

# PFOA/PFAS Emerging Contaminants

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# What Are They?

- Safe Drinking Water Act:
  - The U.S. Environmental Protection Agency is required once every five years to issue a new list of up to 30 unregulated contaminants for which public water systems must monitor. The intent of this rule is to provide baseline occurrence data that the EPA can combine with toxicological research to make decisions about potential future drinking water regulations.
    - List is the Unregulated Contaminant Monitoring Rule (UCMR)
    - The PFCs monitored under UCMR3 included: PFOS, PFOA, perfluorononanoic acid (PFNA), perfluorohexanesulfonic acid (PFHxS), perfluoroheptanoic acid (PFHpA) and perfluorobutanesulfonic acid (PFBS).
    - For example, although PFCs were listed in 2011, all that has happened is issuance of an unenforceable health advisory (70 ppt)

# What Are They Not?

- Enforceable
- CERCLA hazardous substances
  - CERCLA deed warranty for property transfer (“all action necessary to protect human health and the environment has been taken”) inapplicable if not a hazardous substance
- BUT-SDWA allows (does not require) EPA Administrator to issue orders necessary to address what “...may present an imminent and substantial endangerment to the health of persons...” The Administrator can order that alternative water supplies be provided by those who caused or contributed to the endangerment
  - [Done at least twice—Former Pease AFB and Willow Grove Air Reserve Base)

## Could They Become CERCLA Hazardous Substances?

- Only if EPA decided to list them as such
- EPA has never (after 40 years) added to the list of hazardous substances
- EPA has never issued regulations implementing the process to add to the hazardous substances
- If added later, would the DoD component return and clean up?
  - DoD Manual 4715.20, para 9 c (3)(a)-‘...*may* conduct additional environmental restoration...” [*emphasis added*]

# Could They Be Pollutants or Contaminants?

- 42 USC 9601:
  - (33) The term “pollutant or contaminant” shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring...
- Consequence-330 indemnity applies to pollutants and contaminants
  - Applicable only to base closure property

## Could They Be Pollutants or Contaminants? Cont.

- State law – if uniformly applicable throughout the jurisdiction, could establish an enforceable standard, but it would not override federal law without a waiver of sovereign immunity.
- ~20 states have established standards, advisories, or guidance for PFOS/PFOA. No national uniformity

# Why No Federal Action?

- Lack of effective leadership
- Debate over analytic model
  - Risk management or data driven decision
  - Epidemiology or Toxicology
  - What is the default - human health or status-quo?
  - Is history repeating itself?
  - Thalidomide, BPA, DDT/Chlordane, Lead, PCBs
- Lobbying – water associations, manufacturers, others with a financial stake
- Impact
  - Property transfer and development inhibitions
  - Stigma – long term health implications
  - Not insurable

# How To Protect Yourself As A Transferee?

- Recourse against manufacturer – what did they know and when?
- Timeline between 1950 and 2000 shows at least 34 studies and reports (most from 3M and DuPont) reflecting adverse health consequences from PFC exposure



# Reps and Warranties – Draft Deed Language

- Grantor warrants that pollutants, contaminants, or hazardous substances designated now or in the future for consideration by the Administrator of the Environmental Protection Agency (Administrator) pursuant to section 300g-1(b)(1)(B) of the Safe Drinking Water Act (42 USC 300f *et seq.*), or other applicable federal law, in the chemical family of [perfluorinated compounds (PFCs)], present at, under, or emanating from the Property in any medium affecting human health or the environment, that results from, is predicated upon, or otherwise arises from or is related to the activities of Grantor during its use or ownership of the Property, to the extent that such [PFCs] exceed maximum contaminant levels (MCLs) as defined at 42 USC 300f(3) or other enforceable limits of concentration established by the Administrator or by federal law on a national basis or on a state-wide basis established by appropriate state authority, will be recognized by Grantor as a pollutant, contaminant, or hazardous substance as defined in 42 USC 9601(14) or (33) as applicable.

# Reps and Warranties – Draft Deed Language

- Grantor shall indemnify, defend, and hold harmless Grantee, its successors, assigns, and others in control of all or an affected portion of the Property from and against any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage (including death, illness, or loss of or damage to property or economic loss) related to the presence of such [PFCs].