

BULLET BACKGROUND PAPER
ON
LEGAL POSITION ON ENFORCEABILITY OF STATE CLEANUP STANDARDS
FOR PFOA/PFOS IN WISCONSIN

PURPOSE

Provide Wisconsin Air National Guard (WIANG) leadership with an outline of United States Air Force (USAF) legal position on cleanup of PFOA/PFOS in Wisconsin

BACKGROUND

- PFOA/PFOS are found in the aqueous film forming foam used by all military components for fire suppression.
- While U.S. EPA has established a non-enforceable lifetime health advisory of 70 parts per trillion for PFOA/PFOS in human drinking water, they remain “emerging contaminants.” PFOA/PFOS are not federally regulated as hazardous substances.

LAW

- Doctrine of Federal Sovereign Immunity: Under the U.S. Constitution, the federal government is immune from state regulation unless Congress expressly waives its sovereign immunity. Simply put, when the federal government is immune to a state law, the state cannot force the federal government to comply with it.
- Cleanup of *hazardous substances*, pollutants or contaminants released from federal facilities is governed by the Comprehensive Environmental Response, Compensation, & Liability Act (CERCLA). Some federal facilities are on the National Priorities List (NPL) (aka “Superfund”), which is a list of the most contaminated sites. There are multiple phases to CERCLA.
- CERCLA only waives the federal government’s sovereign immunity to state laws concerning cleanup when both of the following are true:
 - The federal facility in question is **not** on the NPL **and**
 - the state laws in question govern the cleanup of *hazardous substances* that are specifically identified as such in CERCLA’s regulations or in other federal laws (such as the Clean Water Act).
- CERCLA’s definition of *hazardous substances* does not include PFOA/PFOS, nor does it include any other substances identified as *hazardous substances* solely under state law. While PFOA/PFOS are not CERCLA *hazardous substances*, they are CERCLA pollutants or contaminants.
- Importantly, when the federal government reaches the cleanup phase of CERCLA, the law requires the federal government to comply with state laws on CERCLA pollutants or contaminants and state laws on *hazardous substances*.
 - This requirement to comply with state laws, however, is not absolute. It only applies:

- during the CERCLA cleanup phase **and**
- when state laws are considered to be “applicable or relevant and appropriate requirements (ARARs).”
- An ARAR is a state standard that is:
 - substantive;
 - formally promulgated; **and**
 - stricter than a federal standard.

ANALYSIS

- Because PFOA/PFOS do not qualify as CERCLA *hazardous substances*, CERCLA’s waiver of the federal government’s sovereign immunity does not extend to state standards for PFOA/PFOS and such state standards are unenforceable against USAF.
- Nonetheless, **if** Wisconsin promulgates standards for PFOA/PFOS – regardless of whether they are CERCLA *hazardous substances* – USAF will be required by CERCLA to follow them under the following circumstances:
 - the CERCLA process progresses to the cleanup phase at a USAF facility in Wisconsin (including BRAC/ANG sites) **and**
 - the state standards properly constitute ARARs, as described above.
- This legal position has been directed by the OSD General Counsel’s office and is consistent with the legal position taken by USAF in several other states nationwide.

CONCLUSION

USAF is immune under CERCLA from Wisconsin’s attempts to enforce state laws regarding substances that are not designated as *hazardous substances* under CERCLA. However, **if** Wisconsin promulgates standards for PFOA/PFOS, USAF may subsequently be required to follow them as ARARs and cleanup accordingly. Until such time as that occurs, USAF remains committed to public health and the environment and will continue to follow CERCLA as its guide for PFOA/PFOS cleanup.