

# EMERGING ISSUES FOR ENVIRONMENTAL & CERCLA PRACTITIONERS

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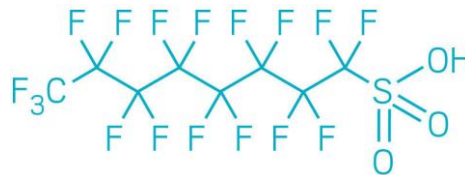


# Agenda

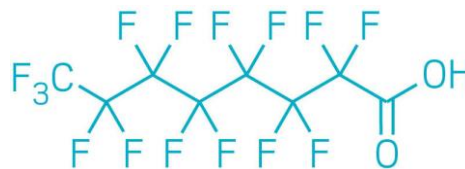
- **Emerging Compounds**
  - PFAS
  - Nationwide Contamination, Litigation and AFFF MDL
  - State and Federal Regulatory Developments
  - Potential Impacts on users of AFFF and PFAS
- **CERCLA and State Contribution Claims**
  - *Guam v. United States*
  - Statutes of Limitations
  - Impacts on CERCLA Claims and Defenses

# What are PFAS?

- Per- and poly-fluoroalkyl substances (PFAS) are a large family of over 4,700 man-made chemicals that have been widely used in industry and consumer products since the 1950s
- Two most commonly studied PFAS are:
  - Perfluorooctane sulfonate (PFOS) is a long-chain PFAS found in older stocks of Aqueous Film Forming Foam (AFFF) and as a breakdown product of precursor compounds

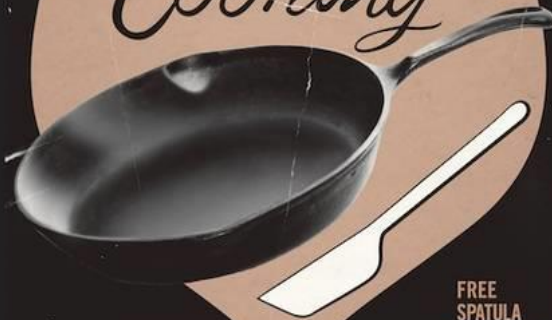


- Perfluorooctanoic acid (PFOA) is also a long-chain PFAS also known as C-8



# AMAZING NEW CONCEPT IN

## *Cooking*



FREE  
SPATULA  
WITH EACH  
"HAPPY PAN"

## MEN! Quiet your "Barking Dogs"!

Step into the  
doggonedest  
most comfortable  
shoes you ever  
wore!

GENUINE  
*Pigskin*

## Hush Puppies

Now—for the first time . . . fine,  
brushed pigskin shoes that are  
the last word in comfort and  
good looks.

Light weight and chamois  
soft . . . with cushion  
crepe soles nearly  $\frac{1}{2}$  inch  
of an inch thick. Soft  
as a pillow to your foot,  
yet with a steel shank  
under the arch for better support . . .

And that's not all . . .

Invisible child of "Scotchgard" repels water and resists



**\$9.95**

**Prepaid**



# STOP

STAINS BEFORE THEY START!

Stain proof! Actually stain proof! She knows that spots aren't  
hard to clean, because it was made of fabric pre-treated with  
"Scotchgard" (Scotch Guard Repellent Only) "Scotchgard" Repellent  
prevents stains with soft "no-mess" in the quality in the fabric  
that stops stains before they start. Spills—most only take a little



**Scotchgard**  
STAIN REPELLER

3M



# Common Uses of PFAS

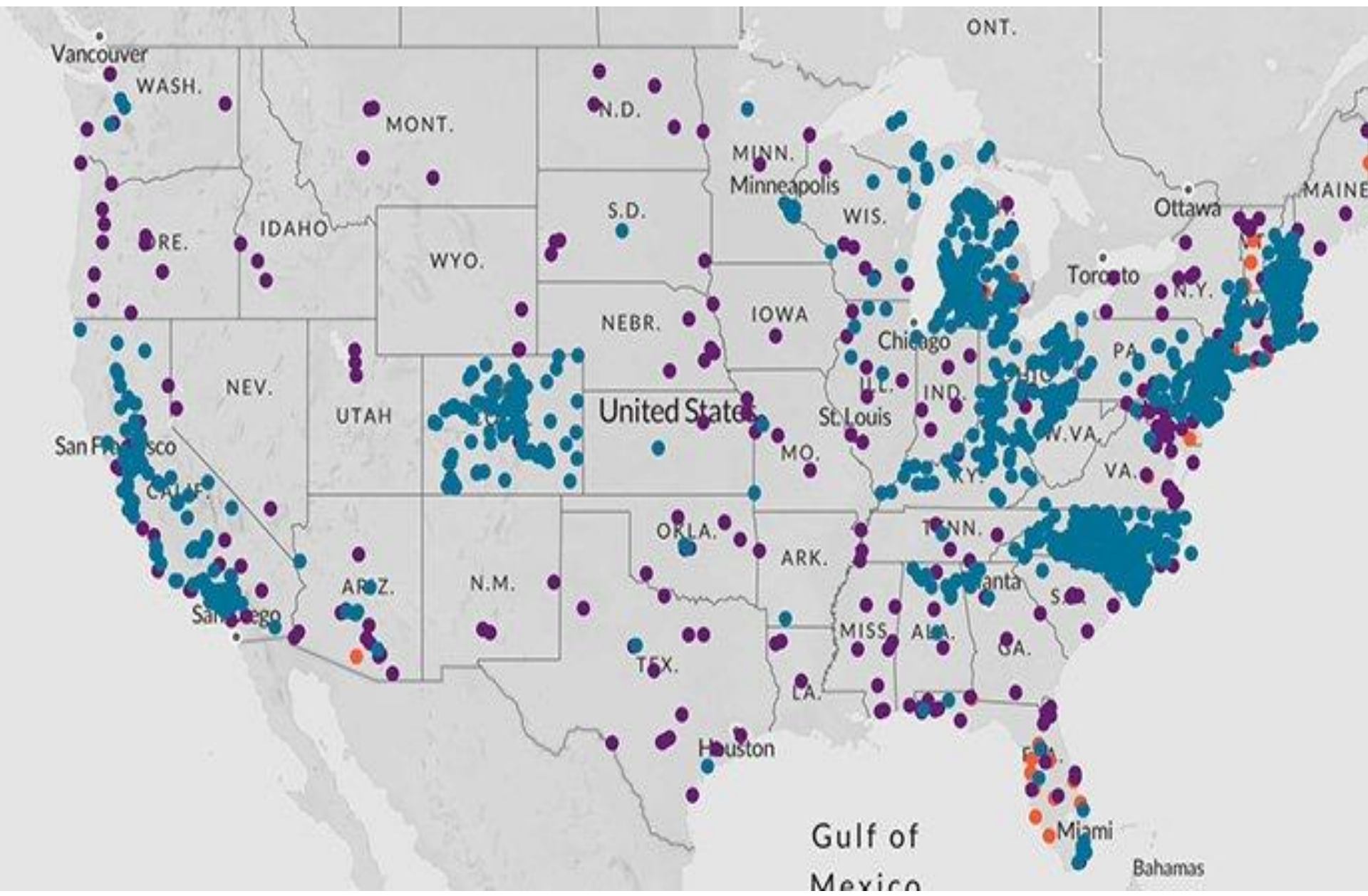
- **Aqueous Film-Forming Foam (AFFF):** a fire suppressant used to extinguish flammable liquid fires such as fuel fires
- **Food Packaging**
- **Commercial Household Products:**
  - Stain- and water-repellent fabrics
  - Nonstick products (e.g., Teflon)
  - Polishes, waxes, paints, cleaning products
- **Industrial Facilities:** production facilities or industries that use PFAS as part of their processes
  - Hydraulic fluids used to prevent corrosion
  - Chemical enhanced oil recovery (EOR)

# Problems with PFOA and PFOS

- Persistent in the environment: do not break down
- Bio-accumulate and bio-magnify: move up the food chain
- Human health effects (ATSDR & C8 Science Panel):
  - Pregnancy-induced hypertension/pre-eclampsia;
  - Increases in serum hepatic enzymes and serum lipids (especially total cholesterol and low-density lipoprotein (LDL))
  - Decreases in serum bilirubin levels, antibody response to vaccines, and birth weight
  - Thyroid disease
  - Testicular and kidney cancer
- 95% of the U.S. population is estimated to have at least some measurable concentration of PFAS in their blood



# National Explosion of PFAS Contamination

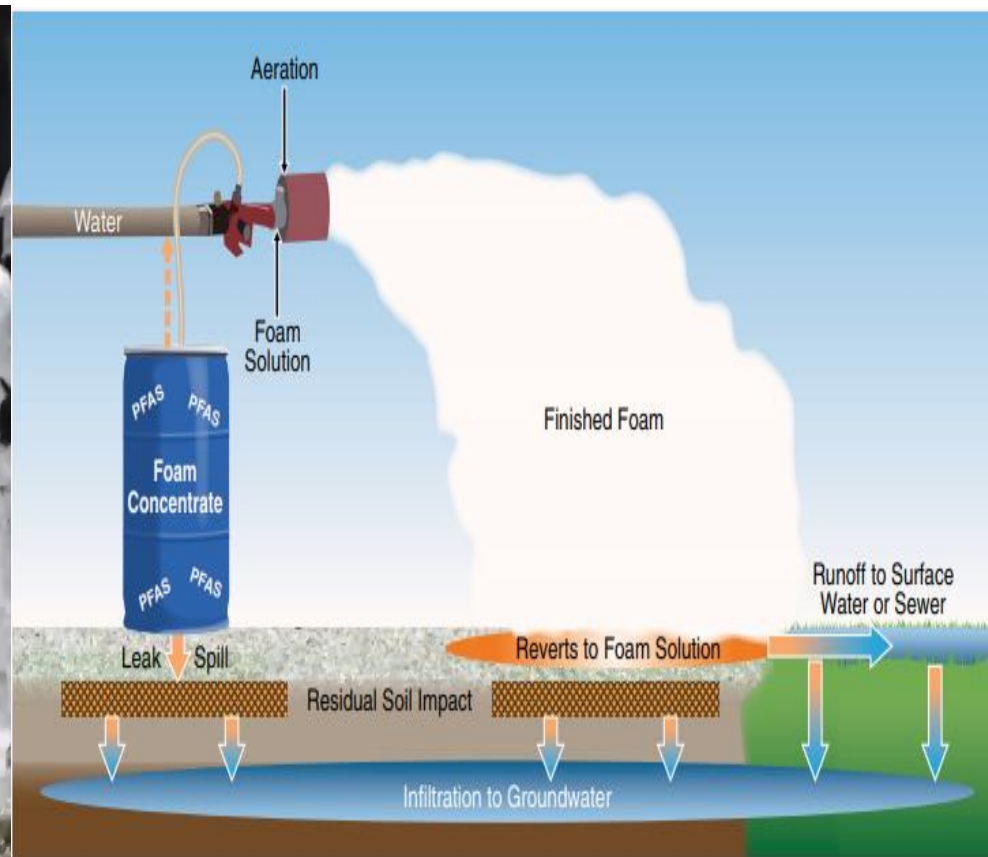


# **AQUEOUS FILM-FORMING FOAM (AFFF)**



# What is AFFF

- AFFF is an abbreviation for Aqueous Film Forming Foam (“AFFF”)
- AFFF is used to extinguish Class B liquid fuel fires, which could include jet fuel, oil or gasoline fires
- AFFF contain foaming agents and typically a PFAS-based fluorosurfactant (e.g., PFOS or PFOA)
- The PFASs are the active ingredients in the fluorosurfactants that power the AFFF to work effectively



Foam concentrate is mixed with water to create a foam solution. The foam solution is aerated at the nozzle to make finished foam. For legacy fluorotelomer AFFF, thousands of gallons of foam concentrate use would result in release of 1 pound of PFOA. (New York State 2017). **Source: ITRC**



**Deer Park, Texas**  
March 20, 2019

**Kelley  
Drye**

# AFFF MDL - Claims

- The AFFF multidistrict litigation (MDL), *In re: Aqueous Film-Forming Foams Products Liability Litigation*, Civ. A. No. 2:18-mn-2873-RMG (D.S.C.), comprises over 1,200 cases, including:
  - Claims by states, water districts, and municipal governments for contaminated drinking water and other environmental media from AFFF/PFAS
  - Purchasers of AFFF suing to recover remediation costs (breaches of warranties, fraudulent concealment)
  - Personal injury and property damage claims from a wide variety of individuals, ranging from residential well owners to firemen
- Tens of billions of dollars at stake

# Claims Assert Manufacturers Knew of the Risk with PFAS

- DuPont invented PFAS in 1938
- 3M and DuPont among major PFAS manufacturers since the 1950s, PFOS was 3M product; DuPont used PFOA in Teflon
- Documents clear: 3M & DuPont knew PFOA and PFOS were persistent, biomagnified, and toxic by the 1970s
  - ♦ Worker Studies & Animal Studies (60's, 70's, 80's)
  - ♦ Blood serum studies (60's, 70's)
  - ♦ Drinking water of residents around facilities (80's, 90's)
- 2005 - DuPont paid largest TSCA fine in history for failing to warn the public, regulators and consumers

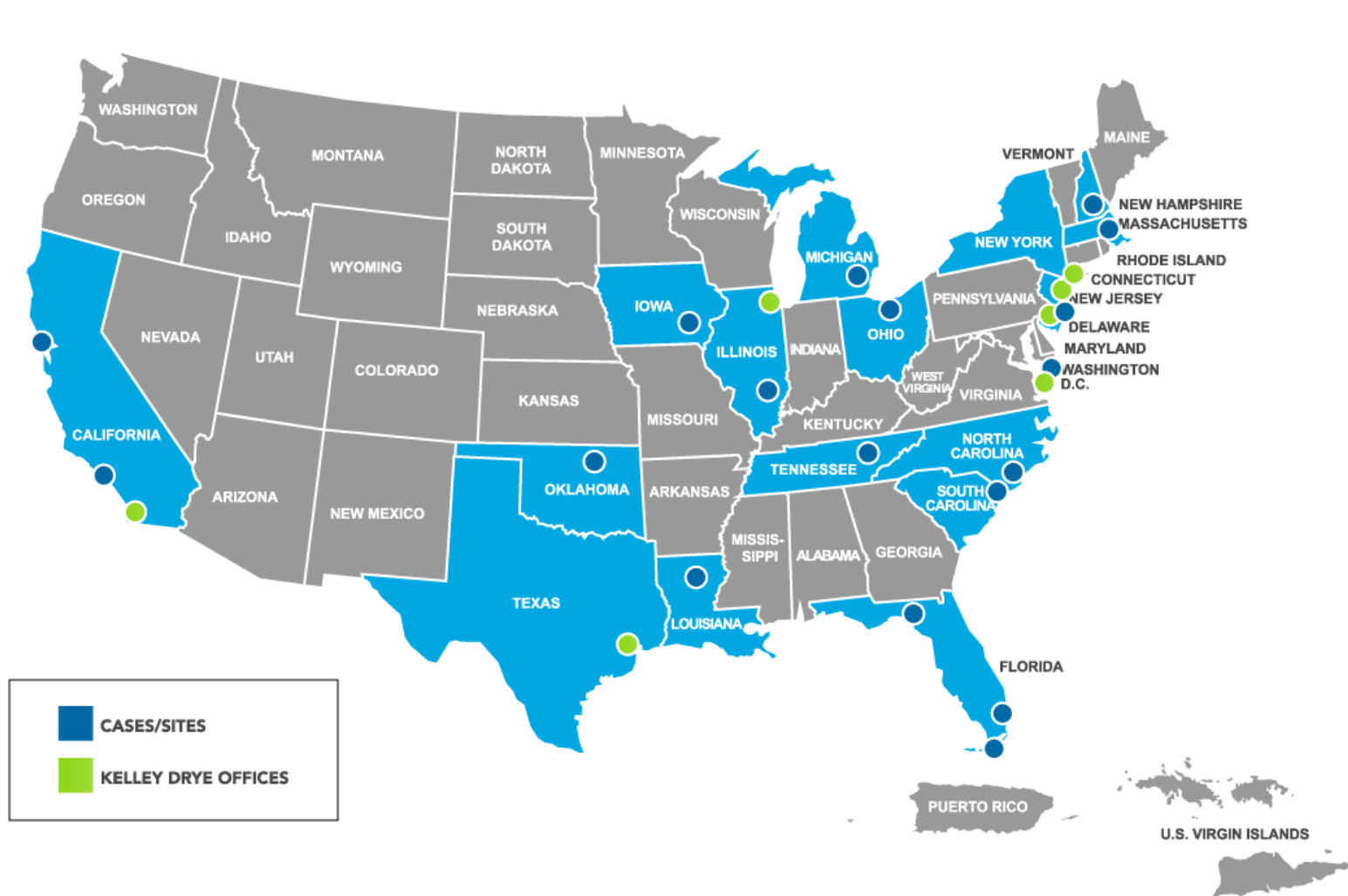


# AFFF Plaintiffs' Costs & Damages

- **Individuals** are generally seeking costs related to personal injury, medical monitoring, property damage, and economic loss
- **Private companies** are generally seeking the costs related to investigation, treatment, restoration, remediation, disposal, and economic loss caused by PFAS from AFFF
- **Water providers** are generally seeking costs related to investigation, remediation, treatment, maintenance, and economic loss associated with drinking water
- **States** are generally seeking costs related to investigation, remediation, restoration, treatment, property damage to public and submerged lands, economic damages, punitive damages, and punitive damages for fraudulent concealment

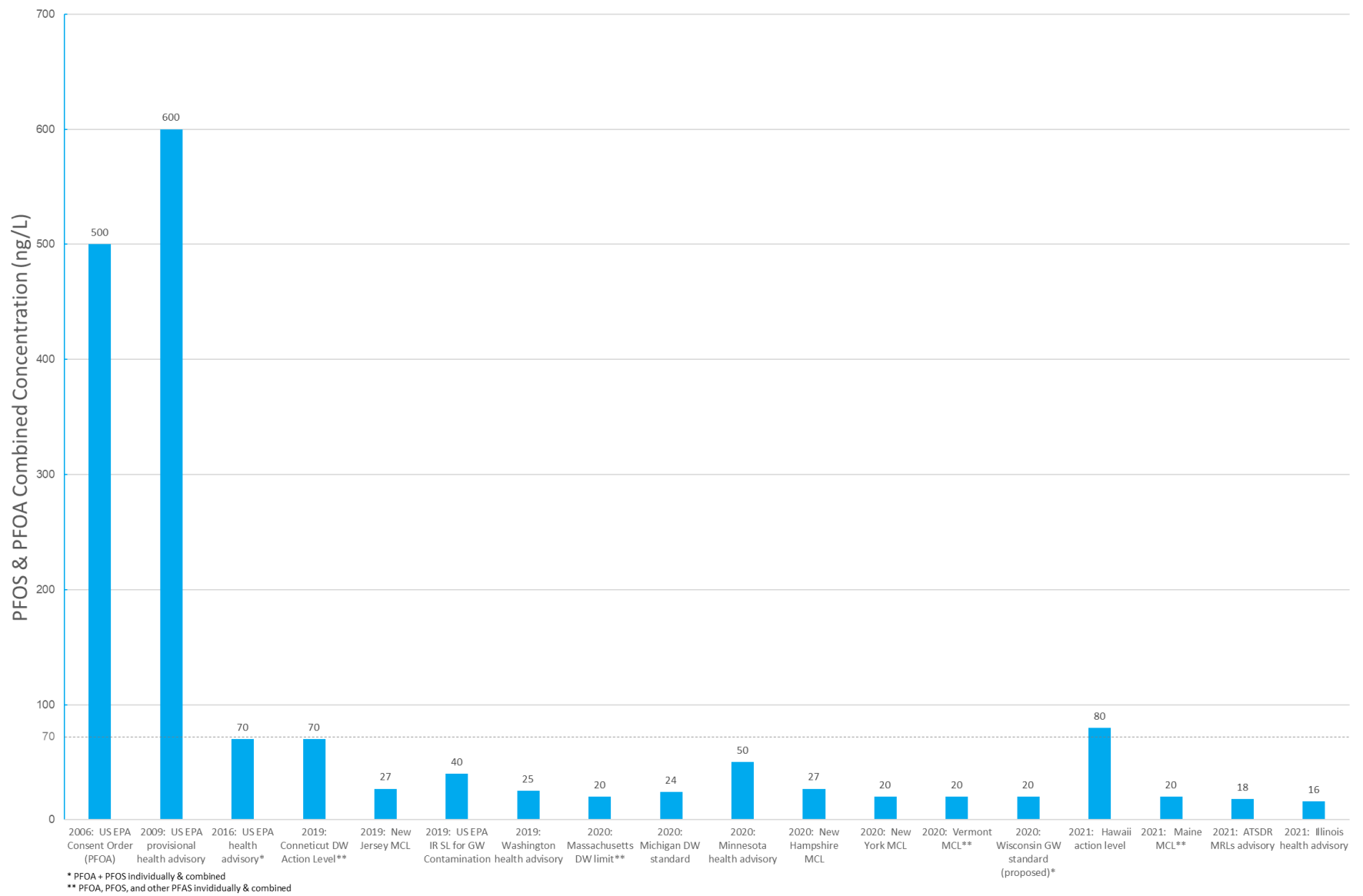


# National PFAS Representation



# **EVOLVING SCIENCE AND STATE AND FEDERAL STANDARDS**



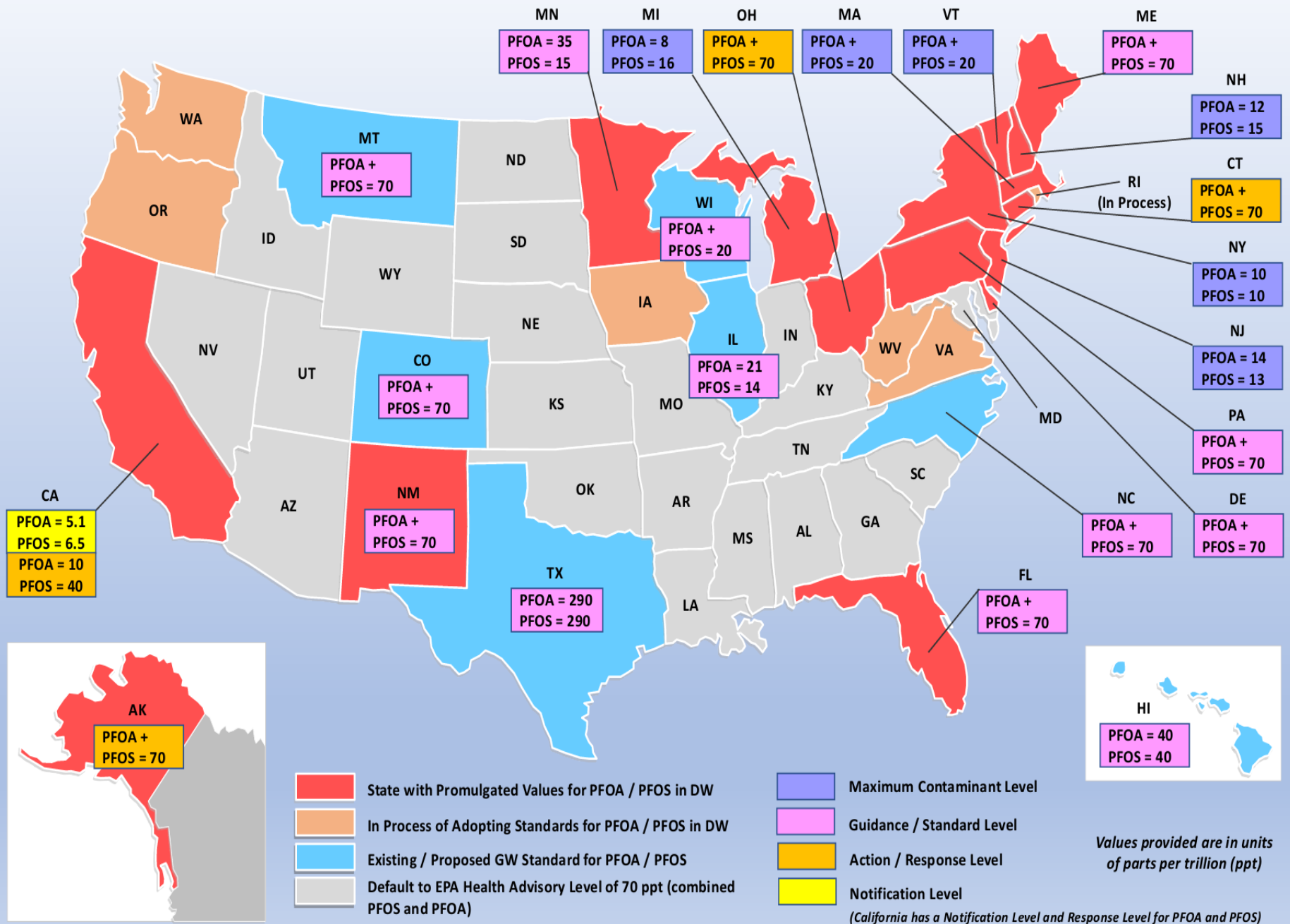


# State Standards:

## *Water and Hazardous Substances/Waste*

- As of August 2021, 22 states have a standard or guidance for at least one PFAS in at least one environmental medium
  - 19 states have a **groundwater** standard or guidance (e.g., NH)
  - 17 states have a **drinking water** standard or guidance (e.g., Michigan)
  - 4 states list PFOS and/or PFOA as **hazardous substances** (e.g., NY)
- Several states have a drinking water or groundwater standard or guidance **below the EPA's 70 ppt health advisory** (e.g., NJ)
- Some states include **additional PFAS** (beyond PFOA and PFOS) in their standard or guidance (e.g., Massachusetts)

# Summary of State's Regulation of PFOA and PFOS in Drinking Water (DW) or Groundwater (GW)



# Federal Action:

## *Drinking Water & Groundwater*

- **January 2009:** EPA set a provisional health advisory for PFOA at 400 parts per trillion (“ppt”) and for PFOS at 200 ppt.
- **May 2016:** EPA sets a drinking water health advisory of 70 ppt for PFOA and PFOS (individually and combined)
- **December 2019:** EPA recommends screening groundwater at federal cleanup sites at 40 ppt to see if further evaluation is necessary.
  - 70 ppt set acts as the preliminary remediation goal (where no state or tribal maximum contaminant level (“MCL”) applies)
- **February 2021:** EPA made a final determination to regulate PFOS and PFOA under the SDWA



# Federal Action:

## *Drinking Water & Groundwater*

- **March 2021:** EPA published its proposed UCMR5 that will require sampling for 29 PFAS in drinking water
  - Occurrence data will be used for future regulatory determinations
- **March 2021:** EPA reissued an advance notice of proposed rulemaking (“ANPRM”) to address PFAS in industrial discharges
  - Data will be used to determine CWA effluent limitation guidelines for discharges of PFAS
- **May 2021:** EPA reported that it will issue MCL goals in 2021
  - Citation to breast milk studies suggest new levels could be an order of magnitude less than current guidance

# Federal Action:

## *Hazardous Substances/Waste*

- **December 2020:** EPA released an interim guidance on destroying and disposing of certain PFAS (thermal destruction, landfilling, and underground injection)
- **January 2021:** The Congressional PFAS Task Force asked the President to direct EPA to immediately designate PFOA and PFOS as hazardous substances under CERCLA
- **January 2021:** EPA announced an ANPRM to address PFOS and PFOA in the environment through CERCLA and RCRA
  - This action was **frozen** by the Biden Administration's regulatory freeze and has been placed on the long-term action list.
- **April 2021:** EPA announced the creation of the EPA Council on PFAS "to strategize the best way . . . to mitigate and reduce PFAS pollution and protect public health and the environment"

# Federal Action:

## *Proposed Legislation*

- **PFAS Action Act of 2021** (passed the House on July 21<sup>st</sup>): Requires EPA to set a drinking water level for PFOS and PFOA, to designate them as hazardous substances and hazardous air pollutants, to place limits on industrial discharges of PFAS, to provide \$200 million annually for wastewater treatment, to prohibit incineration of PFAS waste, to require comprehensive PFAS health testing, and create voluntary label for PFAS in cookware.
  - **DOA in the Senate? Not currently in NDAA.**
- **Infrastructure Investment and Jobs Act** (passed the Senate on August 10<sup>th</sup>): \$55 billion for drinking water infrastructure (\$10 billion is dedicated to cleaning up PFAS)
  - **House vote next week?**

# So, what does this all mean?

- If you have PFAS on your property, industrial facilities, pipeline easements, or tank farms, you could be facing:
  - Increased regulatory and reporting requirements
  - Substantial investigation and remediation costs (a **CERCLA designation** will shift strict liability onto current owners of property where AFFF was previously applied)
  - Potential NRD or other enforcement claims
  - Potential exposure to property damage claims (for offsite groundwater plumes)
  - Potential personal injury claims from employees, firemen, and trainers

# What to do about PFAS?

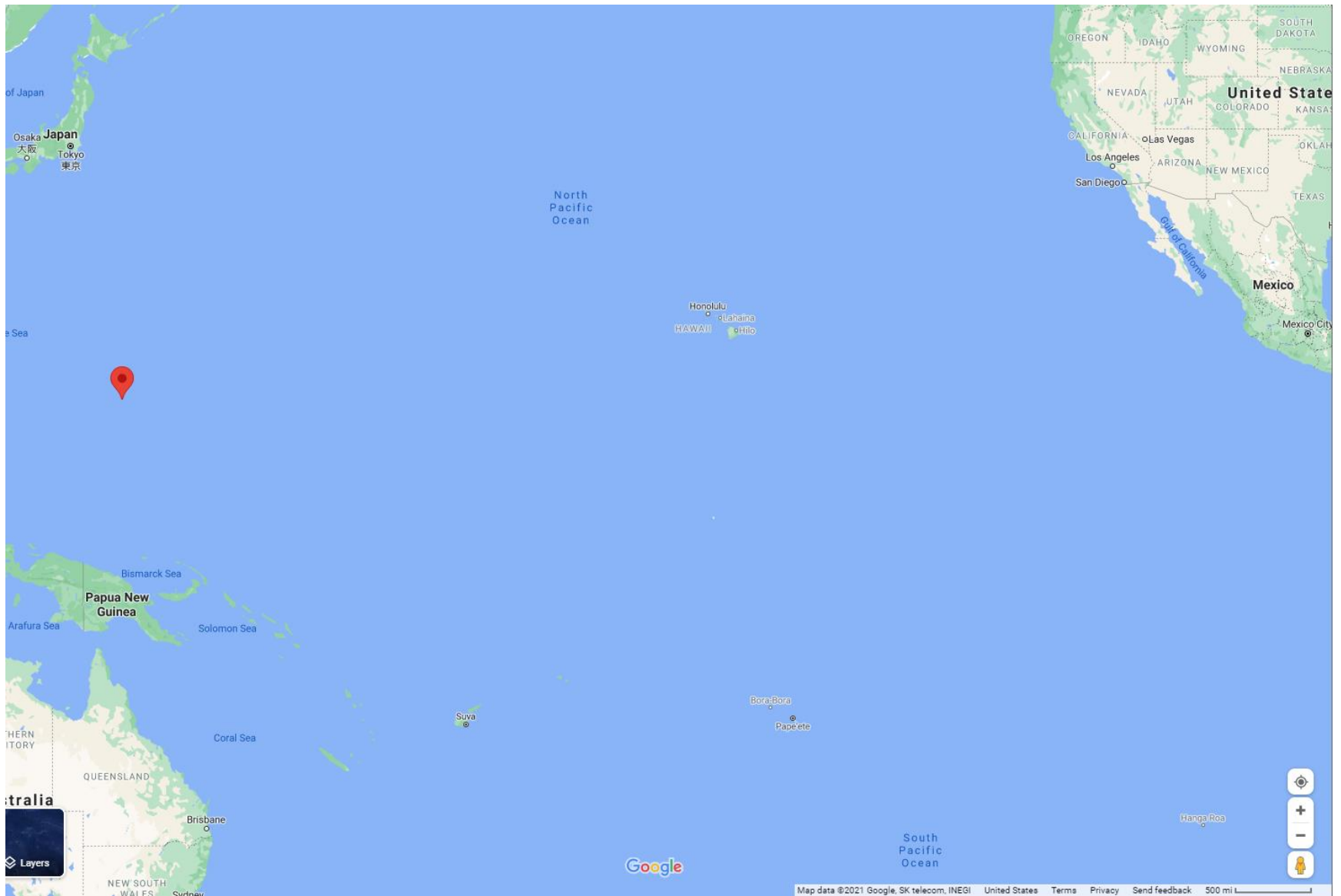
- Check your stocks of AFFF
- Dispose and upgrade systems
- Evaluate policies, protect fire-teams, and personnel
- Site investigations and remediation of source areas and treatment of groundwater
- Remediation contribution claims under state or federal laws (may not be helpful)
- Common law claims against the PFAS/AFFF Manufacturers
  - BEWARE: Statutes of repose and limitations

# ***GUAM V. UNITED STATES***

\*\*\* The views and opinions expressed in this presentation are those of the presenter and do not reflect the official policy or position of his clients.





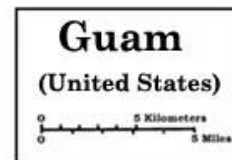




## Philippine Sea



## North Pacific Ocean



# THE ORDOT DUMP



# Ordot Dump Pre-Closure





# Ordot Dump Pre-Closure





US M101 HE 155MM Projectile  
(Artillery)

# U.S. Ordinance

US M1 75MM Projectile  
(Howitzer)





# U.S. Ordinance

US 81MM Projectile  
(Mortar)



M50 Series Incendiary Bomb

# Ordot Dump Post-Closure





# Ordot Dump Post-Closure



***GUAM VS. UNITED STATES***

**NO. 17-CV-2487**

**U.S. DISTRICT COURT (D.C.)**

**NO. 19-5131 (D.C. CIRCUIT)**

**NO. 20-382 (SCOTUS)**



# Procedural History

- Order on U.S.'s Motion to Dismiss in favor of Guam, 341 F. Supp. 3d 74 (D.D.C. Oct. 5, 2018)
- U.S. seeks interlocutory appeal noting split in the Circuits on CERCLA limitations issue (2019)
- D.C. Circuit Court unanimously reverses District Court, 950 F.3d 104 (D.C. Cir. Feb. 14, 2020)
- Guam seeks rehearing/rehearing *en banc* (Summer 2020)
- Guam seeks certiorari from SCOTUS (Fall 2020)

# Legal Landscape

- 2d Circuit – *Consolidated Edison Co. of NY, Inc. v. UGI Utilities*, 423 F.3d 90 (2005)
- 3<sup>rd</sup> Circuit – *Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131 (2013)
- 6<sup>th</sup> Circuit – *Hobart Corp. v. Waste Management of OH, Inc.*, 758 F.3d 757 (2014); *Florida Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996 (2015)
- 7<sup>th</sup> Circuit – *Bernstein v. Bankert*, 733 F.3d 190 (2013); *Refined Metals Corp. v. NL Industries, Inc.*, 937 F.3d 928 (2019)
- 9<sup>th</sup> Circuit – *Asarco LLC v. Atlantic Richfield Co.*, 866 F.3d 1108 (2017)

# SCOTUS – Questions Presented

1. Whether a non-CERCLA settlement can trigger a contribution claim under CERCLA Section 113(f)(3)(B).
2. Whether a settlement that expressly disclaims any liability determination and leaves the settling party exposed to future liability can trigger a contribution claim under CERCLA Section 113(f)(3)(B).

# State AGs' Amicus

1. States' interest in encouraging cleanups supports limiting Section 113(f)(3)(B) to settlements under CERCLA that conclusively resolve liability.
2. The decision below enables the United States to evade CERCLA liability and saddle individual States with a disproportionate financial burden.
3. The D.C. Circuit's misinterpretation of § 113(f)(3)(B) would reach settlements entered into solely under State law. Because § 113(f)(3)(B) claims are "governed by Federal law," § 9613(f)(3)(C), State law must yield to monolithic nationwide standards in a vast swath of cleanup disputes. Not cooperative federalism.



# SCOTUS Opinion

- Issued May 24, 2021, less than a month after oral argument, 141 S. Ct. 1608, 593 U.S. \_\_\_\_ (2021).
- Unanimous decision with all Justices participating
- Authored by Justice Thomas (Atlantic Research)
- Extremely textual in its approach (as argued by Guam and in the AGs' *amicus* brief)
- Comports with recent decisions (*Atlantic Research*, *BNSF*, *Christian*)
- Clearly concerned with federalism issues and takes approach presented by only one federal Circuit

# SCOTUS Opinion

- “To be sure, as the [US] points out, remedial measures that a party takes under another environmental statute might resemble steps taken in a formal CERCLA ‘response action.’ *But relying on that functional overlap to reinterpret the phrase ‘resolved its liability . . . for some or all of a response action’ to mean ‘settled an environmental liability that might have been actionable under CERCLA’ would stretch the statute beyond Congress’ actual language.*”
- Take away – Must be liability for a CERCLA response action that has been resolved – Back to Con. Ed.!!!

# SCOTUS Opinion

- “<sup>4</sup> This straightforward inquiry has the additional ‘benefit’ of ‘provid[ing] clarity’ for the 3-year statute of limitations. *United States v. Briggs*, 592 U. S. \_\_\_, \_\_\_ (2020) (slip op., at 4). If a broad, textually undefined set of environmental settlements could start the clock on a §113(f)(3)(B) contribution action, a party who did not realize that his non-CERCLA settlement overlaps with a hypothetical CERCLA response action might fail to sue in time.”
- Exactly what happened to Guam.
- Creates bright line rule.

# SCOTUS Opinion

- “That this subsection centers on and is entitled ‘contribution’ is the first clue that it is concerned only with the distribution of CERCLA liability. A contribution suit does not exist in a vacuum, but rather is a tool for apportioning the burdens of a predicate ‘common liability’ among the responsible parties. *United States v. Atlantic Research Corp.*, 551 U. S. 128, 138–139 (2007).”
- Take away – no federal common law right to contribution (look to state law) and must have common liability for it to fit within the contribution construct.

# Impact Going Forward

- Bright line rule
- Impacts certain prior settlements
- Impacts certain pending cases (*e.g.*, Omega case in CA and Asarco case in MT)
- Addressed in model CERCLA Consent Decree language
- Evaluate your remediation sites and claims
  - Evaluate your state law remedies early in cleanup!
  - If you need CERCLA contribution claims, you need to trigger CERCLA!

# Conclusions

- Evaluate and understand your sites
- Evaluate and understand your risk and your remedies early
  - Unique problems posed by emerging contaminants
  - CERCLA (or more likely RCRA) listing could have huge impacts and shift massive costs
- In evaluating environmental risks, remedies and relief available, closely consider state laws, common law and statutory constructs
  - Federal remedies may not be available