



ENVIRONMENTAL RISK & PFAS LITIGATION CONFERENCE

The New York City Bar Association | June 16-17, 2026

From PFAS to Other Toxic Torts, Insurance Coverage Challenges Persist



Scott Davis, Esq.
Spencer Fane LLP
Dallas, TX



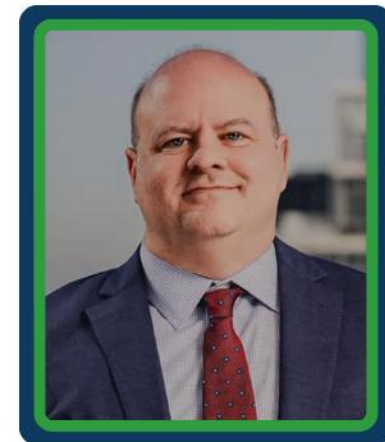
Kevin Dreher, Esq.
Barnes & Thornburg LLP
Chicago, IL



Richard A. Janisch, J.D.
Founder, Principal
Arcina Risk Group LLC
Los Angeles, CA



Rachel H. Kim, Esq.
Vice President - Coverage and
Bad Faith Senior Claims Counsel
Sompo North America
Garden City, NY



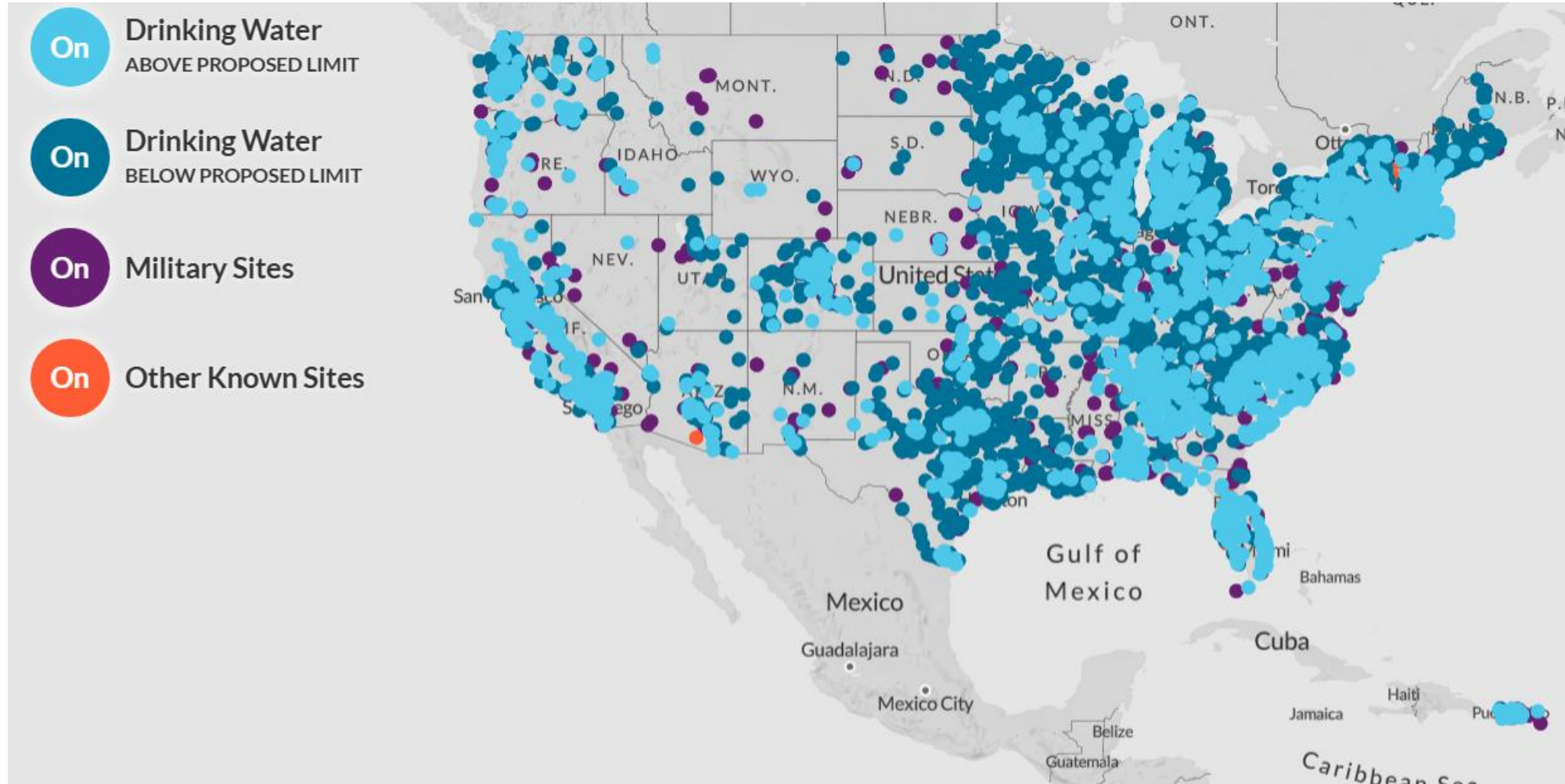
Bradford S. Moyer, Esq.
Kennedys
Kalamazoo, MI



PFAS – AFFF MDL Update

- Currently more than 15,200 cases pending (June 2026)
- More than \$11-12B in settlements with major manufacturers for water provider suits approved
- October 2025 kidney cancer bellwether trial taken off-calendar to allow for filing of additional personal injury lawsuits
- Focus on personal injury cases involving firefighters, military personnel, and contaminated communities
- CMO 37 entered to enforce compliance with personal injury requirements and fact sheets and allowing “cure periods”
- 28 personal injury bellwether cases selected addressing kidney cancer, testicular cancer, thyroid disease, and ulcerative colitis
- No reported personal injury settlements reached thus far

PFAS Contamination

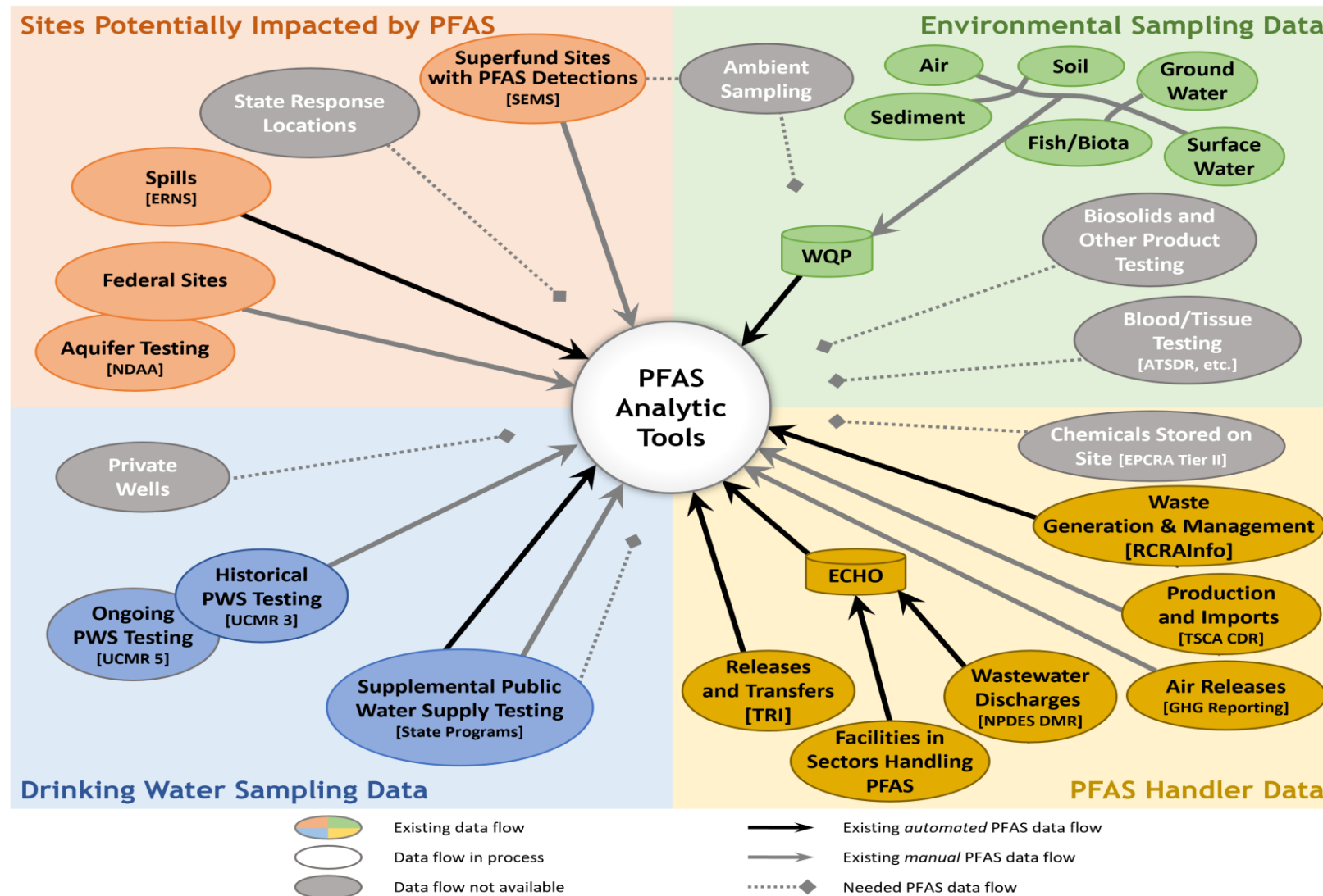




PFAS Science

- PFAS Prevalence
 - Detected in 9,728 sites in 50 states, D.C., and four US territories
 - 206 PFAS compounds currently listed in the EPA's Toxics Release Inventory
- Federal and state regulation and enforcement
- EPA Unregulated Contaminant Monitoring Rule (UCMR5)
 - Published in December 2021
 - Final data and update expected in Fall 2026
 - Requires sample collection for 30 chemical contaminants 2023-2025
 - Applies to water systems involving both surface water, groundwater systems, and mixed source systems
- Testing and Detection
 - UCMR5 requires reporting of detections at 4 ppt or higher
 - Current techniques
 - Technology will continue to evolve
 - What does this mean for insureds and insurers?

PFAS Analytic Tools



LEGACY INSURANCE IMPLICATIONS

Insurance is an Asset

- Build historical policy search into your strategy for both property damage and bodily injury claims
- Whose insurance is it...understand the “corporate history” of acquisitions and predecessor companies
- Map the years of damage or exposure to the earliest available policies
- Identify policy limits, possible erosion of legacy policies and solvency status to determine viable coverage
- Research possible past agreements and/or settlements with legacy insurance
- Be proactive
 - Timely noticing
 - Conduct due diligence for future acquisitions
 - Review and organize legacy coverages



CASE STUDY – UNIFORM COMPANY



- Various lawsuits from water districts for release of PFAS into the water system from laundered uniforms
- Onsite internal records research of boxes producing:
 - Policies
 - Certificates of Insurance
 - Loss runs
 - Renewal declaration pages
 - Carrier correspondence
- Identified coverages spanning 1979 to 1994
 - Located millions in primary and excess



CASE STUDY - AIRPORTS



- State EPA orders clean-up of PFAS contamination from early 1970s
- Internal records search revealed former broker who produced records verifying insurance from the 1970s and 1980s
- Most airports have London market insurance which often produces evidence of primary coverage back to the 1940s
- Located three insurers
- Insurers agreed to coverage including defense and remedial investigation fees





Other Policies for PFAS: Pollution Legal Liability (PLL)

- Claims Made versus Occurrence (CGL) = Timing Restrictions/Retros
- Designed to specifically cover pollution claims/losses, including PFAS
- Market response after CGL pollution exclusions narrowed coverage for environmental claims
- Heavily Manuscripted for Individual Insured – Sites/Known Pollutants/ETC
- Frequently with Limited Pollution Exclusions - may or may not exclude PFAS
- Key Coverage Terms/Questions:
 - “Pollution Incidents”
 - Timing Issues: “Claim” and Retro Dates
 - Scope of Exclusions



Claims Made vs. Occurrence Policies

- Claims-Made Policies:
 - EIL and PLL Policies
 - Cover claims that are made against the policyholder during the policy period and reported during a defined period
 - Coverage typically only available under one policy, typically the one in effect at the time the claim is reported
- Occurrence-Based Policies:
 - CGL Policies
 - Cover occurrences (accidents) that happen during the policy period
 - For long-tail environmental claims, policyholders frequently seek coverage under historic policies
 - If claimant alleges exposures that occurred 40 years ago, you must locate CGL policies from those periods
 - A single claim may trigger multiple policies over multiple years

Duty to Defend in PFAS Cases



Duty to Defend in CGL Policies – A Lesson from *Wolverine World Wide*

- Duty to Defend is Threshold question
 - Wolverine was the first major PFAS duty-to-defend ruling, setting precedent for future claims
 - Often leads to bifurcation of duty to defend and duty to indemnify
- Duty to Defend Standard vs. Indemnity
 - Duty to defend resolved on pleadings (4 Corners Analysis)
 - Duty to defend = possibility of coverage
 - Duty to indemnify = is there actual coverage
 - Indemnification requires factual development
- Related Issues Potentially Addressed at Duty to Defend Stage
 - Impact of Pollution Exclusions
 - Allocation of defense costs

PFAS Lessons From WWW



Wolverine World Wide, Inc. v. The American Insurance Company, et al.

W.D. Mich., Case No. 1:19-cv-00010

- **Duty to Defend:** Primary Insurers breached duty by failing to provide legal services
 - Consequential Damages Awarded as Defense/Investigation costs presumed reasonable
- **Defense Costs:** (1) Fees presumed reasonable; (2) offensive claims against 3rd parties “defensive” and recoverable; (3) investigation expenses qualify as defense



PFAS Litigation – Duty to Defend

- Determining the duty to defend:
 - Scope and standard
 - “Eight corners” jurisdictions
 - “Eight corners plus” jurisdictions
- Core coverage issues impacted by alleged duty to defend:
 - Trigger
 - Lost policies
 - Allocation
 - Threshold coverage terms and provisions
 - Pollution exclusions
 - Impact on other exclusions and conditions
- Scope of discovery



PFAS Litigation – Duty to Defend

- *Wolverine World Wide:*
 - Bifurcation of defense and indemnity
 - Impact on coverage defenses
 - Scope and extent of defense obligation
 - Selection and control of counsel
 - Defense costs issues
 - Rates
 - Number of firms
 - Charges
 - Legal invoices
 - Reimbursement
 - Trigger and allocation relative to duty to defend
 - Discovery in context of duty to defend

Independent Counsel & Other Policies



Need for Independent Counsel

- ROR may trigger policyholder's right to independent counsel
- Goal = avoid conflict between defense strategy versus not prejudicing coverage claims
- Independent counsel selected and controlled by policyholder
- **Examples of ROR Issues Necessitating Independent Counsel**
 - Defending against pollution liability vs. application of pollution exclusions
 - Timing of events surrounding pollution/BI/PD versus trigger of coverage = was coverage triggered during covered vs. uncovered years?
 - Allocation of costs/damages between defense/investigation vs. remediation

AFFF Key PFAS Coverage Rulings



- ***National Foam v. Zurich*** (CA law)
 - Duty to defend granted, full defense rates; pollution exclusions for environmental contamination, not product-use injuries
- ***Town of Harrietstown v. Westchester Fire*** (NY law)
 - Duty to defend; pollution exclusion rejected via “crash fire explosion” exception; the burden is on the insurer to prove no possibility of coverage
- ***Tyco v. Century Indemnity*** (WI law)
 - Insurers have duty to defend direct-exposure firefighter AFFF claims



PFAS – Key Coverage Issues Persist (CGL)

Forum and
Choice of
Law

Trigger of
Coverage

Number of
Occurrences

Allocation
and
Exhaustion

PFAS and
Pollution
Exclusions

Damages
and Relief
Sought

POLLUTION EXCLUSION - SNAPSHOT



GL

**EIL
PLL**

POLLUTION EXCLUSION: EXAMPLE



Duty to defend does not apply to

Bodily injury or property damage

Arising out of the

Discharge, dispersal, release or escape of

Smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, or... **pollutants** into or upon the

Land, the atmosphere or any water course or body of water;

POLLUTION EXCLUSIONS

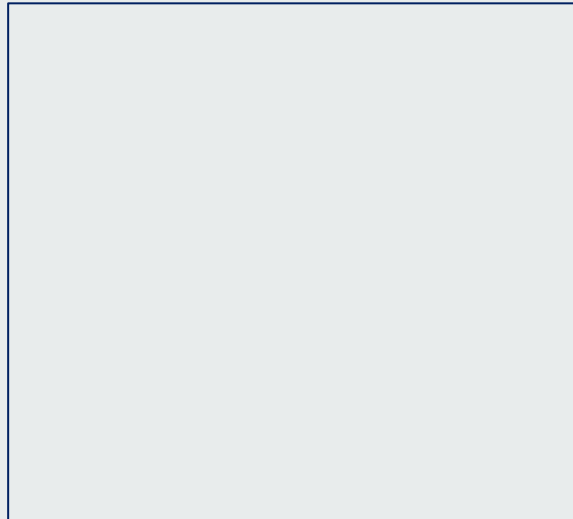


Sudden and Accidental

...but does not apply if such discharge, dispersal, release or escape is

**“sudden
and
accidental.”**

Absolute



Total



Regulatory...

Testing,
monitoring,
cleaning...



PFAS Lessons From WWW



Wolverine World Wide, Inc. v. The American Insurance Company, et al.

W.D. Mich., Case No. 1:19-cv-00010

- **Pollution Exclusion:** Denied insurers' summary judgment at Duty to Defend stage.
 - Expected and Intended = whether insured expected PFAS waste to discharge from disposal area to cause PD/BI
 - Sudden & Accidental Exception = Requires Discrete Accidental Releases.

Remediation Claim Issues under EIL Policies



1. New claim v. old claim
 - *Regulatory reopeners*
2. First discovered
3. First commenced
 - *Retroactive date*
4. Covered property
5. Known claims
6. Investigation costs
7. PFAS exclusion





EIL/PLL Coverage Issues

- What generally is a “Pollution Condition” requiring reporting?
 - The discovery of a discharge, dispersal, release or escape of a pollutant during the policy period
 - Must be reported to the insurer during the policy period
- What generally constitutes a “Claim” requiring reporting?
 - A written demand seeking a remedy or compensation
 - Alleged liability or responsibility on the part of the named insured
 - A “legal obligation to pay” by the named insured
- What is typically excluded?
 - A “pollution condition” existing prior to the inception date
 - Known by a “responsible person” and not disclosed in the application
 - “Responsible person” defined



PFAS Exclusions

- As regulations and litigation regarding PFAS intensify, insurers have begun to implement more specific PFAS exclusions in their policies
- This trend includes the development of endorsements and policy forms that explicitly exclude coverage for bodily injury, property damage, and other liabilities related to PFAS exposure
- The Insurance Services Office (ISO) has issued several PFAS-specific exclusions for use in CGL policies effective 5/1/23, designed to “broadly exclude bodily injury, property damage and personal and advertising injury related exposures associated with PFAS”
 - CG 34 95 Exclusion – PFAS, to use with products/completed operations liability coverage part or Owners and Contractors protective liability coverage part
 - CG 40 32 Exclusion – PFAS, to use with the commercial liability coverage
 - CU 34 54 Exclusion – PFAS, to use with the commercial liability umbrella coverage
 - CX 21 97 Exclusion – PFAS, to use with the commercial excess liability coverage
 - BP 15 91, Exclusion – PFAS, to use with businessowners liability coverage



PFAS Exclusions (cont'd)

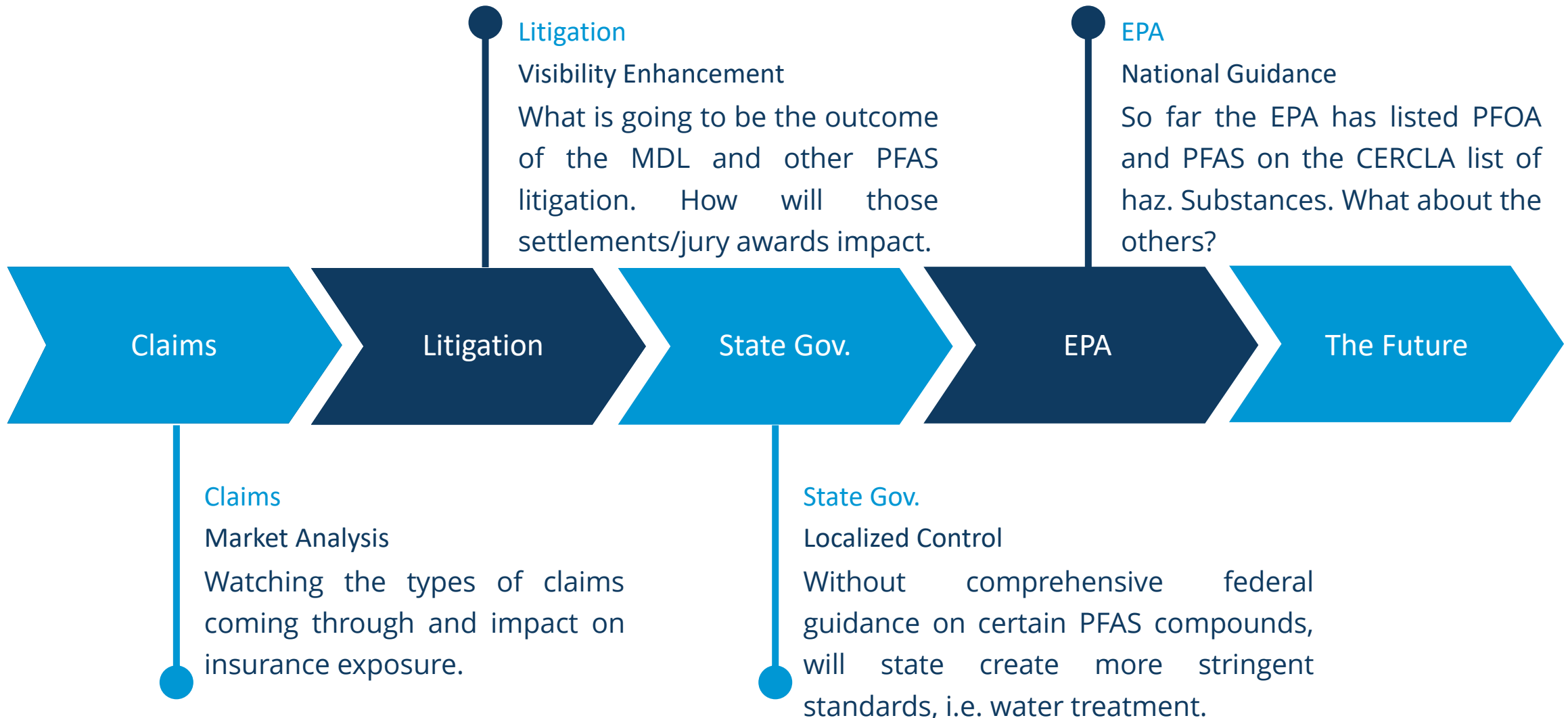
- The 2023 ISO exclusions defined PFAS to mean any:
 - 1. Chemical or substance that contains one or more alkyl carbons on which hydrogen atoms have been partially or completely replaced by fluorine atoms, including but not limited to:
 - a. Polymer, oligomer, monomer or nonpolymer chemicals and their homologues, isomers, telomers, salts, derivatives, precursor chemicals, degradation products or by-products;
 - b. Perfluoroalkyl acids (PFAA), such as perfluorooctanoic acid (PFOA) and its salts, or perfluorooctane sulfonic acid (PFOS) and its salts;
 - c. Perfluoropolyethers (PFPE)
 - d. Fluorotelomer-based substances; or
 - e. Side-chain fluorinated polymers; or
 - 2. Good or product, including containers, materials, parts or equipment furnished in connection with such goods or products, that consists of or contains any chemical or substance described in Paragraph C. 1.
- The definition of “PFAS” has evolved as technology and detection improve and regulatory standards change



PFAS Exclusions (cont'd)

- Some later exclusions expanded the PFAS definition as follows:
- PFAS means any perfluoroalkyl or polyfluoroalkyl substance, including but not limited to 10:2 fluorotelomer sulfonic acid (10:2 FTS), 11 chloroeicosafluoro-3-oxaundecane-1-sulfonic acid (11CIPF3OUdS); 2H,2H,3H,3H-perfluorodecanoic acid (7:3 FTCA); 2H,2H,3H,3H-perfluorohexanoic acid (3:3 FTCA); 2H,2H,3H,3H-perfluorooctanoic acid (5:3 FTCA) 4,8-dioxa-3H-perfluorononanoic acid (ADONA); 4:2 fluorotelomer sulfonic acid (4:2 FTS); 6:2 fluorotelomer sulfonic acid (6:2 FTS); 8:2 fluorotelomer acid (8:2 FTS); 9-chlorohexadecaruooro-3-oxanonane-1-sulfonic acid (9CIPF3ONS). methyl perfluorooctane sulfonamido ethanol (NEtFOSE); hexafluoropropylene oxide dimer acid (HFPO-DA); n-methyl perfluorooctane sulfonamide ethanol (NSAeFOSE); n-ethyl perfluorooctanesulforarnidoacetic acid (NEtFOSAA); n-ethyl perfluorooctane sulfonamide (NEIFOSAI. n-methyl perfluorocktanesullonamsclaoacetic acid (NMeFOSAA); n-methyl perfluorooctane sulfonamide (MeFOSA), nonafluoro-3,6-diouheptanoic acid (NFDHA), perfluoro(2-ethoxyethane) sulfonic acid (PFEEESA); perfluoro-3-methoxypropanoic acid (PFMPA); perfluoro 4 methoxybutanoic acid (PFMBA); perfluorobutane sulfonic acid (PFBS); perfluorobutanoic acid (PFBA), pertluorodecane sulfonic acid (PFDS); perfluorodecanoic acid (PEDAL perfluorodockcanoic acid (PF0ciA); perfiucroheptare sulfonic acid (PFHpS); perfluoroheptanoic acid (PFHpA); perfluorohexadecanok acid (PFFIxDA); perfluorohexane sulfonic acid (PFHxS); perfluorohezanoic acid (PFHxA), perfluorononane sulfonic acid (PFNS), perfluoronoranoic acid (PFNA); perfluorooctadecanoic acid (PFODA); perfluorooctane sulfonamide (PFOSA): perfluorooctane sulfonic acid (P1O5); perfluorooctanoic acid IPFOA), perfluoropentane sulfonic acid (PFPeS); perfluoropentanoic acid (PFPeA), perfluorotetradecanioc acid (PETAL perfluorotridecanoic acid (PFTrDA); perfluoroundecancic acid (PFUnA); perfluorodedecanesulfonic acid (PFDoS); polytetrafluoroethylene (PTFE), 8:2 fluorotelomer unsaturated carboxylic acid (8:2 FTUCA) or 8:2 polyfluoroalkyl phosphate diester (8:2 diPAP), or any precursor chemicals.
- PFAS shall include any anion forms of PFAS associated with their corresponding acid forms. Further, PFAS shall also include aqueous film forming foam (AFFF) containing PFAS or any additives or component materials contained therein or degradation byproducts thereof.

Where are we going?





THANK YOU