PFAS Remediation Funding: 10 Mistakes to Avoid

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PFAS Remediation Funding Overview

- Several categories of claims exist – the focus here is on claims:
  - Against manufacturers of products containing PFAS
  - Against historic, municipal insurers

- In both areas, the opportunities available are often misunderstood, or not even on the radar

Manufacturers



https://chemsec.org/reports/the-top-12-pfas-producers-in-the-world-and-the-staggering-societal-costs-of-pfas-pollution/

Insurers

CNA
For All the Commitments You Make®

Liberty Mutual

TRAVELERS

Allstate

Nationwide

https://mosaicia.com/business-insurance/general-liability-insurance/

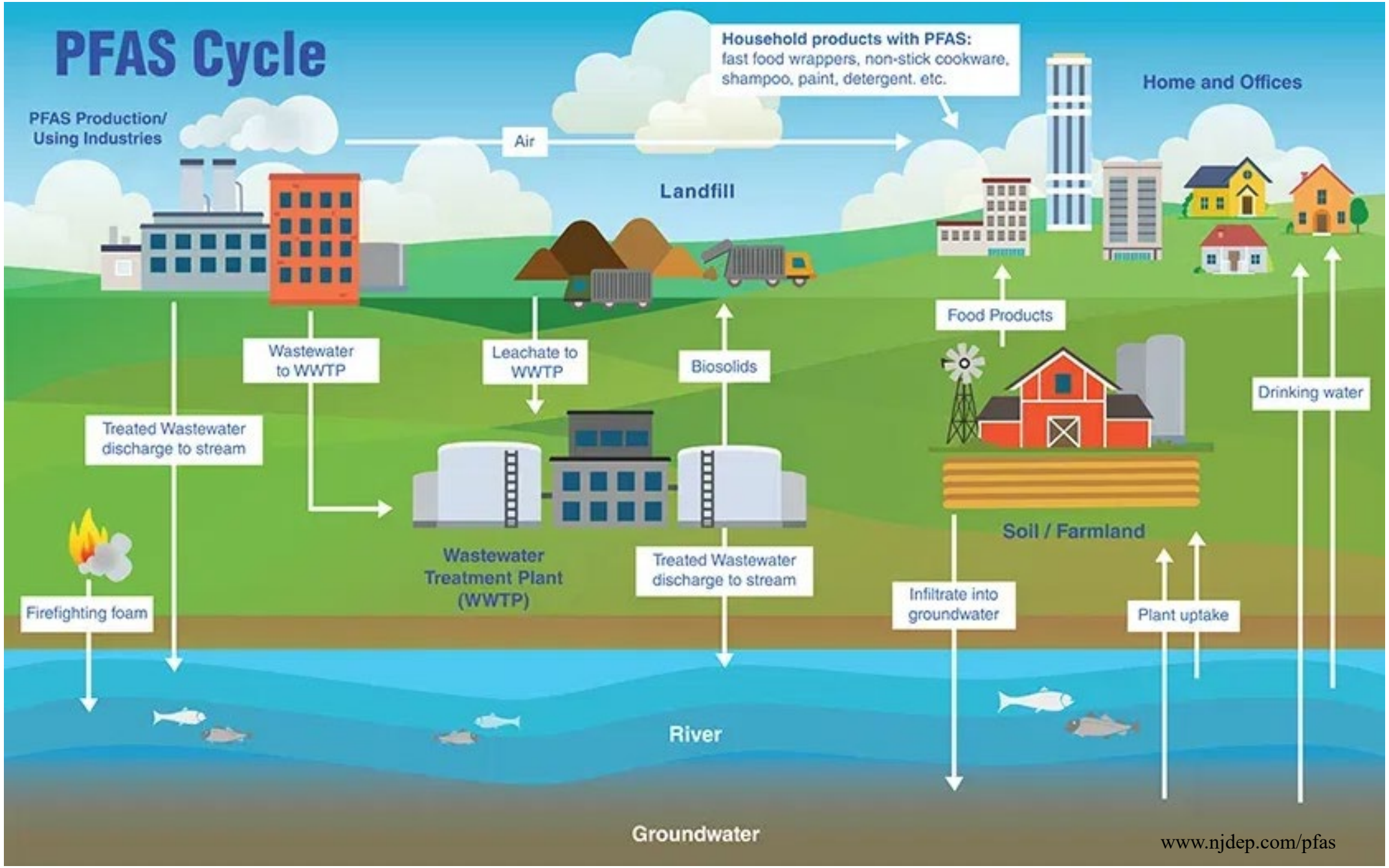
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Mistake 1:

Assuming that the multi-district litigation (MDL) in South Carolina only applies to public water systems

- Public water systems have recently settled with PFAS manufacturers, but this is only stage 1 of the process
- Future phases of the MDL will include property damage claims, airport claims, etc.
- You need to monitor and potentially participate in this process





www.njdep.com/pfas

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Mistake 2:

Assuming that the MDL will fully compensate you for your remediation costs

IT WILL NOT

Mistake 3:

Ignoring Historic Liability Insurance Issued to the City

- Old liability insurance policies were very different than today's coverage
    - Limited or no pollution exclusion until the 1970's, and broader exclusions not until the mid-1980's
    - No time limit on when a claim can be filed
- So long as the contamination stems from operations during the policy period, such as landfill operation or spread of biosolids, the claim can be made decades later
- Some regulatory driver is needed, but this usually does not require a lawsuit
- Key insurance is pre-1985, when PFAS was being utilized and insurance policy language is broader



https://www.hiltonheadmonthly.com/living/nature/5725-50-years-of-clean-water

Mistake 4: Assuming the City did not buy insurance; or
Mistake 5: Assuming the insurance can never be located

- Insurance was much cheaper in the 1970's and earlier – most municipalities bought liability coverage
- This is run-of-the-mill liability coverage, not environmental policies



https://www.investopedia.com/terms/c/commercial-general-liability-cgl.asp

Insurance Archeology

- Almost no one every thinks the old policies can be located

- However in most instances this coverage, or evidence of existence of the coverage, can be located through a combination of:
  - Internal records (e.g., City Council minutes, annual financial reports)
  - Broker records
  - (Infrequently) insurer records

- This can be a tedious task, more easily and effectively done by someone who has done it multiple times — searching for a needle in a haystack, but it is almost always there

Insurance Archeology



Insurance Archeology

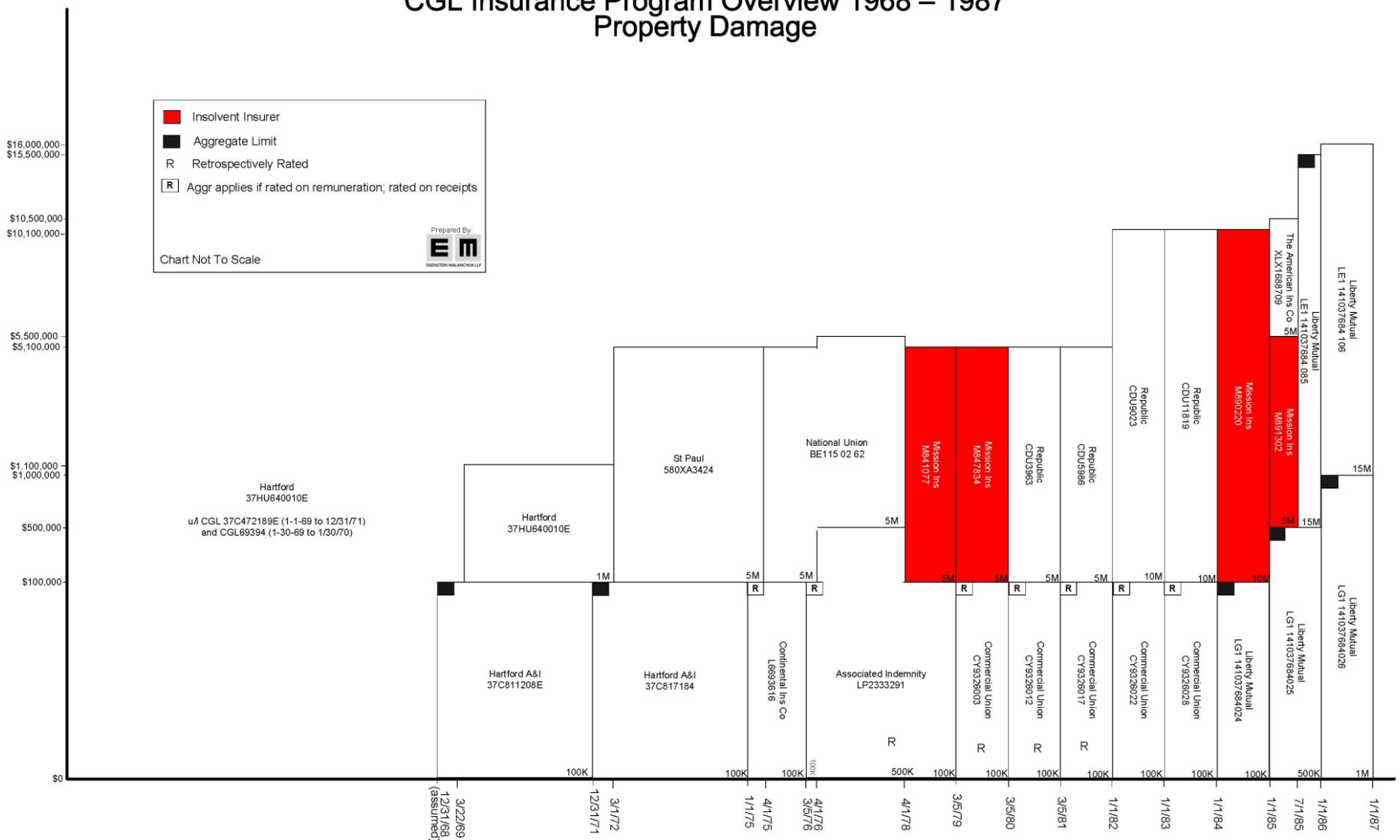




Insurance Coverage

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XYZ Company
CGL Insurance Program Overview 1968 – 1987
Property Damage



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Mistake 6:
Let's just wait and see how big are the City's PFAS issues

- Finding insurance evidence can take months
- Having the insurance in-hand, when issues arise, is critical
  - Historic insurance during years of PFAS usage can pay for attorneys' fees and investigative costs relating to PFAS
  - Usually these "defense costs" do not decrease available policy limits
- However "defense costs" generally will only be covered from the date you provide notice to the insurer, and not retroactively
- Avoiding "late notice" defenses by insurers is also important



https://www.dulaneylauerthomas.com/library/insurance-claim-denial-attorney-for-warrenton-fauquier-culpeper-va.cfm

Mistake 7:
Failing to think about more recent insurance policies

- Although the key insurance claims are pre-1985, "absolute" pollution exclusions in later years aren't always so absolute

- Does an exclusion for "pollutants" exclude damage due to PFAS?
  - Maybe not, because PFAS was used as intended and was not a waste product
    - Some US jurisdictions limit "pollutants" to traditional wastes, and for example exclude gasoline used at a gas station
    - Indiana requires pollution exclusions to specify the contaminant
      - Inconceivable that PFAS was listed historically



https://www.alamy.com/stock-photo-old-lloyds-of-london-wartime-insurance-policies-from-1939-41-household-51790505.html

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Mistake 8: Assuming all insurance claims are created equal
Mistake 9: Ignoring the airport

- Proving the timing of the contamination is important
  - Municipal water systems vs landfills
- Airports always have insurance, and limits often are higher
- Insurance is often easier to locate
- FAA requirements to use AFFF makes the timing of the claim easy to establish
- Pollution exclusions may have exceptions for AFFF used to address a plane crash



www.internationalairportreview.com

Mistake 10:
Assuming that cost recovery = litigation

- The MDL settlements are more akin to the filing of a claim in a bankruptcy proceeding
- Insurance claims can be negotiated with a thorough presentation of the potential remediation costs and of insurance allocation methodologies to spread the costs over time



https://www.manassaslaw.com/blog/negotiate-a-settlement-in-virginia/



https://www.kcrlawfirm.com/blog/how-long-will-it-take-to-get-a-settlement-check-after-a-personal-injury-accident-in-nj/

Thank you!

Feel free to follow up with us:

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