PFAS Litigation and Regulatory Developments Conference

CLAIMS UNIQUE TO PFAS LITIGATION

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PFAS in Residential Septic Systems: It's not Always Due to the Nearby Industry

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Abstract

Consumer product use and discharge to domestic septic systems

+

Densely developed residential area lacking area-wide municipal water and sewer

+

Shallow groundwater and bedrock

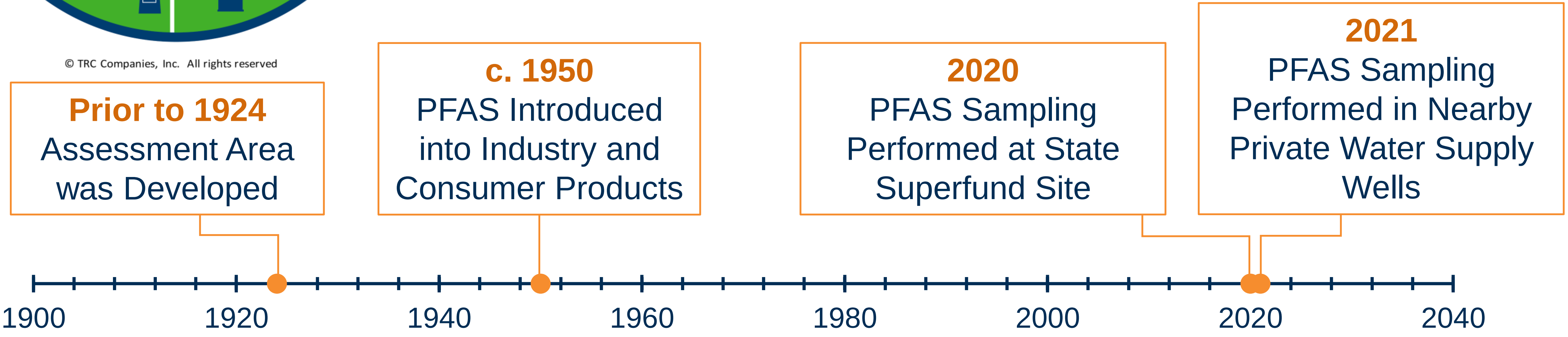
+

Vertical downward groundwater gradient

Widespread presence of PFAS in private water supply wells

Introduction

- Groundwater from monitoring wells at State Superfund Site (historic dry cleaners) sampled for PFAS, results > criteria
- Several nearby individual private water supply wells sampled for PFAS, results > criteria



Approach

Expand Private Well Sampling Program

- Assessment Area: ½-mile radius of Superfund Site
- 306 properties with individual private water supply wells

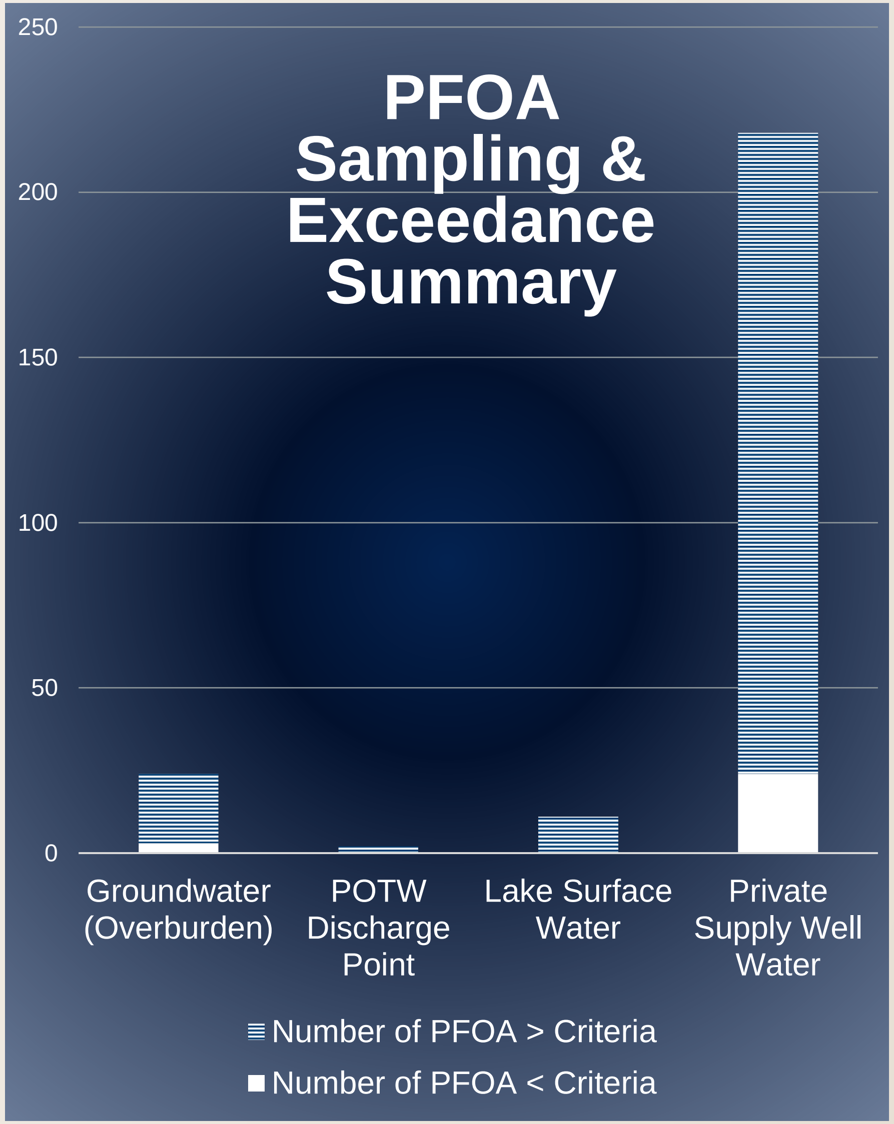
Perform PFAS Source Investigation

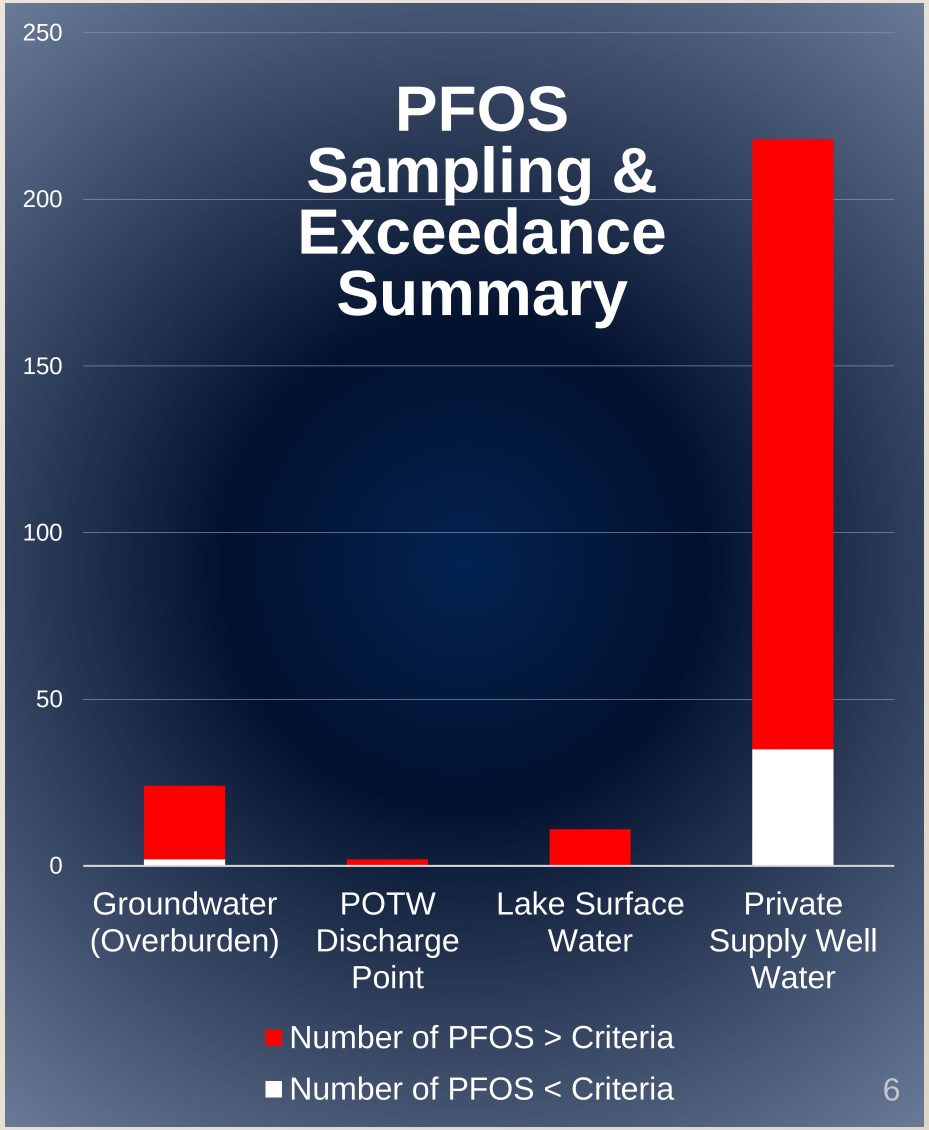
Desktop Study → Site Inspections & Interviews → Environmental Investigations → Data Analysis & Reporting

Results and Discussion

Analytical Results Discussion

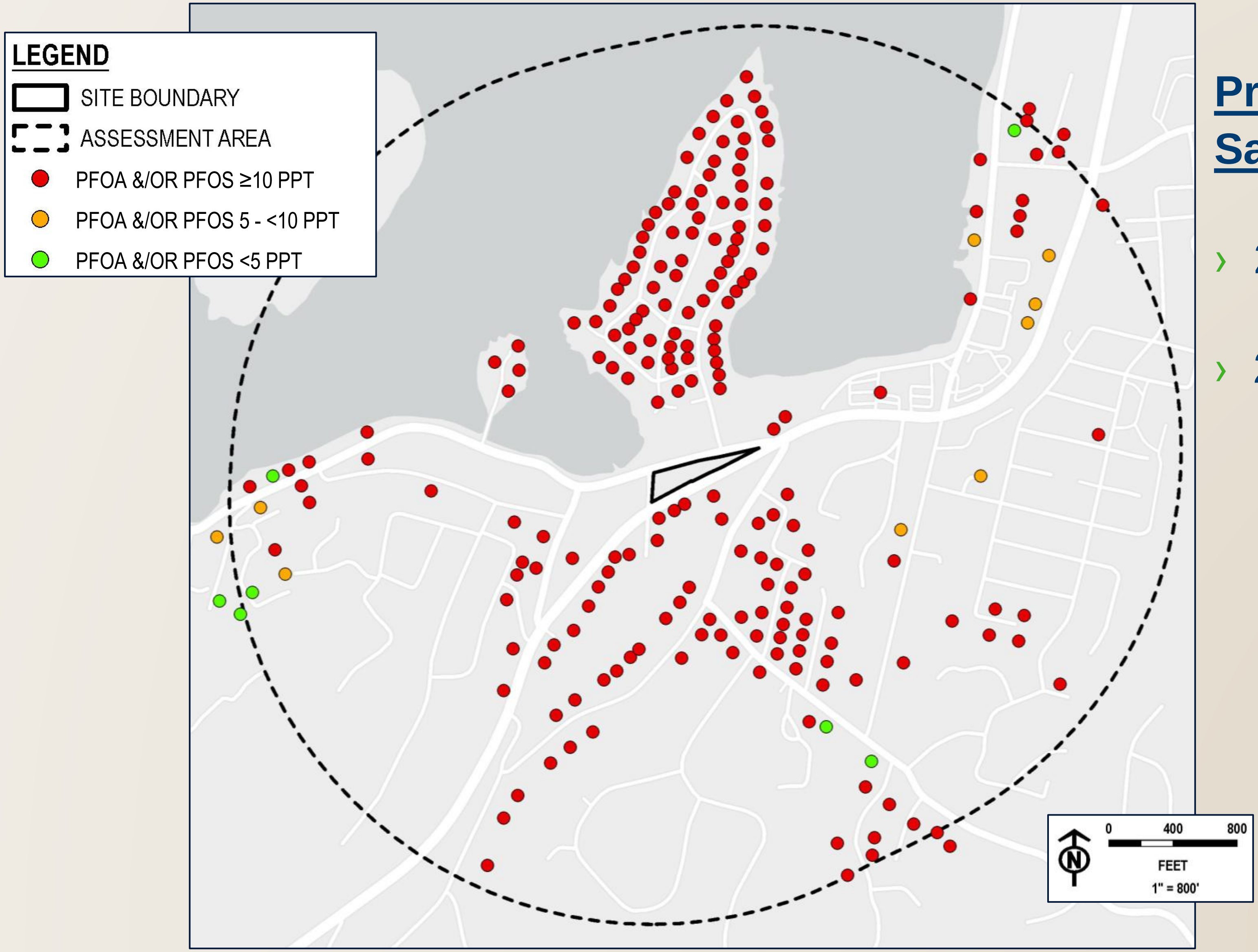
- PFAS detected nearly ubiquitously throughout Assessment Area.
- Detections typically exceeded comparison criteria.
- Soil and sediment analytical results provided limited value.
- Septic tracers detected in every sampled location.





Results and Discussion

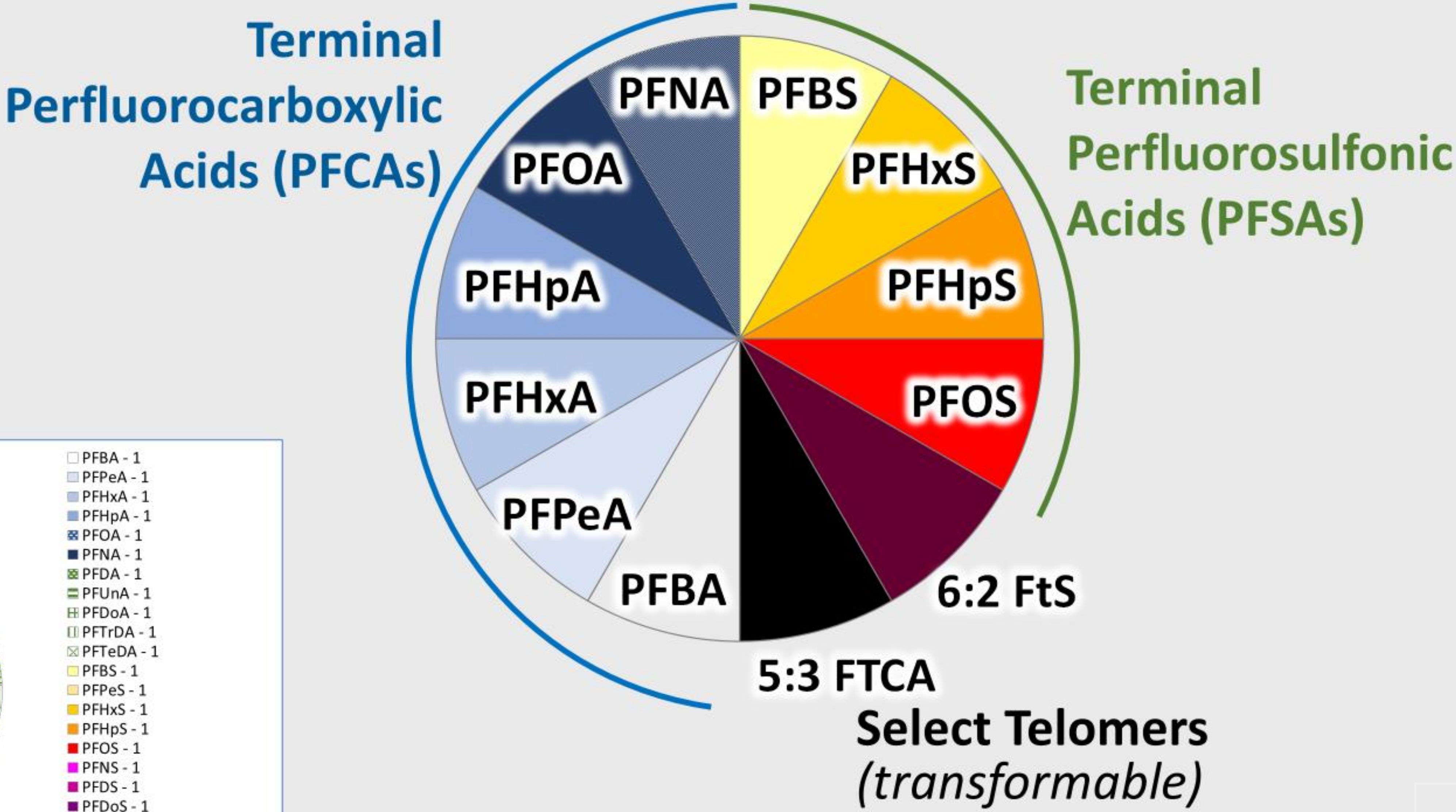
Analytical Results Discussion

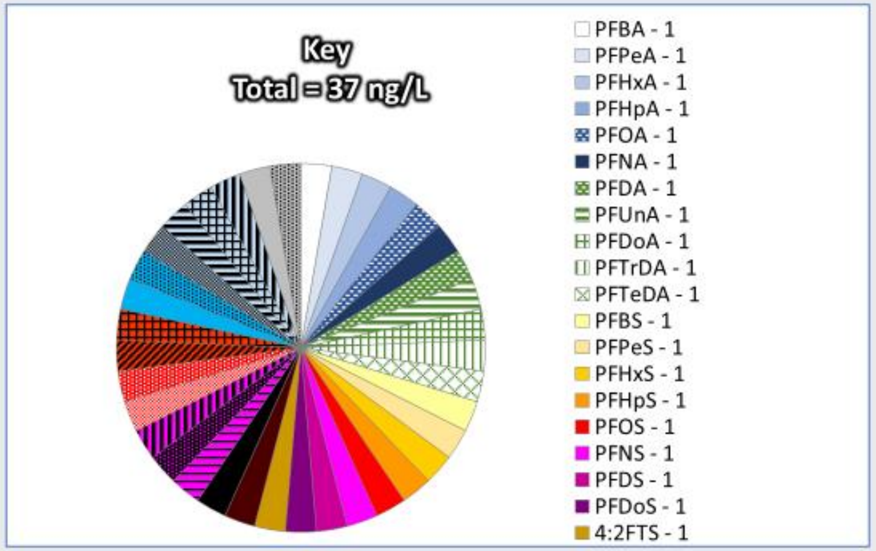


Private Water Supply Well Sampling - PFAS

- 218 Properties Sampled
- 202 ≥ Criteria

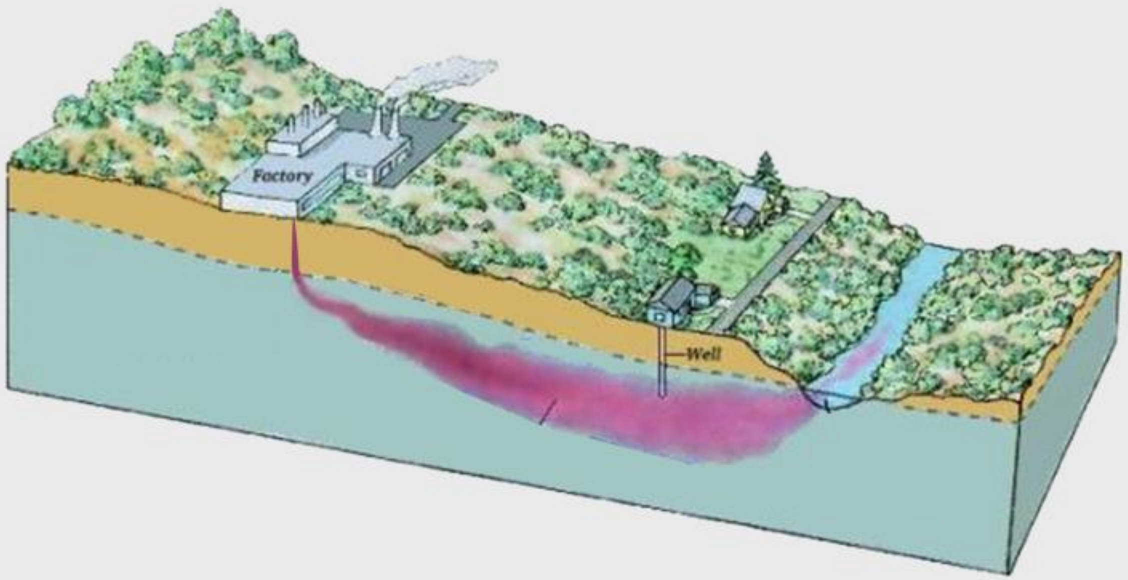
Example Analytes for Comparison

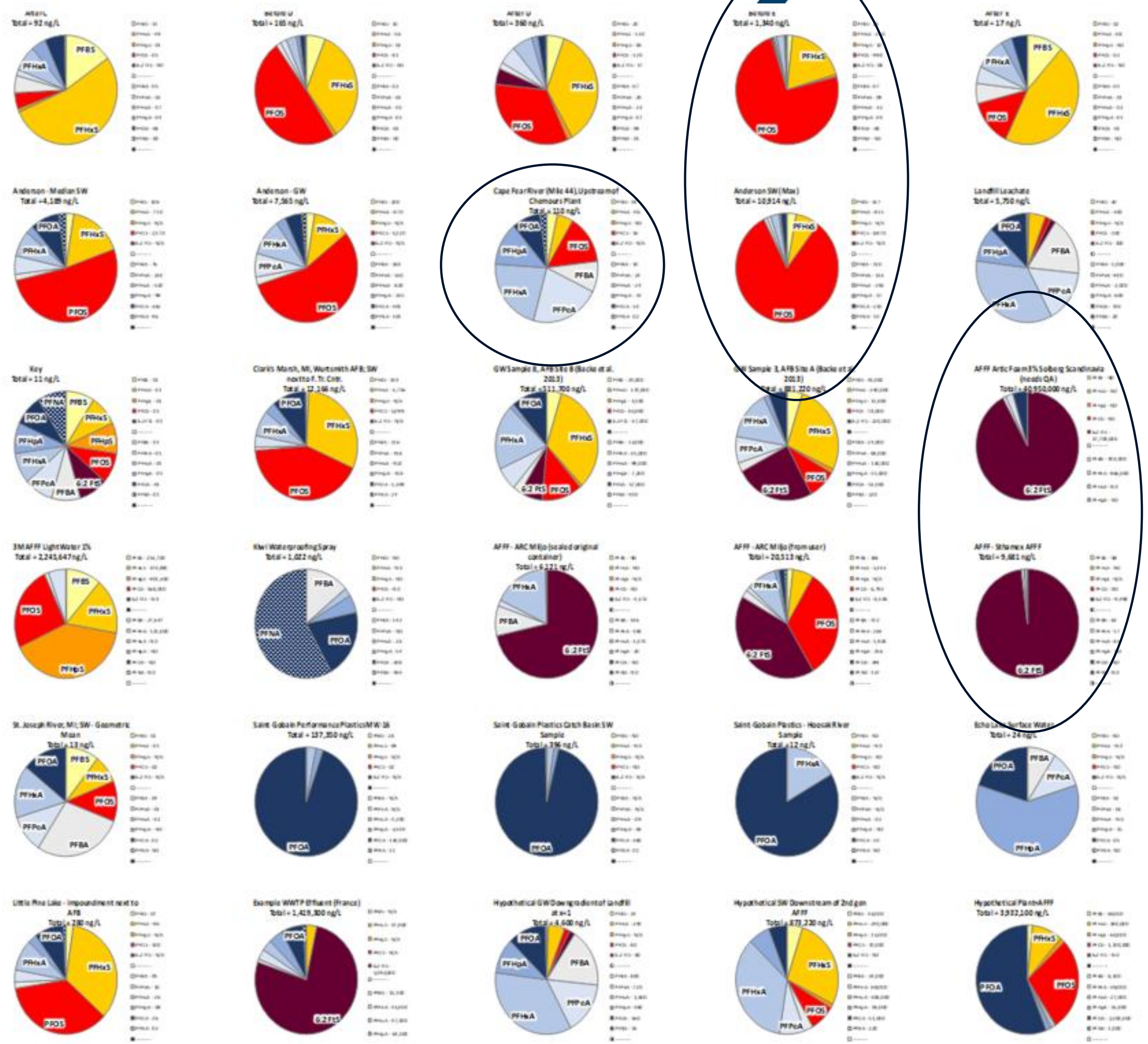




Chemical Signatures

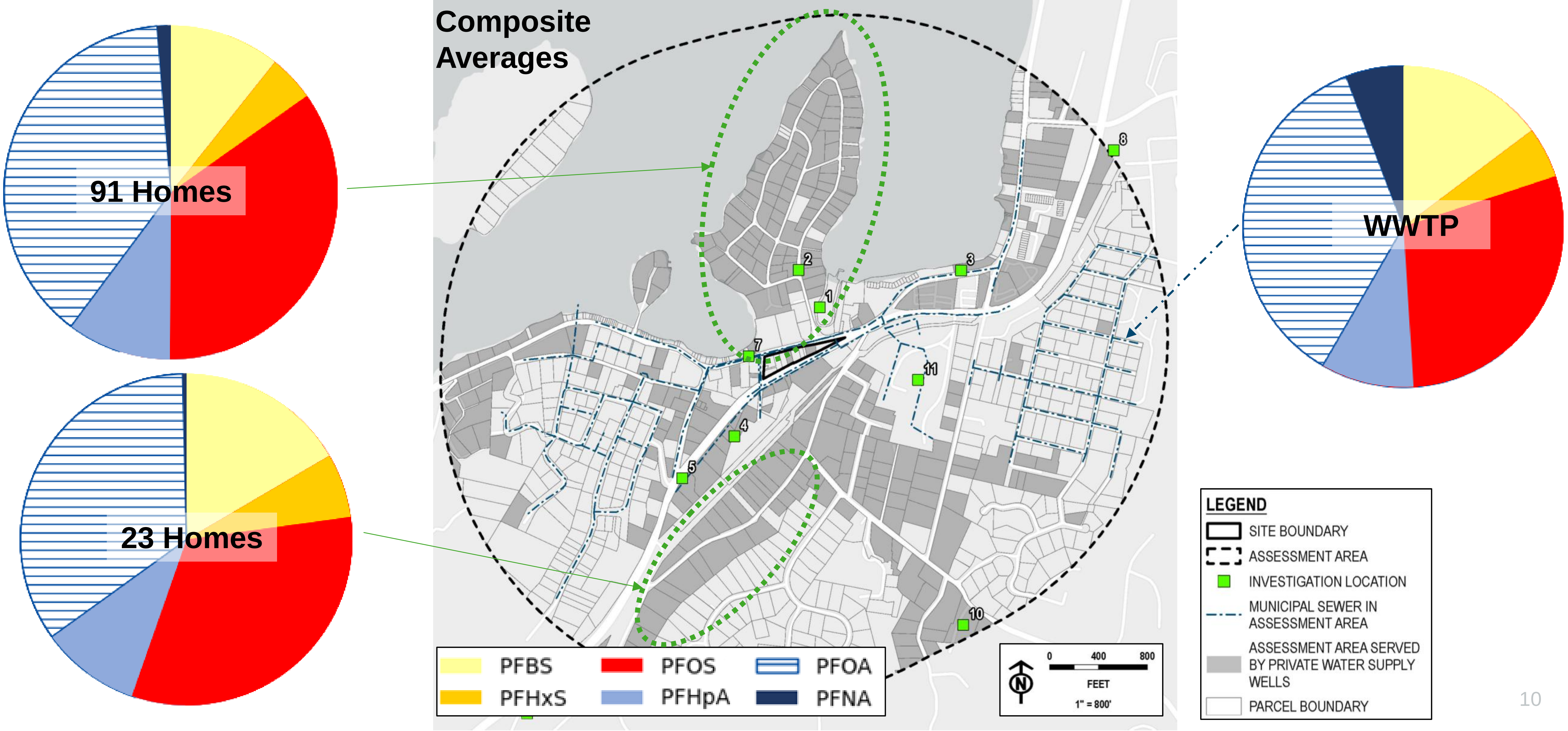
Signatures reflect various source and fate/transport scenarios





Results and Discussion

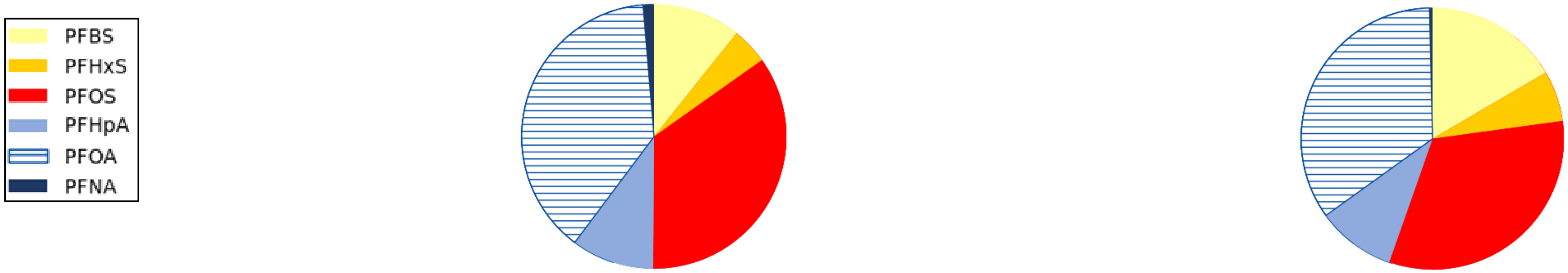
Defining the PFAS Signature of Area-Specific Wastewater Discharges



Results and Discussion

Evaluation of PFAS Detections in Private Water Supply

	91 Homes		23 Homes	
	Average	**SDσ**	**Average**	**SDσ**
Total PFAS (ppt)	58.5	22.84	49.4	11.6
% PFBS	10.7%	6.3%	16.6%	4.5%
% PFHxS	4.5%	2.3%	6.3%	2.2%
% PFOS	34.9%	8.1%	32.5%	2.7%
% PFHpA	10.1%	2.7%	9.7%	1.1%
% PFOA	38.5%	6.6%	34.6%	2.6%
% PFNA	1.3%	1.8%	0.4%	1.2%

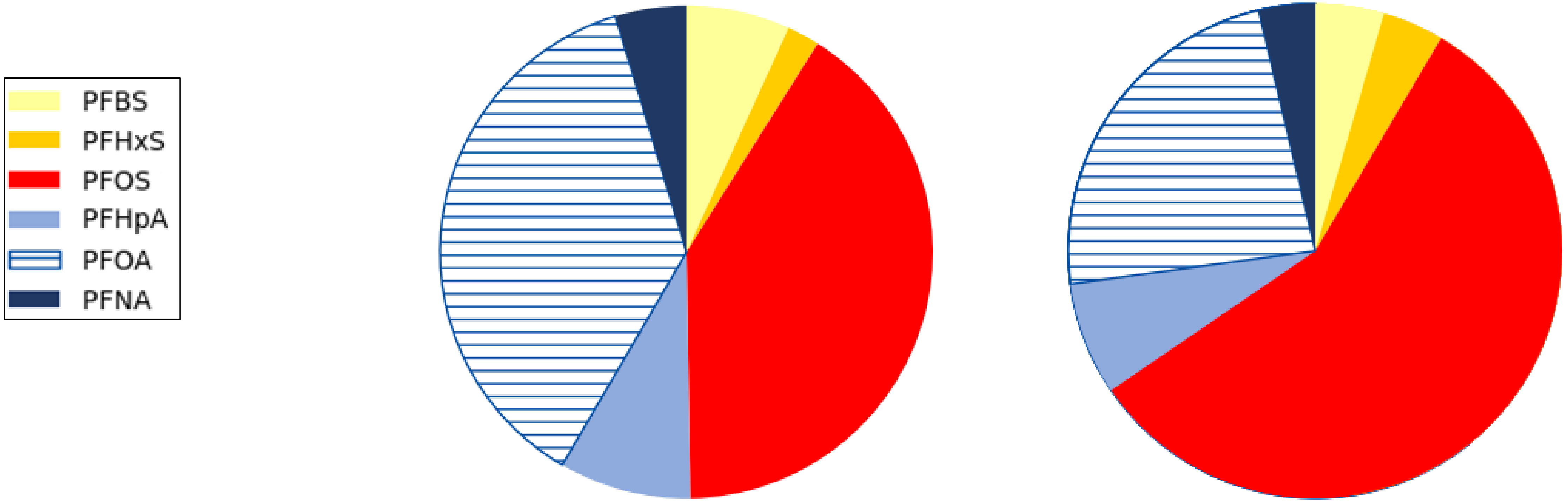


Results and Discussion

PFAS Concentrations: Overburden GW vs. Bedrock Private Water Supply Wells

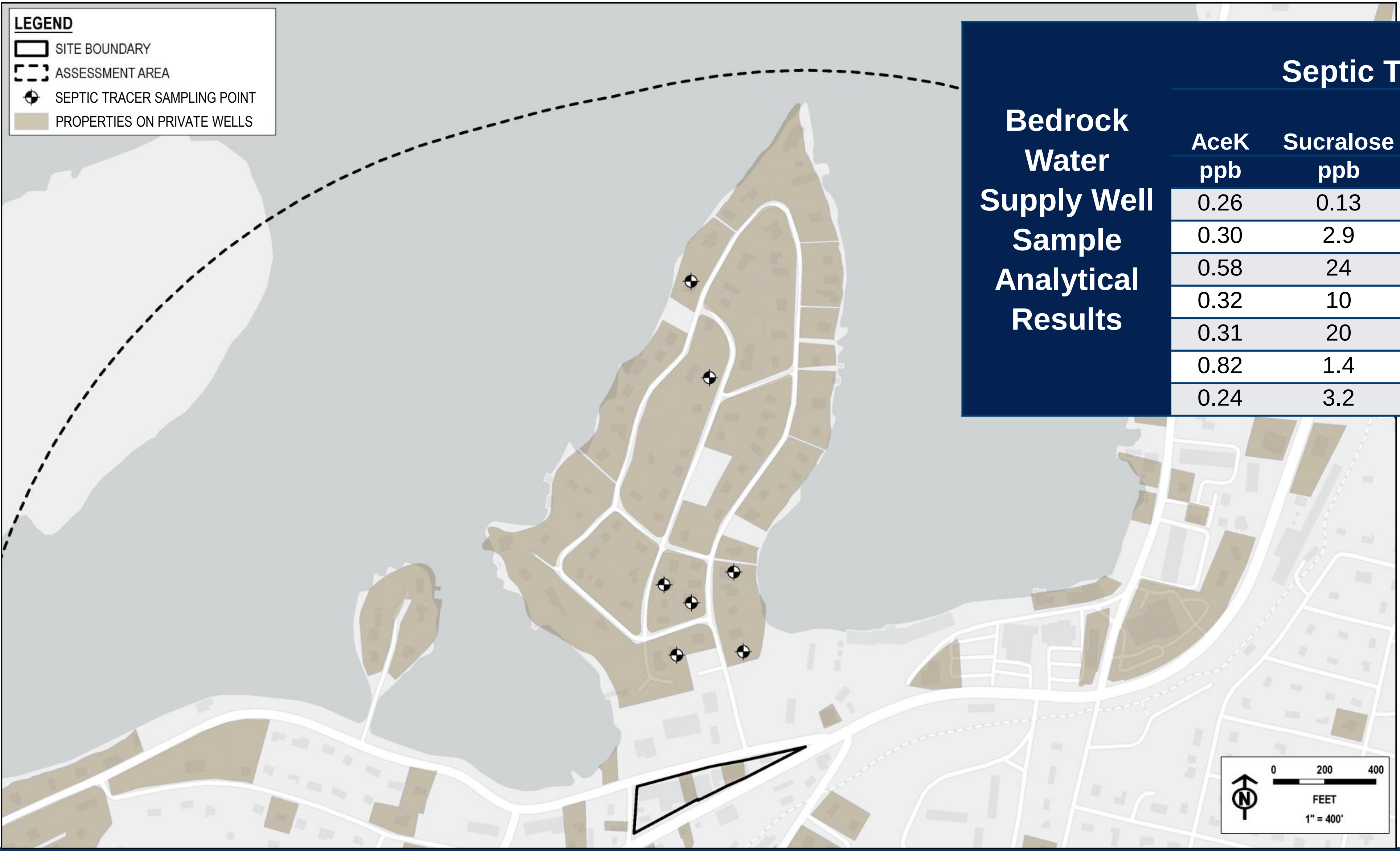
“Location 2” Residential Property
PFOS Concentration Among Highest in Assessment Area

Location Sampled:	Overburden (property perimeter)	Private Well
Total PFAS Concentration:	102.9 ppt	149.2 ppt



Results and Discussion

Septic Tracer Analytical Results



Bedrock Water Supply Well Sample Analytical Results

Septic Tracers				PFAS	
AceK ppb	Sucralose ppb	Nitrite ppm	Nitrate ppm	PFOA ppt	PFOS ppt
0.26	0.13	<0.040	3.67	46	14
0.30	2.9	<0.010	6.13	21	22
0.58	24	<0.040	19.5	35	85
0.32	10	<0.020	15.3	23	32
0.31	20	0.013	12.8	20	29
0.82	1.4	<0.010	2.81	25	37
0.24	3.2	<0.004	3.67	25	11

- Septic tracers and PFAS detected in every sampled location.
- Data confirms pathway in every instance.

Results and Discussion

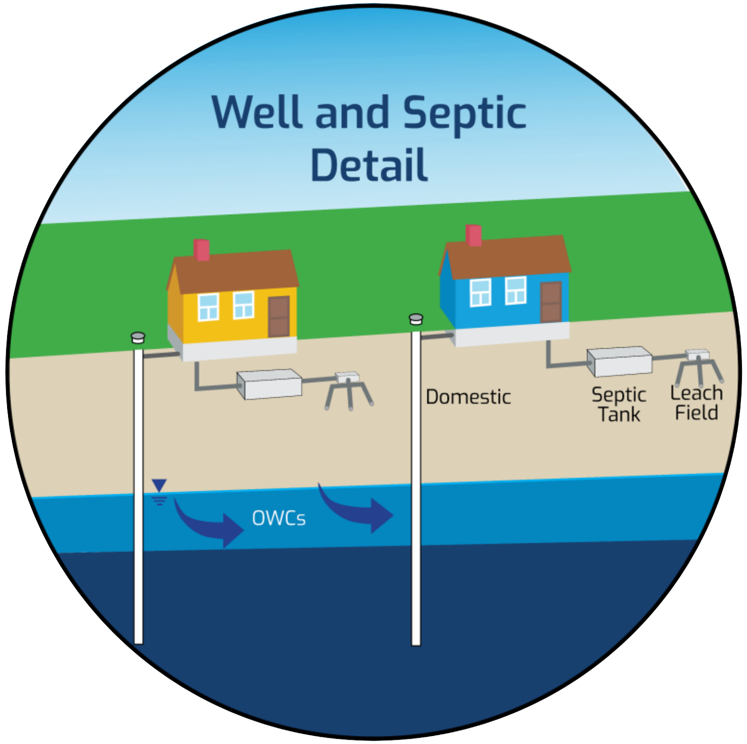
Septic Tracer Analytical Results

- **Investigation Location 2:** Septic tracers and PFAS detected in overburden and bedrock water supply.

Investigation Location 2	Units	Private Well	Overburden Groundwater	
AceK	ppb	0.58	0.25	0.35
Sucralose	ppb	24	2.2	6
Nitrite	ppm	<0.04	Not Tested	
Nitrate	ppm	19.5		
PFOA	ppt	35	38	42
PFOS	ppt	85	42	61

Summary of Findings

1. PFAS concentrations throughout Assessment Area generally uniform (i.e., no PRP).
2. PFAS in overburden groundwater near septic system leach fields.
3. PFAS signatures similar in the overburden groundwater and bedrock water supply.
4. Septic tracers detected in every sampled location, confirming a pathway in every instance.
5. Strong similarities among PFAS signatures for WWTP Discharge Point and overburden groundwater and private water supply well samples.

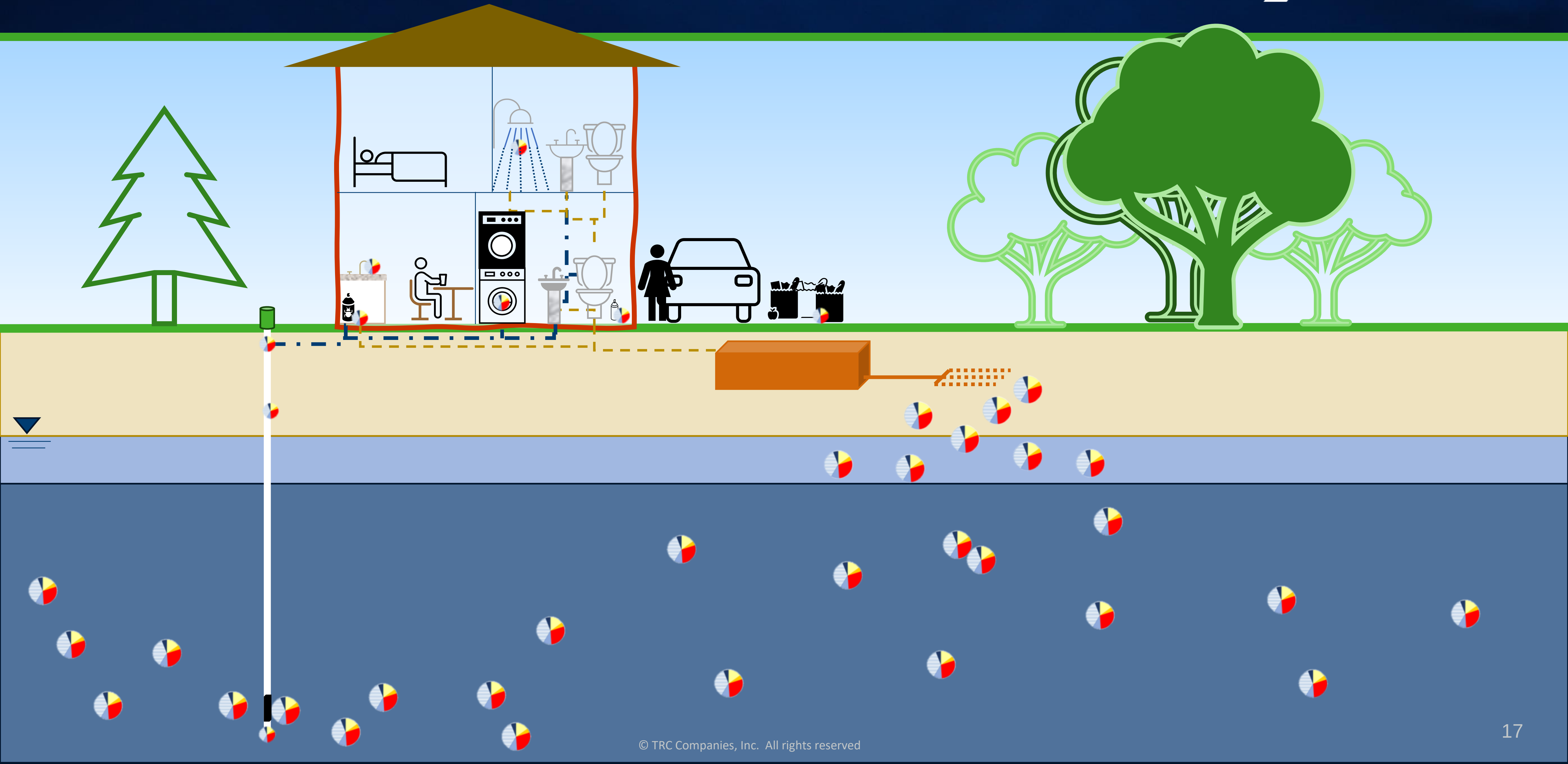


OWCs *– Organic Wastewater Compounds*

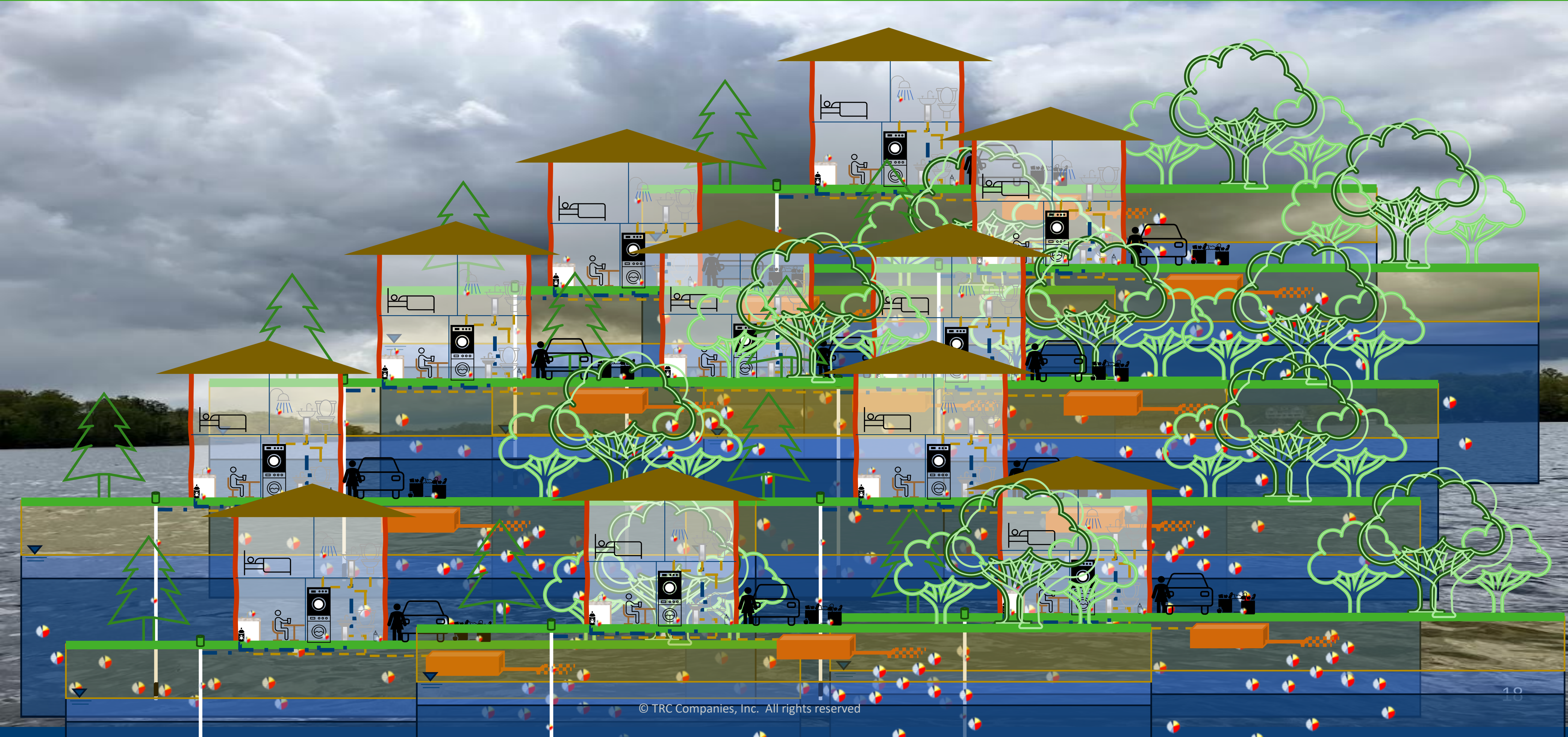
Conclusions

- ✓ Narrow overburden thickness and a vertical downward groundwater gradient facilitate the vertical migration of PFAS from overburden groundwater to the bedrock groundwater/private water supply.
- ✓ Pumping of PFAS-impacted groundwater from private water supply wells and discharge to shallow septic systems results in vertical mixing or homogenization of the PFAS signatures in the assessment area.
- ✓ **Nearby industry is not the source** of widespread PFAS contamination in bedrock drinking water supply aquifer.

Conceptual Site Model



Conceptual Site Model



Take Aways

- **An industrial point source(s) or release(s) is not always responsible for PFAS contamination in the bedrock drinking water supply aquifer.**

- **With area-specific information on the physical setting** (depths to groundwater and bedrock, and groundwater flow direction) **and infrastructure** (wells, septic systems, etc.)**, you may be able to avoid costly investigations searching for a point source.**

- **In settings with shallow groundwater and bedrock, a vertical downward groundwater gradient, and private wells and septic systems, this Conceptual Site Model will most likely frequently apply.**

THANK YOU

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False Advertising Injury Claims

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Red Bull does not give you wings

- Rise of class class action lawsuits alleging a companies' marketing is false or misleading due to the presence of PFAS

- Typically based on consumer state consumer protection statutes, breach of warranty, negligence, and/or fraud claims

- False advertising claims – food and beverage, beauty and cosmetics, personal care and hygiene, dental products, household goods, baby and infant products, and textiles

Potential Defendants

Buzzword Marketing

Companies advertising products made with “all natural ingredients” or other buzzwords are potential targets

Allegations that the advertising deceives consumers because the product contained PFAs

Safety Statement Marketing

Companies advertising their products as “free from harmful chemicals” might be vulnerable to lawsuits on the tenuous theory that the prevalence of PFAs means you cannot make such a claim.

Innocuous Marketing

Yankee Candle sued based on statements such as “We take great pride in making them using only the finest quality ingredients and materials”

Plaintiffs alleged deception based on organic fluorine presence in candles

Hold the PFAs, please

Richburg v. ConAgra Brands

- Plaintiffs sued Orville Redenbacher under fraud and deceptive practice statutes in Illinois, New York, and Florida

- Plaintiffs alleged that manufacturers use PFAs to treat food contact materials, such as wrappers and packaging, because it increases their water and grease resistance, in addition to enhancing their non-stick properties. They cited studies that "have confirmed that PFAs [in food contact materials] migrates to food, where it is then ingested by consumers."

Richburg Arguments

Plaintiffs' Allegations

- Plaintiffs alleged Redenbacher's marketing and labeling strategies were deceitful because it utilized misleading representations to aggressively and strategically "convince consumers that the Products are free of unnatural or artificial ingredients."

- For example, defendant labels its Redenbacher products as containing "only real ingredients" and "100% ingredients from natural sources," when instead they allegedly contain harmful PFAS levels.
- Plaintiffs made did not claim physical injuries, only economic injuries

Defense Position

- Defendant put forward an FDA document authorizing the use of PFAs in specific food application including microwave popcorn bags

- Lack of standing

- Failure to state a claim

- Testing issues

Richburg Decision

- Court found it implausible that reasonable consumers would consider migratory PFAs to be ingredients specifically citing the FDA exemption.

- Court did not address standing or the testing arguments.

- *Richburg v. ConAgra Brands, Inc.*, No. 22-CV-2420, 2023 U.S. Dist. Lexis 21137 (N.D. Ill. Feb. 8, 2023)

Are these claims covered?

- The lack of bodily injury allegations in most false advertising cases might provide a basis for exclusion.
- Did the injury arise out of a product failing to do what the company advertised it would do? If so, it might be excluded.
- Likely to depend on the nature of the allegations.
- *Tzumi Innovations LCC v. Twin City Fire Ins., Co.* court found Tzumi's policy did not cover the PFAs suit because there no allegations that the advertising disparaged another company's proudcts.

THANK YOU

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