

PFAS Regulations and Roadmap:

Impacts on New England Water and Wastewater Facilities

Presented by Ken Sansone, Attorney

SL Environmental Law Group

May 24, 2022



Agenda

- ▶ What is the regulatory environment for PFAS?
- ▶ What is the legal responsibility of manufacturers of PFAS-containing products for contamination?
- ▶ How can water suppliers use the law to make PFAS manufacturers pay?

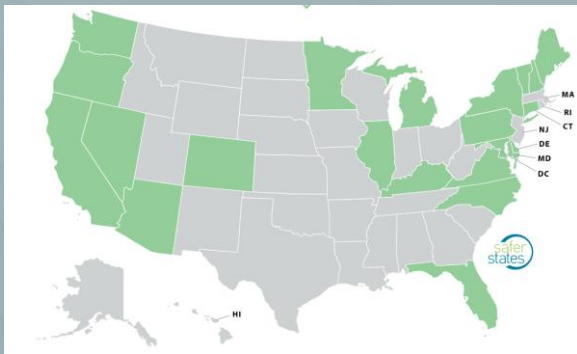
Many products contain PFAS



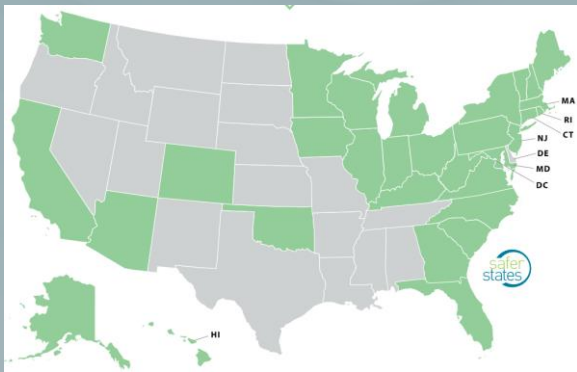
How PFAS enters the environment



National Primary Drinking Water Standard (US EPA)



- ▶ EPA to finalize limits for PFOA & PFOS in 2023
- ▶ Will be first federally enforceable limits
- ▶ Likely lower than current 70ppt levels



<https://www.saferstates.org/bill-tracker/FilterBills>

Latest developments from the EPA

- ▶ Faster than: PFAS Strategic Roadmap, EPA's Commitment to Action 2021-2024:
 - ▶ *“EPA will seek to hold polluters and other responsible parties accountable for their actions, ensuring that they assume responsibility for remediation efforts and prevent any future releases.”*
- ▶ Infrastructure package: \$10 billion for testing and clean up of PFAS
- ▶ Next step: setting an MCLG - the maximum level of a contaminant in drinking water at which no known or anticipated adverse effect

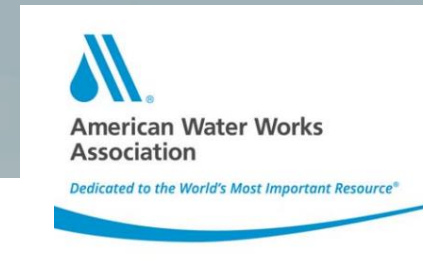
Source: [EPA](#)

CERCLA

- ▶ January 2022 EPA submitted proposal to designate PFOA & PFAS hazardous substances
- ▶ Final rule slated in 2023

Designating PFAS as a CERCLA hazardous substance would help communities that have a known responsible party with financial means to pay for cleanup. However, it could also create liability for communities that encounter PFAS in their water treatment activities. Once PFAS is removed from water, it then must be disposed of. A water utility that properly disposes of residuals containing PFAS, in a manner consistent with applicable laws, must not be held liable under CERCLA for future costs associated with PFAS cleanup. Those costs and responsibilities must remain with the original polluters that introduced PFAS into the environment. Failure to protect water utilities from this liability would victimize the public twice: once when they are forced to pay to remove PFAS from their water, and again when they are forced to pay to clean up PFAS elsewhere.

Source: [AWWA](#)



Biosolids

Studies Reporting PFAS in Biosolids

Study	Number of PFAS Tested	Sum of PFAS Concentrations, Rounded	Where PFAS Were Measured
United States Samples from 4 wastewater treatment plants (Kim Lazcano et al., 2019) ³⁵	17	18–49 ng/g	Sewage sludge, prior to treatment
		8–123 ng/g	Biosolids, after treatment (heat, composting, blending, hydrolysis)
United States Samples from 1 wastewater treatment plant (Armstrong et al. 2016) ³⁶	12	98 ng/g [*]	Limed biosolids, dry weight
		2–601 ng/g ^{**}	Limed biosolids, range of individual PFAS detections, dry weight
United States Samples from a nationwide sewage sludge inventory (Venkatesan and Halden, 2013) ³⁷	13	539 ng/g [*]	Sewage sludge, dry weight (air dried prior to extraction)
		1.2–618 ng/g ^{**}	Sewage sludge, range of individual PFAS detections, dry weight (air dried prior to extraction)
United States Samples from 2 different sites (Yoo et al., 2009) ³⁸	10	98–682 ng/g	Sewage sludge, dry weight

▶ 2 states to consistently check sludge and farms for PFAS contamination:

▶ Maine:

- ▶ Some farms shut down due to PFAS-tainted fields, state is investigating 700 more
- ▶ \$60M fund to help farmers with medical monitoring

▶ Michigan:

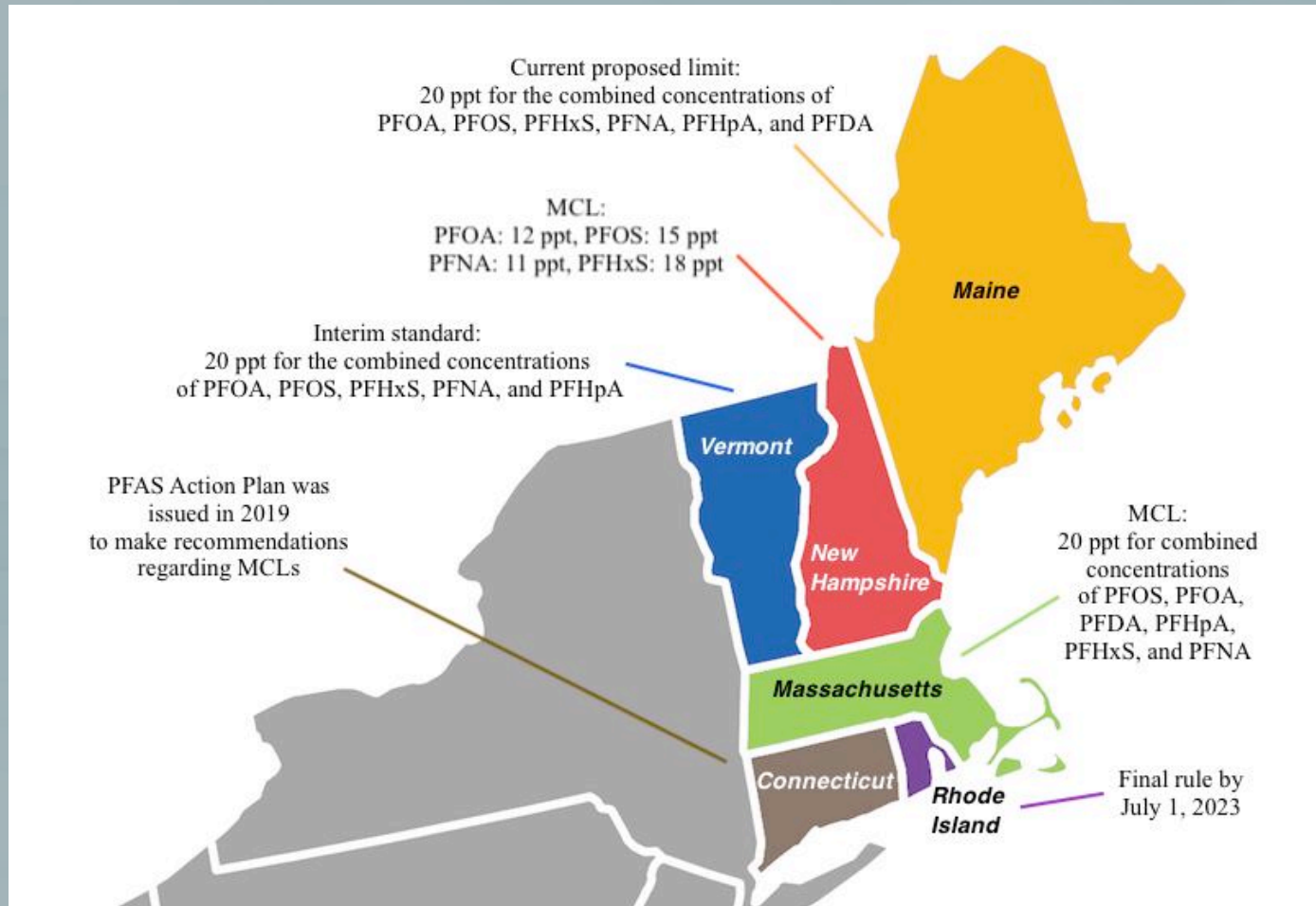
- ▶ Contaminated farmland and beef; growing evidence links biosolids to public health problems and contaminated drinking water

▶ Farmer class action suit

Wastewater concerns

- ▶ Ability to dispose of biosolids
 - ▶ Sludge contaminated with PFAS cannot be applied to the land, which is most popular and most cost-effective method
 - ▶ Incineration temperature is not high enough to destroy PFAS
- ▶ Discharge of PFAS into the receiving streams or bodies of water
 - ▶ Contamination of downstream water systems and the associated liability

Regulatory Environment in New England



Agenda

- ▶ What is the regulatory environment for PFAS?
- ▶ What is the legal responsibility of manufacturers when their products harm others?
- ▶ How can water suppliers use the law to make PFAS manufacturers pay?





Product liability principles

“If the product fails to live up to the ordinary consumer’s reasonable expectations as to safety, the manufacturer should be liable for the damage caused by its product. Even if the chance of injury is slight, the burden of any resulting injury should be borne by the party best able to bear the loss.”

”

Finn v. G. D. Searle & Co., 677 P.2d 1147, 1166–67 (Cal. 1984).

Defective product

A product did not perform the way consumers expected.

OR

The risks of the design outweigh the benefits of the design.

Failure to warn liability

It is well settled that a manufacturer has duty to warn users of foreseeable latent dangers associated with ordinary uses of its products.

”

Powell v. Standard Brands Paint Co., 212 Cal. Rptr. 395, 397 (Ct. App. 1985).

Failure to warn

The foreseeable risks could have been reduced or avoided by providing reasonable instructions or warnings

and

the failure to provide those instructions or warnings makes the product unreasonably dangerous.

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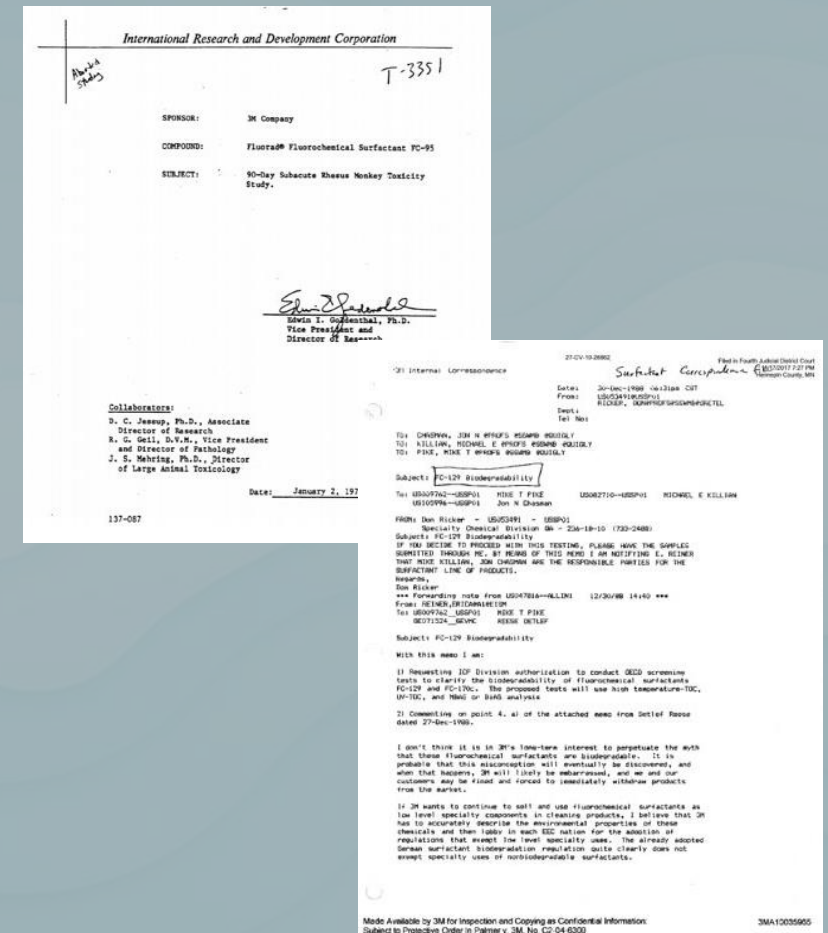
3M knew the risks

“[PFOS] was administered to rhesus monkeys.... The study was terminated after 20 days because of the early deaths of the monkeys in all treatment groups.”

”

“I don't think it is in 3M's long-term interest to perpetuate the myth that these fluorochemical surfactants are biodegradable.”

3M Internal Memos, 1979 & 1988

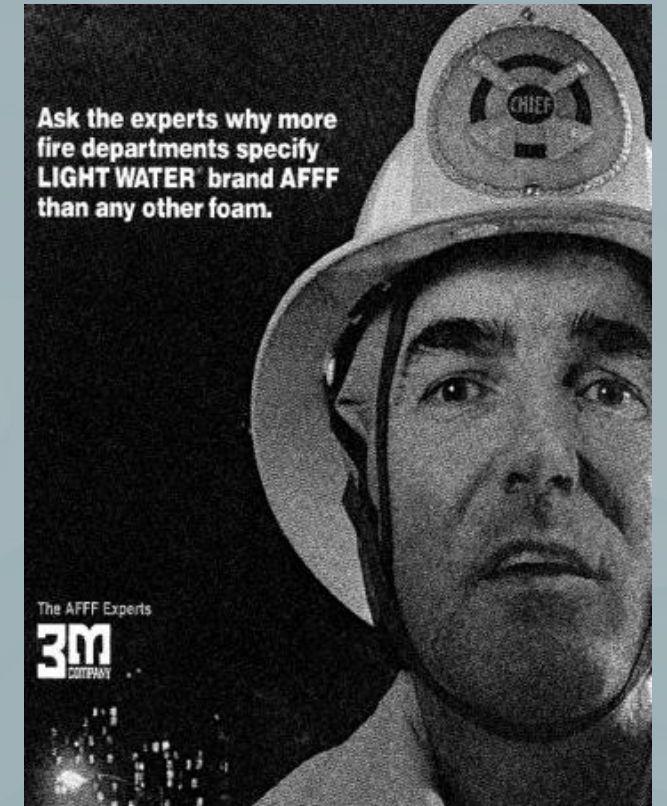


3M knew the risks

“[AFFF] is biodegradable, low in toxicity, and it can be treated in biological treatment systems. ... Tests and actual use situations have shown that animal and aquatic life are not adversely affected.”

3M Marketing Brochure

”



Current posture of PFAS litigation

- ▶ AFFF MDL
- ▶ Statewide cases
- ▶ Others

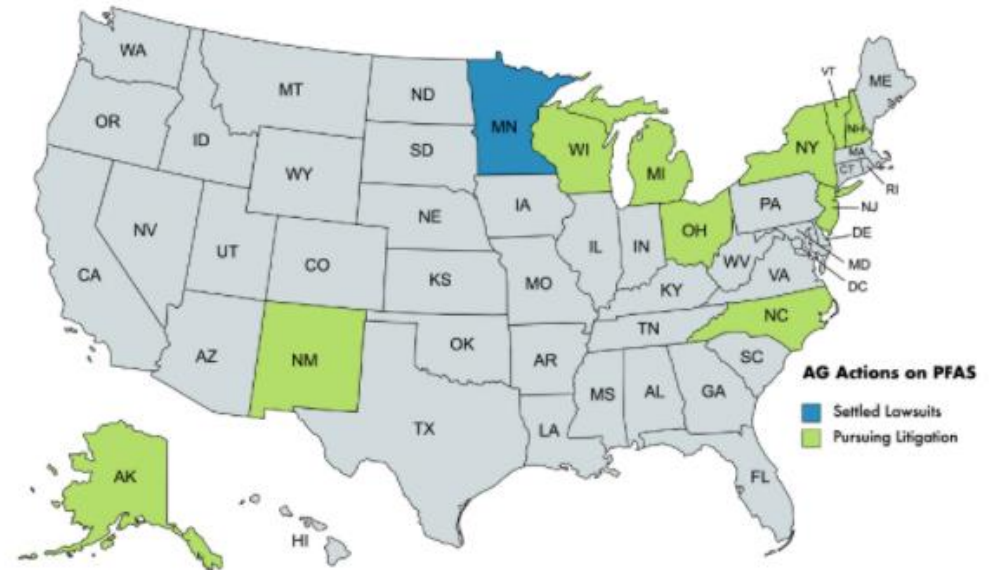
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING
FOAMS PRODUCTS LIABILITY
LITIGATION

MDL No. 2:18-mn-2873-RMG

This Document Relates to All Actions

State Attorney General PFAS Lawsuits



<https://www.saferstates.com/toxic-chemicals/pfas/>

Status of AFFF MDL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
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- ▶ Water system “bellwether” cases selected
- ▶ Other systems who file need only to complete brief “fact sheet” for now
- ▶ Goal is to attempt mass resolution – other cases will be sent “home” for trial



Successful water contamination litigation against manufacturers



MTBE

Perchlorate



1,2,3-TCP



The litigation process

Concern

The truth

Expensive?



Contingency basis.

Negative public perception?



Sends the message that public resources are being protected.

Burdensome?



Experienced lawyers reduce impact on staff.

Do we need to sue our local airports, fire departments, or customers?



Sue national PFAS manufacturers.

The litigation process - PFAS

Concern

The truth

We don't know the source.



There were only two domestic manufacturers of PFOA and PFOS—3M and DuPont.

The regulations aren't set yet.



Regulation will likely be in place by the time the case reaches a decision point.

We haven't incurred costs yet.



Counsel will work with experts to calculate all likely future costs, regardless of the status of treatment.

Why not just wait?



The statute of limitations may be running!

About SL Environmental Law Group

- ▶ Partners with five other law firms in a PFAS consortium
 - ▶ Chronicled in: *Dark Waters* (2019), *The Devil We Know* (2018) and *Mann v. Ford* (2010)
- ▶ Represents over 40 PFAS clients to-date
- ▶ Over 18 years of experience working with public and private water utilities, and city and state governments
- ▶ Focuses exclusively on water contamination litigation
- ▶ Has recovered over \$1 billion on behalf of our clients

Please reach out to discuss your options

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