

A close-up photograph of a white marble column and its base, showing the fluted shaft and the tiered capital. The image is partially cut off by a white curved line that separates it from the text area.

Legal Updates For Pretreatment Programs

Wilmington, NC

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Disclaimer

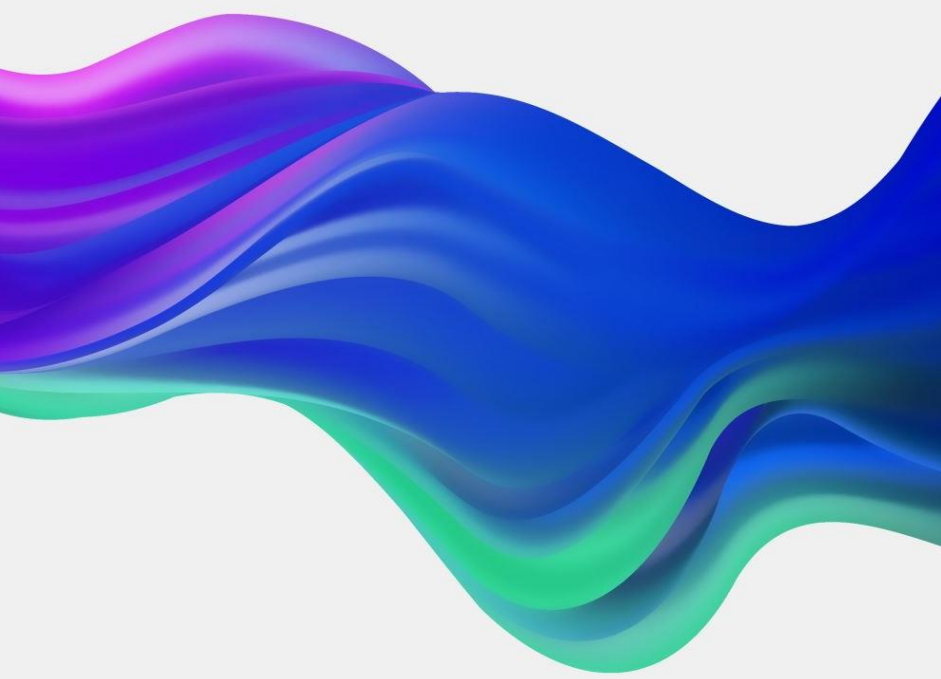
This presentation is not providing legal advice.

Consult with your local counsel on pretreatment issues.

Agenda

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- Pretreatment Fines & Penalties
- Minimizing PFAS & Emerging Contaminants
- Questions?

A decorative graphic on the left side of the slide, featuring a series of overlapping, wavy bands in shades of purple, blue, and green, creating a sense of motion and depth.

Pretreatment Fines & Penalties

Pretreatment Fines

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- ▣ What to do with punitive pretreatment fines?
- ▣ How to calculate?
- ▣ Who to send it to?
- ▣ When to send it?

N.C. Constitution art. IX § 7

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(a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, & other property belonging to a county school fund, & **the clear proceeds of all penalties and forfeitures & of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to & remain in the several counties, & shall be faithfully appropriated & used exclusively for maintaining free public schools.**

N.C. Constitution art. IX § 7

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(b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures, & fines which are **collected by State agencies** & which belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools.

N.C. Constitution art. IX § 7

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(a) Transfer clear proceeds of

- ▣ Penalties, fines, and forfeitures
- ▣ Collected in the counties
- ▣ For any breach of the penal laws of the state

To the county to be appropriated to public schools

(b) General Assembly can transfer

- ▣ Clear proceeds of penalties, fines, and forfeitures collected by State agencies that belong to the public schools under (a)
- ▣ to a State General Fund
- ▣ for the General Assembly to then appropriate to counties to maintain public schools on a per pupil basis

N.C. Constitution art. IX § 7

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How do we know if pretreatment fines are captured under art. IX?

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Penalties, fines, & forfeitures

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- **Covered** under N.C. Constitution art. IX section 7
 - ▣ **Punitive** fines and penalties

- **Not Covered** under N.C. Constitution art. IX section 7
 - ▣ a remedial penalty imposed based on the **replacement costs** of a good or service or the costs **associated with making a good or service available** in the future

Penalties, fines, & forfeitures

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In Pretreatment Context

- Fines & penalties against an individual for violating the SUO are **punitive** fines and penalties
 - ▣ Charges imposed to punish or deter conduct

- **Surcharges** to individuals in response to higher treatment costs or related to making treatment available **are not punitive**
 - ▣ Charges related to higher operating or treatment costs

N.C. Constitution art. IX § 7

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To the county to be appropriated to public schools

Breach Penal Law of the State

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- Two ways pretreatment fines could be breaches of the penal laws of the state:
 - ▣ Implementing a state mandate
 - ▣ The local ordinance is criminally enforceable

State Mandates

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- Civil penalties resulting from ordinances implementing a state mandate are “penal laws of the State”
 - ▣ N.C. Ct. Appeals: “a local ordinance, which is enacted pursuant to authority delegated by the state and the [EMC] and passed to enforce state-mandated air quality standards is such a law.”
 - ▣ Fines collected by local air quality authority were “penal laws of the State” as the State conferred power to impose fine

SUOs Part of State Mandate

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- Sewer Use Ordinances and Pretreatment Programs implement a state mandate
 - ▣ Like local air quality authority, a pretreatment program's authority to impose fine stems from & enforces state mandate
 - ▣ NC DEQ retains authority to enforce “pretreatment permits issued by local governments”

Breach Penal Law of the State

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- Two ways pretreatment fines could be breaches of the penal laws of the state:
 - ▣ Implementing a state mandate
 - ▣ The local ordinance is criminally enforceable

Criminal Penalties

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- Civil/criminal fines and penalties for violations of local ordinances that may impose criminal penalties are “penal laws of the State”
- N.C. Gen. Stat. § 143-215.6B allows DEQ to impose criminal penalties for violations of the terms of “pretreatment permits issued by local governments” & a SUO may allow criminal charges

N.C. Constitution art. IX § 7

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- ▣ Punitive Penalties, fines, and forfeitures
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To the county to be appropriated to public schools

(b) General Assembly can transfer

- ▣ Clear proceeds of penalties, fines, and forfeitures collected by State agencies that belong to the public schools
- ▣ to a State General Fund -Civil Penalty & Forfeiture Fund
- ▣ for the General Assembly to then appropriate to county schools on a per pupil basis

“Clear Proceeds”

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- N.C.G.S. § 115C-437: to county schools
 - ▣ Penalties and/or fines less the actual costs of collection, not to exceed ten percent (10%) of the amount collected...

- N.C.G.A. § 115C-457.2: to State General Fund
 - ▣ Penalties and/or fines less the actual costs of collection, not to exceed twenty percent (20%) of the amount collected.

“Clear Proceeds” Formula

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Statute:

- ▣ Clear Proceeds = fine - “actual costs of collection”
 - “Actual costs of collection” = the amount spent to collect
 - no more than 10% of fine sent to **county finance officer**
 - no more than 20% of fine sent to **OSBM**

Constitutional “Clear Proceeds”

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- **Constit. distinction between collection & enforcement**
 - **Enforcement Costs:**
 - Costs of locating & prosecuting violators
 - Substantial discretion
 - Exercising independent judgment to detect violations & decide whether & how to investigate & punish it
 - **Collection Costs:**
 - The administrative and executory costs
 - Less discretion & more passive and indirect
 - a person gathering a penalty is given discrete tasks directed towards a discrete goal

Red Lights in Greenville

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- ❑ *Fearrington v. City of Greenville* (N.C. 2024): Collection costs are deductible, enforcement costs are not
- ❑ Enforcement & Prosecution
- ❑ Collection



“Clear Proceeds” in Pretreatment

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- Collection costs can be offset (up to allowable %),
enforcement costs cannot
 - ▣ Enforcement: Costs associated with sampling and assessing the penalty/fine
 - ▣ Collection: Costs associated with gathering the penalty/fine
- Practical Approach
 - ▣ Do not seek to recoup “actual cost of collection”
 - Juice not worth the squeeze
 - Except where collection costs exceed a pre-determined threshold

Destination for “Clear Proceeds”

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(a) Transfer clear proceeds of

- ▣ Punitive Penalties, fines, and forfeitures
- ▣ Collected in the counties
- ▣ For any breach of the penal laws of the state

To the **county** to be appropriated to public schools

(b) General Assembly can transfer

- ▣ Clear proceeds of penalties, fines, and forfeitures collected by State agencies that belong to the public schools
- ▣ to a **State General Fund** - Civil Penalty & Forfeiture Fund
- ▣ for the General Assembly to then appropriate to county schools on a per pupil basis

Destination for “Clear Proceeds”

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- Where do YOU send your penalties/fines?
 - ▣ local school system financial officer or county finance officer
 - ▣ OSBM for Civil Penalty and Forfeiture Fund
 - ▣ Other?

Destination for “Clear Proceeds”

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- Two possible routes to discuss with local counsel
 - ▣ local school system financial officer or county finance officer
 - Cities?
 - ▣ OSBM for Civil Penalty and Forfeiture Fund
 - Legislature appropriates on a statewide per pupil basis to the counties

Consideration

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□ Uncertainty

- ▣ Pretreatment programs stand in the State's shoes?
- ▣ N.C. Ct. Appeals opinion....

Timing of Payment

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- You have **10 days** after the close of the calendar month in which the penalty/fine was received/collected to forward clear proceeds....

RECAP

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Pretreatment Fines/Penalties

- Punitive fines for breaching penal laws go to schools
- Send “clear proceeds” = Fine – (“actual cost of collection”)
- TO
 - ▣ County finance officer
 - ▣ OSBM
- W/I 10 days following month fines were received/
collected

PFAS & Emerging Contaminants

Overview

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- ❑ 1000s of known PFAS and likely others under development or not yet identified
 - ▣ Generally agreed the lower the concentrations, the better
- ❑ Other emerging contaminants like 1,4-Dioxane are also of increasing public discussion

CR'S GUIDE TO

Better, Safer Drinking Water

Many Americans still drink water with unhealthy levels of toxic chemicals, heavy metals, bacteria, and other contaminants. Here's how to test yours and clean it up.

EPA's MCLs

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- EPA has promulgated MCLs for PFOA, PFOS, PFHxS, HFPO-DA, and PFNA in drinking water

Compound	Final MCLG	Final MCL (enforceable levels)
PFOA	Zero	4.0 parts per trillion (ppt) (also expressed as ng/L)
PFOS	Zero	4.0 ppt
PFHxS	10 ppt	10 ppt
PFNA	10 ppt	10 ppt
HFPO-DA (commonly known as GenX Chemicals)	10 ppt	10 ppt
Mixtures containing two or more of PFHxS, PFNA, HFPO-DA, and PFBS	1 (unitless) Hazard Index	1 (unitless) Hazard Index

MCL Consequences

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- Appealed but not stayed
 - ▣ Asking Court for a stay early on is a high hill....

- 5-year implementation schedule
 - ▣ Compliance will be based on running annual average

- Why it matters to Pretreatment?
 - Discharges into or above public water supply waters
 - Minimize PFAS in biosolids

State Surface and Ground Water PFAS Criteria

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- DEQ pushing PFAS Surface & Ground Water Criteria
 - ▣ Would be THE most stringent PFAS criteria in U.S.
- PFOA:
 - 0.01 ppt (non-water supply)
 - 0.001 ppt (water supply)
- PFOS:
 - 0.06 ppt

State Surface and Ground Water PFAS Criteria

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Compliance with effluent limits using a two-tiered approach:

- Tier 1: Combined PFOA + PFOS $\geq$ 20 ppt – **you get effluent limits**
- Tier 2: Combined PFOA + PFOS $<$ 20 ppt – effluent limits deferred

Consequences of State Surface Water Criteria

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Impaired waters statewide?

Implications for:

- ▣ Existing dischargers
- ▣ Expanding dischargers
- ▣ New dischargers

Consequences (Con't)

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- Could end land application of biosolids
 - ▣ Biosolids have ppb levels of PFAS
 - ▣ Proposed instream criteria are ppt

EMC Trying to Slow DEQ's Roll....

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- EMC skeptical of the DEQ's proposed criteria
 - ▣ Water Quality Committee deferred SW request to November
 - Need more time to review Regulatory Impact Analysis
 - Assessing an alternative monitoring & source reduction rule
- ▣ EMC voted to allow DEQ to public notice GW criteria
 - PFOA, PFOS, & GenX (HFPO-DA)

DEQ IMACs

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- DEQ likely to adopt interim maximum allowable PFAS concentrations in October

<u>Substance</u>	<u>Acronym</u>	<u>CAS Number</u>	<u>Concentration (ng/L)</u>
Perfluorooctane sulfonic acid	PFOS	1763-23-1	0.7*
Perfluorooctanoic acid	PFOA	335-67-1	0.001*
Hexafluoropropylene oxide dimer acid	HFPO-DA (GenX)	13252-13-6	10
Perfluorobutane sulfonic acid	PFBS	375-73-5	2,000
Perfluorononanoic acid	PFNA	375-95-1	10
Perfluorohexane sulfonic acid	PFHxS	355-46-4	10
Perfluorobutanoic acid	PFBA	375-22-4	7,000
Perfluorohexanoic acid	PFHxA	307-24-4	4,000

* The proposed IMACs for PFOA and PFOS are below detection level or the Practical Quantitation Limit (PQL). A measurement at or above the current PQL of 4 ng/L for PFOA and PFOS as reported in EPA Test Method 1633 would constitute an exceedance of the proposed IMAC for that chemical.

Other Considerations

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- PFOS & PFOA listed as hazardous substances under CERCLA
- ▣ EPA enforcement discretion memo states it will not pursue POTWs
- ▣ Could still trigger liability for the clean up costs associated with releases of PFOS & PFOA in the future if third party seeks indemnification for clean up costs, so limiting exposure wise

Other Considerations

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- Also appealed but not stayed

- Practical Considerations
 - ▣ If retiring in 10 years, “no worries”

 - ▣ If retiring in more than 10 years → only the “hot spot” landfills, land application, or NPL sites will likely get you

Risks to Pretreatment Programs

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- Environment Nonprofits are increasingly interested in pretreatment programs to target SIU/IU discharges
- ▣ The SELC recently settled an action against a municipality in Georgia asserting that “the city allowed the unrestricted discharge of PFAS” into the POTW
- As to pretreatment minimization steps the City has agreed to take:
 - “If a city in the heart of the nation’s carpet industry can impose these commonsense measures, anyone can, and they should.”

“Measures”

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- Consent Decree changes to City’s pretreatment:
 - ▣ Information requests to IUs on PFAS use
 - ▣ Industrial Waste Surveys include questions about PFAS use, PFAS sampling results, & narratives of BMPs implemented to min PFAS
 - ▣ Sewer Use Ordinance Revisions to require the **disclosure of PFAS discharges to the public sewer** and the **development and prescription of PFAS pretreatment standards or BMPs** for all new & renewed permits

Risk to Pretreatment Programs

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- Required provisions in the City's pretreatment permits prohibiting the discharge of pollutants, including PFAS, that:
 - interfere with the use or disposal of biosolids or
 - in combination with “discharges from other sources,” inhibit or disrupt treatment processes or operations, incl. land application

Risk to Pretreatment Programs

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- Such pretreatment permit provisions could be consequential
 - ▣ Biosolid concentrations relative to MCLs
 - ▣ Proposed NC WQS set exceptionally low in-stream concentrations

Other Settlement Provisions

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- Cease land application of biosolids
 - ▣ Must send biosolids to either
 - solid waste hazardous disposal facility with a liner and leachate collection **or**
 - a pre-approved hazardous waste disposal or treatment facility
- Free connections to public water or point of use treatment for residential homes within two miles of sites where city had land applied biosolids if tests show PFAS within 75% of the MCLs in well water

Landfill Settlement Provisions

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- Proposed SELC Settlement with largest landfill in NC
 - ▣ Apply for an NPDES permit & treat PFAS to EPA's MCL levels within one year
 - Stormwater
 - Leachate
 - ▣ Restrictions on waste from AFFF & PFAS remediation projects
 - ▣ Suit of Community Outreach Programs
 - Includes air monitoring & running a recycling program

Minimization

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- Minimization within a pretreatment program is a sensible approach to reducing emerging contaminants entering POTWs

Minimization Plans

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- Survey/Information request
 - ▣ A well-defined problem is half solved

- Minimize
 - ▣ Contact dischargers with PFAS levels worth evaluating and work together to minimize discharges to the extent practicable
 - ▣ For most IUs, the juice won't be worth the squeeze

Minimization Plans

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- Enforce
 - ▣ Monitor Pollutant & Effectiveness
 - ▣ Review sewer use ordinance to ensure:
 - You can require disclosure of contaminants from SIUs
 - You can require SIUs to pay to sample their effluent
 - You have the authority to require minimization
- Most IUs have fully cooperated/embraced minimization

DEQ Permit Minimization

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- PFAS Conditions in a POTW's NPDES Permit in NC
 - ▣ Quarterly PFAS Monitoring
 - POTW Effluent
 - SIUs suspected of discharging PFAS (either POTW sample or SIU permit requires)
 - ▣ Adjust Industry Waste Survey to find all IUs discharging PFAS
 - Provide information to DEQ as part of Annual Report
 - Begin sampling within six months of survey
 - ▣ Encourage BMPs

Potential Approach

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- Consider **proposed volumes** and whether those volumes **are likely to move PFAS dial** at your plant
- Have a **general PFAS/ECs discussion with potential SIUs**, incl. any specific PFAS info
- Based on that discussion, require them to **disclose in a certified writing** information that you deem warranted
- New/expanded dischargers:
 - ▣ Perform characterization monitoring (monthly/quarterly)
 - ▣ Then maintenance monitoring (quarterly/biannual/annual)

Sampling Type

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- 28-day holding time for PFAS
 - ▣ Only need to refrigerate
- Allows you to take composite samples
 - ▣ 24-hour
 - ▣ 3, 5, 7 –day composites
- Greater coverage of industrial user discharges
- More bang for your sampling dollars

Targeted vs. Non-Targeted

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- We recommend targeted & non-targeted sampling
 - ▣ Targeted Samples
 - Will provide results on individual PFAS
 - Method 1633, 537.1, & etc.
 - ▣ Non-targeted Samples
 - Fluorine: Adsorbable organic fluorine (AOF) & extractable organic fluorine (EOF)
 - Total Oxidizable Precursors (TOPs)

Targeted vs. Non-Targeted

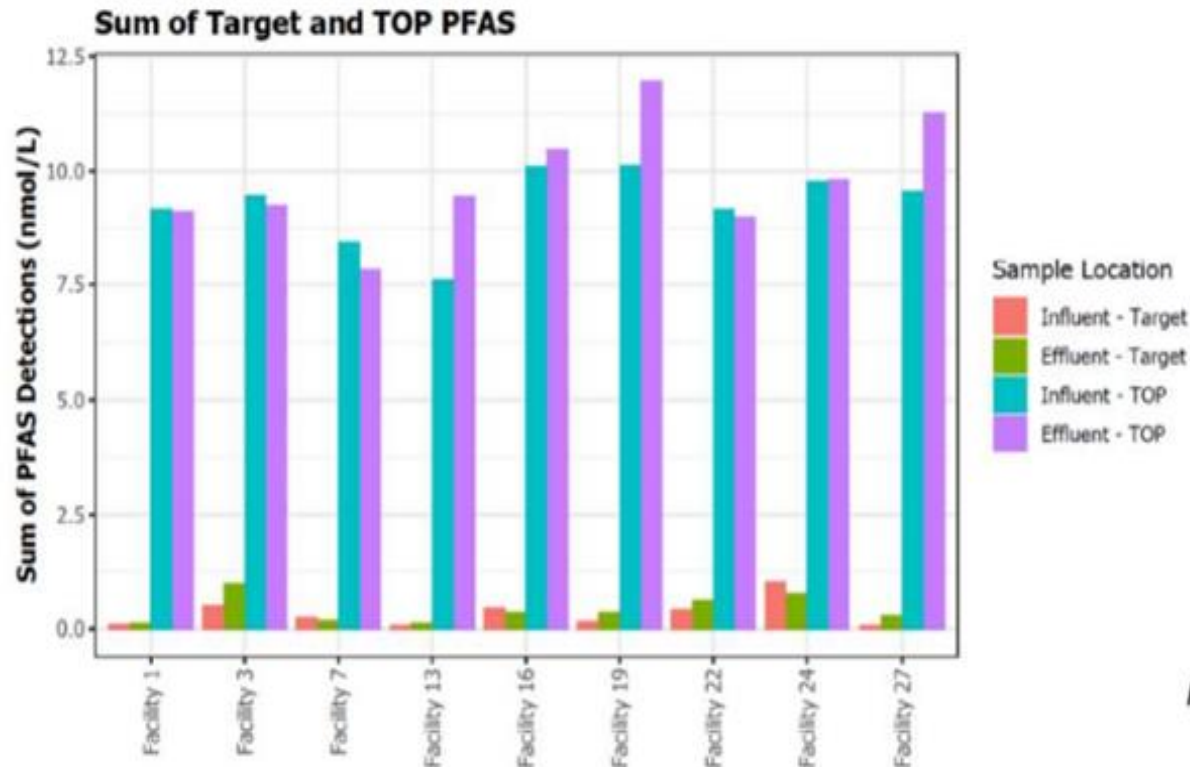
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Targeted vs. Non-Targeted

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WRF 5031: Oxidizable Precursors in Influent and Effluent Streams



Preliminary data

Understand Domestic Levels

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- Determine “domestic” PFAS levels
 - ▣ Sample a trunk sewer from a portion of your system serving only domestic customers
 - ▣ Consumer products will contain and release PFAS
 - Expect 20-60 ppt PFOA + PFOS
 - Expect 40-100 ppt total PFAS.
- ▣ Are most IUs really any different?
 - Even fewer move the dial on your effluent conc.

Domestic Levels

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- ❑ Critical to understand
- ❑ Likely the largest load to POTWs
- ❑ Sets a baseline for what is practicable for minimization by non-domestic users
- ❑ Key fact to help educate environmental stakeholders and downstream sister utilities

Minimization Plan

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- After characterizing PFAS loading, engage with non-domestic users on minimization options
- Collaborative/voluntary approach has yielded fruit
 - ▣ IUs may not realize they are a PFAS/contaminant source
 - ▣ Many solutions have been practicable

Minimization Plan

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□ Examples:

- Product substitution
- Process changes
- Recycling/recapturing process side streams with high PFAS
- Isolate & treat waste streams with high PFAS
- Implemented closed loop operations for certain PFAS intensive processes, e.g. medical or military production
- Other

Landfill Minimization Plan

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- Special Waste Tracking to screen for wastes with high PFAS
 - Assess based on PFAS concentration, landfill capacity, and historical loading whether landfill can accept the waste
- Manage the landfill's working face to keep it as small as possible and divert stormwater from covered areas to limit the generation of leachate

Landfill Minimization Plan

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- Investigate possible closure of older landfill cells (which typically have higher PFAS levels) to reduce leachate volume and PFAS concentrations
 - ▣ We normally try to defer closure costs....
- Evaluate onsite materials & processes that could also introduce PFAS into leachate, including surveys of suppliers

Landfill Leachate Treatment

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- Ongoing pilot studies may produce economically viable treatment & destruction opportunities for PFAS in landfill leachate
 - ▣ Separation
 - Foam Fractionation
 - Adsorption
 - ▣ Destruction
 - Supercritical water oxidation
 - Electrochemical oxidation

Minimization Plans for New or Expanding Industrial Users

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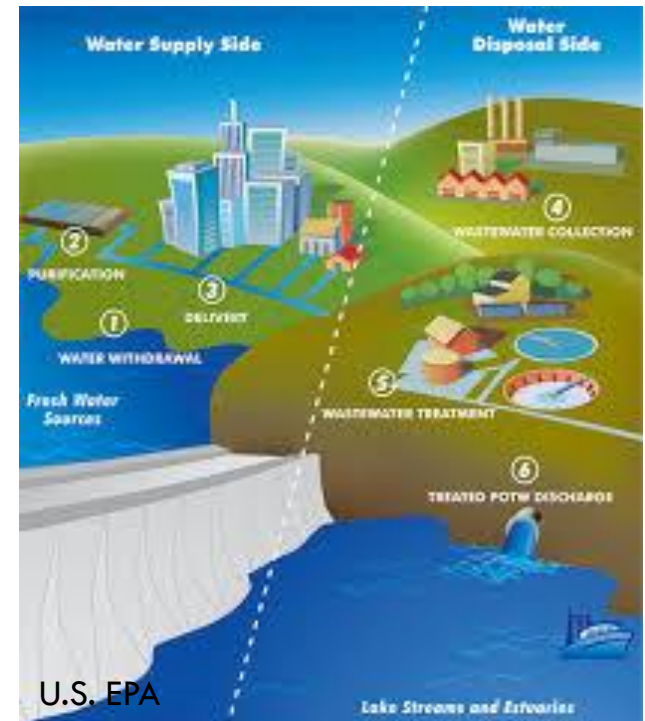
- Update industrial waste surveys for PFAS and other chemicals of concern
- Watch relocating and/or expanding users
 - ▣ Int'l companies have sustainability reports?
 - Do they treat for PFAS at other similar facilities?
 - ▣ Is someone relocating a product line from another state due to a POTW turning up the heat on their PFAS loadings?

Considerations

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□ Vicinity to Water Intakes

- ▣ If you discharge above a water intake your evaluation of practicable pretreatment PFAS minimization options should be more searching.



Considerations

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- Biosolids: land application & landfilling
 - ▣ Most POTW biosolids have “boring” PFAS levels
 - However, some are industrially impacted
- Watch for hot spots
 - ▣ Certain land application fields
 - Were industrial solids previously applied?
- ▣ Landfills
 - Send solids to landfills with lower PFAS leachate levels

Considerations

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- Don't forget about your reuse
 - ▣ Spray irrigation
 - ▣ In ppt levels so that is relatively good news
 - ▣ But, soil accumulation?

Enforce through Monitoring

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- After characterization monitoring, maintenance monitoring will be required for the foreseeable future
 - ▣ For POTWs and IUs
 - ▣ Maintain public confidence in your operations
 - ▣ Tripwire should there be changes by non-domestic users

Enforce with SUOs

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□ Update Sewer Use Ordinances

- ▣ Ensure you have authority to require disclosure of PFAS production, use, or discharge from IUs
- ▣ Ensure you have authority to require sampling & that the sampling is at the IU's expense

Don't Forget Haulers

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- Don't forget hauled waste generally & for PFAS
 - ▣ Ensure honesty through verification sampling
 - ▣ Take frequent samples but only test the samples randomly
 - Haulers will not know if their sample will be tested
- Heightened effort if you have water intakes proximately downstream....

Minimization Plans

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□ Survey

- ▣ A well-defined problem is half solved
 - Characterization/Maintenance PFAS monitoring

□ Minimize to the extent necessary & practicable

- ▣ Through cooperative outreach

□ Enforce

- ▣ Review sewer use ordinance to ensure:
 - You can require disclosure of contaminants from SIUs
 - You can require SIUs to pay to sample their effluent

Thank you for your service!

Questions?