

### PFAS 2018

# JUST A FEW LEGAL ISSUES YOU MIGHT CARE ABOUT . . .

LSP Seminar November 8, 2018 Natick, MA

# Per- and Polyfluoroalkyl Substances (PFAS)

What do EPA's changes mean for us?

How does this affect Due Diligence, AAI and Continuing Obligations for owners?

What Reporting obligations? Monitoring

obligations?

**Consultants Duties?** 

What's next?





### **EPA** – Big Picture – PFOA & PFOS

<u>Pruitt</u> (and Office of Ground Water and Drinking Water) – 2018 Decisions

- 1. Determine whether to set **MCLs**
- Determine whether to propose PFOA and PFOS as <u>CERCLA Hazardous</u> <u>Substances</u>
- 3. Develop **Groundwater cleanup recommendations**
- 4. Develop GenX and PFBS tox values

PIERCE ATWOOD

# OTHER EPA Near Term Actions? (WHEN?)

- Treatability Study published 8/23/18
- PFAS National Management Plan
- Develop analytical methods
- Providing treatment info on "media"
- Tools for proactive risk communication
- Groundwater Sampling Best Practices Recommendations (in final review)
- Updating draft list of uses and industries, and types of manufacturing and use sites



### **EPA Maximum Contaminant Levels**

- 1. <u>PFOA/PFOS on Contaminant Candidate List 3 & 4 and Unregulated Contaminant Monitoring Rule 3</u>
  - -- Data from 2013-2015 for larger Public Water Systems
  - -- Occurrence data available (though MDL high?)
- 2. MCL Proposal in 2019? Final in 2020?
  - EPA quietly says ATSDR Min. Risk Levels probably too stringent
  - EPA's view of toxicology and Ref. Doses will determine MCL
- 3. <u>EPA MCL Significance</u>? Immediately: In states where EPA has Primacy for SDWA for Public Water Systems. Ultimately: states must adopt an MCL.
- 4. Watch your state MCL!
  - States can and will be more stringent!
  - Generally EPA MCLs prevail over time. Alex Dunn: "It will take a while..."

### **PFAS as CERCLA Haz Substance?**

### REQUIRES RULEMAKING UNDER CERCLA SEC. 102

- 1. Existing CERCLA and NPL Sites
  - Reopeners probably broad enough
  - CERCLA 5-year protectiveness reviews of remedial actions
- 2. WHICH PFAS??
- 3. Adopt a Reportable Quantity (RQ)?

#### **IMPLICATIONS?**

- 4. <u>CERCLA claims for cost recovery and contribution</u> (in addition to state laws) (And, in addition to other federal and state claims, e.g., thus RCRA Imminent and Substantial Endangerment Liability, MCP)
- 5. What will be the Applicable or Relevant and Appropriate Requirements (ARARs)? Remember State funding...
- 6. New CERCLA and NPL Sites?
- AND AFFF containing glycol ether already IS a Haz Substance

# Due Diligence Implications, All PIERCE ATWOODS Appropriate Inquiry (AAI), and Continuing Obligations

- Until PFAS are haz substances, CERCLA "All Appropriate Inquiry" and ASTM ESA standards don't apply
- BUT, today -- doesn't "Due Diligence" include PFAS, esp. where captured by state rules?
- And if state has landowner defense and state regulates it, then isn't it AAI or "good commercial and customary standards and practices?"
- So -- What are client/consultant expectations? IF you are in Mass, PFAS are within 21E and MCP.
- Once a CERCLA Haz Substance, doesn't a new "Continuing Obligation" arise, to assert a Landowner Defense? Remember "due care" and "reasonable steps?" (And, WHICH PFAS?)

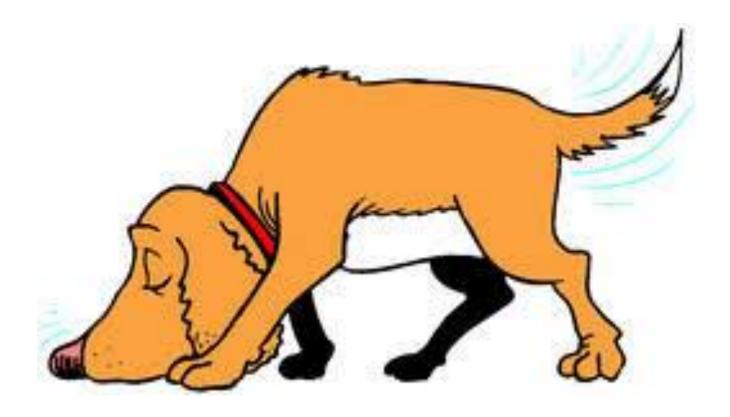
### **PFAS Due Diligence Implications**

## **Sites** that may have used/released PFAS (MADEP 6/18 Interim Guidance):

- Manufacturers of PFAS or where applied (fabrics and shoes, furniture and carpets)
- Landfills -- disposal of large volumes of products with PFAS, CDD waste? Municipal solid wastes?
- Properties at/near fire training, firefighting sites
- Junkyards where auto fluff disposed
- Properties at/near airports, military bases
- Crash sites where AFFF may have been used
- Metal coating and some electroplating facilities



# ACTUAL PHOTO OF CONSULTANT CONDUCTING DUE DILIGENCE



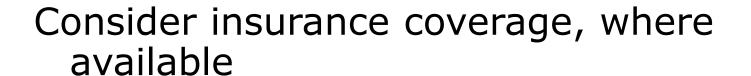


### Other Due Diligence – consider:

Contract terms with a broad definition – include PFAS compounds (i.e., may not be "hazardous" under defined terms)

Review of prior and current purchased chemicals and products

Review of disposal locations



### Reporting Issues - to Government

### **MANDATORY**

Federal - Nope

State = Varies!

- MCP "Imminent Hazard" 2 hour notice. LSP has duty if client doesn't.
- Maine "Significant Threat" consultant reporting
- New Hampshire "Ambient Groundwater Quality Standards" exceeded

### **VOLUNTARY/PRUDENTIAL**

- Don't ignore other Fed or St. standards (e.g., advisory standards)
- Will it be discovered anyway?
- What regulatory program (if any) applies?



# Voluntary/Prudential Reporting Obligations to NON-CLIENTS?

IS IT PRUDENT OR WITHIN THE REASONABLE PERSON STANDARD OF CARE OWED TO ANOTHER (DUTY TO WARN)?

- LSP Rules: "hold paramount public safety"
- Is anyone or drinking water supplies at (real) risk? (What levels, compared to available standards?)
- What is the imminence and likelihood of the harm?
- Has it been/will it be reported to the government maybe government should notify?
- Are there conflicting confidentiality obligations?

### PIERCE ATWOOD

# **Monitoring – Do you have to monitor for PFAS Compounds?**

- Mandatory
  - MASS MCP COC if present depends on CSM/site specific info. Part of Phase II Comprehensive Site Assessment do Method 2 or 3 Risk Characterization. No general obligation to reopen old sites.
  - NH NO requirement to monitor unless directed, but detection of >AGQS triggers Initial Response Action, likely more monitoring (ENV-Or 605.04). AND DES asking for monitoring at landfills and HW spill/Corr. Action site, CERCLA Sites. Using 35 ppt as action level.
  - ME no requirement to monitor environment, but some DEP requests. (Also see beneficial reuse waste standards at Chap. 418)
- Voluntary/Prudential? Many more considerations!



# SOME CLIENTS ARE RISK AVERSE – WHY SHOULD THEY MONITOR VOLUNTARILY IF NO REASON TO BELIEVE PEOPLE ARE AT RISK?





## I was helping my client, and now she's going to sue me!

### For Example:

- Why didn't you consider PFAS when you advised me?
- Why didn't you test/test properly for this?
- Why isn't the remedy properly designed?
- You should have anticipated standards might change!

(It's an "emerging" contaminant?!)





### I was helping my client and now she's going to sue me!

### What is the standard of care?

- Professional Standard of care reasonable care ordinarily used by others in the profession -- or a higher standard, e.g., Expert?
- LSP Standard of Care. It's the MINIMUM.

What does the contract say? Definitions

#### and Limitations:

- Damages limitation
- Standard of care
- Dollar limitations on recovery
- Time limit on claims





## I was helping my client and now she's going to sue me!

Notify your insurance carrier if threatened or pending claim

### But what can you do **NOW**?

- Practice Defensively
- "Paper the File!"
- Consider a PFAS or Emerging Contaminant Addendum in your contracts



# The Attorney-Client privilege: Are you seeking legal advice?

- Whose issue is it? Your Client's? Or Yours?
- Begin investigation *In Anticipation of (imminent) Litigation* AND/OR
- ☐ Consultant retained under *Attorney Client Privilege* to aid in rendering legal advice

LEGAL ISSUES: Legal significance of the data? Possible claims? How to minimize my liability? What legal obligations?

# What's next? Implications (it's not ALL bad)

- Toxicity conclusions may change?
- More sampling and analysis
- Sites are now more complicated
- Reopening sites
- More litigation
- State resources further stretched
- More guidance
- More rulemaking



PIERCE ATWOODS

# How do you handle the extra uncertainty of PFAS when you have to deal with

CHANGE?

- A. Everything changes
- B. The future is uncertain
- C. It never turns out the way you expect



Have enough experience to LOOK AROUND THE CORNERS, and work through the decision trees, and do the best you can!

### **Practical suggestions**

### KNOW THE LAW IN YOUR JURISDICTION

# KEEP CURRENT WITH AGENCY GUIDANCE AND ENFORCEMENT POSITIONS

## THINK AHEAD ON RISKS OF LITIGATION AND LIABILITIES

### PIERCE ATWOOD 9

**LinkedIn: Kenneth Gray** 

**Twitter: @KennethFGray** 

### Presenter

Kenneth F. Gray kgray@pierceatwood.com

Merrill's Wharf 254 Commercial Street Portland, ME 04101

PH / 207.791.1212