



NACWA 2020 National Clean Water Law & Enforcement Virtual Event  
**PFAS & Clean Water – What Clean Water Utility Lawyers  
Should Know: The Role of TSCA**

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# Toxic Substances Control Act: The Basics: Original Statute

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- Enacted in 1976
- Provides EPA with authority to impose restrictions relating to chemical substances, including bans or restrictions on chemicals that present an unreasonable risk (TSCA § 6)
  - Burden was on EPA to demonstrate a chemical presented an unreasonable risk
  - Requirements included a cost-benefit analysis and selection of “least burdensome” option for regulating, a very difficult legal burden
- Other key TSCA provisions require a “pre-manufacture” notice for chemicals not on inventory of existing chemicals (§ 5) and impose testing, reporting, and record-keeping obligations on manufacturers (including importers)


# Toxic Substances Control Act: The Basics: Lautenberg Amendments

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- 2016 Frank R. Lautenberg Chemical Safety for the 21st Century Act amended TSCA
    - New approach on new chemicals: before a new chemical can be commercialized, EPA must conclude it is not likely to present an unreasonable risk
    - For existing chemicals, EPA must identify high and low priority chemicals and conduct risk assessments of high priority chemicals
    - Safety for new and existing chemicals is evaluated on the basis of known, intended, and reasonably foreseen “conditions of use”; if risk is found, risk management measures must be developed and implemented
    - Disposal is a condition of use
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# TSCA & PFAS Chemicals: Early Steps

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- March and December 2002 – EPA finalizes Significant New Use Rule (SNUR) requiring notification before any future manufacture (including import) of close to 90 PFAS chemicals specifically included in the voluntary phase out of PFAS compounds between 2000 and 2002
  - October 9, 2007 – EPA adds 183 PFAS chemicals to PFAS SNUR
  - October 22, 2013 – EPA SNUR requiring companies to report all new uses of certain PFOA-related chemicals as part of carpets
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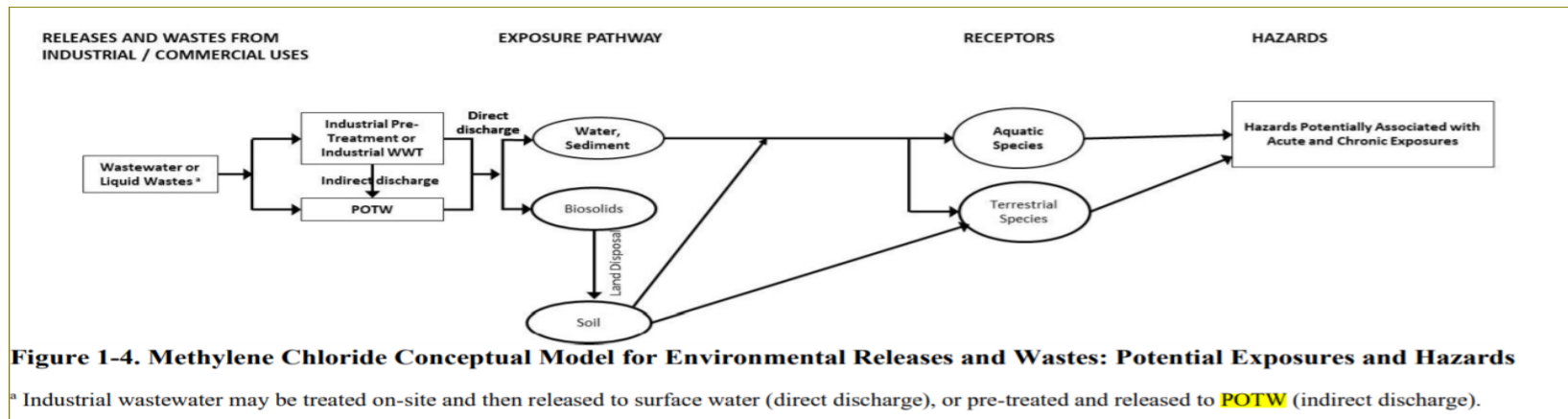
# TSCA & PFAS Chemicals: Recent Actions

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- January 21, 2015 – EPA proposes SNUR to require reporting by manufacturers (including importers) and processors of PFOA and PFOA-related chemicals, including as part of articles
  - February 20, 2020 – EPA includes TSCA actions in PFAS Action Plan and proposes supplemental SNUR to require notification before import of long-chain PFAS chemical substances as part of surface coatings on articles
  - June 22, 2020 – EPA finalizes 2015 and 2002 proposed SNURs
  - November 5, 2020 – EPA submits for interagency review a draft Compliance Guide for Imported Articles Containing Surface Coatings Subject to the Long-Chain PFAS Significant New Use Rule
  - Potential new Administration approach: TSCA prioritization of PFAS chemicals?
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# TSCA, PFAS, & Water Utilities

- Most provisions of TSCA apply to chemical manufacturers (including importers), distributors, and downstream product manufacturers
- But TSCA risk assessments include evaluating discharges to POTWs (see conceptual exposure model from methylene chloride risk assessment)



# TSCA vs. Other Programs

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- If EPA finds the discharge of an existing chemical into a POTW presents an unreasonable risk to the environment due to risks from surface water or biosolids (incineration or land application), it may impose limits on the amount of the chemical that may be discharged into the POTW under TSCA
  - But, EPA's Office of Water regulates POTWs and biosolids, and the Air Office regulates incinerators
  - TSCA § 8 directs EPA to use another EPA-administered law if the unreasonable risk "could be eliminated or reduced to a sufficient extent" unless EPA in its discretion determines it is in the public interest to use TSCA.
  - The same type of deference applies to OSHA or another non-EPA federal law, unless EPA determines the other regulation is inadequate or the other agency accedes to EPA's jurisdiction
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# Other Relevant TSCA Provisions: Section 6

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- TSCA § 6 authorizes EPA to seek temporary or permanent relief to protect against an unreasonable risk that is an imminent hazard, regardless of cost or other non-risk factors
  - This authority extends to actions against those that manufacture, process, distribute, use, or dispose of a chemical
  - A POTW could be brought in as a necessary party in an EPA action




# Other Relevant TSCA Provisions: Section 21

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- TSCA § 21 allows citizens to petition EPA to issue a TSCA rule; district courts may review EPA's denial of the petition using a *de novo* standard
  - *Food & Water Watch, Inc. v. EPA*, 302 F.Supp.3d 1058 (N.D. Cal. 2018), involves an ENGO's challenge to EPA's denial of a petition to ban the fluoridation of drinking water under TSCA
    - Court gave little deference to EPA on science and policy determinations during bench trial
    - At the court's urging, on November 4, Food & Water Watch filed a supplemental petition ((incorporating trial evidence and other recent developments). However, on November 5, DOJ renewed its demand that the court dismiss the lawsuit for lack of standing.
    - This approach could be a model for other groups seeking a ban on the use of biosolids containing PFAS chemicals and/or a pretreatment requirement on discharges to POTWs

# TSCA & PFAS – What Happens Next?

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- Pressure for more action on PFAS chemicals could increase interest in using TSCA approaches, with stepped-up TSCA action already a target for many groups
  - In addition to already complicated scientific questions on PFAS chemicals, no clear approaches to modeling impacts on POTWs of forever chemicals like PFAS compounds
  - Need for NACWA members to be vigilant on TSCA developments
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