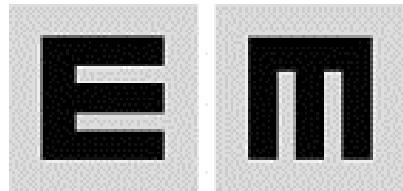


Funding PFAS Remediation in Biosolids

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EISENSTEIN MALANCHUK LLP

How Does This Work?

- Old liability insurance policies were very different than today's coverage
 - Limited or no pollution exclusion
 - No time limit on when a claim can be filed
- So long as the contamination stems from operations during the policy period, such as manufacturing and wastewater treatment, the claim can be made decades later
- Old unrelated records may hold clues (i.e. purchasing records, legal files, general ledgers)
- Some regulatory driver is needed, but this usually does not require a lawsuit



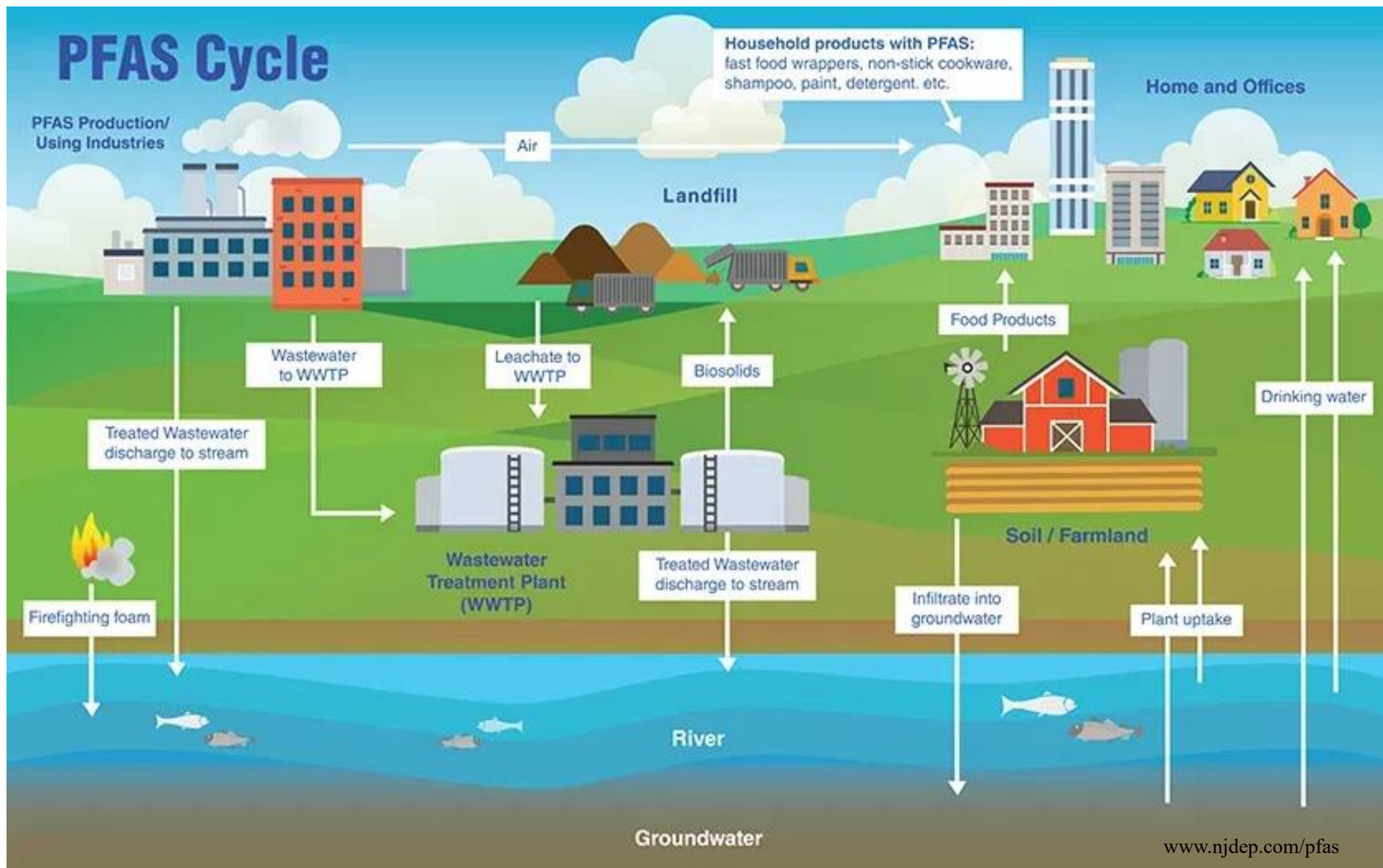
<https://www.hiltonheadmonthly.com/living/nature/5725-50-years-of-clean-water>

PFAS in Industry

- PFAS was being developed in the 1940's, post-war
- Scotchgard Fabric Protector
 - Discovered 1952
 - Sold in 1956
 - Patented 1973
- 1963: PFAS patented by US Navy as AFFF
 - Drastically reduced time to extinguish fuel fires compared to protein-based foams
- Stainmaster carpet 1973

Why Do I Care Now?

- Historic insurance during years of PFAS usage can pay for attorneys' fees and investigative costs relating to PFAS
 - Usually these “defense costs” do not decrease available policy limits
- However “defense costs” will only be covered from the date you provide notice to the insurer, not retroactively
- Find your insurance, notice your insurers, and be prepared



What Insurance Policies Am I Looking For?

- Normal business liability insurance — not environmental
- The most valuable coverage to find is from the 1970's and earlier
- Pollution exclusions first appear in the early 1970's
 - State law varies widely as to whether these “qualified” pollution exclusions limit the scope of coverage — in some States evidence of contamination due to a leak or spill, etc. may be required
- “Absolute” pollution exclusions generally are seen starting in the mid-1980's

Insurance Archeology

- Public and Private entities often cannot locate some or all of their historic liability insurance
- However in most instances this coverage, or evidence of existence of the coverage, can be located through a combination of:
 - Internal records (e.g., meeting minutes)
 - Broker records
 - (Infrequently) insurer records
- This is an exercise much more easily, and effectively, done by someone who has done it multiple times — searching for a needle in a haystack, but it is almost always there

Insurance Archeology



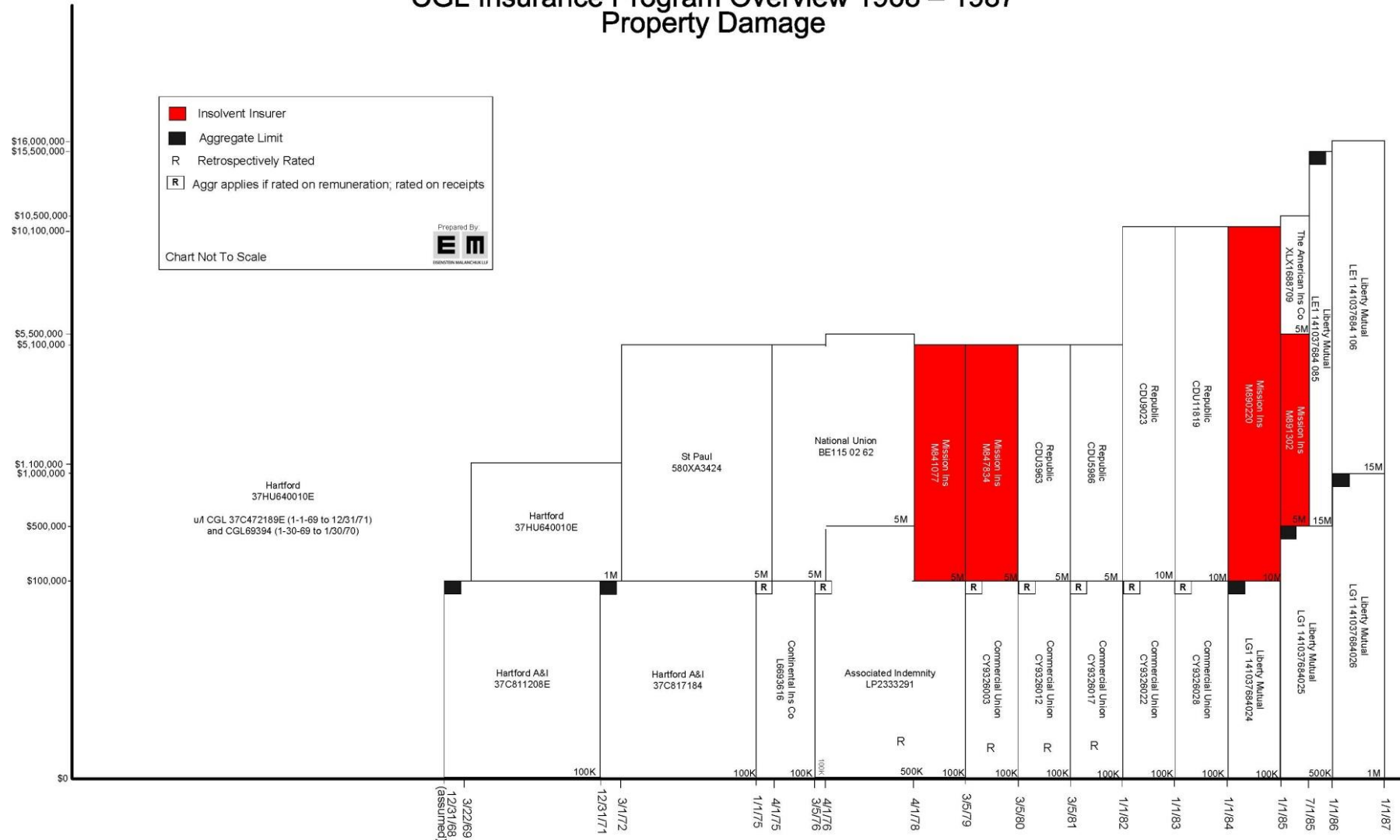
Insurance Archeology



Insurance Coverage

XYZ Company CGL Insurance Program Overview 1968 – 1987 Property Damage

Draft – Dec 5, 2011
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The Steps in the Process

Is there a case?

Site history

- Stock or asset purchases
- Flow of liabilities
- Policy rights

Liabilities

- Past costs
- Future costs
- Regulatory compulsion

Policies

- Existence/evidence
- Terms
- Exclusions
- Solvent carriers

Determine whether sufficient coverage exists to support a claim



Build the claim

Provide details of transactions to demonstrate coverage is proper

Prepare an analysis of each site in the claim describing the site, the nature of the problem, the proposed solution for risk transfer purposes, the costs to date and the future costs for the proposed solution

Perform allocations according to various theories to determine how much each policy/carrier should pay of the total damages

Complete the detailed insurance coverage chart and policy language analysis

Implement standstill and confidentiality agreements with each carrier



Negotiate the claim

Develop settlement strategy

Prepare targets and demands for each carrier

Hold principal to principal meetings with each carrier to settle the claims

How About Liability Insurance After the Mid-1980's?

- “Absolute” pollution exclusions aren’t always so absolute
- Does an exclusion for “pollutants” exclude damage due to PFAS?
 - Maybe not, because PFAS was used as intended and was not a waste product
 - Some US jurisdictions limit “pollutants” to traditional wastes, and for example exclude gasoline used at a gas station
 - Indiana requires pollution exclusions to specify the contaminant
 - inconceivable that PFAS was listed historically

Key Takeaways

- Find your insurance now, before you need it
- Use the insurance to pay for attorneys' fees and environmental investigations
- Also use the insurance to pay for investigation and remediation costs

Thank you!

Please follow up with us:

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