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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Cos. Should Review Insurance Policies For PFAS Coverage

By **Ally Cunningham, Sarah Lintecum and Alana McMullin**
(June 2, 2021, 12:00 PM EDT)


Ally Cunningham


Sarah Lintecum


Alana McMullin

We've reached a legal and regulatory inflection point when it comes to perfluoroalkyl and polyfluoroalkyl substances, or PFAS — a large group of human-made chemicals that have been used, manufactured and distributed in the United States since the 1940s.

The U.S. Environmental Protection Agency recently signaled its intent to provide strong federal leadership in regulating PFAS by proposing an interagency EPA Council on PFAS. Among other things, the council will be tasked with evaluating whether to designate perfluorooctanoic acid, or PFOA, and perfluorooctanesulfonic acid, or PFOS — two of the most studied PFAS compounds — as hazardous substances and/or hazardous waste under environmental statutes later this year.

As a result, companies across the country need to understand the issues involved — particularly related to insurance — when it comes to the so-called forever chemicals.

Because of their water- and stain-resistant qualities, PFAS compounds are found in a variety of products, from food packaging to firefighting foams. Due to their chemical makeup, PFAS compounds do not break down under normal environmental conditions, instead accumulating over time; they also can move easily through the environment.

But because of their widespread use, release and disposal over decades, they are found nearly everywhere — in soil, groundwater, surface water, drinking water, the atmosphere, the ocean and even in an estimated 98% of the human population, where they also bioaccumulate.

Some researchers say they have found links between a number of PFAS and many health concerns, including kidney and testicular cancer, thyroid disease, liver damage, developmental toxicity, ulcerative colitis, high cholesterol, pregnancy-induced preeclampsia and hypertension, and immune dysfunction.[1]

Meanwhile, public outcry concerning these potential health effects has triggered investigation by many state and federal entities to better understand and assess PFAS and their risks to human health and the environment.

This effort has culminated in a patchwork of regulation and regulatory guidance at the state and federal level, and a wave of toxic tort and remediation-based litigation by both private and public entities as well as individuals.

Companies caught in the middle of this should know that expenses related to PFAS lawsuits or potential government enforcement actions may be covered by historical commercial general liability insurance policies and/or more recent pollution-specific insurance policies unless there is a specific exclusion that bars coverage. But that's only the beginning of what they need to understand about PFAS.

The PFAS Litigation Trend

Over the past few decades, regulatory agencies — both state and federal — have focused on investigating and understanding the extent and impact of PFAS contamination across the country, specifically its impact on drinking water, groundwater and human health.

This interest in PFAS as an emerging contaminant has more recently generated state-led regulations limiting the amount of PFAS in drinking water and surface water, federal guidance relating to drinking water and surface water, a push for federal regulation of PFAS, and complex litigation concerning the extent of PFAS environmental consequences.

Fast-paced and ever-changing regulation from state and federal entities has become an issue for companies with potential PFAS liabilities.

On Jan. 14, in the final days of the Trump administration, the EPA issued the prepublication version of an advanced notice of proposed rulemaking, or ANPRM, seeking comment on developing future regulations pertaining to PFOA and PFOS under the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act.

Specifically, the EPA was seeking public comment on whether PFOA and PFOS should be designated as hazardous substances under CERCLA and/or hazardous waste under the RCRA.

Similarly, the PFAS Action Act of 2021, introduced in April, seeks to require the EPA to designate PFOA and PFOS as CERCLA hazardous substances within one year and to determine whether to designate all PFAS compounds as CERCLA hazardous substances within five years.

The ANPRM was embargoed for evaluation following the transition to the Biden administration, but the PFAS Action Act remains pending before Congress.

As of June 11, 2020, the EPA identified 233 Superfund sites with confirmed PFAS detections in groundwater, 47 of which had amounts exceeding the EPA's health advisories. This indicates the broad reach that a hazardous substance designation could have for sites nationwide.

After comments on the ANPRM were sought, EPA Administrator Michael S. Regan issued a memorandum on April 27 detailing the creation of an EPA Council on PFAS. The council is specifically tasked with developing "PFAS 2021-2025 – Safeguarding America's Waters, Air and Land," a multiyear strategy to develop public health regulations related to PFAS.

The appointment of the council indicates the federal government's intent to accelerate PFAS-related

regulatory action and may signal potential enforcement actions to remediate PFAS pollution in the near future.

The council is composed of senior EPA officials. It's tasked with providing an initial recommendation for a multiyear strategy to deliver critical public health protections arising from PFAS pollution within 100 days of its establishment.

The EPA's designation of two of the most widely used PFAS compounds under one or both of the most prominent environmental laws in the U.S. could signal broad sweeping liability for many parties with potential PFAS liabilities.

Designating PFOA and PFOS as CERCLA hazardous substances would make PFOA- and/or PFOS-contaminated sites eligible for listing as Superfund sites, give federal and state authorities the means to seek damages and cleanup costs from responsible parties, and lead to related litigation over the allocation of cleanup costs. Other related tort litigation is likely to arise too.

To date, most PFAS-related lawsuits have been filed against PFAS manufacturers, most notably 3M Co., Dow Chemical Co. and DuPont de Nemours Inc. These lawsuits have been filed by state agencies and attorneys general aggressively pursuing site remediation enforcement actions or individual plaintiffs alleging exposure to PFAS in drinking water, soil and groundwater.

The most notorious PFAS-related litigation to date is a multidistrict litigation arising from aqueous film-forming foams found in firefighting, fire suppression and fire training. The matter, In re: Aqueous Film-Forming Foams Products Liability Litigation, is currently pending in the U.S. District Court for the District of South Carolina.

The plaintiffs in this MDL, which was initially consolidated in early 2019, include public and private water providers, state entities, and individual residents and firefighters. They allege property damage and bodily injury or, alternatively, a likelihood of future injury, due to alleged exposure to PFAS.

Many PFAS-related lawsuits allege claims of medical monitoring, negligent discharge, trespass, personal injury and property damage, and seek compensatory and punitive damages, abatement of future PFAS contamination, water and soil testing, and costs for the diminution of property value.

Additionally, some states are suing PFAS manufacturers under state environmental laws for declaratory and injunctive relief to remediate and investigate the contamination caused by PFAS.

For example, in 2018 the Michigan Department of Environmental Quality sued a manufacturer of PFAS-containing products in Michigan Department of Environmental Quality v. Wolverine World Wide Inc., filed in the U.S. District Court for the Western District of Michigan.

There, Michigan requested that the company investigate the extent of contamination to the groundwater, implement remediation plans to clean affected water sources and provide safe drinking water for Michigan residents affected by the contamination.

Ultimately, the parties settled in 2020 for $69.5 million. Additionally, numerous private party lawsuits have settled for close to $900 million. And these actions are just the beginning, as PFAS litigation and regulation is expected to last for years to come and implicate more industries that have incorporated PFAS into their products, such as textiles, food packaging and cosmetics.

With the immense costs associated with PFAS regulations, such as defending lawsuits, responding to government investigations, testing and data collection, funding remediation, and potential liability for alleged personal injuries and property damage to third parties, insurance coverage undoubtedly will be crucial to many companies.

Insurance Coverage for the Litigation Trend

Because PFAS have been used for decades, both historical commercial general liability policies and more recent pollution-specific policies may provide coverage for third-party claims. Depending on the types of claims asserted in each PFAS-related lawsuit, the extent of potentially available insurance will necessarily vary, with the applicability of certain pollution exclusions being a significant factor.

CGL insurance policies not only provide coverage for third-party claims of bodily injury and property damage but also cover personal and advertising injury claims — such as wrongful eviction, invasion of private occupancy of land, trespass, nuisance and loss of use or enjoyment of property — that are caused by the insured.

Under typical CGL policy terms, carriers have both a duty to defend the insured against any potentially covered claims and a separate duty to indemnify the insured for any covered settlement or judgment, up to policy limits.

Additionally, policy limits may be affected by prior claims made under potentially applicable historical CGL policies, as previous claims may have eroded or exhausted coverage for newly discovered PFAS-related claims.

Notably, courts in all states have interpreted common CGL provisions covering property damage to include groundwater contamination. Accordingly, groundwater contamination caused by PFAS — a common allegation by plaintiffs in PFAS-related suits — is likely to trigger CGL policies in place during the years of the alleged groundwater contamination.

As more PFAS-related claims are brought, the question will be whether any exclusion in the policy bars coverage.

Pollution Exclusions

In the 1970s and early 1980s, the environmental regulation landscape drastically changed with creation of the EPA and the passage of two federal laws, CERCLA and the RCRA, leading to private parties and entire industries facing new liabilities for the alleged environmental impacts of their businesses.

Around 1973, general liability insurers began to add a pollution exclusion to CGL policies to avoid paying for large remediation efforts resulting from decades of contamination. This early version of the pollution exclusion, however, had a notable exception: Coverage often existed if the pollution event was sudden and accidental.

Courts remain split over the meaning of "sudden and accidental," with some courts defining the terms narrowly (requiring an explosion or other so-called boom event) and some defining the terms broadly (permitting coverage for environmental contamination that did not result from a one-time boom event).

Depending on the jurisdiction, the broader interpretation may apply to claims alleging PFAS-caused groundwater contamination that began years prior to its discovery.

Because of the favorable rulings for policyholders under the sudden and accidental exclusion, most insurers broadened the pollution exclusion in 1985. What is often referred to as the "absolute pollution exclusion" was born.

Unlike the earlier version of the exclusion with the sudden and accidental exception — which focused on how the contaminant was released — the absolute exclusion focused on what was released. Because of this, insured parties have found it difficult to obtain coverage for claims involving traditional environmental contaminants (which PFAS will likely be considered) under CGL policies containing an absolute pollution exclusion.

However, injury arising out of an insured company's products or completed operations is not specifically barred under the absolute pollution exclusion. Accordingly, coverage may be triggered if the contaminant escapes or is released into the environment from an insured party's product or their completed operations and results in bodily injury or property damage.

In fact, the Insurance Services Office, the entity that drafted and issued the absolute pollution exclusion, specifically noted that pollution arising from the products or completed operations hazard is covered under the new policy language.

It remains to be seen how PFAS released into groundwater from one's products or completed operations will be treated under this policy language.

Personal and Advertising Injury Coverage

Additionally, some courts have distinguished between which damages the pollution exclusion applies to in CGL policies.

Many courts have held that the pollution exclusion applies exclusively to property damage or bodily injury claims and not personal and advertising injury claims also covered by CGL policies. Accordingly, claims made by individual plaintiffs for personal and advertising injury damages may not be excluded by the pollution exclusion and thus may be covered.

These types of personal injury claims, as mentioned above, have already been brought against various manufacturers of PFAS.

Environmental Coverage

Coverage may also be available under more recent environmental pollution policies, which specifically cover pollution conditions for both contamination or exposures already identified at a specific site and future pollution conditions that migrate to or originate at a covered location. These policies are less standardized than most CGL policies, and the coverage varies significantly from policy to policy.

These environmental pollution policies generally insure "pollution conditions," such as the discharge, release, escape or migration of contaminants onto or upon certain properties.

Depending on the language of the policy, coverage may exist for remediation, government orders or

third-party claims. Considering the recent state of environmental regulations and the potential for regulatory action by federal agencies, PFAS are likely to be considered a pollutant under these policies.

These policies are written either to apply on an occurrence basis (i.e., the policy in place when the alleged contamination occurred is triggered, regardless of when the claim was made against the insured) or on a claims-made basis (i.e., the policy in place when the claim was asserted against the insured party is triggered).

Care should be taken to understand and comply with specific notice provisions in each policy in order to prevent any loss of potential coverage due to late or improper notice. Claims-made policies typically have strict notice requirements, so there may be little time between receiving notice of the claim and having to notify the carrier.

A New PFAS Frontier

Like other emerging environmental contaminants, this new frontier of PFAS-related claims will likely lead to insurance-related litigation to determine whether certain pollution exclusions apply and whether certain third-party claims trigger coverage.

Companies with potential exposure to PFAS-related liability should review their current and historical CGL policies and any existing pollution-specific policies. Additionally, companies or individuals that may own property containing PFAS-related contamination should consider environmental pollution policies to fund future remediation or other related costs.

Ally Cunningham is a partner, and Sarah Lintecum and Alana McMullin are associates, at Lathrop GPM LLP.

[1] https://www.atsdr.cdc.gov/ToxProfiles/tp200.pdf.