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## Policyholder Alert

# USEPA Releases PFAS Roadmap, Potentially Triggering Deep Environmental Liability



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### Key points:

**The EPA vows to “hold polluters and other responsible parties accountable” for PFAS contamination**

**Proposed rule will designate certain PFAS compounds as hazardous substances under CERCLA**

**Historic insurance policies may cover PFAS-related liabilities**

**Indirect evidence of old policies can establish coverage**

On October 18, 2021, the United States Environmental Protection Agency’s (USEPA’s) Council on PFAS released its strategic roadmap that lays out in one document the USEPA’s whole-of-agency approach to addressing PFAS. The roadmap builds on USEPA’s 2019 Action Plan in a manner that USEPA describes as a commitment to “bolder new policies to safeguard public health, protect the environment, and hold polluters accountable.” Further, the Agency states that the risks posed by PFAS demand that the USEPA address the PFAS problem on multiple fronts at the same time by leveraging the full range of statutory authorities to confront the human health and ecological risks of PFAS.

One of the “bolder” policies USEPA intends to deliver is to “hold polluters and other responsible parties accountable for their actions, ensuring that they assume responsibility for remediation efforts and prevent any future releases.” This will primarily be accomplished by designating certain PFAS compounds (PFOA and PFOS) as hazardous substances under CERCLA (Proposed rule expected Spring 2022; Final rule expected Summer 2023).



This would have the immediate impact of requiring facilities across the country to report to USEPA when there is a release of PFOA or PFOS to the environment in an amount that exceeds the reportable quantity (RQs) assigned to these substances. This reporting paves the way for USEPA or other agencies to seek administrative, cost recovery and contribution actions against potentially responsible parties (PRPs) relating to the investigation and remediation of contaminated sites. As CERCLA also allows for private rights of action for cost recovery and contribution, the number of PRPs potentially liable under CERCLA either through governmental, private or third-party actions should significantly increase. PRPs will be looking for ways to

reduce their exposure by suing other PRPs, exercising contractual indemnities and seeking insurance coverage.

## **Insurance coverage for PFAS liabilities**

PFAS groundwater contamination is potentially covered by a company's historic comprehensive general liability ("CGL") policies. The CGL policy provides insurance coverage for damages because of property damage and bodily injury. In every state, groundwater is property, and contamination of groundwater is property damage. In every case of PFAS groundwater contamination – and indeed any type of groundwater contamination – the responsible party should examine whether it has insurance coverage to cover its liability. For long-tail claims, policies that predate the so-called absolute pollution exclusion of 1986 or the 'sudden and accidental' pollution exclusion of circa 1973 (discussed below) may provide coverage.

Most companies understand if they are served with a summons and complaint, they should give notice to their insurance companies. However, many companies do not understand that coverage is not only triggered by a complaint but can be triggered by a letter from USEPA or a state regulatory agency. The CGL policy provides coverage for a company's damages because of property damage, regardless of the event that triggers the damages. In most states, coercive action, such as a Superfund Section 107 potentially responsible party letter, is deemed coercive enough to trigger CGL coverage. This applies even if the insurance company contends that in the absence of a lawsuit, the groundwater contamination is 'voluntary.' Many courts recognize that when a company acts under duress to perform a cleanup because of the coercive power of the government, coverage exists.

This puts a premium on notice to the insurance company. In some states, including New York, late notice of a claim is fatal to coverage as matter of law. If a company fails to give notice to its insurance company because it does not realize that the government or a private party has made a potentially covered claim against it, it can forfeit coverage. In most states, late notice will only bar coverage if the insurance company can demonstrate actual prejudice. However, the standard of what constitutes prejudice is often unclear. In at least some states, the court will assume prejudice if the delay is too long.

### **Continuous trigger of coverage**

The question then arises, which CGL policies may apply? The CGL policy in place when the property damage or bodily injury occurs applies. If someone trips on a company's steps and breaks his or leg in 2019 and sues the company in 2021, the policy in effect in 2019 applies. The timing of the property damage controls. However, in a case where, for example, a company puts out a fire using a foam that contains PFAS, the PFAS seeps into the groundwater, and the contaminated groundwater continues to flow for many years, when does the property damage take place?

To answer this question, most courts have adopted what is known as the continuous trigger. This theory holds that property damage occurs during the entire period in which the groundwater contamination occurs, from the initial discharge of PFAS into the groundwater, throughout the period in which the groundwater continues to flow and cause further contamination, until manifestation of the contamination. This maximizes coverage for the company.

This 'trigger' issue is complicated by the fact that the insurance industry

***“Continuous trigger” theory holds that property damage occurs during the entire period in which the groundwater contamination occurs.***

placed pollution exclusions into CGL policies, typically in 1973 and 1986. In 1973, the insurance industry introduced the so-called 'sudden and accidental' pollution exclusion, which barred coverage for pollution discharges unless the discharge was 'sudden and accidental.' Some courts have held that 'sudden' has a temporal connotation, and that coverage only exists for an explosion or other 'boom' event. However, courts in other states, have held that 'sudden and accidental' is only a restatement of 'unintended and unexpected,' and that coverage exists under all policies in effect until 1986, when the insurance industry introduced an absolute pollution exclusion that barred coverage for discharges of pollutants, whether or not sudden.

A company may next ask, how do I find my pre-1986 or pre-1973 CGL policies. Preliminarily, a company does not need a copy of its insurance policy. A policyholder can prove its entitlement to coverage on the basis of secondary evidence of those policies. In many cases, it can take very little secondary evidence to prove the existence of an insurance policy. A company's insurance brokers are a good source of information about past insurance coverage. A company may also have records that contain information about its policies. A company may record its insurance policies in its minute book. It may have provided notice to its insurance company with respect to prior claims. It may have retained certificates of insurance.

Many companies in this situation turn to insurance archaeologists — specialists in discovering documents relating to old insurance policies. They can be very successful in finding evidence of pre-1986 insurance. As Sheila Mulrennan, president of the Insurance Archaeology Group Ltd., says: "It is a strategic imperative for

companies facing PFAS claims to research missing general liability policies prior to 1986. Documenting as many historic assets as possible will enable policyholders to maximize insurance recoveries."

Insurance coverage for PFAS groundwater contamination thus raises a number of legal and factual issues, and a company should seek the assistance of a trained insurance professional or lawyer in investigating such coverage. However, while the issues may seem daunting, success in this endeavor can offset the substantial costs of PFAS groundwater remediation. Every company should conduct the investigation necessary to determine whether it has insurance coverage. ▲

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