Environmental Obligations, Sustainability, PFAS, and Environmental Liability

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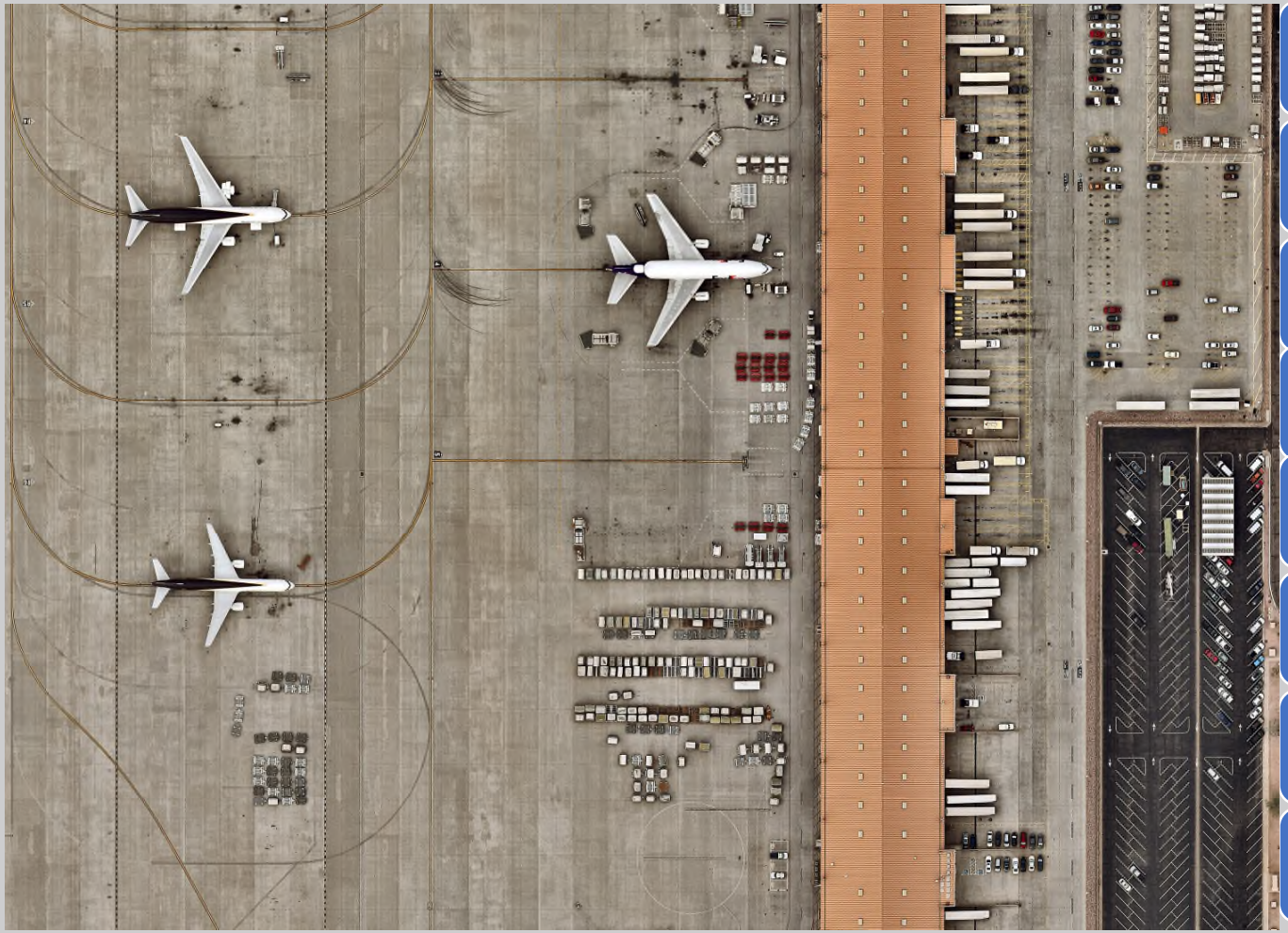
Session agenda

Environmental Impacts & Obligations

PFAS Primer

Reducing Environmental Liability & Cost Recovery

Overall airport impacts



- Operation of aircraft
- Operation of airport vehicles, passenger vehicles, and airport ground service equipment
- Cleaning and maintenance of aircraft, vehicles, and facilities
- Deicing and anti-icing aircraft and airfields
- Fueling and fuel storage
- Airport facility operations and maintenance
- Construction and expansion of facilities
- Use of fire-fighting foams containing PFAS

Water quality impacts

- Many airports located near waterways
- Biggest concerns
  - Construction
  - Anti-icing/deicing
  - Leaks/spills
  - PFAS

Image: San Francisco Chronicle

Water quality obligations

- Multiple federal regulatory schemes implicated
  - Clean Water Act § 402 – NPDES permits for point source regulation
  - Clean Water Act § 404 – required for dredging/filling any jurisdictional waters or wetlands
  - Clean Water Act § 311 – mandates spill response plans for oil spills
  - Safe Drinking Water Act – federal agencies are prohibited from funding actions that would contaminate a sole source aquifer or recharge area
- Applicable stormwater regulations (state/local) will require stormwater Best Management Practices (BMPs)
- May be state-specific PFAS requirements (more on this below)

Air quality impacts

- Airports can have significant air quality impacts
  - Aircraft emissions
  - Airport emissions (motor vehicles, ground service equipment, stationary sources like boilers and generators)
- Aircraft emissions and airport emissions are subject to different regulatory regimes
- Can have especially harmful impacts if populated areas are adjacent/downwind
- Pollutants of greatest concern:
  - gases (VOCs, CO, CO_2, NO, NO_2,)
  - particulates (black carbon, particle-bound aromatic hydrocarbons, $PM_{2.5}$)

Image: Getty Images

Air quality obligations

Have all existing air emissions sources been identified, and current and max potential emissions quantified?

Do all existing sources have necessary state/federal permits?

When new equipment is planned or existing equipment is to be modified, are air permitting requirements evaluated and permit applications filed?

Is construction started only after necessary permits are in hand?

Are permits readily available at facility?

Are facility personnel familiar with conditions in all permits? Is compliance with those permits checked and compliance recorded and reported if required?

Does airport have current copies of all state, local, federal air regulations?

Has the airport established a system to identify rule changes?

Have the state rules been examined to identify all requirements that apply to the airport?

Is a system in place to check compliance with those rules?

To the extent emissions levels, control system failures, and accidental releases are reportable under state rules, are those reporting requirements met?

Hazardous materials impacts and obligations

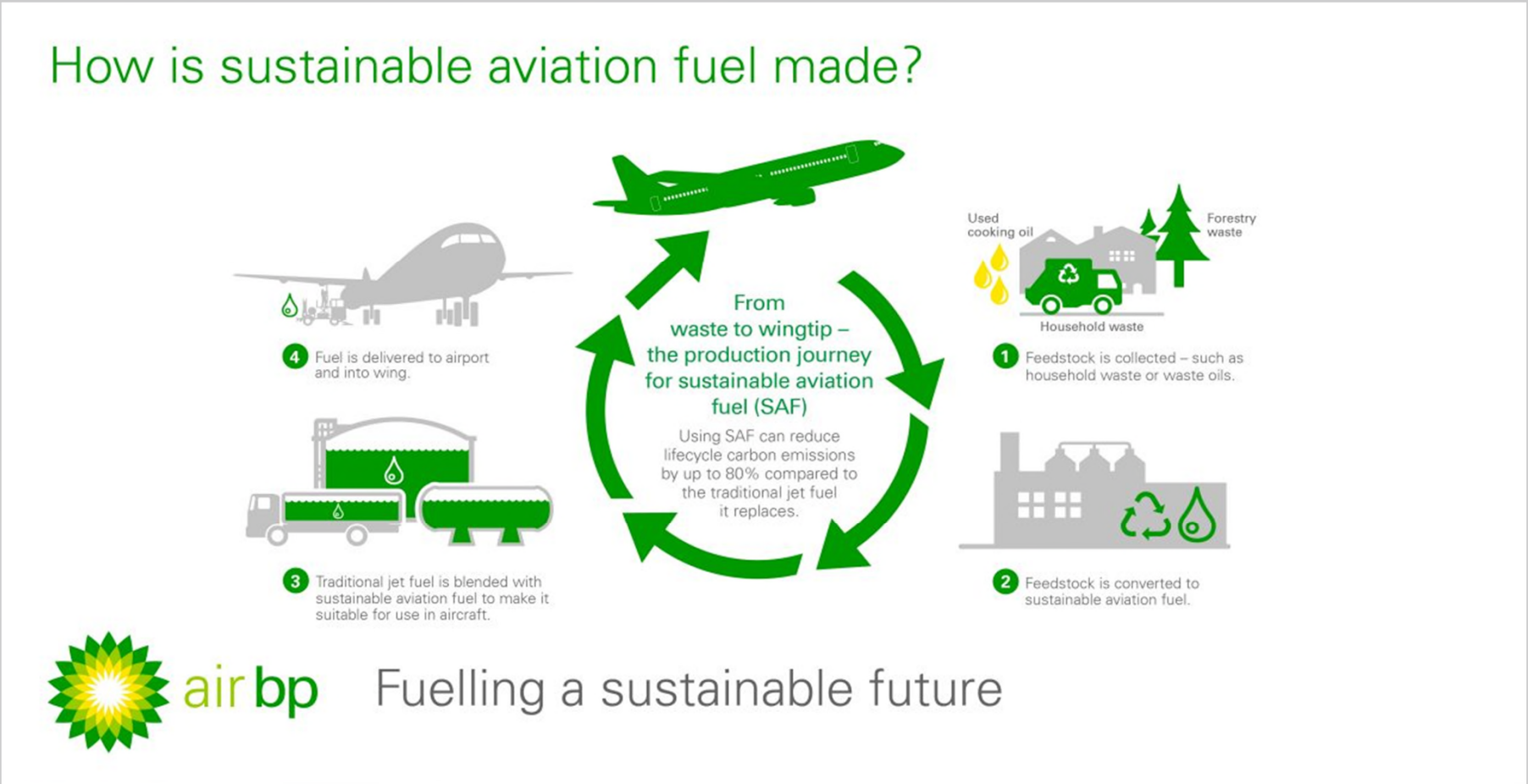
- Airports are large industrial operations that store and use significant amounts of industrial chemicals
- Handle, store, and use hazardous materials in accordance with federal, state, and local regulations
  - *Occupational Safety and Health Act* (OSHA): worker and material safety requirements
  - *Resource Conservation and Recovery Act* (RCRA): appropriate classification and disposal of solid & hazardous wastes
  - *Clean Water Act* (CWA): proper handling of wastewater, including spill/leak containment
  - *Hazardous Materials Regulations* (HMR): governs transport of hazardous materials in commerce

Image: Shutterstock

Overall environmental management

Who Is responsible	Environmental provisions in contracts	Integrate environmental issues into management	Educate, train, and communicate
Know who is responsible for environmental compliance in each area of airport (airport operator, tenant, military, etc.)	Properly negotiate environmental provisions in airport leases and other contracts	Consider drafting environmental policies/procedures as part of the airport rules and regulations; consider environmental issues in airport planning	Educate staff about reporting obligations and other procedures; ensure proper training; communicate as needed with stakeholders (in coordination with counsel)

Sustainable aviation fuel (SAF)



- What is SAF?
- SAF Grand Challenge
- Inflation Reduction Act programs
  - SAF tax credit
  - SAF competitive grant program

Image: BP

Reducing airport GHG emissions

Category of GHG Emissions	Sample Mitigation Strategies
Airport Operator Emissions	
Power plant, generating electricity and heat/cooling	Modernize power/heating plants, generate or purchase energy from renewable sources (solar, wind, etc.)
Airport fleet vehicles, incl. transfer buses and site machinery	Fleet modernization and use of alternative fuels, hybrid, electric
Building energy use – lighting, HVAC, machinery	Energy efficient buildings, lighting, operations
Aircraft Emissions	
Engine emissions during landing, takeoff, taxiing and cruise	Efficient taxiway and airport layout, single-engine taxiing, aircraft towing, departure and arrival management to maximize gate availability
Aux. power unit emissions	Provide fixed electrical ground power
Other Emissions	
Ground support, ground handling equipment	Use of electric aircraft tug vehicles and electric baggage tractors
Off-site ground access vehicles, trains	Coordinate with public transit and hotel/car rental shuttles for fleet modernization and use of alternative fuels

PFAS: what you need to know now

Image: iStock

- What are PFAS?
- Why are they a special concern for airport operators?
- Where are PFAS at airports?
- What regulatory developments have occurred and how might they impact airport operators?
- What should my airport be doing?
- NEXT: how can my airport recover PFAS cleanup costs?

What Are PFAS?

Stain- & water-resistance treatments

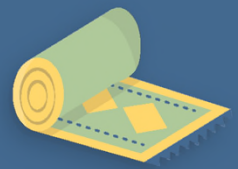
Nonstick cookware

Waterproof apparel

Cleaning products

Firefighting foam

Takeout containers



Carpets & textiles

Image: Washington State Department of Ecology

Aqueous Film-Forming Foam (AFFF)

Image: Fluid Equipment

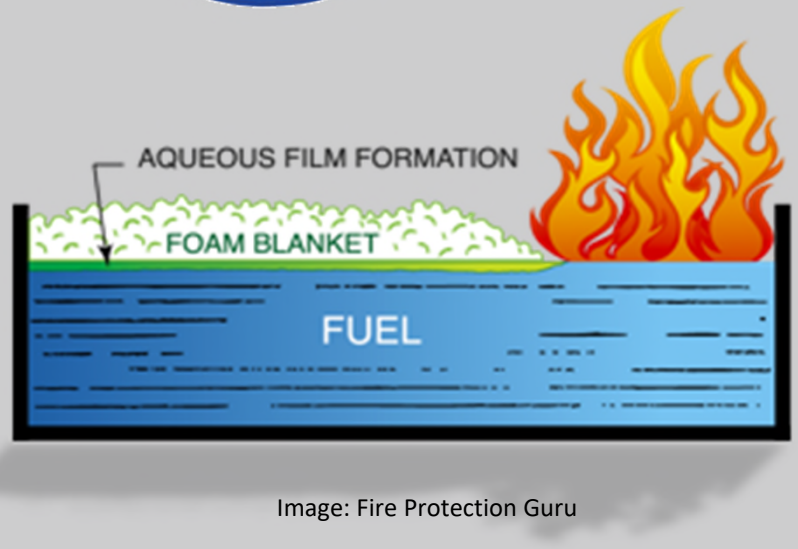


Image: Fire Protection Guru

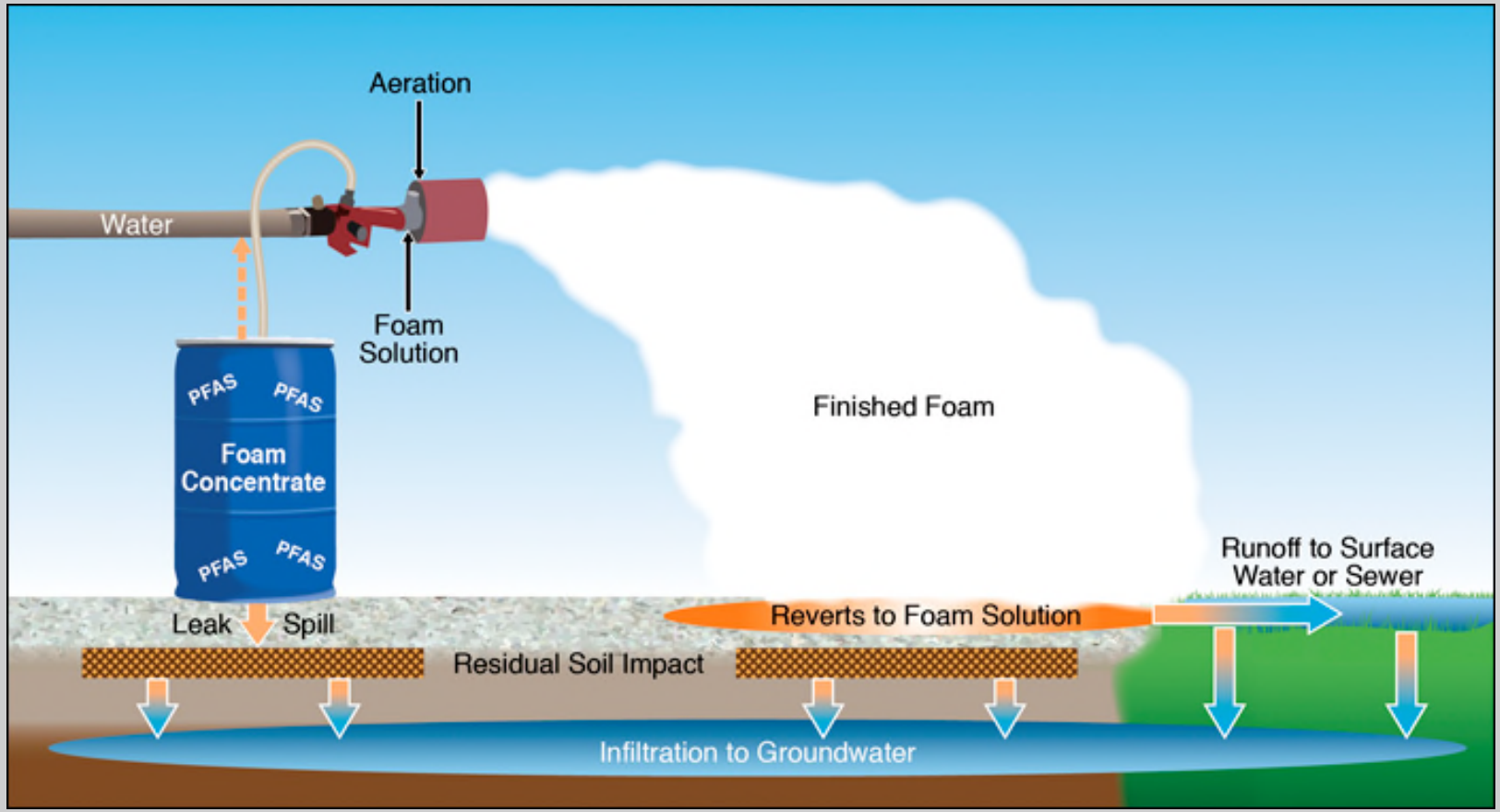


Image: Interstate Technology Regulatory Council

PFAS at airports

Image: Golder WSP

PFAS federal regulatory developments

CERCLA/Superfund

Proposed Rule issued to designate PFOA & PFOA as CERCLA hazardous substances

(proposed rule Aug. 26, 2022)

Safe Drinking Water Act

Proposed rule to set Maximum Contaminate Level for PFOA & PFOS nationwide

(proposed rule expected 2022)

Clean Water Act

EPA intends to use NPDES permit program to require PFAS BMPs, monitoring, and notification

(expected 2022)

Preventing PFAS Runoff At Airports Act

Funding for commercial airports to acquire equipment for testing ARFF without discharging PFAS

(passed Congress Sept. 29, 2022)

Fluorine Free Foam

DOD to issue MILSPEC that allows for FFF; FAA to apply same standard

(By or before Jan. 31, 2023)

State regulation of PFAS

- State regulations differ by
  - PFAS covered
  - Binding or not
  - Regulatory level
  - Media covered (water, soil)
- ~ 15 states have emergency rulemaking powers that can be invoked in a PFAS contamination event or if PFAS are designated as hazardous.
- Great resources:
  - ITRC PFAS Water & Soil Values
  - Integral-Corp maps

PFAS Regulatory Criteria – Drinking Water, Groundwater, and Surface Water

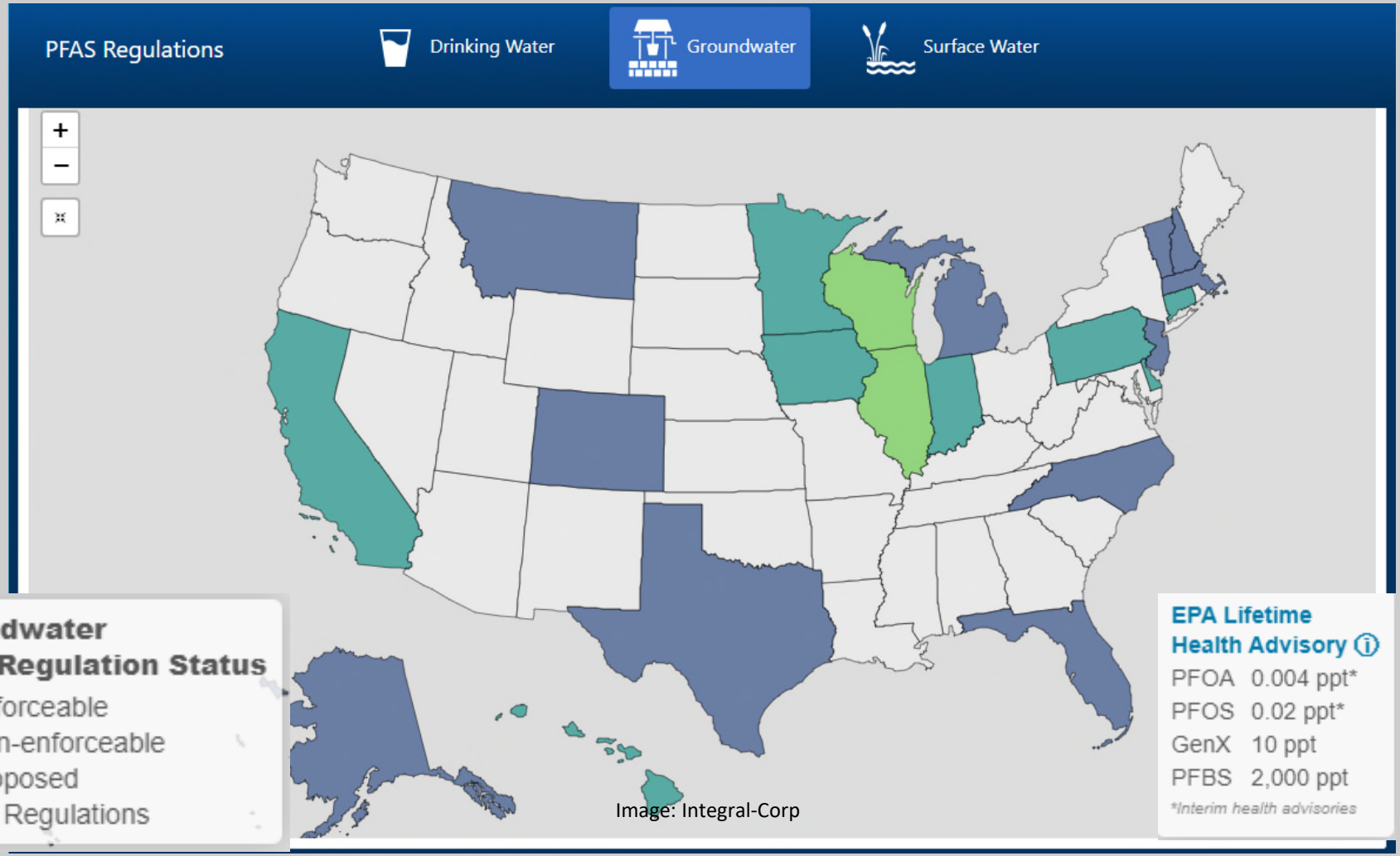


Image: Integral-Corp

PFAS take-aways

Where Are We?

- Many airports have likely had PFAS releases from AFFF, releases which:
  - may have caused groundwater and soil contamination onsite
  - may have migrated to off-site areas and caused impacts on other properties, to drinking water sources, or to landfills (leachate and/or groundwater)
- Impending federal regulations could impact airport operators by:
  - imposing soil/water/other testing, notification, cleanup standards
  - requiring soil and groundwater remediation onsite
  - requiring special handling and disposal of PFAS-impacted materials
- It is uncertain that there will be carveouts for airports or funding.

What's Next?

- Airport operators need a strategy for:
  - Reducing PFAS liability
  - Recovering PFAS-related cleanup costs
- Many elements of such a strategy apply beyond PFAS, to other environmental issues or other emerging contaminants

How to limit PFAS liability

General

- Do not admit liability and reserve rights
- Know and abide by current regulations
- Understand airport tenant operations
- Consider PFAS in planning/development

Releases

- Minimize future releases to greatest extent possible
- Work to understand historical releases (proper documentation to distinguish sources)

Remediation

- Maximize ability to recover remediation costs in future under CERCLA by complying with the National Contingency Plan

Publicly

- Develop a response team (legal, technical, and PR)
- Disclose potential PFAS liability risk in Official Statements
- Be responsive and respectful with regulators

PFAS cost recovery options

- Statutory
  - Federal
    - CERCLA
    - RCRA
  - State
- Common Law
- Insurance
- Grants
- Note: this cost recovery discussion focuses on PFAS, but many of these principles may apply more broadly

CERCLA/Superfund

- Who is potentially liable for cleanup costs under CERCLA?
  - Airport operator (as owner or operator of a facility or generator)
  - Current and past tenants (current “owner” or operator of a facility or at time of the release or a “generator” of hazardous substances)
  - Transporters
- Liability is
  - Strict (without fault)
  - Retroactive
  - Joint and Several (generally)

Image: EPA

CERCLA: basics of cost recovery/contribution claims

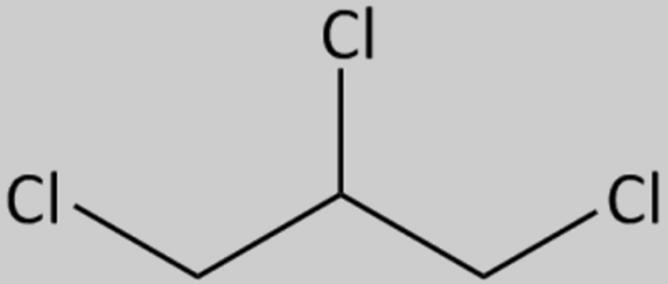
- EPA can order PRPs to complete investigations and perform response actions
- An airport operator can lead its own response action and seek cost recovery from others
- Types of claims:
  - **Cost Recovery**
  - **Contribution**
  - **Declaratory Judgment (liability for future response costs)**
- Defenses are very limited
- Court may allocate among PRPs using equitable factors

Commonly used allocation factors (the "Gore Factors")

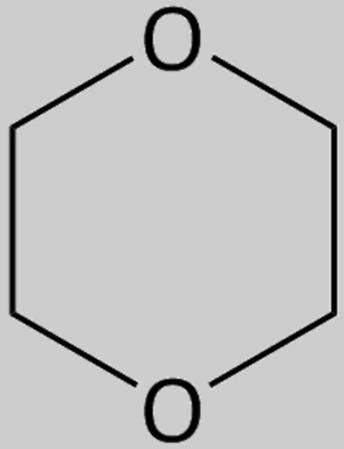
- Degree of care
- Degree of cooperation with government
- Distinguishable contribution to whole
- Volume of waste
- Toxicity
- Degree of involvement with the waste

Lessons learned from other emerging contaminants

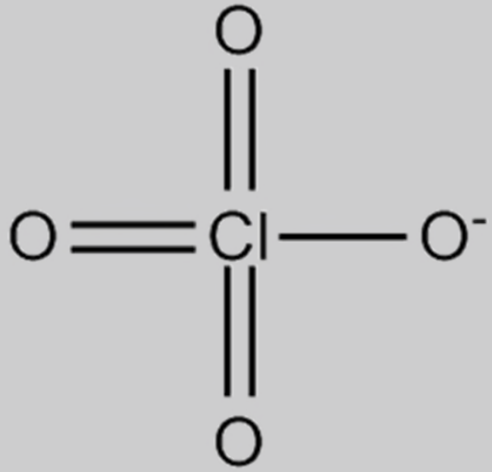
- **Testing challenges**: new approaches develop rapidly and chemicals show up in new places so that older testing may not stay valid long, complicating cost recovery efforts
- **Costs of remediation**: can be very expensive to treat/manage waste, which increases imperative for cost recovery strategy but also increases risks
- **Public perception of risk**: uncertainties over actual risk can lead to demands for extreme measures, which can complicate cost recovery



1,2,3-TCP



1,4-Dioxane



Perchlorate

Images: California Office of Environmental Health Hazard Assessment

Key considerations (CERCLA)

- If you want to recover your response costs under CERCLA, you need to follow procedures as you move forward with the investigation and cleanup (e.g., the National Contingency Plan (NCP))
- Take care: you are a PRP. Avoid making the problem worse!
- Remember importance of retaining & deploying a multi-disciplinary team with legal, technical, communications expertise
- Strategic considerations

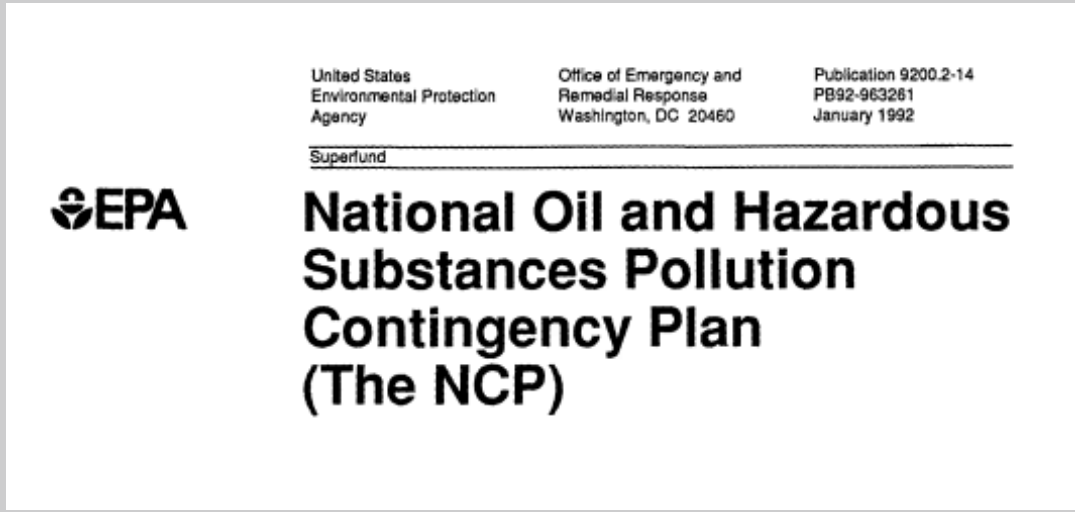

United States Environmental Protection Agency
Office of Emergency and Remedial Response Washington, DC 20460
Publication 9200.2-14 PB92-963261 January 1992
Superfund
EPA
National Oil and Hazardous Substances Pollution Contingency Plan (The NCP)

Image: EPA

Resource Conservation and Recovery Act (RCRA)

- Enacted in 1976 and governs generation and management of solid and hazardous waste from “cradle to grave”
  - Regulates disposal of solid and hazardous wastes
  - All PFAS are solid wastes, even if not listed as CERCLA hazardous substances
- RCRA 7002(a)(1)(B) Citizen Suits
  - Who can you sue?
    - Those who generated the waste
    - Those who transported or disposed of waste
    - Those who caused or contributed to endangerment
  - Must show **imminent and substantial endangerment** to human health or the environment
- How different than CERCLA?
  - Covers both hazardous waste and **solid waste**
  - Relief: injunctive relief and attorney fees, but not costs

Image: Brent Industries

State Superfund programs

Authority/Provision	Number of States
Authorized clean-up funds	47, Puerto Rico
Enforcement authority	50, D.C., Puerto Rico
Priority List	29
Citizen Suits	21
Property Transfers	33
Voluntary Clean-up Programs	49 (incl. D.C.)
Brownfields	30 (incl. D.C.)
Long-term Stewardship	26

- All states have Superfund programs of some type
- Examples of states that list PFOA/PFOS as a Hazardous Substance:
  - ME, NJ, PA, WI, VT

Common law causes of action

Torts

- Negligence
- Trespass
- Nuisance

Products Liability

- Design defect
- Failure to work
- Strict Liability
- Ex: AFFF MDL (D. S.C.)

- Plaintiffs should consider:
  - What's the standard of care?
  - What's the statute of limitations?
  - What recovery is available?
    - Past costs
    - Future costs
    - Attorneys' fees

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: AQUEOUS FILM-FORMING FOAMS
PRODUCTS LIABILITY LITIGATION

MDL No. 2873

Image: Joint Panel On Multi-District Litigation

- 2,500+ products liability cases against PFAS manufacturers for harms due to PFAS released in use of AFFF
- Cases consolidated in D.S.C. 2018
- Defendants: primary manufacturers of PFAS
- Plaintiffs: states, counties, cities, water utilities, some airport operators
- Claims: failure to warn, defective design, nuisance
- Status: in discovery with bellwether trials being chosen
  - *Stuart (FL) v. 3M, et al*. in 2023
- Importance:
  - Decisions will have a huge impact on future PFAS litigation
    - Government contractor defense
    - Level of knowledge of harms
    - Evidentiary standards

Funding source: historic insurance policies

- Older CGL policies can be valuable resources
  - Before 1970s, CGL policies did not exclude pollution
  - 1970s to 1986, CGL policies tended to cover sudden and accidental pollution
  - Post 1986, CGL policies generally contained an absolute pollution exclusion
  - Generally, these are occurrence-based policies
- Newer environmental policies may provide coverage for emerging contaminants, like PFAS
- Who can help?
  - Risk managers
  - Consultants/insurance archeologists

Grant funding

- CA Prop 1 Groundwater Grant Program
  - Planning and Implementation Funding
  - Prevention and clean-up
  - $800 million in funds

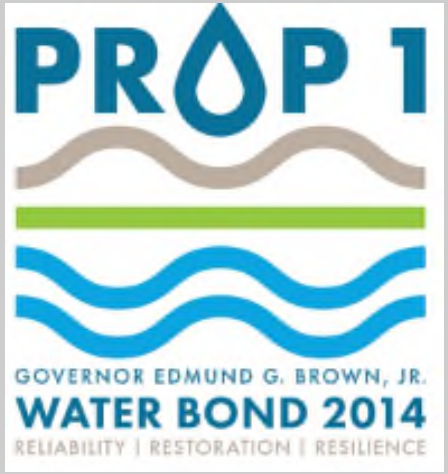


Image: California Department of Water Resources

- Minneapolis Contamination Cleanup and Investigation Grant Program
  - Assessing and cleaning up redevelopment sites
  - Public and private
  - Up to 75% of costs

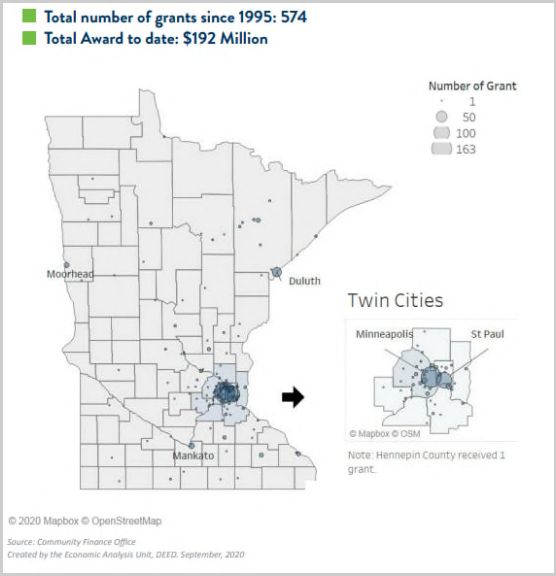


Image: Minnesota Legislative Reference Library

Conclusion

Airport operators today must be **sophisticated environmental managers**

- Ensure run-of-the-mill environmental compliance (air, water, waste)
- Track emerging issues and comply with new obligations (GHG reduction, climate resiliency, PFAS)
- Develop strategies to reduce new legal and financial risks, like cost recovery to mitigate financial risk of PFAS regulation under CERCLA

QUESTIONS?

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