________________

Additional Underwriting Scrutiny:

Has your facility ever (to your knowledge as CLOTHING MFG) used the following chemical? If yes, do you still use this chemical today? This acid is used to enhance oil and water resistance and in products such as Teflon. Do not consider the manufacturing facilities that you may get supplies from. The chemical would have to have been present at your facility and handled by your employees directly.

Exclusions

In consideration of the premium charged for the Policy, it is hereby understood and agreed that the following Paragraph PF. **PFC AND PFAS** is added to Clause **VI. EXCLUSIONS**:

PF. **PFC AND PFAS**

arising out of or resulting from any perfluorinated chemicals (PFC) and per- and polyfluoroalkyl substances (PFAS) including, but not limited to, perfluorooctane sulfonate (PFOS), perfluorooctanoic acid (PFOA), perfluorobutane sulfonate (PFBS) and GenX, and any precursor chemicals or compounds, or other replacement PFC or PFAS.

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ENVIRONMENTAL INSURANCE MARKETING (FROM A BROKER'S PERSPECTIVE) – CIRCA 2020 AND BEYOND…..

Charitable Organization – they are going to receive a donation from the Township. The property was a former municipal firehouse (with no documented use of AFFF/drills at the property). The site was to be redeveloped as 4 townhomes by the organization

Carrier #1 – declined
Carrier #2 - declined
Carrier #3 - quoted – PFAs exclusion
Carrier #4 - indication – PFAs exclusion
Carrier #5 – indication – PFAs exclusion
Carrier #6 - will quote with a PFAs exclusion
Carrier #7 – will apply a PFAs exclusion and a dewatering exclusion

It's not a matter of pricing …. it's PFAS exposure that is driving the marketplace

Anyone have a secondary site carrier where they have been able to get products coverage for drinking water for a regional water authority? The incumbent is Carrier #1 who is adding a PFAS exclusion, Carrier #2 is supposed to get me a quote and I have declinations from Carrier #3, Carrier #4, Carrier #5, Carrier #6, Carrier #7, Carrier #8, Carrier #9, Carrier #10, Carrier #11, Carrier #12, and Carrier #13. Carrier #14 would have a lead and PFAS exclusion.

We worked on Airport lease and obtained quotes from the following markets.

Carrier #1– no PFA's exclusion
Carrier #2 – PFA's exclusion
Carrier #3 – PFA's exclusion
Carrier #4 – PFA's included
Carrier #5 – no PFA's exclusion

Carrier #6 quoted without a PFAs exclusion and Carrier #7 originally quoted with a PFAs exclusion and then removed it.

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ENVIRONMENTAL INSURANCE WITHOUT PFAS LIMITATIONS ???

When we've been successful negotiating off a PFAS exclusion it's because of the following:

- Shown no history of fire losses at insured sites;
- Established no foam/AFFF based fire suppression systems at insured sites;
- Confirmed no known history of operations that have used PFAS as an input or otherwise produced it;
- If a waste management site, demonstrated our Insured is in the business of PFAS destruction and employing best in class measures to manage it;
- Best in class, right monitoring, discussions with the regulators;

What's Next ???

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CLAIM CONSIDERATIONS

1. Is the entity implicated listed on the Policy as an Insured?
2. Is property on the Policy included as a Covered Location?
3. Did the pollution condition commence on or after the retroactive date?
4. Is cleanup required by Environmental Law?
5. Is the requirement to sample for PFAS associated with an excluded matter?
6. Claims made and Reported issues: Was the PFAS first discovered, and reported, during the policy period? Was the claim first made, and reported, during the Policy Period?
7. Standard Environmental Claim issues: Approval of legal defense counsel, consent to cleanup, are cleanup costs reasonable and necessary?
8. Is there Other Insurance available for the claim?

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If you have any questions, please do not hesitate to contact me

THANK YOU!!!

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[redacted]

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QUESTIONS?

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THANK YOU.

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