Stephanie Otts:

Good afternoon. I'm Stephanie Otts. I'm the Director of the National Sea Grant Law Center. And welcome to the second installment of our 2022 Webinar Series. And today I'm excited for Catherine Janasie and Olivia Deans to provide the legal and regulatory update related to PFOA and PFAS. So welcome everyone. It's great to see everyone here for our webinar. Just for those of you who might not be familiar with the National Sea Grant Law Center, we're one of the 34 Sea Grant programs, which are based at universities around the country. We are based at the University of Mississippi School of Law here in Oxford, Mississippi. And our mission is to provide non advocacy, legal research, outreach, and education services to the entire Sea Grant Network and their constituents. If you're interested in the work that the Law Center does, please visit our website, but you can also follow us on Twitter and Facebook.

Stephanie Otts:

Just a few housekeeping items today. We do have everyone muted right now to reduce background noise. During the course of the presentation if a question pops into your mind, please add it to the chat at any time, we will have some time for Q & A at the end. At that time, participants could raise their hands using the little, raise your hand function to ask questions verbally, if we're able to handle it that way. So this webinar has been approved for one hour of CLE credit. The National Sea Grant Law Center will not be turning in information to the Mississippi Bar to report it, so attorneys should self report.

Stephanie Otts:

But at the end of the webinar, we will share a Google Form link so that if you are interested in reporting the CLE credit, we can collect that information. And then that can help us later if you need assistance with documenting attendance or anything like that. Stay tuned to the end if you are seeking CLE credit. We will also share a link to the evaluation survey at the end of the webinar. We are also recording this webinar and it will be posted to our website as soon as we're able to get the transcript, and captions, and all of those things ready, and we'll send an email to all registered attendees when that is available.

Stephanie Otts:

And so with that introduction, I'm going to turn it over to Catherine Janasie and Olivia Deans.

Catherine Janasie:

Yes. Hi good afternoon, everyone. Today, Olivia and I structured this to give you first, just an introduction to PFAS, and then look at the federal framework to see where PFAS fits in. And as you'll see, we've seen not as much activity on the federal level as we have on the state level. Olivia's going to give us a pretty good overview of the state approaches, and then the cases that we've seen up until this point in time. And as Stephanie mentioned, we'll have time for your questions and answers at the end of the presentation.

Catherine Janasie:

What are we talking about here? So per- and polyfluoroalkyl substances, as most of us know, are an urgent public health and environmental issue that are facing communities across the United States. PFAS have been manufactured and used in many industries in the United States and around the world since in the 1940s, and they're still being used today. We're seeing this growing body of scientific evidence that's showing that exposures at certain levels, specifically PFAS, can adversely impact human

health and other living things. And so despite those concerns, PFAS are still being used in a wide range of consumer products and industrial applications.

Catherine Janasie:

We've been using PFAS since the '40s and they've been used in so many different products, PFAS can be found in surface water, groundwater, soil, and air, from rural areas to densely populate urban ones. This map is one that was published from the Environmental Working Group showing sites, where they'd found that we know there is PFAS contamination. So as you can see, it's a problem that's facing us across the nation and in a lot of sites. We wanted to start with the federal framework. There are a lot of federal authorities that do exist to manage PFAS, but the federal framework isn't comprehensive at this point in time regarding what actions the Environmental Protection Agency has taken. And so that's why we're seeing so much state action to fill that gap on the federal level.

Catherine Janasie:

The other thing I wanted to note before we get into the federal framework is that most of these federal statutes aren't going to provide damages to private parties who are harmed by PFAS. An example of that, I'm going to talk about effluent guidelines, maybe being developed under the Clean Water Act. And so if those were to go into permits and an industrial source violated that permit, private parties could sue, but the damages from that would go to the government. They wouldn't go to the private parties who are damaged. And so that's why we're seeing a lot of state level cases like the one Olivia is going to talk about.

Catherine Janasie:

Next slide. The first statute we wanted to talk about is the Safe Drinking Water Act. Congress passed the Safe Drinking Water Act to protect public drinking water sources. And under the act EPA can set enforceable national, primary drinking water regulations for drinking water contaminants. Those regulations require monitoring of public water systems, but the scope of the monitoring depends on the size of the public water system.

Catherine Janasie:

What's important is that the Safe Drinking Water Act does not regulate private wells. That's something to keep in mind when we're thinking about groundwater contamination by PFAS, if someone has it in a private well, they're not covered by this act. Now EPA has issued regulations for over 90 drinking water contaminants, and while the EPA issues those rules, it's important to note that the primary enforcement of the act lies within this state, so as an example of cooperative federalism.

Catherine Janasie:

How are drinking water regulations created? And will we see one for PFAS? So to regulate a contaminant EPA has to publish a National Primary Drinking Water Regulation for that specific contaminant. EPA begins that process by periodically publishing what's known as a contaminant candidate list. And that list contains unregulated contaminants that are expected or known to be in public water systems. That listing process includes research and collecting data to get the information to EPA, to determine whether not they're going to regulate that contaminant under the Safe Drinking Water Act. Once a contaminant is included on a CCL, the EPA then determines whether or not to develop a drinking water regulation for the contaminant. When we're talking about PFAS in 2016, EPA

included PFOS and PFOA on its 4th CCL. Then in 2020, they proposed to create a drinking water regulation for those two PFAS.

Catherine Janasie:

And in March, 2021, they finalized that determination. We're hopeful that we'll see a draft regulation sometime this year, but you'll never know exactly how long that may take from the EPA. Now, if the EPA doesn't adopt a drinking water contaminant, it can issue a health advisory, which it has done for PFAS, and they also have to create unregulated contaminant monitoring rules. And so the act requires EPA to create a list every years of unregulated contaminants that must be monitored by public water systems. And it released its fifth rule in December 2021 and included 29 PFAS on that list.

Catherine Janasie:

The next act we wanted to cover is the Clean Water Act, which Congress passed to regulate discharges of pollutants into navigable waters, which are also called Waters of the United States. The Safe Drinking Water Act, it's a cooperative federalism statute. So we have federal rules and state implementation. What's important with the Clean Water Act is that it distinguishes between point sources and non-point source pollution. A point source is a discrete conveyance like a pipe, somewhere you can see the pollution coming out of. Those discharges require a permit called a National Pollutant Discharge Elimination or NPDES permit. Non point source pollution is simply defined by the act as all other sources of pollution that doesn't come from a point source.

Catherine Janasie:

That's its runoff from fields or parking lots. The regulation of non-point source pollution doesn't require a permit, and it's mostly been left to the state to regulate under the act. EPA has the authority to set effluent limitations for specific pollutants to specify levels that are allowable and discharges. And so EPA establishes these national technology based limitations from discharges of pollutants to navigable waters from certain categories of point sources. The sources could be industrial, commercial, et cetera. The state permitting agencies then use those national guidelines to set technology based and effluent limitations in the NPDES permits for the point sources. And I'm going to talk a little bit later about the actions we've seen from EPA regarding PFAS, and specifically with these ELGs.

Catherine Janasie:

TSCA, the Toxic Substances Control Act is our next statute. TSCA provides EPA with the authority to require reporting, record keeping, and testing requirements and restrictions related to chemical substances and mixtures. It's aim is to protect against unreasonable risk to human health in the environment from existing chemicals, excluded substances from the act include common ones like drugs, cosmetics, foods, food additives, pesticides, nuclear materials. So they're not covered by the act. But under the act EPA has the authority to maintain a chemical substances inventory, require testing to evaluate potential human health or environmental hazards, regulate including either restriction or banning the manufacture, importation, processing, distribution, use, or disposal of the chemical substance that represents unreasonable risk of injury to human health or the environment. And so EPA has taken some steps under these authorities to regulate PFAS, which we'll talk about.

Catherine Janasie:

What provisions are relevant when we're thinking about what EPA has done so far under TSCA for PFAS? The first is Section 4, which regard testing orders. Under Section 4(a)(1), EPA can issue an order

requiring the development of information on a chemical if EPA makes certain statutory required findings. For example, EPA could find that a chemical could present an unreasonable risk or injury to the health or environment, and they need more information to determine if the chemical presents such an unreasonable risk. Under Section 4(a)(2), EPA can issue an order requiring the development of information for specific things. If they receive a notice under TSCA Section 5, if they're going to implement a requirement imposed, rule, order or consent agreement, or if it's to determine if a chemical substance or mixture that's manufactured, processed or distributed in commerce, for export represents an unreasonable risk as well. EPA can also issue an order at the request of another federal entity that has to meet it's regulatory testing needs for toxicity exposure. And that testing is required by another statute.

Catherine Janasie:

Section 5(a), regards significant new use rules. The EPA, if it determines that a chemical use is a significant new use then a manufacturer has to submit a notice and review information to the EPA about how the chemical may increase the exposure to humans or the environment. Under section 5(a), EPA can determine that the use of the chemical substance is a significant new use. They have to make that determination by rule, after considering statutory factors.

Catherine Janasie:

And then once EPA makes that determination, Section 5(a) requires persons to submit a significant new use notice to EPA at least 90 days before they manufacture, import, or process the chemical substance for that use. And then finally, TSCA Section 8(a)(7), reporting requires EPA to make a rule that requires each person who has manufactured a chemical substance that is a PFAS in any year, since January 2011 to report a broad range of information required by the statute. And so as when we give a broader overview of the timeline of some actions the EPA has taken, they've used each of those sections regarding PFAS.

Catherine Janasie:

The next statute we wanted to cover is the Clean Air Act. The Clean Air Act is considered the most complicated environmental law statute, which is why we decided to give you a diagram instead of text. And so Congress passed the Clean Air Act to combat multiple sources of air pollution using the latest science and technology. It makes a distinction between stationary sources like power plants and mobile sources like automobiles.

Catherine Janasie:

And so stationary sources, which is where the meat of the act is, are subject to requirements concerning criteria pollutants and hazardous air pollutants. Now criteria pollutants are often referred to common pollutants. There are six of them: particulate matter, ozone, sulfur dioxide, nitrogen oxide, carbon monoxide, and lead. The EPA in Congress have not expanded that list for decades. In fact, they've only added lead to the original list from the original statute, because there was a lawsuit that required them to.

Catherine Janasie:

We're not thinking that PFAS will fit within that framework. On that side of the Clean Air Act. It's with those criteria pollutants, if you're familiar with, at all with the Clean Air Act that EPA establishes National

Ambient Air Quality Standards, and then the states use those in developing their state implementation plans.

Catherine Janasie:

Where we think we're going to see PFAS maybe fit in the Clean Air Act is on that Hazardous Air Pollutant side. And so stationary sources are subject to requirements concerning hazardous air pollutants. And EPA has the authority to designate hazardous air pollutants for chemicals that are known or suspected to cause cancer or other serious health effects like respiratory, reproductive or neurological effects. EPA can also designate a HAP that has adverse environmental effects such as affecting plant or animal species. The original list of hazardous air pollutants was 189 pollutants. Since 1990 EPA has modified it here and there and so now the list includes 188 hazardous air pollutants.

Catherine Janasie:

An important part of that process is that the Clean Air Act does allow any person to petition EPA to add or remove a HAP. That petition has to provide adequate data for the EPA to determine whether to make the listing of the contaminant as a Hazardous Air Pollutant. That info can include the emissions, ambient concentrations, bio accumulation, or deposition of the substance to see if that warrants a listing as a Hazardous Air Pollutant.

Catherine Janasie:

And so there's an recent example of that process actually working. For decades, the EPA received petition to list 1-bromopropane or 1-BP as the Hazardous Air Pollutant. Finally in 2015, they decided that the petitions were complete enough that they could make a determination. And so in the end of 2021 and early 2022, EPA finalized a rule to list 1-BP as a hazardous air pollutant as a result of those petitions.

Catherine Janasie:

So where we are with PFAS right now is that it could potentially be listed as a HAP. We haven't seen any actions specifically yet on that, but importantly, in it's 2021-2024 Strategic Roadmap for PFAS, EPA did state that it wanted to collect more data and information to support a future HAP listing for PFAS under the Clean Air Act. The next statute is the Resource Conservation and Recovery Act known as RCRA or the Solid Waste Disposal Act. Congress created what's called a cradle to grave regulatory system to provide the comprehensive regulation of hazardous waste with RCRA.

Catherine Janasie:

What's important to know is it applies to hazardous waste, but that hazardous waste has to be a solid waste. But because lawyers aren't scientists a quirk of RCRA is that solid waste includes discarded material, which includes solid, liquids, semi solids or contained gases materials. So basically all states of matter, not just solid ones. And the meat of the statute is subtitled C, which requires generators and transporters of hazardous waste and treatment, storage, and disposable facilities, which are known as TSD facilities to comply with a multitude of federal requirements to ensure that hazardous waste is properly handled, transported, stored, and disposed of.

Catherine Janasie:

If RCRA applies to hazardous waste, what does that mean under RCRA? For RCRA purposes, a hazardous waste is a solid waste or combination of solid waste, which because of quantity, concentration, physical, chemical, or infectious characteristic either could cause or significantly contribute to an increase in mortality or serious irreversible, or incapacitating reversible illness or pose a substantial present or potential hazard to human health or the environment when it's improperly treated, stored, transported or disposed of, or otherwise managed.

Catherine Janasie:

To become a hazardous waste under RCRA, EPA has taken this two prong approach. The first way that a waste can be covered is to have it be a listed waste. And so those are considered per se hazardous under RCRA. If company generates a listed waste, it has to treat that waste as hazardous regardless of the concentration of the listed waste in that waste batch. If there's just a cup of a listed waste and say two tons of something, it's still a hazardous waste if it's a listed waste. Characteristic waste are based on the characteristic of the waste itself. If it's not listed, but the waste is ignitable, corrosive, reactive, or toxic, the generator has to determine that on a case by case basis, whether the waste batch is going to exhibit one of those characteristics and be considered a hazardous waste under the act. So it's more onerous on the generator to make that determination. And I'll discuss in one minute, a couple minutes about where we are with PFAS and its determination as a hazardous waste under RCRA.

Catherine Janasie:

Finally, we have CERCLA, the Comprehensive Environmental Response Compensation and Liability Act of 1980. And so this is also known as the Superfund statute, it provides federal funds to clean up hazardous waste sites or other contaminants and the environment, those sites are referred to as Superfund sites. I wanted to put CERCLA last because it contains elements of all those other statutes I've already talked about. A hazardous waste for CERCLA purposes is really a catchall of all these other statutes. Is it a hazardous waste under RCRA, a toxic water pollutant under a Clean Water Act? Hazard Air Pollution under the Clean Air Act? Has it been designated under CERCLA or the Clean Water Act? Or is it imminently hazardous chemical under TSCA? CERCLA does not apply to petroleum, including crude oil, which is its big exception.

Catherine Janasie:

CERCLA also importantly makes a lot of people liable for releases of hazardous waste at these waste sites. Those responsible parties are supposed to pay for the cleanup costs if they're able to. CERCLA further established prohibitions and requirements concerning closed and abandoned hazardous waste sites, they created a trust fund to provide for cleanup when there is no responsible party that can be identified. It allows EPA to rank the hazardous waste sites, which they do through the national priorities list to see which site should be cleaned up first.

Catherine Janasie:

And it also created a National Contingency Plan, which gives us procedures to be followed, to assess contamination at a site, the degree of hazard of public health or the environment, alternatives to clean up the site and other actions by the EPA. How could PFAS be regulated under CERCLA? If it doesn't make any of those other designations under the previous statutes we talked about, it could be designated as a hazardous substance specifically for CERCLA. Another example could be that during the assessment and planning phase, EPA could way a range of purchase to address groundwater contamination and create guidance to address how PFAS could be remediated in groundwater.

Catherine Janasie:

To wrap up the federal side, we wanted to put together a timeline of some of the other actions that the federal government has taken that I may not have touched on previously. In 2002 is when EPA begins a priority review of PFAS. It invited eight major companies to voluntarily phase out PFAS at that time. In 2016, as I mentioned, it established health advisories for PFOA and PFOS under the Safe Drinking Water Act. 2019, it releases an action plan and invites scientific feedback and public comments. February 2020 EPA proposes to regulate PFOA and PFOS under the Safe Drinking Water Act.

Catherine Janasie:

December 2020, it releases guidance for PFAS disposable under the National Defense Authorization Act. And I missed June there. So the Significant New Use Rule under TSCA [in June 2020]. And then 2021 up there on the top, they published regulatory determinations. First, as I mentioned for the fourth contaminant list for PFOA and PFOS. And then they also, as I mentioned earlier, took action under the Clean Water Act.

Catherine Janasie:

And so they initiated further data collection and analysis to support future effluent limitation guidelines, specifically for the organic chemicals, plastic and synthetic fibers point source category. That category only has a small number of facilities that actually manufacture or process PFAS. And so while they're currently covered by that effluent guideline, the guideline itself at this point in time, doesn't address PFAS at all. EPA with this data collection is starting the process to get the information to potentially include PFAS in those guidelines for that specific category of points source dischargers.

Catherine Janasie:

And then just more recent actions we're seeing June, 2021, they proposed a rule that would require manufacturers of PFAS to report data to EPA, including chemical identity categories of use volumes, et cetera. That was under TSCA. Also in June 2021, we see a proposal for PFOA and PFOS to be listed as a hazardous waste under CERCLA. October, we get a national PFAS testing strategy under TSCA Section 4. Also in October EPA announces it's going to make two rulemakings in response to a petition by the governor of New Mexico under RCRA.

Catherine Janasie:

The governor had asked PFAS to be listed as a hazardous waste, either as a class or as individual chemicals. In response to that EPA said that it would list it as a hazardous constituent under the statute, which means it's not a hazardous waste on its own, but that it will be subject to corrective action requirements. And so it will be required to be cleaned up if it's at a site that's being covered by CERCLA otherwise. December 2021 EPA gives us a fifth unregulated contaminant monitoring rule, as they mentioned, which had 29 PFAS on it. And then finally January, they add four PFAS to the Toxic Release Inventory List. So with all of that, I will pass it on to Olivia to talk about state actions and lawsuits.

Olivia Deans:

Thanks, Cathy. As Cathy mentioned, the federal government has taken a variety of actions in the past few years, but there hasn't really been a comprehensive federal regulation of PFAS. I'm going to talk a little bit about those state standards and what they have done in the absence of federal regulation. As many of you might be familiar with, federal regulatory standards act as a floor and states can then enact

stricter standards for a contaminant, and it can do this through the legislature, through a statute, or through regulations issued by a state agency.

Olivia Deans:

So some of the approaches that states may take include MCLs or Maximum Contaminant Levels for drinking water, they might establish health based advisory values, classify PFAS as a hazardous substance or a hazardous class designation. They might put product manufacturing restrictions or food consumption advisories. And so for each of these approaches, there are different administrative burdens and pros and cons to each.

Olivia Deans:

I'll highlight a few states primarily in the Great Lakes region that have taken these different approaches. And also just a note that even though we're talking about a few states, many states across the country are taking steps to regulate PFAS. And then one other thing to note is that, some states may not have the authority from a statute or regulation to regulate PFAS, so they might be able to fill these federal gaps in certain circumstances, but they might be more dependent on federal requirements in order to comprehensively regulate.

Olivia Deans:

I'll start with Michigan. Michigan has established enforceable drinking water standards for our seven PFAS contaminants, and those are listed on the right of the slide there. And so prior to these enforceable standards, Michigan had issued lifetime health advisory levels for these contaminants, but these were not enforceable limits. And so while they were going through the rulmaking process, the agency deemed some of the contaminant level as a little too strict and set the enforceable standards at lower values. But you can see that these are still some of the most stringent values in the country, and they're more stringent than the federal EPA health advisory levels.

Olivia Deans:

So after that in 2020, under authority of the Michigan Safe Drinking Water Act, the Michigan agency, the Department of Environmental Great Lakes and Energy set these maximum contaminant levels. And an MCL is a maximum amount of a contaminant that is allowed in drinking water. When that contaminant exceeds the MCL, then the public water supplier must take certain actions to reduce the contaminant. And this might include additional testing, treatment, public notice requirements, et cetera. This rule took effect in August, 2020 and the state estimated that it's impacted over 2,700 public water systems in Michigan.

Olivia Deans:

And these MCLs also impact groundwater. So under Michigan's Natural Resources and Environmental Protection Act, groundwater that vents to surface water must also meet these MCL water quality standards for PFAS. I think Michigan is just a good example of this more traditional, enforceable, MCL levels. Next, Minnesota, unlike Michigan, Minnesota does not have enforceable PFAS standards. The state has issued health based values for PFAS and drinking water. And those levels are set at 15 parts per trillion and 35 parts per trillion for PFAS and PFOA. So again, these limits are stricter than the EPA's health advisories. Two years ago, the state issued health risk limits for these chemicals, which go through a sort of rulemaking procedure where public comments are accepted and the scientific community is solicited for input, but these values are still not enforceable standards.

Olivia Deans:

Finally, Minnesota has published an action plan called the Minnesota PFAS Blueprint that is a comprehensive plan for how the state plans to regulate and approach this PFAS problem. And it sort of mirrors the EPAs action plan that Cathy mentioned, but there haven't been any regulations past, and it is set to take quite a few years to be put into place. But I think there are still some interesting components of this plan. First the plan proposes to regulate the entire class of PFAS chemicals as a hazardous substance, which would require disclosure and monitoring requirements.

Olivia Deans:

And the Blueprint also indicates that the state doesn't have the current regulatory authority to enact state drinking water standards or MCLs. But it does note that there might be other options to regulate such as through groundwater or through private wells. I think Minnesota is just a good example of a state trying to regulate when it doesn't have clear authority, but does have this blueprint set up set similar to the EPAs. Similar to Minnesota, Wisconsin also does not have enforceable PFAS standards. The Wisconsin Department of Natural Resources or DNR is the leading the efforts on tackling the contamination problem.

Olivia Deans:

And the agency was making efforts to monitor, collect information and test for PFAS contaminants. But the agency may have taken a step a little bit too far when it required businesses to submit data. And I'll talk about that in opinion, in a few more slides. But what the state has done, interestingly is issue fish consumption advisories due to high levels of PFAS found in brown trout. And those were issued for the Green Bay area unlike Michigan on the slide there. Just to recap for Wisconsin, it's a good example of a state with food consumption advisories, and also an example of where a state might not have authority to comprehensively regulate PFAS.

Olivia Deans:

Vermont has regulated PFAS in several different capacities. There have been a lot of proposed bills to limit strict liability for PFAS contaminations, or efforts to make it easier to recover medical monitoring costs. But I think Vermont is a really interesting example of the states that's regulated products that contain PFAS chemicals on some capacity. Last June, Governor Scott signed into law an act that places restrictions on many products that contain PFAS, and those are on the slide there, but it might be firefighting foam or equipment, food packaging restrictions, rugs, and water treatment materials. Ski wax, which I think is something I hadn't heard about before in an interesting example of a product that contains PFAS, but this state has also listed PFAS chemicals as potentially harmful to children. There's additional requirements for manufacturing and selling products in that state.

Olivia Deans:

Finally, I would like to cover New York. New York was the first state to regulate PFOA as a hazardous substance in 2016. And then PFOS also regulated as a hazardous substance in New York under authority of the Environmental Conservation Law. Once a chemical is designated as hazardous, then that chemical is prohibited from being released unless it is authorized. So how Cathy mentioned and that release of the chemical must also be reported. And along with this hazardous substance designation, there are also proper storage requirements. Notably firefighting foam was exempted from this designation, even though it contains these PFAS chemicals.

Olivia Deans:

New York also has MCLs established for PFOA and PFAS, which similar to Michigan is stricter than the EPA advisory levels and are stricter than a lot of other states. And then one other interesting aspect of PFAS regulation through New York is the possibility of regulating concentrations in the air. Last year a bill was proposed to regulate PFAS concentrations in the air. It wasn't passed, but I believe there are other efforts and bills in the works to look at contaminations in the air. And the agency for the state also amended its guidelines for permit application so that it could consider consideration of PFAS as an air contaminant. Again, New York is an interesting example of a state regulating PFAS as a hazardous substance.

Olivia Deans:

Next I'll just turn to some litigation efforts. There are thousands of state PFAS cases and hundreds even just in the last few years. I think it's kind of helpful to group them into categories of cases to understand how states and citizens are pursuing litigation options. The main categories I listed on the slide there might be a state bringing cases for violation of an environmental statute or regulations such as MCLs that we talked about in Michigan. Another example might be citizen actions that allege nuisance or a tort claim. For example, this might be a manufacturer releasing PFAS that pollutes citizens' private well or citizen actions for medical monitoring cases. And like a lot of disputes, most of these cases end in a settlement or they're dismissed on other grounds but, I think it's kind of interesting to look at some of these settlement agreements and cases right now. I'll go through a few of them.

Olivia Deans:

The first major settlement I want to discuss was brought in 2010 by the State of Minnesota against 3M. And I think this is one of the more famous or popular cases. But 3M is a major manufacturing and consumer products company with its headquarters in the Twin Cities metropolitan area in Minnesota. And so in 2010, the state filed suit against 3M for knowingly disposing of PFAS chemicals that polluted the groundwater, surface water, and just natural resources of the state. The complaint alleged widespread contamination in the area. And the complaint also said over a hundred square miles of groundwater was polluted by PFAS.

Olivia Deans:

The state brought the claim under the Minnesota Environmental Response and Liability Act, or MERLA which states the state is the trustee of the air, water and natural resources and allows it to seek damages. A settlement was reached for $850 million in 2018 with about $720 million going back to being invested in drinking water and natural resource projects in the Twin Cities metropolitan area. And the allocation of the settlement agreement was determined by input from a work group, comprised of stakeholders from 3M, government representatives, business owners and members of the community. Not only was it a really large dollar amount settlement, but it also had this really interesting framework for how the funds were to be distributed.

Olivia Deans:

The next case citizens from Hoosick, New York brought a class action suit against operators of manufacturing companies, such as 3M, Gobain Plastics and Honeywell for PFOA groundwater contamination. And the claims included money for property damages, nuisance claims, and medical monitoring costs. In the case that the defendants, 3M and the companies moved to dismiss for a failure to state a claim and the court granted that in part and denied it in part. And on appeal, the court found

that the claims could move forward for personal injury, property damage, trespass, and private nuisance, but not on those medical monitoring grounds. In February, a $65 million settlement was reached and approved and there is an additional complaint against Dupont Manufacturing. And that case is continuing. .

Olivia Deans:

And then the last settlement agreement I'll talk about was for a class action filed between private citizens in Wisconsin versus Tyco Fire Products. And the case alleged three type of claims. So a property ownership claim, an exposure claim and a personal injury claim. And these claims essentially alleged that Tyco Fire Products, specifically the AFFF, the Aqueous Film Forming Foam contaminated private wells and drinking water sources with these PFAS chemicals. And so the action was filed in 2018 and a settlement agreement was reached in January 2021. And after that settlement agreement was reached, the Wisconsin DNR does say that it's continuing to work with Tyco to conduct additional site investigations and working on cleaning up these drinking water sources.

Olivia Deans:

Those were a few of the major PFAS settlement cases. And now I just want to talk about a few interesting PFAS cases that are going on right now and interesting to watch. The first is a case out of Wisconsin with an opinion that came out last month, where the judge held that the Wisconsin DNR did not have the authority to regulate and require PFAS testing from businesses. To take a step back, several businesses in Wisconsin entered into a voluntary testing and monitoring program with the DNR to gather information about PFAS contaminants. And then the Wisconsin DNR told the businesses they were required to test for PFAS contamination and submit additional data to the agency. But in response to this, the businesses filed suit and claim that the agency did not have the authority to require this. And the claim also highlighted that not enough information was provided.

Olivia Deans:

They didn't know of the hundreds of PFAS chemicals, which ones they were supposed to be testing and submitting information for. The agency, the DNR argued that under the Wisconsin Hazardous Substance Bill Act, the DNR had the authority to require testing, even in the absence of established regulations, especially because of the human health concerns associated with PFAS and the court did not agree with the agency and held that the DNR did not have authority to require this testing.

Olivia Deans:

So the agency did issue a press release after this stating it plans to appeal. The case is ongoing and interesting to see what happens. But I think this case is a good example, highlighting the challenges that the industry faces in just remediation and PFAS testing, because it's a massive burden without clear guidelines. And it also shows challenges for states that they face in regulating PFAS, especially if it's unclear, if there's authority to regulate.

Olivia Deans:

In 2019, the State of Vermont filed two suits for damages to aid in cleaning up state waters and natural resources in the state from PFAS contamination. And both of these cases were against 3M. And they alleged damages from consumer products containing PFAS and damages from firefighting foam. And so prior to this case, Vermont had established health advisories for five PFAS compounds in drinking water and groundwater, and had also established a really comprehensive statewide sampling plan. And so

through this sampling plan, they found a lot of contaminated areas, and that's when the state alleged 3M knew of the PFAS risk and failed to act. So essentially the State of Vermont was making an argument that 3M was violating the public trust doctrine. And the state also brought a public nuisance argument.

Olivia Deans:

3M filed to dismiss this case. And they argued that, the public trust doctrine wasn't this broad and only applied to navigable waterways. And they also argued that this was not a public nuisance case because 3M had relinquished control when they sold these products. The court held last year in May 2020, two years ago in the state's favour and did not dismiss the case. They said that the public trust doctrine is more broad and could cover both public health issues associated with the state's natural resources. But both of these cases are still ongoing.

Olivia Deans:

And then the last case I'll talk about is the town of New Windsor versus the United States. And this case is about firefighting foam that contaminated drinking water, surface waters and groundwaters. And so the town filed suit for damages and injunctive relief against the federal government, State of New York and other defendants, such as 3M and Dupont. And the U.S government and State of New York were named as defendants for their alleged role in developing this aqueous foam with 3M and for the leasing facilities that were partially responsible for the alleged water contamination.

Olivia Deans:

In this case, the PFAS contamination was so extensive that the towns drinking water treatment plant and supplies had to be shut down and still needs to be replaced. The town is making a similar argument to the Vermont case where they claim the defendants knew about the risk from PFAS and are making a public nuisance claim. Also associated with this case, there are two other related cases filed by the neighboring Newberg City. And those cases in this case have been transferred to a federal district court in South Carolina, where a judge is hearing 79 other pending PFAS cases. A lot of PFAS cases, but this case is ongoing. And I think the outcome opinion will be very interesting, especially since the federal government and state governments were named as defendants.

Olivia Deans:

I think that covers it. Just to recap so there is no comprehensive national, federal regulation of PFAS, kind of like Cathy mentioned, and in the absence of this, states have taken a variety of approaches to limit PFAS contamination. I think we will see stricter and more comprehensive federal regulation emerge. As Cathy talked about a little bit, the EPA is leading this effort to regulate PFAS and states might have to adjust standards to meet these federal limits. Thank you.

Stephanie Otts:

Thank you, Olivia. Thank you, Cathy. Thanks everyone for sticking with us. I know that it was a lot of information. Please feel free to ask questions in the chat box, if you have questions for Olivia and Cathy. I also failed to mention at the beginning that we did prepare CLE materials to go along with this webinar. It was sent to registrants prior to today's webinar. It follows the outline of this presentation, provides a lot more information, including links to where some of these statements and actions by agencies, what can be found online.

Stephanie Otts:

And so we will also post that with the recording when it becomes available. But let's see if anyone has any questions. Okay. Good. One question is coming in. First, is there any concern about PFAS in coastal environments or on aquatic species habitats? I don't see any monitoring in large water bodies, kind of Great Lakes or coastal marine. Is there tissue uptake by aquatic organisms that could pose issues from food safety?

Olivia Deans:

I could just address the food safety really quickly, but I think there have been food advisories issued for like brown trout in the Great Lakes. Wisconsin has worked on that. So I think, yeah, that's definitely an issue to monitor.

Stephanie Otts:

Yeah. And why was the New York case transferred to South Carolina? So Olivia, did you say it's been because it's being consolidated with other federal cases?

Olivia Deans:

Yes. Yep.

Stephanie Otts:

Yeah. It was probably just a decision among the courts that there were enough cases happening that they pulled the New York cases down to the judge in South Carolina. Great. Oh, and someone commented that there is a study going on about fish tissue sampling. So that's great to know. Yeah.

Stephanie Otts:

Great. Yeah. We know there's a lot been happening with respect to both on the science side for just how widespread is it, what is it being impacted? And then you kind of layer on a lot of this litigation that is kind of operating in its own universe, maybe kind of outside of some of those scientific studies. Yep.

Stephanie Otts:

Oh, Mississippi-Alabama Sea Grant says that they have an ongoing study related to farmed oyster and Mobile Bay and PFAS, PFOA. That would be interesting. Okay. All right. Wow. You can keep putting comments in the chat box, but as we're starting to wrap up, just wanted to do a couple of... Circle back to the housekeeping. If anyone was joining us today that is seeking or going to report CLE credit, we would love to collect that information. And so Olivia's going to drop a link into the chat that will take you to a simple Google Form where you can let us know your jurisdiction, and that will also record your attendance. If we need to provide documentation of that to your state bar, we can do that.

Stephanie Otts:

Also, we are really interested in your feedback on this webinar. And so we also have a link to a survey where you can give us a little bit of information about that. Our next webinar will be on May 12th. Cathy and Olivia, is that the right date? And it'll be featuring presentations from two policy fellows who have been working with the Center For Water Policy at the University of Wisconsin, Milwaukee, I believe. And I apologize to them in advance if I got their affiliation wrong, but they'll be talking about their work on several different water projects during the time of their fellowship.

Stephanie Otts:

Okay. And I see a direct message in the chat, and we can answer that as we are shutting down here as well. Thanks for sending that in. I want to thank Olivia and Cathy, for giving us this presentation. I want to thank everyone for being here and I hope you'll join us for future webinars in our webinar series. Thank you.