



Alliant Environmental

PFAS Contamination Risks

Across the country, especially in Michigan where communities are still recovering from public water supplies contaminated with lead, news is breaking on per and polyfluoralkyl substances (PFAS). Municipalities and regulators are working together to assess the exposure pathways and find justified solutions to clean-up without causing undue alarm to the general public. The far reaching extent of PFAS is certainly something to be concerned about, but knowing more about PFAs and ways to reduce harm can help alleviate fear and offer solutions for dealing with this risk.

What, exactly, are PFAS?

PFAS are a group of human-made chemicals used to produce heat, oil, water and stain resistant products. 3M is the most well-known manufacturer of PFAs because of their product Scotchgard, a spray that protects clothing, fabrics, upholstery and carpets from stains and other damage. The concern with PFAS is not so much in the end products (our clothing, footwear and household fabrics) but more in the manufacturing and disposal of these products.

Additionally in this category, there are fluorinated surfactants, which are the active ingredient in aqueous film-forming foam used to extinguish flammable and combustible liquids and gases. Airports represent one of the largest exposure pathways with their use of PFA contaminated fire-fighting foam.



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What we cover in this article:

1. What are PFAS?
2. Who is responsible if there is a contamination?
3. What can you do to limit liability/exposure?

According to the U.S. Agency for Toxic Substances and Disease Registry, PFAS adversely effects growth, learning and behavior of children, contributes to lowering a woman's chance of getting pregnant, increases cholesterol levels, harms the immune system and increases the risk of cancer. PFAS are often referred to as "forever chemicals" since they do not break down. The current Lifetime Health Advisory levels for PFAS in drinking water is 70 parts per trillion but many critics claim that number is too high.

There is no question that PFAS are a serious contaminant of concern and the public outcry is growing. The problem is that the extent of contamination is so far reaching that regulators and industries are struggling with the practicality of how and where to test and, based on the results of the testing, how to educate the public without creating unfounded fear. Municipalities and companies also struggle with how to treat and dispose of PFAS. The best way to combat them is through incineration but there aren't many incinerators left in the United States. Landfills aren't an option because the compounds end up in the leachate and contaminate groundwater. Water treatment plants are the most reasonable utility, given that they are the bottleneck of distribution, but no treatment technology exists to produce clean water and eliminate the impacts from PFAS.

If there is contamination, who should be responsible?

Airport operators, the Department of Defense, municipalities, and public and private sector industries are all at risk of being held responsible for PFAS clean-up, associated third-party property damage and toxic tort / bodily injury law suits. Even if a property owner has no historical use of PFAS, they could still be held responsible for clean-up of PFAS if it were found that their property were contaminated. This is because of the joint and several liability associated with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Liability. Joint and several liability means that you can be held responsible for contamination on the land you own even if the previous owner caused the contamination. Many state / local regulations are at least this stringent.

An example of how the regulatory environment on PFAS might take form, is unfolding in Rockford, Michigan where Wolverine Worldwide, a \$2.4 billion global corporation, has come under heavy public scrutiny due to PFAS contamination in the public drinking water supply. Wolverine manufactures well-known footwear brands like Chaco, Sperry, Merrell and Hush Puppies. For over 60 years Wolverine treated their products with the 3M compound used to make shoes water repellent. The Detroit Free Press reports that the company, which used to be a stalwart of the Michigan industrial economic engine, is now subject to over 100 lawsuits from local residents stemming from nearly three years of waste disposal practices from their tannery operations. Wolverine, in turn, is suing 3M for having sold them the product. Wolverine argues that 3M knew that PFAs posed an environmental health risk for years and failed to warn customers about potential adverse environmental risks.

What can clients do to help limit liability/exposure?

Pollution liability policies are a risk management tool for property owners and site pollution policies provide coverage for clean-up of unknown pollution conditions, third-party bodily injury and property damage and legal defense expense associated with covered claims. Due to a wider understanding of the human health threat of PFAS coupled with unclear standards for clean-up, coverage in the pollution insurance market place may be hardening.

It is important to remember with these pollution liability policies that full disclosure is in the property owner's best interest. A pollution underwriter will review a lot of information on a property before binding coverage. Most of the historical and current exposures are provided in Phase I or Phase II Environmental Site Assessments or Investigations. Underwriters schedule these reports as known and disclosed reports to obviate the Non-Disclosed Exclusion built into many carrier forms as a standard endorsement. Unless specific contamination is excluded, the information in these reports are deemed disclosed and therefore covered. This underwriting process assures a shared risk between both the insured and the insurer.

In the absence of historical detail, underwriters start with the traditional environmental data and other factors that could minimize or maximize the PFAS exposure. Important questions to determine exposure include understanding where the insured operates – are they located near drinking water supplies?, Are they near heavy industrial areas? Are they located near large bodies of water that could potentially carry PFAS downstream? Have regulations been promulgated in the jurisdiction of the exposure which would cause re-opener concerns?

From an overall pollution market standpoint, carriers are somewhat protected in that operational pollution policies are claims made and reported. When the policies come up for renewal, the exposure can be re-assessed or a carrier has the option to non-renew. From the insured's perspective, this coverage may be found in legacy general liability policies since this risk pre-dates the absolute pollution exclusions (APE) that came about in 1985. Toby Smith, President of Ironshore Environmental, was interviewed in "Risk and Insurance" magazine in October 2018. When asked about the issues associated with PFAS contamination, he explained how Ironshore was assessing their book of business for exposure while being mindful to not overreact. They are taking this exposure very seriously and hopes that his competitors are as well. Mr. Smith reinforces that the more open the insured is the better they are able to understand how much risk they can take.

Obviously this is still a dynamic and evolving issue. There is certainly more to come on this subject. Developments are still to come in legal, regulatory and toxicity of PFOA/PFAS that will best determine the outcomes relative to environmental insurance carrier responses.

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