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PFAS: Understanding the Risk and Securing Insurance Coverage for Liabilities

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Abstract: The chemical compounds known as PFAS have been used in a wide range of commercial applications for decades. Only recently, however, have potential health risks of PFAS exposure come to light, generating a wave of litigation, regulation, and potential exposure for companies connected to PFAS. The article explains the nature of the substance, how it may be detected, and how insurance coverage may apply to liabilities related to PFAS.

Introduction

What Are PFAS?

Per- and polyfluoroalkyl substances (PFAS) are a group of man-made chemicals that includes perfluorooctanoic acid (PFOA), perfluorooctanesulfonic acid (PFOS), GenX, and many other chemicals (aka, fluorochemicals). PFAS have been manufactured and used in a variety of industries around the globe, including in the United States since the 1940s. PFOA and PFOS have been the most extensively produced and studied of these chemicals. Both chemicals are very persistent in the environment and in the human body—meaning they don't break down and they can accumulate over time.[1] Hence, the use of the term "forever chemicals."

On April 19, 2024, the U.S. Environmental Protection Agency (EPA) designated PFOA and PFOS, including salts and structural isomers, as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund. Although the EPA had originally

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considered nine PFAS compounds to be listed as hazardous substances due to their potential toxic, carcinogenic, mutagenic, or teratogenic effects on humans or other life forms, the EPA elected not to include those other seven PFAS compounds at this time. The U.S. EPA's designation aims to protect public health and the environment from potential exposure to these chemicals and provides a mechanism to hold those determined to be responsible parties accountable for cleanup costs for PFOA and PFOS.[2]

The Ubiquitous Occurrence of PFAS

PFAS have been used for many years in food packaging, clothing and carpets, cosmetics, oil and gas, plating, medical and dental devices, elastomers, firefighting foams, and many other industries for decades due to their properties that resist heat, grease, and water. Depending on the source agency and definition, the number of PFAS have been estimated to be from thousands to more than 7 million. The advancement of analytical laboratory equipment and methods has resulted in the ability to detect specific PFAS at the single digit nanogram per kilogram concentrations. With this technology, PFAS can now be detected even in the most remote parts of the world, including rain and snow in Antarctica.[3]

How Do I Know If PFAS Is On My Property?

Typically, the first step in researching if PFAS are or have been used at a facility is to review all Safety Data Sheets (SDS) and older Material Safety Data Sheets for the facility. However, unless the SDS is relatively new, it is likely a false negative could be concluded if only relying on SDSs since PFAS were not widely known to regulators until the early 2000s. Another valuable initial tool is the EPA's PFAS Analytic Tool,[4] which can be used to identify known PFAS contamination and usages in the neighboring area around a facility. Following these initial desktop assessments, to understand if PFAS may have been used at a facility or are present due to off-site sources, a thorough due diligence must be performed.

Doing Your Due Diligence

ASTM Phase I ESA

ASTM Phase I Environmental Site Assessment (ASTM E1527-21 Standard) is the beginning of the deeper dive into research on the site. The ASTM E1527-21 Standard is typically used by a buyer during due diligence for the purchase of a property. However, the individual components of the Standard are important steps, and are directly applicable to any environmental investigation whether by the buyer or the owner. The Standard provides an initial understanding of the site history, site ownership, previous investigations and releases, and whether any Recognized Environmental Concerns exist.

Industry NAICS—Past and Present

The Association of State Drinking Water Administrators have developed a PFAS Source Water Assessment Mapping Guide[5] that identifies 13 North American Industry Classification System (NAICS). The NAICS codes can also be used to determine older, comparable SIC codes. If a business is aligned with one of the 13 NAICS codes, this becomes a line of evidence that PFAS may exist on the property or was/is used at the property.

Property Development Chronology

The property development history is an important step in understanding where PFAS may have been used within a facility and exposures could have occurred. Many facilities have been built with multiple additions over time and manufacturing/chemical processes may have moved as expansion occurred. Drilling down to the level of individual manufacturing and chemical processes is the next step if a potential PFAS-related NAICS code is applicable.

Fire Suppression System(s) Review/Chronology

Similar to the property development history, an understanding of the type of fire suppression system(s) used over time can help understand the potential locations for releases and exposure. Maintenance records, system testing, and storage of chemicals help to pinpoint areas of concern and potential testing.

Extensive Employee Interviews

The ASTM E1527-21 Standard includes interviewing personnel with historical knowledge of a site. However, this is often done remotely or with the use of a form sent to a single point of contact. It is Montrose/CTEH's experience that individual one-on-one interviews at the facility of interest can yield considerably more information. On-site interviews of current and retired personnel allow for cross-referencing different employees memory while walking through a facility. The interviews should include a wide cross-section of employees, such as maintenance, engineering, emergency response personnel, health and safety, procurement, and management.

Historic Procurement Records Review

A search of procurement records can be valuable but also tedious depending on the system of organization and how far back in time records are available. Procurement records may not be maintained on-site as well or could be lost if multiple entities have owned a property.

Release, Spill, and Fire History

A historic release of PFAS would likely not have required reporting to an agency since it is only recently that certain PFAS have been classified as hazardous substances. Therefore, an investigator must be attentive to the fact that individuals being interviewed may not put two and two together regarding the importance of a PFAS spill. An investigator should also contact the Fire Marshall if a fire had occurred at a facility to determine whether aqueous firefighting foam had been used to extinguish the fire and what type of containment measures may have been used.

Understanding Potential Exposure/Risk If PFAS Is Present

The due diligence process described above is the first step in developing a PFAS conceptual model for the site. The potential presence of PFAS due to historical or current use does not automatically mean that exposures are occurring. Testing is typically required to determine if historical activities, fires or releases may have resulted in PFAS releases into the environment. Prior to testing, it is recommended that a risk management decision matrix be developed in concert with the conceptual model to understand the pros and cons of testing.

Insurance Coverage for PFAS Liabilities

Potential PFAS Liabilities

PFAS exposure has been linked to a range of health problems, including high cholesterol, a decreased immune response to vaccines in adults and children, and an increased risk of kidney cancer.[6] These findings have spurred a wave of litigation and regulatory responses.

Individuals claiming exposure to PFAS and resulting injuries have brought toxic tort lawsuits against companies responsible for manufacturing and distributing PFAS-containing products. For example, thousands of claims involving a fire-fighting product known as aqueous film-forming foam (AFFF) have been consolidated into a single multi-district litigation in South Carolina federal court.[7]

Municipal water providers and state attorneys general have also brought numerous lawsuits against PFAS manufacturers and distributors, alleging contamination of groundwater sources and seeking remediation and recovery of cleanup costs.[8]

Other plaintiffs have brought consumer class action claims for mislabeling products based on an alleged failure to disclose the PFAS content.[9] Products and industries targeted by these lawsuits have included cosmetics, food packaging, food and beverages, and animal food.

State and federal regulators have followed suit, enforcing violations under federal or state environmental laws, such as the Clean Water Act, the Resource Conservation and Recovery Act, the Clean Air Act, and, most recently, CERCLA (see above).

What Policies Could Apply?

Policies that may provide coverage for PFAS liabilities and losses fall into two general categories: (1) third-party liability insurance, which insures the policyholder against claims (e.g., lawsuits or demand letters) made against the policyholder by third parties; and (2) first-party insurance, which insures the policyholder's own property or assets against loss or damage.

Third-Party Liability Insurance

Comprehensive General Liability (CGL)[10] insurance policies are a staple of almost every insurance program. CGL policies insure against claims by third parties asserting that the policyholder is liable for bodily injury and property damage, among other things. In the PFAS context, diseases alleged to result from PFAS exposure, such as kidney cancer or thyroid disease, constitute "bodily injury" for purposes of CGL coverage. Likewise, PFAS-related groundwater contamination may constitute "property damage." CGL policies may also respond to governmental demands to clean up property or groundwater, including a potentially responsible party demand letter under CERCLA.

Environmental Pollution insurance policies (often known by other names, such as Pollution Liability, Environmental Impairment Liability, or Environmental Liability) may also provide coverage for third-party claims for PFAS injuries and property damage. Such policies are less common than CGL policies and are frequently purchased by companies in industries with a greater risk of pollution exposures.

Directors and Officers (D&O) insurance could potentially provide coverage for PFAS mislabeling claims. D&O policies typically exclude bodily injury and property damage, but sometimes provide coverage for misrepresentations and other types of acts or omissions. While most D&O policies provide similar coverage for the conduct of a company's directors and officers, coverage available to the entity itself differs between public and private companies. Typically, a public company's D&O policy will only provide limited coverage to the entity for securities and derivative claims, while a private company D&O policy will provide broader coverage for the entity's conduct.

First Party Insurance

Where PFAS compounds are present in a policyholder's own land or groundwater, first-party insurance policies, such as Property insurance or the first-party component of an Environmental Pollution policy could potentially apply to pay for the cost of cleaning up or remediating the PFAS. In this context, the presence of PFAS could constitute "property damage" for the purpose of coverage.

Challenges to Securing Insurance Coverage for PFAS Liabilities

Although many different types of insurance policies could potentially cover PFAS losses, there are a number of practical and legal issues that may complicate recovery.

Missing Policies

Typically, a policyholder purchases a new set of insurance policies each year. Liability insurance policies are structured either as "claims made" or "occurrence based." Claims-made policies apply to new claims that are "made" against the policyholder (e.g., lawsuits filed, demands received) during the year the policy is in effect, without regard to when the events giving rise to the claim took place.

In contrast, occurrence-based policies—including most CGL policies—apply to claims that are based on *occurrences* (i.e., accidents, injuries) that happened during the year that the policy was in effect, regardless of when a claim is eventually asserted against the policyholder. Therefore, if a claimant was exposed to a

PFAS-containing product in 1984, but he does not sue the manufacturer for resulting injuries until 2024, the manufacturer likely will need to look for coverage under its 1984 CGL policy, or perhaps under multiple successive policies starting in 1984.

This can create significant problems for policyholders facing claims that are based on PFAS-related activities and exposures that occurred years or decades ago. Unless the policyholder has maintained meticulous records of its insurance policies—and most do not—the policyholder will have to undertake a search for its old insurance policies if it hopes to obtain coverage.

It is important to note that actual copies of the policies are not necessary. A company can prove the existence of its policies through secondary evidence. Companies should review their files to see if they contain evidence of historic insurance coverage. A company's insurance broker or risk consultant is another source of insurance policy information. Many companies employ an outside insurance archaeologist who specializes in locating old insurance policies.

Pollution Exclusions

Pollution exclusions in insurance policies present another obstacle to coverage. In 1986, the insurance industry widely adopted an "absolute pollution exclusion" in most CGL insurance policies. The exclusion bars coverage for damages or injuries resulting from "pollutants," broadly defined to include almost any type of irritant or contaminant. Insurance companies have relied on the absolute pollution exclusion to defeat coverage for many different types of claims involving environmental contamination or products that contain harmful substances.

The application of this exclusion to PFAS, however, is untested. Some courts have found the absolute pollution exclusion to be inapplicable to claims based out of the use of products that are being put to their intended use, even if the product contains a harmful substance.[11] Many PFAS personal injury claims involve the exposure to a product, such as AFFF, that is being used as intended. Nonetheless, coverage under policies sold after 1986 may be significantly impacted by pollution exclusions.

Vagaries of State Law

Insurance policies are generally interpreted under state law. While most states are in alignment on a large number of legal principles governing insurance policies, there are several significant issues on which courts in different states have reached opposing conclusions. One such issue is the precise nature of the "occurrence" that triggers coverage under an occurrence-based CGL policy. With respect to environmental exposure injuries, courts in different states have found that the occurrence can be (1) the policyholder's decision to manufacture the product or substance in question, (2) the claimant's first exposure to the product or substance, (3) the claimant's development of disease or injury while still in its latent period, and (4) the first manifestation of the injury, among other triggers.[12] Depending on which one represents the occurrence, coverage may be triggered under one set of insurance policies or completely eliminated under another.

Determining which state's law applies to an insurance policy can also present challenges. Most policies do not include a governing law provision. If litigation over insurance coverage is brought, choice of law is determined by the rules of the state where the lawsuit is pending. Some states apply the law of the state where the contamination takes place, while other states will apply the law where the company is headquartered or where the insurance policy was delivered. These vagaries of state law that can affect the outcome of coverage litigation often result in gamesmanship and forum shopping.

Providing Notice

Policyholders facing a PFAS claim must provide notice to their insurance companies at the earliest opportunity. In a minority of states, late notice of a claim can foreclose coverage. In the majority of states, late notice will only foreclose coverage if the insurance company can demonstrate actual prejudice. In some states, this is an almost impossible hurdle for insurance companies to meet. However, failure to give timely notice is an unforced error that should be avoided at all costs.

Notes

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12. *See, e.g.*, *Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill. 2d 23, 41, 514 N.E.2d 150, 158 (1987).