

Shelter From the Storm: Environment Law as a Backstop to Administrative Overhaul

Rachel L. Partington, Esq., KNAUF SHAW LLP

Federalism



- The Constitution establishes a system of “dual sovereignty,”
- States surrender many of their powers to the Federal Government, but also retain some sovereignty.
- Tenth Amendment
 - Reserves powers to the states, as long as those powers are not delegated to the federal government.
 - Includes creating public safety systems, managing business and trade within the state, and managing local government.
 - Referred to as reserved powers.
- Concurrent Powers
 - Concurrent powers refers to powers which are shared by both the federal government and state governments.
 - Includes the power to tax, build roads, and create lower courts.

Trump Administration & EPA Rollbacks

- Roll back Obama-era policies aimed at curbing climate change or limiting environmental pollution
- Threaten to limit federal funding for science and the environment.



Rollbacks- To Paint a Picture

- SHARP LOGGING INCREASE ON PUBLIC LANDS
- EPA CRIMINAL ENFORCEMENTS HIT 30-YEAR LOW
- EPA TO DISBAND AIR POLLUTION REVIEW PANEL
- EPA REPEALS OBAMA-ERA METHANE RULES
- TRUMP EPA UNVEILS PLAN TO NULLIFY FEDERAL RULES ON COAL POWER PLANTS
- WHITE HOUSE CUTS NASA CLIMATE MONITORING PROGRAM
- EPA STARTS ROLLBACK OF CAR EMISSIONS STANDARDS
- FEMA EXPELS "CLIMATE CHANGE" FROM STRATEGIC PLAN



PFAS- There's something in the water

- The Flint, MI water crisis in 2014 highlighted serious impacts past practices and everyday products we use can have on drinking water.
- Emerging contaminants such as perfluorinated compounds (PFCs) and 1,4 – Dioxane have recently been found to be impacting groundwater and drinking water throughout the country.
- In New York, these contaminants are impacting public water supply systems and private drinking wells in several communities including: Hoosick Falls, Petersburg, Long Island, and Newburgh.



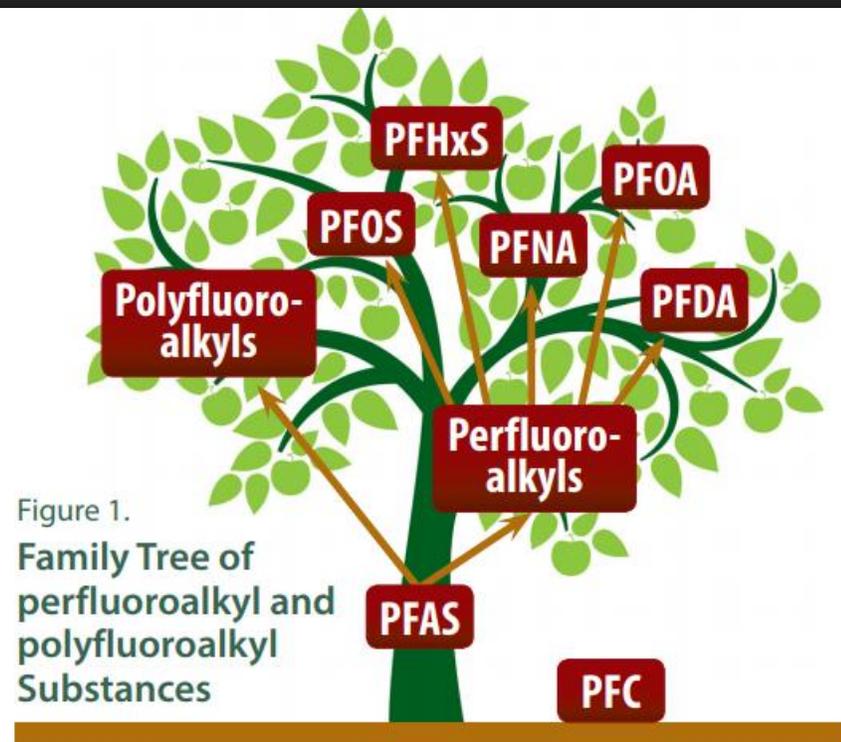
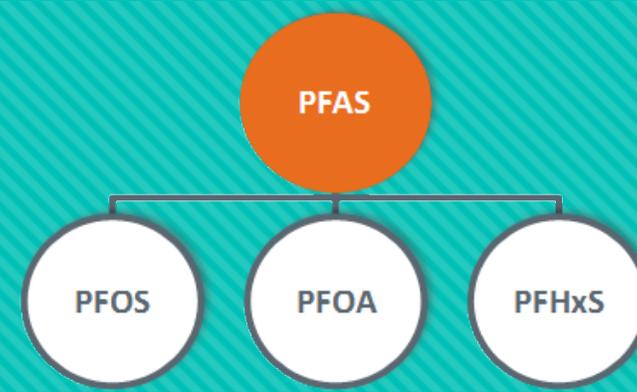


Figure 1.
Family Tree of
perfluoroalkyl and
polyfluoroalkyl
Substances

What is PFAS?



Types of PFAS

- Per- and polyfluoroalkyl substances (PFAS) are a group of man-made chemicals that includes PFOA, PFOS, GenX, and many other chemicals.
- PFAS have been manufactured and used in a variety of industries around the globe, including in the United States since the 1940s.
- PFOA and PFOS have been the most extensively produced and studied of these chemicals.
 - Both chemicals are very persistent in the environment and in the human body – meaning they don't break down and they can accumulate over time.
- There is evidence that exposure to PFAS can lead to adverse human health effects.

Where is PFAS found?



- **Food** packaged in PFAS-containing materials, processed with equipment that used PFAS, or grown in PFAS-contaminated soil or water.
- **Commercial household products**, including stain- and water-repellent fabrics, nonstick products (e.g., Teflon), polishes, waxes, paints, cleaning products, and fire-fighting foams (a major source of groundwater contamination at airports and military bases where firefighting training occurs).
- **Workplace**, including production facilities or industries (e.g., chrome plating, electronics manufacturing or oil recovery) that use PFAS.
- **Drinking water**, typically localized and associated with a specific facility (e.g., manufacturer, landfill, wastewater treatment plant, firefighter training facility).
- **Living organisms**, including fish, animals and humans, where PFAS have the ability to build up and persist over time.

Federal Response

There's something happening here, what it is ain't exactly clear



- Last year, Fmr. EPA Administrator Pruitt promised EPA would release an action plan
- 2.14.19 Acting Administrator Wheeler released action plan, yet responses and deadlines were unclear
- PFAS has yet to receive hazardous substance listing
- Wheeler- EPA will begin process of setting the Maximum Contaminant Level by year's end

Repercussions

- PFAS, which is extremely hazardous, can be treated as if it isn't such
- Need to disclose issues
- Impacts which types of lawsuits may proceed or continue and what types of remedies are available

New York Response



- Governor Cuomo's creation of Water Quality Rapid Response Team (WQRRT)
- Legislation establishing the Drinking Water Quality Council (DWQC)
- In January 2016, New York became the first state to regulate PFOA as a hazardous substance followed by the regulation of PFOS in April 2016.
- Clean Water Infrastructure Act of 2017
 - A \$2.5 billion investment in drinking water and water quality protection across New York State.
 - Includes up to \$130M for mitigation/remediation of contaminated drinking water.

New York Response

- DEC listed “significant threat” level sites on the Registry and identified potential sites.
- PFC Survey: surveyed 2,500 entities where contamination may be probable (e.g., airports, fire training centers, industry);
 - information is being used to identify and investigate water quality in areas where a potential for PFC contamination may exist.
 - Facility Mapping/Sampling: Based on survey results, DEC and DOH identified and mapped more than 250 facilities within ½ mile of a public or private drinking water supply well. Sampled 125 sites for PFAS, so far
 - All facilities near public drinking water supplies were prioritized for immediate sampling.

New York Response Continued

- State sues aqueous film-forming foam (AFFF) manufacturers in NY Supreme court
- State files Notice of Claim against U.S. Department of Defense related to AFFF discharges

Going forward

- Still much more to be done
- However, NY has served as a backstop
 - Stricter standards
 - Review councils
 - Legislation
 - Funding

Like a Bridge Over Troubled WOTUS

- Waters of the US (WOTUS) is a term used in the Clean Water Act to determine what waters and their conveyances fall under federal and state permitting authority
 - Uneven application regarding protection for streams and wetlands
- The EPA undertook an effort to rewrite and expand the current WOTUS definition.
- After four years of extensive scientific study and analysis, the agencies published clarified definitions of “waters of the United States” in the Clean Water Rule in 2015.
- Published a weighty scientific report that reviewed more than 1,200 peer-reviewed publications on water connectivity.
- Agencies also submitted their proposal to multiple rounds of scientific review by experts in fields ranging from biology to hydrology to geology.
- Report and the expert reviews of it reaffirmed what we already knew to be true and what any person can readily observe: that all waters flow downstream, from small creeks and wetlands to our major rivers and lakes. In order to protect the waters of the United States as directed by Congress, **all waters** must receive Clean Water Act protections.

Court Challenges

- After numerous court challenges, the 2015 definition of WOTUS is in place in 26 states and stayed in the remaining 24 states



Trump Attempted Repeal and Replace

- March '17, US agencies announced intent to “review and rescind or revise” the Clean Water Rule.
- June of 2017, without any valid scientific or legal support, the Agencies proposed to wholesale repeal the Clean Water Rule.
- Agencies began discussing a replacement rule that would be far less protective of waters, but no replacement has been proposed as of this date.
- Amidst failed attempts at a replacement rule, agencies attempted a different strategy and proposed to instead keep the Clean Water Rule on the books, but add a new “applicability date” to the rule of two years in the future, in order to effectively repeal the rule by making it inapplicable for two years.
- Proposed delay was also without scientific or legal support, but the agencies still hurried through a short 21-day public comment period during which they refused to consider or accept public comments on the previous Water Rule’s extensive scientific background or the implications of stalling
- The agencies quickly finalized the “applicability date” rule in February of 2018. Fortunately, this period of “inapplicability” for the Clean Water Rule was short-lived, as this unlawful attempt to buy time has now twice been struck down by federal courts in two different jurisdictions.

NY Response

- Sierra Club has sued, and NYS also pledges to sue
- John Cronin, a Senior Fellow at the Dyson College Institute for Sustainability and the Environment at Pace University has proposed passing legislation for a NY version of the Clean Water Rule, requiring that all bodies of water receive protection
 - Currently in the process of drafting a clean water rule for consideration

Renewables Rollbacks

- May 17, 2018 Trump issued an Executive Order “Regarding Efficient Federal Operations” revoking President Obama’s Federal Sustainability Plan and replaced it with an order that prioritizes energy efficiency at federal facilities instead of cutting GHG emissions by 40% over 10 yrs
 - In contrast, Trump’s new executive order does not contain the word “climate.”
 - Rather than set numerical goals, the order requires federal agencies to meet existing statutory requirements
- August 21, 2018 EPA – proposed replacement of the Clean Power Plan with The Affordable Clean Energy Rule
 - Only proposed at this stage
 - Calls for each state to establish its own standards of performance for coal-fired power plants
 - Plan also calls for previous rule requiring **hourly** emissions testing to be replaced with **annual** testing

NY: Let the Sunshine In



- August 1, 2016 NY Public Service Commission adopted the State Energy Plan (SEP)
- New York Clean Energy Standard: 50% renewable energy by 2030
- 2017 Solicitation Awards
 - \$1.4 billion-single largest commitment to renewable energy in the US
 - 26 large-scale energy projects across New York
 - 22 solar farms
 - 3 wind farms: one features energy storage
 - 1 hydroelectric facility
 - Generate enough energy to power more than 430,000 homes
 - Reduce carbon emissions by 1.6 million metric tons (equivalent to taking 340,000 cars off the road)
 - Create over 3,000 short and long-term well-paying jobs
- July 12, 2018 order also established a streamlined framework for offshore wind
- AND MUCH MORE

But it doesn't end there: State Environmental Quality Review Act



- New York's **State Environmental Quality Review Act** (SEQR) requires all state and local government agencies to consider environmental impacts equally with social and economic factors during discretionary decision-making.
- Agencies must assess the environmental significance of all actions they have discretion to approve, fund, or directly undertake.
- Includes an analysis of all reasonable alternatives to the action.
- "**Decision making process**" encourages communication among government agencies, project sponsors and the general public.
- SEQR applies to all state or local government agencies including districts, special boards, and authorities whenever they must approve or fund a privately or publicly sponsored action.

SEQR Cont.

- Projects are categorized as either type I, II, or unlisted
- Type I- more likely to have an adverse impact and requires filling out a Full Environmental Assessment Form
 - If a significant adverse impact is likely, an Environmental Impact Statement must be conducted
- Type II- not subject to the SEQR process

Updates to SEQR

- Support policies favoring green infrastructure, renewable energy, and smart growth
- Former Type II actions that are now Type I:
 - parking lots for 500 vehicles in a city, village or town with a population of 150,000 or less, or 1,000 vehicles in a population of more than 150,000
- Type II actions now include:
 - Reuse of existing buildings for “green infrastructure”
 - Upgrades to meet energy codes
 - Installation of solar panels on 25 acres or less on various structures (unless historical or eligible for listing)

Here is where you come in

- SEQR process **REQUIRES** opportunity for public input – go to your town hall, planning board, and zoning board of appeals meetings!
- **KNOW THE LAW**, use the DEC site.
- **ASK** for information...
 - FOIL/FOIA



- 6.1.18 US District Court for the District of Columbia ruled that the EPA must respond to a FOIA request seeking records Pruitt relied on in making certain statements regarding climate change, and any agency documents that support Pruitt's conclusions that **human activity is not the largest factor driving climate change**.
- The Agency has provided a response that there are "no records" with regard to this request

THANK YOU

