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The Forever Chemical: Regulation, Litigation And Insurance

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A commentary reprinted from the August 19, 2025 issue of Mealey's Emerging Toxic Torts

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Commentary

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Regulating PFAS In The Garden State: When The Going Gets Tough

Arthur J. Clarke and Walker Prentke

New Jersey has a long and storied history of industrialization dating back to the birth of the American Industrial Revolution, when Alexander Hamilton first harnessed the power of Paterson's Great Falls and continuing into the 20th and even 21st centuries. In Hamilton's day, this industrialization brought the hope of prosperity to a fledgling nation, and, over time, New Jersey would reap the benefits of the resulting economic surge. But along with the spoils came the burdens of industrialization in the form of long-term harm to human health and the environment due to the uncontrolled release of hazardous substances.

New Jersey has shouldered more than its fair share of this harm due to a deeply vested manufacturing

economy that welcomed numerous industries to within its borders, including chemical manufacturing, metals smelting and refining, petroleum refining, telecommunications and electronics manufacturing, pharmaceutical manufacturing, and solid and hazardous waste disposal. New Jersey is home to more Superfund NPL sites than any other state in the country, easily surpassing other industrialized states including Pennsylvania, Ohio, and Michigan.

Perhaps in response to the above, New Jersey has developed a tough stance on the illegal discharge of hazardous substances, earning it the reputation of being one of the strictest states in the nation when it comes to cleaning up hazardous sites. For example, in 1980, it proffered the New Jersey Spill Act as the blueprint for the Comprehensive Environmental, Response Compensation and Liability Act ("CERCLA"), the federal hazardous waste cleanup law that authorized the United States Environmental Protection Agency (USEPA) to implement the National Contingency Plan (NCP) and the National Priorities List (NPL) ranking system, both pillars of the country's approach to cleaning up hazardous waste sites. Later, the State enacted the Environmental Cleanup Responsibility Act (ECRA, now ISRA) to protect purchasers of industrial establishments, and the Site Remediation Reform Act (SRRA) that established the State's Licensed Site Remediation Professional (LSRP) program. New Jersey also promulgated strict regulations aimed at preventing contaminants from reaching the State's air, water, and land; preserving open space, wetlands, and other critical habitats; and levying heavy penalties for violators.

Presently, New Jersey still finds itself at the forefront of the development and enforcement of strict environmental regulations. Most recently, it has implemented a series of robust regulations concerning several new contaminants of concern often labeled as "contaminants of emerging concern" or CECs. These contaminants include per- and polyfluoroalkyl substances (PFAS)[1]

New Jersey's Regulation Of PFAS In Drinking Water

New Jersey was the first state to regulate drinking water for PFAS content when it promulgated an MCL for PFNA of 13 ppt in 2018 and went on to promulgate MCLs for PFOA and PFOS, at 14 ppt and 13 ppt, respectively, in 2020, which have impacted numerous water systems across the state[2]. There are two types of public water systems in New Jersey: community and non-community. A community water system has at least 15 service connections used by year-round residents or which regularly serve at least 25 year-round residents. Examples of community water systems include mobile home communities and municipalities. A non-community water system is a public water system used by individuals other than year-round residents for at least 60 days of the year. A non-community water system can be either transient or non-transient. A non-transient non-community water system serves at least 25 of the same people over a period of six months during the year, as in schools, factories, and office buildings. A transient non-community water system is a system that serves year-round for at least 60 days of the year but does not serve the same individuals during that time-period. Transient non-community water systems include rest stop areas, restaurants, and motels.[3] As of the date of this writing, there were over 150 violations of the PFAS MCLs in community and non-community water systems in New Jersey.

Additionally, New Jersey is a leader in the toxicological investigation of PFAS compounds and was the first state to conduct statewide PFAS occurrence studies. As early as 2006, 23 water systems were investigated for PFOA and PFOS content in drinking water. These studies were implemented in response to the 2006 detection of PFOA in a public water system (PWS) located near an industrial site. In 2009-2010, New Jersey investigated 31 water systems and found 10 perfluoroalkyl acids (PFAAs), a group that includes PFOA, PFOS and PFNA, with minimum detection/reporting levels as low as 4-5 ppt, much lower than the current New Jersey PFAS drinking water standards of 13-14 ppt and commensurate with the current federal PFOA and PFOS standards of 4 ppt.[4]

New Jersey also has strict Ground Water Quality Standards (GWQS) for PFAS, regulating the media in the same manner as drinking water with the same PFAS MCLs as surface water supplies. The GWQS establishes classes of ground water according to the hydrogeologic characteristics of the ground water resource and the designated use(s) to be maintained, restored, and enhanced within each classification area. Designated uses include maintenance of special

ecological resources, provision of and conversion to potable water (drinking water), agricultural and industrial water supply, and other reasonable uses.

The GWQS for PFAS apply to private drinking water wells under the Private Well Testing Act (PWTA). The PWTA is a consumer information law established in 2002 that requires private wells to be tested by a certified laboratory during real estate transfer and requires landlords to test well water supplied to tenants every five years and provide results. This law impacts many residential properties within the State. A private well owner may file a Spill Fund Damage Claim if any of PFOS, PFOA, or PFNA contamination is detected in a private well and the results are greater than the NJDEP Contaminated Site Remediation & Redevelopment Financial Relief Criteria. These criteria are based on the stricter federal MCLs and not the less strict NJDEP MCLs.

New Jersey's Regulation Of PFAS In Wastewater

Citing the risks that PFAS pose to public health and safety and the environment, the NJDEP has issued an Administrative Order (AO No. 2023-01)[5] applicable to generators of wastewater in the state, including Waste Water Treatment Plants (WWTPs) that receive the discharge from Significant Industrial Users (SIUs) permitted by the Department (i.e., Treatment Entities) and WWTPs with approved Industrial Pretreatment Programs, referred to as Delegated Local Agencies (DLAs). The AO does not prohibit or regulate the concentration of PFAS in wastewater; instead, it calls for the NJDEP to "proactively evaluate and reduce potential sources of PFAS, including, but not limited to, evaluating the presence of PFAS in wastewater discharges and considering requirements for the reduction of PFAS in such discharges" in an effort "to better understand the presence of PFAS within wastewater systems, locate potential sources of PFAS to wastewater systems, assess impacts of PFAS on wastewater treatment processes and sewage sludge quality, and develop solutions to reduce or eliminate sources of PFAS entering the wastewater systems or discharging into the waters of the State."

In essence, the NJDEP is requesting Treatment Entities and DLAs to voluntarily collect PFAS data and submit same to the Department. In lieu of enforcing concentration limits for PFAS like it does with other wastewater contaminants, the Department will use the data to investigate the extent of PFAS in the State by:

- Deeming such data as disclosed to the Department as part of the NJPDES permit application and compliance process under N.J.A.C. 7:14A.
- Considering such PFAS data to have been within the reasonable contemplation of the Department as part of the Treatment Entity's or DLA's NJPDES permit application process. (The New Jersey Pollution Discharge Elimination System (NJPDES) program is akin to the federal NPDES program. USEPA authorized the NJPDES program to operate independently from the NPDES program in April 1982.)
- Considering the Treatment Entity's or DLA's discharge of PFAS protected by the permit shield afforded pursuant to 33 USC § 1342(k) unless it is required by the Department to be reported in their Discharge Monitoring Report.

Specifically, the Department states: "The Department will not take an enforcement action for an unpermitted discharge against any Treatment Entity or DLA based upon PFAS data submitted to the Department solely pursuant to this Order." It is unclear where the voluntary program will lead as far as enforcement is concerned, but for now the state is not regulating wastewater PFAS discharges in the traditional sense of requiring a permit with discharge limitations and enforcing those limitations with fines and penalties.

New Jersey's Regulation Of PFAS In Its Contaminated Site Remediation And Redevelopment (CSRR) Program

Site remediation projects in New Jersey must also comply with strict PFAS regulations. According to NJDEP's website, all contamination, including all discharged hazardous substances, hazardous wastes, and pollutants, must be addressed in order to comply with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-1.1 et seq., New Jersey's regulations for conducting site remediation work implemented by Licensed Site Remediation Professionals (LSRPs) and others.[6] Contaminants of emerging

concern (CECs), including PFAS compounds, if discharged to the waters or onto the lands of the State, are pollutants that must be remediated using an LSRP even if the contaminant is not a hazardous substance.[7]

When the site or area of concern under remediation is currently or was formerly occupied by facilities that, after appropriate assessment, were suspected of manufacturing, storing, handling, or using CECs, LSRPs must consider these contaminants during the investigation and remedial action. LSRPs must also evaluate the site for potential spills and releases through air, water, and waste discharges. This requirement is further elaborated by NJDEP stating that the evaluation required for PFAS, among other CECs, must be conducted by an LSRP or other environmental professional for every site currently undergoing remediation to determine if PFAS is a contaminant of concern and if further investigation or remediation is required. This evaluation does not necessarily require sampling; however, multiple lines of evidence should be considered to track whether sampling and possible remediation is mandated. This evaluation requires the LSRP to look at the history of a site undergoing an investigation under the CCSR on a site-specific basis to decide if the operations at the site may have involved PFAS. If the operations may have involved discharges of PFAS, the LSRP must decide if further evaluation or sampling is needed.

NJDEP has promulgated interim soil remediation standards for four PFAS substances to be used when a person responsible for the site remediation detects PFAS substances in the soils at its site. These interim standards will guide LSRPs on whether remediation is necessary and at what concentration the remediation can be considered complete. The NJDEP established interim soil standards for the four PFAS compounds as shown in Table 1.

Table 1.

Contaminant	Groundwater Remediation Standard (µg/L)	Soil Remediation Standard: Ingestion-Dermal Residential (mg/kg)	Soil Remediation Standard: Ingestion-Dermal Nonresidential (mg/kg)	Soil Remediation Standard: Migration to Groundwater (mg/kg)	Soil Leachate Remediation Standard: Migration to Groundwater (µg/L)
GenX	0.02	0.23	3.9	Area of Concern / Site-Specific	0.40
PFNA	0.013	0.047	0.67	Area of Concern / Site-Specific	0.26
PFOS	0.013	0.11	1.6	Area of Concern / Site-Specific	0.26
PFOA	0.014	0.13	1.8	Area of Concern / Site-Specific	0.28

* According to USEPA, GenX chemicals are considered a replacement for perfluorooctanoic acid (PFOA).

PFAS In The Stream Of Commerce

The LSRP's duty to look into historic operations for the possible presence of PFAS is broad and may get broader. Like other states, the NJDEP's PFAS investigation policies have predominantly been focused on impacts originating from the manufacture, use, storage, and discharge of Aqueous Film Forming Foam (AFFF)—also known as fire-fighting foam—but historically, PFAS have also been widely used in a number of consumer products. These include non-stick cookware, waterproof/breathable clothing, chemical/heat resistant industrial products, water and stain resistant coatings on carpets and upholstery, and grease-proof food packaging. One might not expect

these products to be the source of spills and releases of PFAS to the environment, but quite the opposite is true. Research has proven that these products, once in the stream of commerce and, particularly, at the end-of-life phase (i.e., disposal), can be significant environmental sources of PFAS. A singular product is likely to be a small source, but cumulatively, products can be large scale sources.

Of all the potential non-food consumer product sources of PFAS in the environment, among the most vexing are textiles and clothing. Traditionally, the understanding of the public was that PFAS in clothing have primarily been used in "high performance" apparel, where resistance to water and oils was highly desired or needed. However, the use of PFAS in "stain resistant" clothing goes beyond high performance apparel including such common fabrics as cotton twill used in casual clothing such as khakis, a popular casual wear favored by American office workers for years.[8]

Wearing clothing treated with PFAS can lead to a direct human contact pathway that may have a significant impact on human health. However, significant environmental impacts from PFAS treated clothing may come from low concentrations of PFAS that are released during the clothing's wash cycle, which results in the discharges of microscopic fibers. The washing process discharges fibers along with the wash water to wastewater treatment plants (WWTPs). While undergoing wastewater treatment, the WWTP filters out solid fluorinated fibers from the wastewater, and the fibers manifest themselves in the WWTP's sludges/bio solids. In many cases, farmers use the biosolids from the WWTP as fertilizer, and PFAS-containing fibers are spread over agricultural land. This results in PFAS being slowly released into soils and ground and surface waters which may contaminate the nation's food supply. Since the USEPA instituted a phase-out of long-chain PFAS (C8 and above) starting in the early 2000s, manufacturers have either removed fluorinated products from their lines or moved on to shorter-chain fluorinated alternatives (C6) that are not currently regulated in New Jersey. However, from the 1970s through to the early 2000s PFOA precursors were commonly used in commercial products, and as such there is a high potential for legacy PFAS impacts to products to develop into modern environmental problems.

One such site in New Jersey is the Route 31 Sludge Disposal Site located in the eastern portion of Warren County in Washington Township. This site has been impacted by industrial PFAS substances that have been traced back to historic waste sludge from a former textile manufacturing and dying operation. The sludge was spread over at least 45 acres of farmland from the late 1950s through the 1970s. NJDEP has referred the site to the USEPA to address high levels of PFAS in soil and groundwater, and the USEPA's investigation is ongoing. Thus far, 180 homes have been impacted, and the EPA has sampled almost 350 residential and non-residential drinking water wells.[9]

How Other States Are Regulating PFAS In Sludge Fertilizer And Food Products

The use of sludge as fertilizer has prompted several states to take action above and beyond setting PFAS limits to protect drinking water. In Maine, for example, dozens of dairy farms have been found to be contaminated, which has prompted the state to start implementing a program to systematically test its farmland for PFAS. In Texas, a group of ranchers sued the provider of sludge fertilizer last year after a neighboring farm used the fertilizer on its fields. County investigators found several types of PFAS in the ranchers' soil, water, crops, and livestock, and the ranchers have since sued the EPA, accusing the agency of failing to regulate PFAS in biosolids.[10] In Michigan, state officials shut down a farm where tests found particularly high concentrations in the soil and in cattle that grazed on the land. Because PFAS is so persistent in the environment, sludge applied years or even decades ago can continue to be a source of contamination today and in the future unless abated.

The potential for contamination of the food chain is deeply concerning. However, only a few states have taken action to regulate this pathway. In Maine, Bill L.D.130 was recently signed into law. The law establishes agricultural limits for PFAS and provides testing, technical, and financial assistance to farmers and on-farm mitigation efforts. If a maximum PFAS limit is exceeded, the state may prohibit the commercial sale of those products that exceed the maximum thresholds. So far, the state has set two limits for PFAS in food: a PFOS Action Level for beef at 3.4 parts per billion (ppb) in addition to its milk PFOS Action Level of 210 parts per trillion (ppt).

Regulation Of Other Consumer Products

Perhaps the best way to abate the problem is to address it at its source. Several states have introduced legislation limiting PFAS content in textiles and other consumer products, including California, Colorado, Maine, Maryland, Minnesota, New Mexico, and New Jersey. California's ban contains compliance testing for textiles which need to be below 100 ppm in a Total Organic Fluorine (TOF) test, reducing to 50 ppm in 2027. Colorado recently enacted its proposed legislation (SB24-081) into law that will impose a ban on the sale and distribution of products containing "intentionally added" PFAS. The law impacts multiple industries while incorporating gradual product phase-out timelines for compliance. Certain articles of clothing will require a PFAS disclosure almost immediately, and other products that contain intentionally added PFAS will be phased out, including artificial turf, which will be banned from installation beginning in 2026. New Jersey's bill is focused on firefighting personal protective equipment (PPE) and will require written notice to consumers that the product contains intentionally added PFAS and a list of the PFAS compounds that were added (A5195). After a phase-in period of two years, the sale of certain PFAS containing products would be banned.

New Jersey In Perspective

New Jersey still finds itself at the forefront of the development and enforcement of strict environmental regulations and has implemented a series of robust regulations concerning PFAS. These regulations have been directed at environmental media, such as ground water and soil, drinking water, and wastewater. However, other states have made significant progress in the regulation of PFAS chemicals in clothing, consumer goods, food, and agricultural products. These recent measures may represent a growing trend toward banning consumer products that contain PFAS, especially those where PFAS were intentionally added, and abating direct ingestion of PFAS through agricultural products such as beef and dairy products. Many companies that operate at a national level in the US do not have sophisticated enough control of their distribution networks to exclude fluorinated products from specifically being sold in states with PFAS bans in consumer products, and as such, compliance with other statewide initiatives on a national level would likely create a *de facto* compliance for any upcoming legislation regarding consumer products in New Jersey.

Overview Of PFAS Litigation In New Jersey

Matthew J. Sinkman

Attorneys, consultants, and the regulated community – including current and former owners and operators of industrial properties – should be prepared for potential claims regarding per- and poly-fluoroalkyl substances (PFAS). There already is significant litigation in New Jersey regarding PFAS, and much more is expected. That is because PFAS are ubiquitous in the environment; at least some PFAS pose potentially significant health effects, including cancer; and New Jersey and the federal government have set extremely strict standards for PFAS in drinking water, groundwater, and other environmental media.[11]

This section seeks to provide an overview of actual and potential litigation regarding PFAS in New Jersey, as well as strategic considerations related to litigation and regulatory compliance.

Litigation Brought By The State Of New Jersey Regarding Pfas At Specific Sites

New Jersey has aggressively pursued claims with respect to PFAS contamination against manufacturers and suppliers. In 2023, New Jersey settled a lawsuit it brought against Solvay Specialty Polymers USA, LLC and others, alleging discharges of PFAS from a manufacturing facility in Gloucester County.[12] Solvay agreed to pay $393 million to settle the claims.[13] The funds will be used to remediate contamination at and around the facility, upgrade treatment processes at surrounding water utilities, assist residents with contamination in private wells, and compensate the state for natural resource damages (NRD).[14]

In May 2025, the state reached a $450 million settlement with the 3M Company (3M) regarding its supply of PFAS to the Chambers Work facility in Salem County and the Parlin facility in Middlesex County.[15] The settlement, if judicially approved following a comment period, would resolve claims by New Jersey against 3M for NRD across the state and violations of the Consumer Fraud Act with respect to 3M's sale, marketing, and distribution of products containing PFAS in New Jersey.[16]

New Jersey recently reached an approximately $2 billion settlement of litigation against owners and operators of the Chambers Works site, including E.I. DuPont de Nemours & Company and the Chemours

Company.[17] The settlement also resolves claims relating to other sites, statewide claims relating to NRD, and claims relating to AFFF (discussed below). The Chambers Works litigation, which included claims under the Spill Compensation and Control Act (Spill Act), Brownfield and Contaminated Site Remediation Act (BCSRA), and the Industrial Site Recovery Act, was being tried in federal court.[18]

Litigation Brought By New Jersey And Others Regarding Aqueous Film-Forming Foam (AFFF)

In 2019, New Jersey sued 3M and other manufacturers of AFFF containing PFAS, seeking to recover response costs and NRD throughout the state.[19] AFFF is used to extinguish hydrocarbon fires, but a significant portion of AFFF is used for firefighting training.[20] AFFF has been used for decades at United States Department of Defense (DOD) sites, airports, firefighting training centers, industrial sites (*e.g.*, in fire suppression systems), and other sites. In fact, PFAS have been a required component of AFFF used at DOD sites and many airports, and work is ongoing with respect to identifying substitute products.[21] New Jersey also has sued the federal government regarding AFFF.[22]

New Jersey's AFFF suits were transferred to a multidistrict litigation (MDL) in South Carolina District Court. The MDL currently includes about 11,000 cases, of which there are five main types: cases brought by states (including New Jersey) for response costs and NRD; cases brought by water utilities for remedial costs; personal injury cases; medical monitoring cases; and property damage cases.

Last year, 3M and other defendants in the MDL reached settlements with thousands of water providers nationwide. As part of the settlement, 3M agreed to pay $10.5 billion to $12.5 billion (the range depends, *inter alia*, on sampling results), and the remaining defendants agreed to collectively pay approximately $3 billion.[23] Water providers in New Jersey are expected to receive approximately $300 million to $500 million from that settlement.[24]

Bellwether personal injury cases in the MDL are scheduled to begin in October. The first trial will focus on kidney cancer allegedly caused by PFAS in AFFF.[25] Subsequent trials will cover testicular cancer, ulcerative colitis, thyroid disease, liver cancer, and thyroid cancer.[26]

The outcome of those trials, particularly with respect to causation, will shape the outcome of other personal injury actions. Indeed, the outcome of the trials is expected to reverberate beyond the AFFF MDL, given that many consumer and industrial products and processes have caused widespread PFAS contamination in drinking water and other environmental media. Likewise, since there are many potential ways for people to be exposed to PFAS, defendants in personal injury actions likely will raise issues relating to causation.

Consumer Product Claims

Consumer product claims relating to PFAS typically arise from consumer protection statutes prohibiting consumer fraud and false advertising. Actions filed to date relate to a number of consumer goods, including cosmetics, candy packaging, fast-food packaging, mouthwash, smartwatch wristbands, menstrual products, baby wipes, and firefighting gear.[27] Generally, these actions allege that the products are unfit for their intended use because the presence of PFAS in the product renders the product unsafe, and the products violate various consumer protection statutes by misleading consumers into believing the products do not contain PFAS. Many of the product claims are purported class actions but have not yet progressed to class certification; many, but not all of the cases, have been dismissed.[28]

Spill Act And CERCLA Contribution Actions

Certain PFAS are listed as hazardous substances under New Jersey's Spill Act statute and the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[29], and more are likely to be regulated in the future. The New Jersey Brownfield and Contaminated Site Remediation Act requires property owners, operators, and other responsible persons to remediate discharges of hazardous substances.[30] The Spill Act, which does not have a statute of limitations, provides a cause of action for contribution to recover remediation costs against other responsible parties.[31] Accordingly, anyone required to investigate and remediate PFAS contamination in New Jersey may have a claim to recover those costs from other dischargers or other persons responsible for conducting the remediation.

Similarly, anyone cleaning up PFAS or resolving liability with the United States or a state regarding PFAS

may have a claim for contribution against CERCLA responsible parties, including current owners and operators, owners and operators at the time of disposal, arrangers, and transporters.[32] Consultants are becoming increasingly sophisticated at identifying third parties that contributed to PFAS contamination, including through the use of conceptual site models, fingerprinting different types of PFAS, and analyzing historic uses of PFAS at or around a site.

In New Jersey, remediated sites with long-term institutional or engineering controls require biennial certifications with conditions specified in Remedial Action Permits (RAP). For the past several years, the Department of Environmental Protection has required that biennial RAP certifications evaluate whether PFAS have been manufactured, used, handled, stored, disposed, or discharged in an area of concern.[33] Similarly, CERCLA requires submission of five-year review reports at sites with long-term controls to evaluate whether a remedy remains protective of human health and the environment.[34] Those five-year reviews now generally require evaluation of PFAS.[35] However, remediation of PFAS should not be required if a remedy remains protective of human health and the environment, notwithstanding the presence of PFAS.[36]

Additional complications with respect to liability for PFAS under the Spill Act and CERCLA are expected, given that PFAS are ubiquitous and subject to increasing regulatory requirements. For instance, wastewater treatment plants often produce biosolids or sludge containing PFAS. That sludge then may be used as fertilizer for agriculture, or it may be shipped to landfills. All persons involved in this process could be responsible persons under the Spill Act or CERCLA, as seen in recent litigation by farmers against fertilizer manufacturers.[37] Indeed, the Environmental Protection Agency (EPA) is working on establishing limits on PFAS in biosolids.[38] The Department of Environmental Protection also is collecting data (as a likely precursor to regulations) on the discharge of PFAS into biosolids, as well as industrial wastewater and other media.[39] Similarly, manufacturing facilities may disperse PFAS into the air, thereby potentially causing PFAS contamination to be dispersed significant distances.[40]

Given these complexities, EPA has issued a "PFAS Enforcement Discretion Settlement Policy Under CERCLA."[41] The policy provides that "EPA does not intend to pursue entities where equitable factors do not support seeking response actions or costs under CERCLA, including farmers, municipal landfills, water utilities, municipal airports, and local fire departments."[42]

* * *

There already is significant litigation activity regarding PFAS in New Jersey. More such activity is expected, as the state and federal government increasingly focus on PFAS and related regulations are developing in "real time." All stakeholders should stay updated about the evolving regulatory landscape, developments in the pending litigation, and strategic considerations with respect to potential claims.

Insurance Coverage Exists For The Forever Chemical In New Jersey

Robert D. Chesler

PFAS – a class of man-made per- and polyfluoroalkyl substances -- is in our groundwater and in our blood. An article in The New York Times[43] indicates that this ubiquitous so-called "forever" chemical could trigger a bigger wave of litigation than asbestos. PFAS is in innumerable products, and a study[44] cited by the Times found that nearly a third of groundwater samples taken worldwide had PFAS levels higher than the threshold the EPA deems harmful to human health. In addition to creating groundwater pollution, PFAS is also noted by some as a carcinogen. We are currently 'there at the creation' of the next wave of environmental and toxic tort litigation.

The insurance industry already is circling the wagons against the expected coverage onslaught, asserting polluters' exclusions, late notice, and a host of other defenses. New Jersey case law indicates, however, that liability for PFAS groundwater contamination and bodily injury should be covered by historic general liability policies – those in effect before 1986, when the absolute polluters' exclusion was added to the standard commercial general liability (CGL) policy. When pollution being called to account now occurred over the course of decades, old policies often provide coverage. The trick is to find those policies – or legally sufficient secondary evidence that they existed.

Which Policies Apply?

Liability insurance coverage is triggered at the time that damage or injury occurred. Commercial General Liability (CGL) policies are occurrence-based, which means that if a covered event occurs during the policy

period it is covered even if it does not manifest itself until years later. In a "slip and fall" or "fender bender," the time of the damage is easily known. What happens when groundwater contamination is discovered in 2024 that can be traced back to 1980? While the absolute polluters' exclusion will usually preclude coverage under policies in effect after 1986, the policies in effect from 1980 to 1986 in this case may respond.

Under the legal doctrine known as the 'continuous trigger,' all policies from first exposure to PFAS until its discovery must respond to a claim.

The Sudden And Accidental Polluters Exclusion May Not Apply

In or about 1973, the insurance industry introduced its first standard polluters' exclusion to the CGL policy, excluding coverage discharge of pollutants unless the discharges were 'sudden and accidental.' Some state courts have held that this exclusion applies to unintended pollution that occurred gradually. In these states, coverage is precluded after 1973 for PFAS claims of groundwater contamination, except in the case of, for example, a sudden spill or industrial accident.

However, other states have held that 'sudden and accidental' only means unintended and unexpected, however long the pollution continued. In those states, coverage exists for PFAS groundwater contamination under policies with the sudden and accidental exclusion. The New Jersey Supreme Court in particular ruled in Morton Intern. v. General Acc. Ins. (1992) that the exclusion only applies if the damage was intentional (not accidental). Holding that the term "sudden" pertained only to the initial release of pollutants, not to ensuing pollution over time, and giving weight to the insurance industry's characterization of the exclusion to regulators when it was first proposed, the court wrote, "We are fully satisfied that if given literal effect, the standard clause's widespread inclusion in CGL policies would limit coverage for pollution damage to so great an extent that the industry's representation of the standard clause's effect, in its presentation to New Jersey and other state insurance regulatory agencies, would have been grossly misleading."

In about 1986, the insurance industry replaced the 'sudden and accidental' polluters' exclusion with an 'absolute' polluters' exclusion. While this could be a valid defense against most PFAS claims, polluters' exclusions (absolute or otherwise) generally do not apply to products liability, completed operations, and personal injury claims. Unless one of these three exceptions apply, no coverage exists under CGL policies for PFAS contamination that commences after 1986.

You Don't Need The Actual Policy

Most companies do not have copies of their historic insurance policies dating back to before 1986. Companies searching for their old insurance policies can look for secondary proof of coverage from documents such as corporate minute books. While insurance brokers are a useful source of information, many companies seeking sufficient proof of decades-old coverage use insurance archaeologists. This little-known specialty is expert in locating proof of old policies.

The policyholder does not need the actual policy to prove coverage. In a minority of states, the insured must prove the policy by clear and convincing evidence. In the majority of states, though, the insured need only prove the policy by a 'preponderance of the evidence' i.e., prove that coverage is likelier than not. Secondary evidence is sufficient, and sometimes very little secondary evidence at that. At Anderson Kill, we have literally obtained coverage when a single piece of paper identified the name of the insurance company providing coverage in the period in question. Insurance archaeologists are expert at finding evidence of policies dating back as far as the 1970's or earlier.

You Don't Need To Be Sued To Have Coverage

Many companies know to put their insurance companies on notice once they are sued. However, PFAS liability also arises without litigation, in regulatory settings. Coverage can be triggered, for example, by a "potentially responsible party" (PRP) letter from the EPA or a Directive from NJDEP. Your insurance company is required to defend you in such a proceeding, if the policy covers the type of event that triggered the regulatory action. Providing notice to all potentially responding insurance companies early and broadly is necessary. Late notice can bar coverage.

In addition to the duty to pay damages, your insurance company must pay for the cost of defending you. The duty to defend is outside the policy limits and unlimited. It is an asset of the greatest value. We currently have a case in which a $100,000 policy from 1970 is expending $4,000,000 in defense costs on behalf of the insured.

Notice

Many companies do not realize that PFAS is potentially covered by insurance, and fail to give notice to their insurance companies of a claim when the company first receives notice. In most states, an insurance company can only deny coverage for late notice if it can show that it has been prejudiced by the delay in giving notice. This is a very difficult standard for insurance companies to meet, and in many if not most instances, late notice will not bar coverage. In a minority of states, however, no prejudice is required and late notice will foreclose coverage.

Late notice is one of several issues on which there is a division among the states. This puts a premium on choice of law and choice of forum. Coverage for PFAS involves a careful consideration of available forums.

What To Do?

If you think your company may have PFAS exposure, immediately search for your historic insurance policies. At the first whiff of anything resembling a claim, give notice to your insurance companies early and broadly. Examine when the PFAS contamination is alleged to have occurred. You should retain an insurance expert to help you to navigate the claim and respond to the inevitable insurance company denial.

Insurance Archaeology: A Strategic Approach To Maximizing Recoveries For Pfas Liabilities

Brian Della Torre

In the 1967 classic film *The Graduate*, young Benjamin is solemnly advised, "There's a great future in plastics." Dustin Hoffman, who played that young man, is now 89 years old and while the movie and the harm from those plastics are easy to find, often the insurance policies from the 1960s, or even the early 2000s, are more elusive.

Yet insurance policies from the 1960s through the 2000s are a critical tool for responding to the PFAS crisis. Since general liability and excess liability policies are typically written on an "occurrence" basis, they "never expire" and provide coverage for claims emanating from the policy period in perpetuity. When decades later lawsuits are filed alleging such harms, the policyholder can submit claims for defense and indemnification from the insurer on the risk at the time of the occurrence -- but only if they can identify the coverage in place. Even when the policies themselves cannot be located, coverage can be established through secondary evidence such as certificates of insurance, correspondence, accounting records and claims files.

Insurance archaeology is the term for specialized research to reconstruct historic insurance coverage. Since the early 1980s, insurance archaeologists have located coverage for long tail claims ranging from environmental to sexual abuse, from asbestos to wrongful arrest. Archaeology has unlocked trillions of dollars of insurance coverage for entities including Fortune 100 manufacturers, distributors, utilities, religious institutions, municipalities, dry cleaners, retailers, and real estate companies. Since PFAS claims have already been brought against a wide range of entities including airports, water districts, artificial turf manufacturers and bottlers, insurance archaeologists diverse industry experience will be critical.

The Search

The diversity of entities facing PFAS claims means that each research project is unique. The first step of any project is to understand the operations at the time of alleged harm. This includes identifying historic entity names, parent companies and locations. This information helps to identify potential sources of information and shapes the research project. Each of these details can reveal key sources of information on historic coverage.

Conducting A Search – Internal Records

An important source of information is the organization's historic business records. Insurance information can be found in a wide range of records including accounting files, correspondence, contracts, leases, real estate, claims and litigation. Even if these records do not provide insurance information, they can identify leads to outside sources such as brokers, counsel, litigation and contracts that required certificates of insurance.

Today, the investigation of corporate records often begins at the computer screen. Storage vendors maintain electronic indices detailing the contents of corporate records; however, while access may be instantaneous, it is often incomplete. Critical information on departments, dates, locations and even description fields has often been neglected or lost in the transfer of legacy systems within the storage industry.

Identifying the relevant boxes can be a painstaking research project which requires keyword searches, cross referencing codes with department names and comparing descriptions from various indices prepared at different points in time.

For other policyholders, there may be no systematic procedures for records retention. In these cases, the search for missing policies may lead to boxes dumped in a basement, often ignored mezzanine levels in warehouses, or files buried under hymnals in a closet or in the back corner of the stairs by the school squash court.

For public entities like water districts and airports, the minutes of the Board of Directors or Trustees can be an important source of information. Public entities are required to keep detailed minutes, which often reference insurance issues in discussions of policy renewals, brokers, limits of liability, carriers and claims. Minutes are also a critical source of information regarding outside counsel and litigation which can then be further researched through court records and the records of defense counsel.

Once record groups and locations of historic files have been determined, an onsite search is required. In conducting a search, it is important to keep in mind that even a single reference in a single document can identify millions of dollars of insurance coverage. It is also important to capture information on key potential outside sources that may be found in the records, including brokers, additional insureds and outside counsel.

Conducting A Search – External Sources

In instances where corporate records no longer exist or where these sources have been exhausted, more information can be located in external sources.

Insurance Carriers--Requests can be submitted to the primary, excess or workers compensation carriers identified in years where policies are missing. It is helpful to ask carriers to search all their records, including applications and underwriting files that could identify prior or subsequent coverage. These requests may also include the records of all affiliated and legacy companies as other relevant liability policies could have been issued by these carriers. Even the records of insolvent carriers could contain secondary evidence of missing policies.

Former Brokers--Insurance brokers have undergone decades of consolidation, which makes identifying the current successors a painstaking research project. In addition to the agency successor, interviews of the individual brokers that handled the account can also be critical to identifying carriers, or contracts that required evidence of insurance and claims.

Court Research--Policies and secondary evidence of liability insurance may be found in court records for third party liability cases ranging from trip and falls to products suits. In some instances, there may have even been prior DJA coverage actions regarding historic liability policies for environmental or asbestos suits. Court records also identify defense counsel, which can be another outside source of information.

Law Firms--Law firms often retain records for many decades and are a key source of information on past insurance. Outside counsel may have retained records that contain information on insurance coverage including correspondence, real estate files, litigation, and contracts. The records of defense counsel are particularly important as they could also contain pertinent information from prior searches for insurance, correspondence with carriers and even copies of policies.

Other Sources—Several state workers compensation authorities track historic coverage for companies, and since many companies purchased workers compensation and general liability coverage from the same carrier this can be a helpful lead. Additionally, certificates of insurance may have been sent to customers, government regulatory authorities, banks or lessors. These records can be located in historic files or in the records of the third parties themselves.

Maximize Insurance Recoveries

Policyholders can prepare for the coming onslaught of PFAS litigation by locating and documenting historic insurance coverage. Having quick access to the details of the policies and scanned images of the records in a consistent format saves critical time and aids the coordination of information between carriers, outside counsel, brokers and consultants. Since even the process of identifying the current successor to each prior insurance carrier can be a research project in itself, time is of the essence.

As we learned from the waves of environmental and asbestos litigation, an entity that is prepared with the full details of all possible coverage will be at an advantage in securing a defense and negotiating settlements. Preparation for PFAS claims can make the difference between bankruptcy and survival in these litigious times.

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MEALEY'S EMERGING TOXIC TORTS
edited by James Cordrey
The Report is produced twice monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: lexisnexis.com/mealeys
ISSN 1089-0882