



PFASs: STATE OF THE LAW AND TRENDS IN PRACTICE

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Overview



1. State-of-the-law governing PFASs in the environment
2. Significance of the EPA's PFASs Summit Action Items
3. Overview of the trends we are seeing in practice



PFASs: State-of-the-Law


■ Emerging Contaminants

- PFASs are classified as emerging contaminants at both the federal and state levels.
- Chemicals or materials that:
 - are characterized by a perceived, potential, or real threat to human health or the environment, and a lack of published health standards
 - present real or potential unacceptable human health or environmental risks, and either: a) do not have peer-reviewed human health standards; or, b) the standards/regulations are evolving due to new science, detection capabilities, or pathways.
- Theme – a lack of peer-reviewed human health standards



PFASs: State-of-the-Law

- Emerging Contaminants
- Human Health Advisory levels

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- In 2016 EPA published HALs of 70 ppt for PFOA and PFOS in drinking water
 - health advisory are non-enforceable and non-regulatory and provide technical information to agencies on health effects, analytical methodologies, and treatment technologies
 - Many states have adopted the EPA HALs and a small set of states have published more stringent advisory or guidance levels for PFOA and PFOS in drinking water
 - Theme – Non-actionable, non-regulatory, w/ primary focus on longer-chain PFASs (6+C) w/ exception of PFBS (4C)

PFASs: State-of-the-Law

- Emerging Contaminants
- Human Health Advisory levels
- **Maximum Contaminant Levels**

- EPA has not set MCLs
- MCLs are standards that are set by the EPA (or state agency) for drinking water quality
- An MCL is the legal threshold limit on the amount of a substance that is allowed in public water systems under the Safe Drinking Water Act (or state equivalent)
- As for the states, NJDEP Commissioner has accepted MCLs for PFOA and PFOS, but formal rulemaking still needs to be completed
- **Theme – no automatic trigger mechanism requiring public water systems to both test and treat PFASs in drinking water**



PFASs: State-of-the-Law

- Emerging Contaminants
- Human Health Advisory levels
- Maximum Contaminant Levels
- **Cleanup Levels**

- There are no federal numeric standards for cleaning up of PFASs in soil and water
- Some states are actively setting their own binding cleanup levels for PFOA and PFOS (VT, NH, MI, AK, TX, RI, NH)
- Lack of standards leaves significant gaps for parties to fill when negotiating cleanup goals with the EPA or state agencies – increasing the time and costs, w/ unknown outcomes
- **Theme – no, or very limited, established cleanup goals to apply when investigating and cleaning-up PFASs**



PFASs: State-of-the-Law

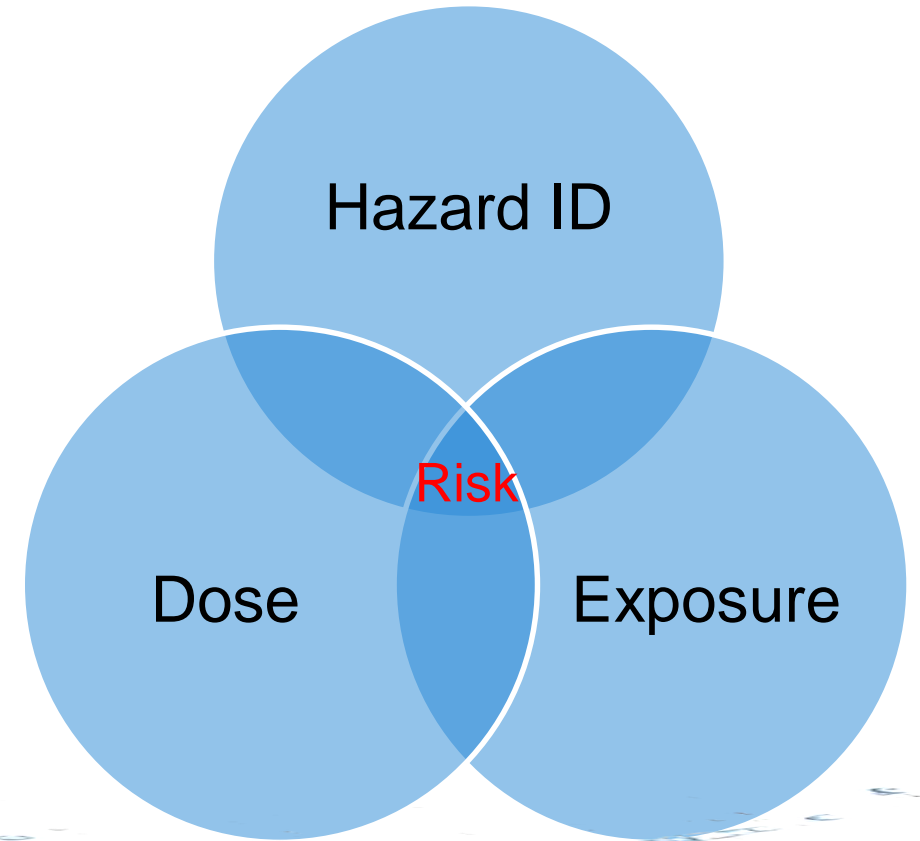
- Emerging Contaminants
- Human Health Advisory levels
- Maximum Contaminant Levels
- Cleanup Levels
- **Hazardous Substance Lists**

- PFASs not presently defined as “hazardous” under:
 - CERCLA
 - TSCA
 - RCRA
 - EPCRA
- States like Vermont, New Hampshire, Michigan, and Alaska are leading the way in state regulation of PFAS chemicals as hazardous substances
- **Theme – no, or very limited, trigger mechanisms to require cleanup or contribution at both the federal and state level**



In the End ~ Assessing Health Risks with Un- or Ill-defined Variables

1. Health advisory levels indicate PFASs have the *potential* to cause harm to humans and/or ecological systems
2. The numerical relationship between exposure to PFASs and effects on humans remains *unclear and debated* in scientific community
3. *Studies are ongoing* into the magnitude, frequency, and duration of human exposure to the PFAS



PFASs: EPA Action Items

1. Initiate steps to evaluate the need for a **maximum contaminant level** (MCL) for PFOA and PFOS.
 2. Begin the necessary steps to propose designating PFOA and PFOS as “**hazardous substances**,” including potentially CERCLA Section 102.
 3. Develop **groundwater cleanup recommendations** for PFOA and PFOS.
 4. Take action to develop toxicity values for **GenX and PFBS**.
- *National Management Plan expected by Year End (2018)*



PFASs: EPA Action Items

■ MCLs for PFOA and PFOS

- EPA to “evaluate the need” to embark on rigorous process
- To set MCL, EPA must first determine how much PFOA or PFOS may be present with no adverse effect ~ MCLG.
- The MCL is then set as close as possible to the MCLG
- Consideration is given to the difficulty in measuring, lack of available treatment technologies, and cost of treatment compared to the public health benefits
- If established after public comment, PWS across the country will be required to test wells, notify the public, and install costly mitigation measures (or take wells offline).
- **Significance - settled science at federal level, adoption by states, and more litigation**



PFASs: EPA Action Items

- MCLs for PFOA and PFOS
- Designate PFOA and PFOS as “hazardous substances”

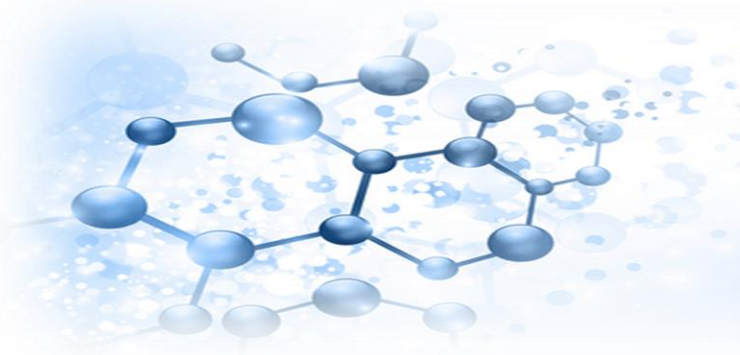
- EPA taking steps to “propose” designation
- CERCLA 102(a) authorizes the EPA to designate a chemical or material as a hazardous substances if it may present substantial danger to the public health or welfare or the environment . . .
- EPA shall promulgate regulations establishing the quantity of hazardous substance the release of which shall be reported
- If designated, EPA may issue orders and seek contribution under CERCLA
- Significance - settled science at federal level, adoption by states, reporting requirements, and more litigation



PFASs: EPA Action Items

- MCLs for PFOA and PFOS
- Designate PFOA and PFOS as “hazardous substances”
- **Develop gw cleanup recommendations for PFOA and PFOS**

- EPA and states look to “applicable or relevant and appropriate requirements” (ARARs) to assure a remedy is protective of human health and the environment
- Risk-based goals are calculated and used to determine cleanup levels when chemical-specific ARARs are not available
- **Significance – clarity in science at federal level, adoption by states, increase in enforcement actions, and more litigation**



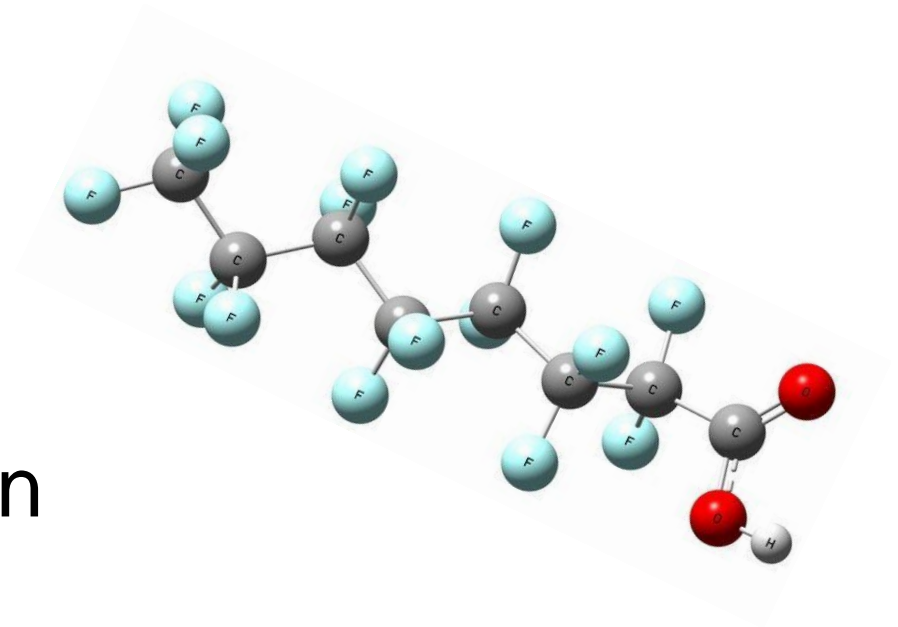
PFASs: EPA Action Items

- MCLs for PFOA and PFOS
 - Designate PFOA and PFOS as “hazardous substances”
 - Develop gw cleanup recommendations for PFOA and PFOS
 - **Develop toxicity values for GenX/PFBS**
- GenX is a replacement for PFOA; PFBS is a replacement for PFOS; both have fewer carbons
 - TSCA SNURs requires testing to ensure they do not “present an unreasonable risk to health or the environment”
 - Examples of required testing includes bioaccumulation, fate and transport, reproductive testing, carcinogenicity testing in animals, chronic testing in aquatic organisms, and animal reproductive studies
 - EPA has reviewed the studies and is preparing its position
 - **Significance – publicize EPA’s position on the health risks (toxicity) of short-chain PFASs**



PFASs: Practice Trends

1. Litigation
2. Enforcement & Cleanup
3. Risk Assessment & Mitigation



PFASs: Practice Trends

■ Litigation



1. Actions against primary **PFOA and PFOS manufactures** (e.g. MN, WV, OH, NC)
 - Private party class actions (e.g. private wells)
 - Large, publicized settlements
2. Actions against **product manufacturers** (e.g. NY, GA, MI)
 - Private party actions and class actions
 - Carpet (GA, AL, NY) and shoe (MI) manufacturing
 - Wide net – pulling in PFAS manufacturers, landfills, etc.
3. Actions against **AFFF manufacturers** (e.g. NY, MA, PA)
 - Private party class actions
 - States attorney generals
 - Municipal water suppliers

■ Litigation Cont...



4. Actions against **PRPs for AFFF release(s)** (e.g. NY, PA, CO, Conn.)
 - Private parties, class actions, and municipal water suppliers
 - DoD sites – Peterson (CO), Stewart (NY), Willow Grove (PA), and Francis S. Gabreski (Conn) . . . more expected
 - DoD has identified ~400 sites with known or suspected releases associated with “firefighting training areas, hangars, fire suppression systems, and aircraft crash sites.”
5. Actions against **GenX manufacturer** (NC)
 - Private well owners
 - Rely on State health advisory levels

Trend – more litigation of toxic risks ahead of regulations with continued focus on manufacturers, AFFF sites, and alleged damage to PWSs and private wells

PFASs: Practice Trends

- Litigation
- Enforcement & Cleanup



- EPA increasing enforcement
 - Type of sites – high levels of PFOA or PFOS in gw
 - EPA's focus on PFAS may effect 5-year reviews
 - PFOA/PFOs may be Reopeners – e.g. gw remedy may not be sufficient
- DoD sites are leading the way and may cause ripple effect
 - Voluntary investigation and cleanup w/ public data
 - Using EPA HALs and CERCLA
- Some states are increasing enforcement (e.g. NY, NJ, MN) and many are increasing monitoring at PWS

Trend – expect more enforcement

PFASs: Practice Trends

- Litigation
- Enforcement & Cleanup
- Risk Assessment & Mitigation



- Existing and Legacy operations
 - Know the law in your jurisdiction
 - Talk to the relevant regulators re enforcement
 - Understand the science and/or hire an expert
 - Investigate your client's use of PFAS
 - Research replacement products
- Mergers & Acquisitions
 - Add PFAS to due diligence and ask the right questions
 - Know the law in your jurisdiction
 - Consider environmental insurance

Trend – increase in risk assessments concerning legacy and current PFAS use, and deals involving target's with historical operations connected to PFAS usage

Questions



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