

PFAS Legal Update



DISCLAIMER

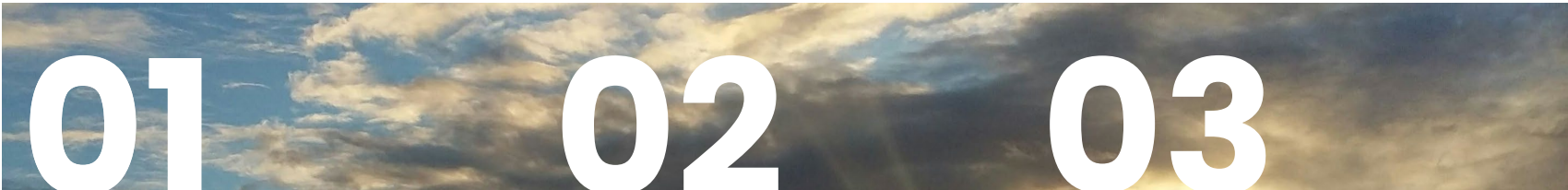
- ▶ This presentation and my comments are not legal advice and are given solely for informational purposes.



Ken Sansone

- Senior Partner, SL Environmental Law Group
- Former Assistant Attorney General (NH)
- Represent nearly 300 public agencies on PFAS claims; obtained \$1.5B in settlements for public water systems
- Extensive trial and appellate experience (lead trial and appellate counsel, *City of Pomona v. SQMNA* – won \$30.208M jury verdict, August 2023)
- *Jeopardy!* champion (one game, 2016)

TODAY'S AGENDA



01

AFFF OVERVIEW

How past AFFF use could lead to financial and liability risks for ports

02

FEDERAL REGULATIONS

The impact of federal regulatory development on Washington ports

03

FUNDING OPTIONS

How legal action can help secure funding to address current and future PFAS costs



Aqueous Film-Forming Foam (AFFF)

Used for decades to fight petroleum-based fires at sites with a risk of fuel fires, such as airports, military bases, and fuel depots.

Also used in required routine firefighting training exercises.

Impacts soil, groundwater, surface water, and sediment.

USE OF AQUEOUS FILM FORMING FOAM (AFFF)

- ▶ Per 14 Code of Federal Regulation (CFR) §139.315-319, AFFF, containing PFAS, has been required by FAA for use at commercial service airports (Part 139) for testing and training exercises and for emergency responses.
- ▶ Estimate of 500+ airports with PFAS impacts in U.S.
- ▶ As of Aug. 1, 2026, only 77 of the 520 Part 139 airports had fully transitioned to fluorine-free foam (F3).

Source: AAAE Environmental Services & Sustainability Committee Meeting, Sept. 10, 2026

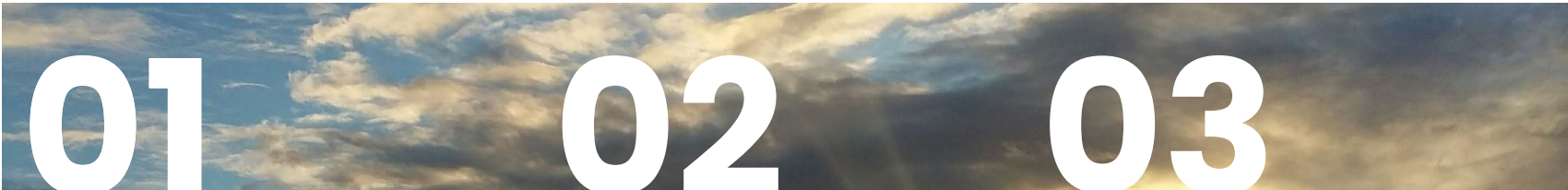


OTHER PFAS CONCERNS



- ▶ Ports that provide drinking water to industrial tenants and employee office buildings are subject to PFAS drinking water Maximum Contaminant Levels (MCLs).
- ▶ PFAS detections in soil on port property may complicate or delay development plans or real estate transactions.

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2024

- ▶ EPA proposed 9 PFAS compounds to be designated as hazardous under RCRA
- ▶ EPA finalized drinking water Maximum Contaminant Levels (MCLs) for 6 PFAS
- ▶ PFOA and PFOS listed as hazardous substances under CERCLA



2025

- ▶ EPA confirmed intention to retain MCLs of 4 parts per trillion (ppt) for PFOA and PFOS
- ▶ EPA released draft risk assessment for PFOA and PFOS in biosolids in January 2025
- ▶ EPA confirmed intention to retain CERCLA designation



2026

- ▶ July: EPA issued new Draft Guidance for Reducing Risk from PFOA and PFOS
 - Provides voluntary recommendations to mitigate risks when managing sewage sludge and biosolids
- ▶ August: D.C. Circuit Court of Appeals upheld the designation of PFOA and PFOS as hazardous substances under CERCLA

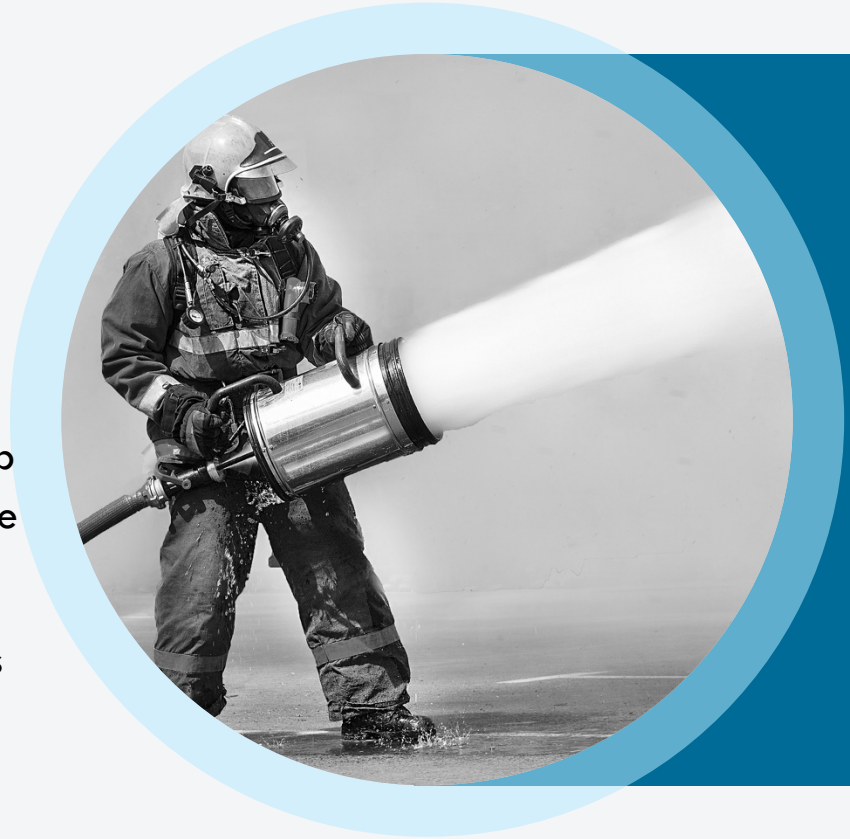
PFAS CERCLA DESIGNATION

- ▶ Creates liability for cleanup costs for anyone who generated, handled, or disposed of PFOA or PFOS
- ▶ The EPA's non-binding enforcement discretion policy provides no guarantees and does not prevent third party lawsuits.
- ▶ Local water systems with MCL exceedances may look for contamination sources, such as airports
- ▶ Potentially Responsible Parties (PRPs) sometimes respond to enforcement by filing cost-recovery or contribution lawsuits against other parties they allege were responsible for contaminant releases impacting the same site.



PFAS RISKS FOR PORTS

- ▶ Ports can be liable despite lack of fault or negligence in using AFFF.
- ▶ Ports can be liable for full extent of cleanup costs, even if other parties contributed to the release.
- ▶ Ports can be subjected to regulatory orders for investigation and potential remediation.



States with standards, regulations, proposed regulations, or health-based advisories for PFAS in soil

Alaska	Indiana	Nevada	Pennsylvania
California	Iowa	New Hampshire	Texas
Connecticut	Maine	New Jersey	Vermont
Delaware	Massachusetts	New Mexico	Washington
Florida	Minnesota	New York	Wisconsin
Hawaii	Nebraska	North Carolina	

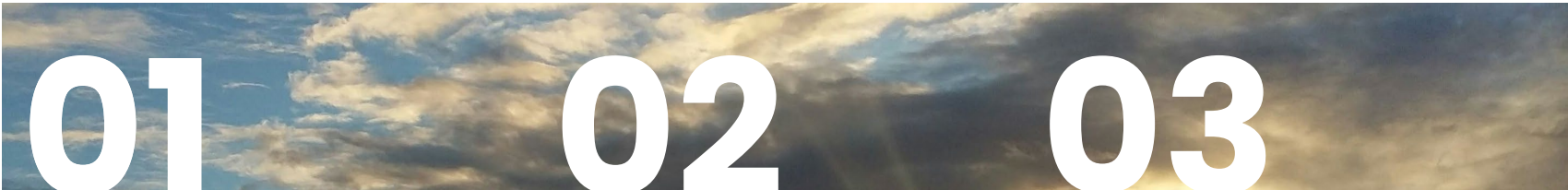
States with regulations addressing PFAS in wastewater and/or biosolids

Maine	Connecticut
Michigan	Virginia
New York	Maryland

States developing regulations for PFAS in wastewater and/or biosolids

Minnesota
Massachusetts

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MANY PORTS ALREADY FACE SUBSTANTIAL COSTS



ARFF Equipment Time
Out of Service



PFAS Soil & Groundwater
Remediation Costs
(including for off-site contamination)



Site Investigation
and Testing Costs



ARFF Equipment
and Facility
Decontamination

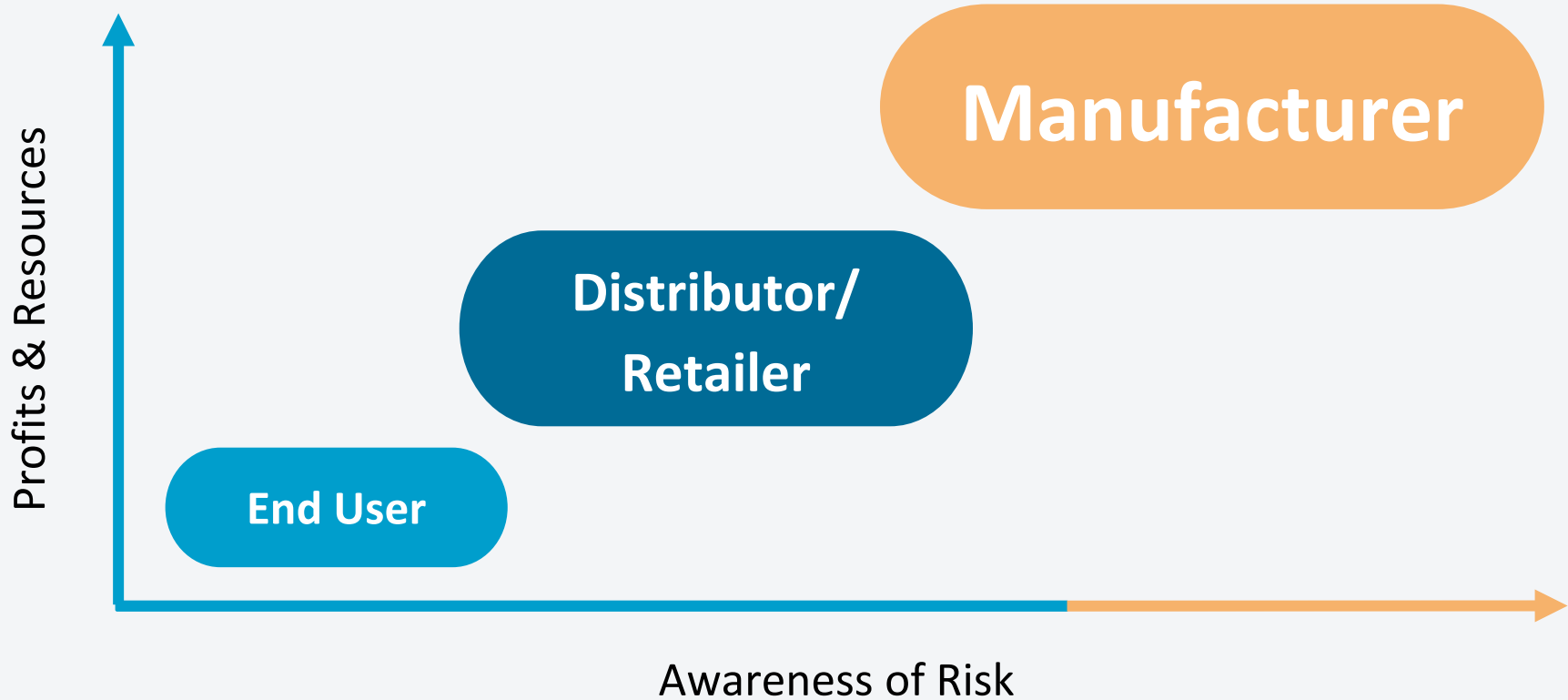


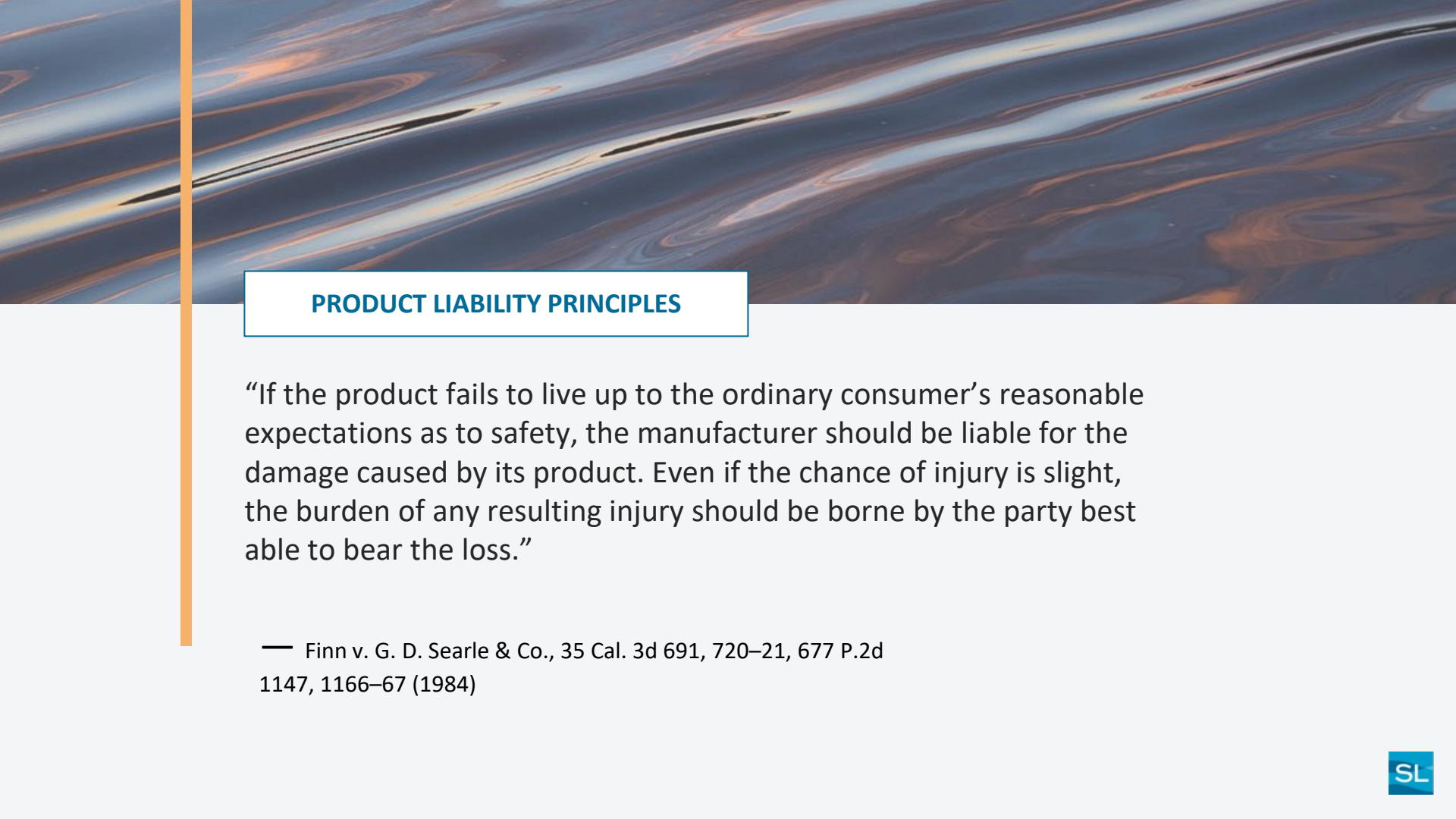
AFFF Transition
and Disposal



Ongoing Monitoring
Costs







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., 35 Cal. 3d 691, 720–21, 677 P.2d 1147, 1166–67 (1984)

FAILURE TO WARN

FORESEEABLE RISKS



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

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



UNREASONABLE DANGER

Ames 1/2/89

International Research and Development Corporation

T-3351

SPONSOR: 3M Company

COMPOUND: Fluorad® Fluorochemical Surfactant FC-95

SUBJECT: 90-Day Subacute Rhesus Monkey Toxicity Study.

Sp. 1/2/89

137-087

21 Internal: Lab-Research

27-01-10-0880

Subject: *Surfactant* *Ames 1/2/89* *Sp. 1/2/89*

From: *Surfactant* *Ames 1/2/89* *Sp. 1/2/89*

To: *Surfactant* *Ames 1/2/89* *Sp. 1/2/89*

Subject: FC-129 Biodegradability

To: US00702-US001 *MODE T FINE* US00710-US001 *MITCHELL, E KILLIAN*

From: *Surfactant* *Ames 1/2/89* *Sp. 1/2/89*

Subject: FC-129 Biodegradability

With this memo I am:

1) Requesting US00702 authorization to conduct OECD screening tests to clarify the biodegradability of fluorochemical surfactants FC-129 and FC-130. The proposed tests will use acid temperature-TSC, UP-TSC, and HMO or BMD analysis.

2) Commenting on point 4, of the attached memo from Detlef Ruesch dated 2/20/88 (138).

I don't think it is in 3M's long-term interest to perpetuate the myth that these fluorochemical surfactants are biodegradable. It is probable that this misconception will eventually be dispelled, and when that happens, 3M will (and be well-served), and we and our customers may be forced to immediately withdraw products from the market.

3) 3M wants to continue to sell and use fluorochemical surfactants at low-level specialty components in cleaning products. I believe that 3M has to aggressively address the environmental perception of these chemicals and then lobby in each OECD nation for the abolition of regulations that exempt low-level specialty uses. The already adopted German surfactant biodegradation regulation (which clearly does not exempt specialty uses of nonbiodegradable surfactants).

Made Available by 3M for Inspection and Copying as Confidential Information
Subject to Protective Order in *Parker v. 3M*, No. C2-04-6300

3MNA1005995



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



Aqueous Film-Forming Foams (AFFF) Products Liability Litigation
MDL No. 2873

- ▶ Located in the United States District Court of South Carolina
- ▶ Groups together cases from many plaintiffs against the same PFAS manufacturers
- ▶ Landmark settlements reached for drinking water utilities with 3M (\$12.B), DuPont (\$1.1859B), Tyco (\$750M), BASF (\$ 316.5M)
- ▶ Soil contamination bellwethers identified by the Court, discovery underway

WHY TAKE ACTION NOW?

LIMIT FINANCIAL BURDEN



- ▶ Airports and port facilities might already be incurring PFAS-related costs.
- ▶ Litigation can help recover current and future costs.
- ▶ Settlements can benefit agencies regardless of regulatory requirements.

- ▶ No guarantee that future settlements will include entities that did not file their own lawsuits.
- ▶ If class settlements are reached, payouts may be higher for agencies that filed their own suits.



MAXIMIZE FUNDING

INVESTIGATION



- ▶ Does an agency need to conduct an extensive source investigation before filing suit?
 - ▶ No. Focusing on the manufacturer of the contaminant, or the product that contains it, means that identifying particular discharge sites is typically not necessary as part of a pre-suit investigation.
- ▶ Does the agency need to conduct extensive testing of soil or water?
 - ▶ No. The lawsuit can generally be filed based on federally or state-mandated testing that has already occurred – or contamination can be assumed based on AFFF discharges



- ▶ Can an agency file a lawsuit even if it hasn't incurred any remediation costs yet?
 - ▶ Yes. Courts have ruled that an agency can bring suit for contamination if “a reasonable [agency] in [its] position would treat the water to reduce the levels or minimize the effects of the” contaminant.

In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 725 F.3d 65, 107 (2d Cir. 2013)

STATUTES OF LIMITATIONS



- ▶ Generally, a claim against a product manufacturer for environmental contamination does not accrue until the contaminant “caused or should have caused” the plaintiff to act in response. *City of Pomona v. SQM North America Corp.*, 750 F.3d 1056 (9th Cir. 2014)
- ▶ Testing for a contaminant and reporting the results as required by regulators is not enough to start the limitations clock.
 - ▶ Expect defendants to argue that any response starts the clock.
 - ▶ Beware of statutes of repose for products liability claims – “useful life” of product (presumed to be 12 years)

SETTLEMENT/LITIGATION PROCEEDS

Will our agency be required to dedicate the proceeds of any settlement or judgment to remediating the contaminant?

No. Typically, settlement agreements in these matters involve simply the payment of money in exchange for a release of liability, and leave the agency free to devote the funds to where they're needed.

For cases that reach trial, the relief is usually just money damages, rather than injunctive relief requiring the defendant to perform its own remediation.

Settlements can also preserve the agency's right to bring claims if contamination migrates to other places in the future, beyond where it had been detected at the time of settlement.

NEXT STEPS FOR PORTS

- ▶ If your port has AFFF onsite, dispose of it properly and transition to F3 as soon as feasible.
- ▶ Consider F3 transition challenges.
 - ▶ Do ARFF vehicles need cleaning/replacement?
 - ▶ Is training needed to prepare firefighting personnel to use new F3 foams?
 - ▶ AFFF disposal: Port authority fire departments are eligible for Dept. of Ecology Collection & Disposal Program.
- ▶ Consider potential contamination risks and budget impacts, and seek funding solutions.



Thank You

Questions?

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