Not so PFASt?
A Look at PFAS Litigation, Regulation, and Beyond

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Disclaimer

AGENDA



"THE FOREVER LITIGATION"



PFAS REGULATION



UCMR5/EMERGING CONTAMINANTS



CUT TO THE CASES

THE FOREVER LITIGATION

Types of Litigation

- Direct Discharge/Site-specific
  - Statutory
  - Property Claims
- Torts/Personal Injury
- Natural Resource Damages



THE FOREVER LITIGATION - CONT'D

Types of Plaintiffs/Defendants





- **AFFF MDL**
  - Foam makers (2 types), surfactant/component part manufacturers, toll processors
- **Public Entities (municipalities, water providers, etc.)**
- **State Attorneys General**
- **Private Plaintiffs/Individuals**
  - Property Damage
  - Exposure, Plaintiff Type (i.e., Turnout Gear)
- **Broader PFAS Defendants**

PFAS REGULATION

Maximum Contaminant Levels

EPA's Proposed Action for the PFAS NPDWR

Compound	Proposed MCLG	Proposed MCL (enforceable levels)
PFOA	0 ppt*	4.0 ppt*
PFOS	0 ppt*	4.0 ppt*
PFNA	1.0 (unitless) Hazard Index	1.0 (unitless) Hazard Index
PFHxS		
PFBS		
HFPO-DA (commonly referred to as GenX Chemicals)		

The Hazard Index is a tool used to evaluate potential health risks from exposure to chemical mixtures.

*ppt = parts per trillion (also expressed as ng/L)

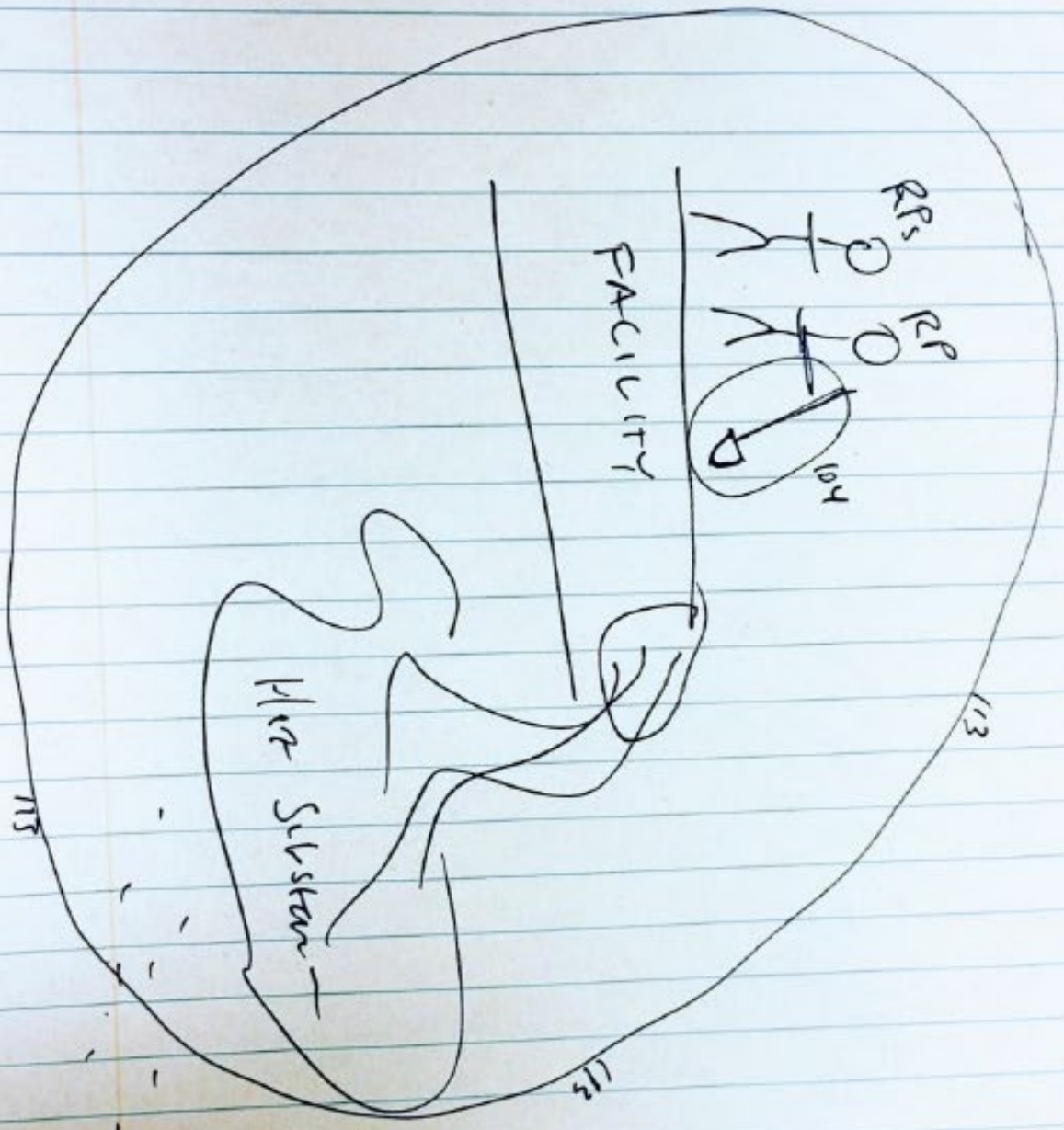
RCRA Hazardous Substance Designation

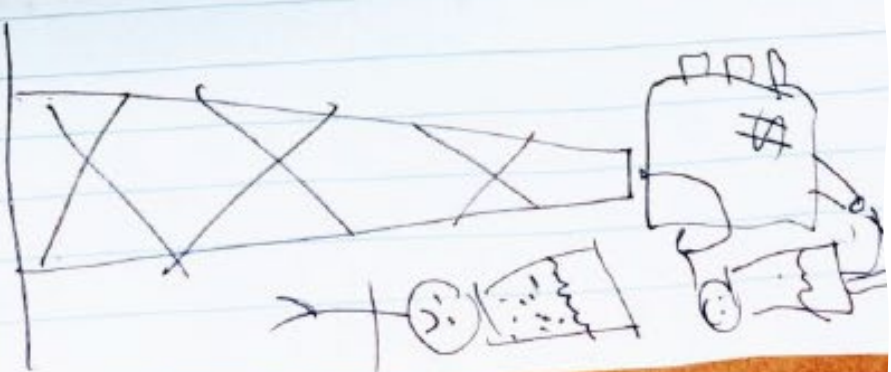
- PFOA
- PFOS
- PFBS
- HFPO-DA/GenX
- PFNA
- PFHxS
- PFHxA
- PFBA

Long Island

Adam - New CERCLA Memo

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PFAS REGULATION - CONT'D

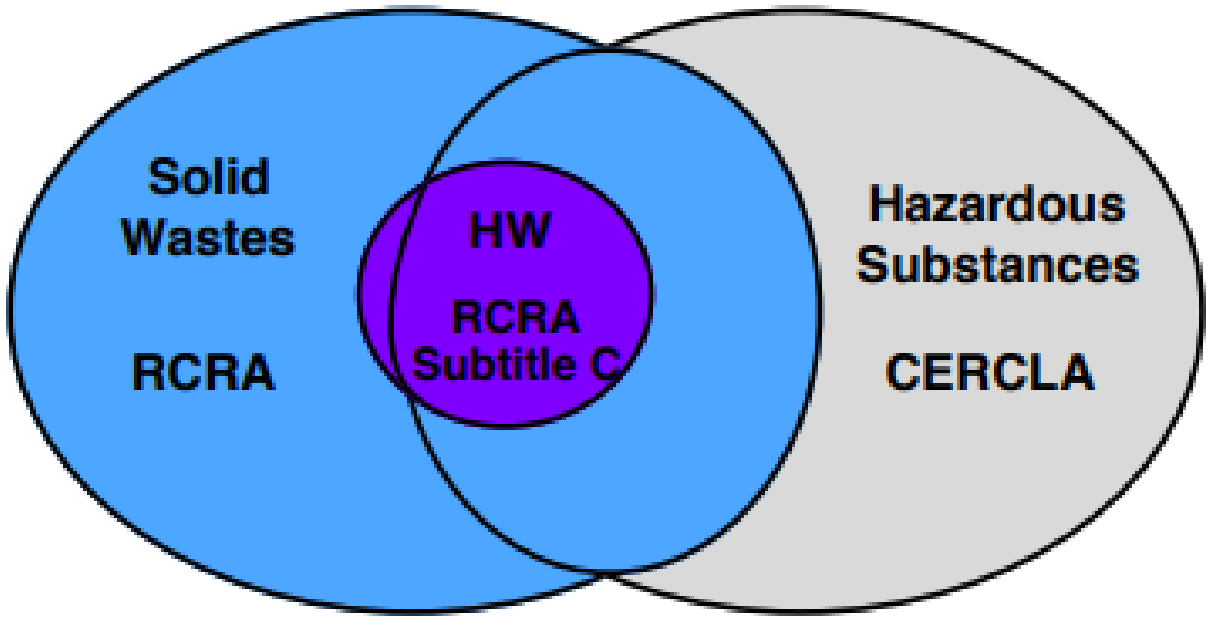
- CERCLA-a snapshot
  - A focus on owners, transporters, and arrangers
  - Arranger: "Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person..."
    - 42 U.S.C. § 9607(a)(3)
    - *Exs. Miami Dade Cty v. U.S.*, 179 Fed. Appx. 678 (11th Cir. 2006); *Burlington Northern & Santa Fe Ry. v. United States*, 556 US. 599 (2009)

BUT WHAT DOES IT MEAN?

- NOT ALL CERCLA "HAZARDOUS SUBSTANCES" ARE RCRA HAZARDOUS WASTES
  - Substances listed by virtue of CWA, CAA, or TSCA do not automatically become RCRA hazardous waste (and vice versa).
  - Substances designated as "hazardous substances" under 42 U.S.C. 9602(a) do not automatically become RCRA hazardous waste.
  - RCRA "solid wastes" also are not automatically "hazardous substances."

EPA, *RCRA Orientation Manual, Chapter VI, CERCLA - The Hazardous Waste Cleanup Program*, VI -10 (2014).

Figure VI-3: Relationship Between CERCLA Hazardous Substances and RCRA Hazardous Wastes



CERCLA hazardous substances encompass RCRA hazardous wastes as well as other toxic pollutants regulated by CAA, CWA, and TSCA. RCRA nonhazardous solid wastes do not trigger CERCLA response actions unless they contain another hazardous substance or present an imminent and substantial danger to human health and the environment as pollutants or contaminants.

UCMR5/"EMERGING CONTAMINANTS"

- 29 PFAS

EPA Method 533 (PFAS monitored under UCMR 3 are in **bold**)			
1H, 1H, 2H, 2H-perfluorodecane sulfonic acid (8:2 FTS)	9-chlorohexadecafluoro-3-oxanone-1-sulfonic acid (9Cl-PF3ONS)	4,8-dioxa-3H-perfluorononanoic acid (ADONA)	Perfluorohexanoic acid (PFHxA)
1H, 1H, 2H, 2H-perfluorohexane sulfonic acid (4:2 FTS)	Perfluorobutanoic acid (PFBA)	Hexafluoropropylene oxide dimer acid (HFPO-DA) ("GenX chemical")	**Perfluorohexanesulfonic acid (PFHxS)**
1H, 1H, 2H, 2H-perfluorooctane sulfonic acid (6:2 FTS)	Perfluoroheptanesulfonic acid (PFHpS)	**Perfluorobutanesulfonic acid (PFBS)**	**Perfluorononanoic acid (PFNA)**
Nonafluoro-3,6-dioxaheptanoic acid (NFDHA)	Perfluoropentanesulfonic acid (PFPeS)	Perfluorodecanoic acid (PFDA)	**Perfluorooctanesulfonic acid (PFOS)**
Perfluoro (2-ethoxyethane) sulfonic acid (PFEESA)	Perfluoropentanoic acid (PFPeA)	Perfluorododecanoic acid (PFDoA)	**Perfluorooctanoic acid (PFOA)**
Perfluoro-3-methoxypropanoic acid (PFMPA)	11-chloroeicosafluoro-3-oxaundecane-1-sulfonic acid (11Cl-PF3OUdS)	**Perfluoroheptanoic acid (PFHpA)**	Perfluoroundecanoic acid (PFUnA)
Perfluoro-4-methoxybutanoic acid (PFMBA)			
PFAS Analytes Unique to EPA Method 537.1			
N-ethyl perfluorooctanesulfonamidoacetic acid (NEtFOSAA)	N-methyl perfluorooctanesulfonamidoacetic acid (NMeFOSAA)	Perfluorotetradecanoic acid (PFTA)	Perfluorotridecanoic acid (PFTrDA)
EPA Method 200.7 or Alternate SM 3120 B or ASTM D1976-20			
Lithium			



CUT TO THE CASES - CONT'D



Post-*Ford*

Climate docket examples



Pleading Causation

Hardwick (6th Cir.)



Evidence challenges

Doubling down on *Daubert*



Evidence Types

Civilian/community science

FORD

PJX requires: "an affiliation between the forum and the underlying controversary." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021).

"[W]e have never framed the specific jurisdiction inquiry as always requiring proof of causation–i.e., proof that the plaintiff's claim came about because of the defendant's in-state conduct." *Ford*, 141 S. Ct at 1026.

Hot take: "Due process allows a corporation to be sued on any claim in a State where it has appointed an agent to receive whatever suits may come." *Mallory v. Norfolk S. Railway Co.* 2023 WL 4187749 at *6 (U.S. June 27, 2023)

HARDWICK

KETHLEDGE, Circuit Judge. Seldom is so ambitious a case filed on so slight a basis. The gravamen of Kevin Hardwick's complaint is that his bloodstream contains trace quantities of five chemicals—which are themselves part of a family of thousands of chemicals whose usage is nearly ubiquitous in modern life. Hardwick does not know what companies manufactured the particular chemicals in his bloodstream; nor does he know, or indeed have much idea, whether those chemicals might someday make him sick; nor, as a result of those chemicals, does he have any sickness or symptoms now. Yet, of the thousands of companies that have manufactured chemicals of this general type over the past half-century, Hardwick has chosen to sue the ten defendants present here. His allegations regarding those defendants are both collective—rarely does he allege an action by a specific defendant—and conclusory. Yet Hardwick sought to represent a class comprising nearly every person "residing in the United States"—a class from which, under Civil Rule 23(c), nobody could choose to opt out. And as relief for his claims,

QUESTIONS



CUT TO THE CASES



POST-*FORD* JURISDICTIONAL CHALLENGES AND DECISIONS



PLEADING CAUSATION



EVIDENCE CHALLENGES



EVIDENCE TYPES