

PFAS 2018

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

Kenneth F. Gray, Esq.
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

Pruitt (and Office of Ground Water and Drinking Water) – 2018 Decisions

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

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. **PFOA/PFOS on Contaminant Candidate List 3 & 4 and Unregulated Contaminant Monitoring Rule 3**
 - 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. **EPA MCL Significance? 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. CERCLA claims for cost recovery and contribution (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 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



Consider insurance coverage, where available

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?

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



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**

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