Managing Your Company's Environmental Legal Risk: What You Need To Know

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Agenda

- Types of environmental risks
- Environmental Insurance Claims
- Common Coverage Issues
- What are PFAS?
- How are People Exposed to PFAS?
- Current Regulation of PFAS
- Q&A

Environmental Risk and Insurance Claims

Different Types of Environmental Risk

- Superfund sites, historic CERCLA liability – note, you do not have to be a polluter to have potential joint and several liability for the full cleanup!
- RCRA
- Other examples:
  - Moldy buildings
  - Carbon monoxide releases
- Emerging contaminants:
  - PFAS
- Everyone has potential environmental risk!

Which Policies Might Apply

- Is this first-party loss or a third-party liability, or both?
  - Any number of policies could apply – environmental policies, property policies, CGL, D&O, etc.
- How far back does the claim reach?
- Oftentimes long-tail claims spanning multiple years
- Are predecessor's policies relevant?
- Any additional insured coverage?

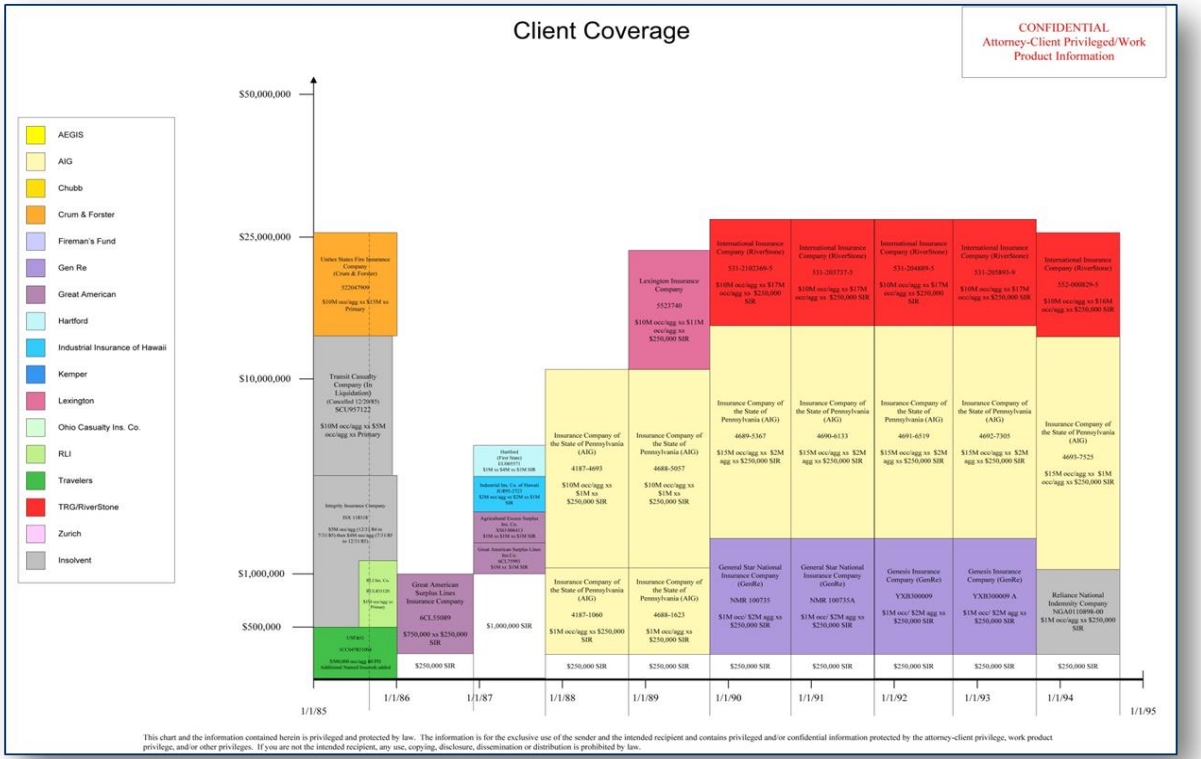
General Liability Policy

- Provides insurance coverage for claims because of bodily injury and property damage
- Groundwater pollution is covered property damage

Gather Policies/Insurance Archeology

- Insurance Archeology -- searching for policies and secondary evidence to prove the existence and terms of coverage
- Where to look?
  - Risk management
  - Accounting
  - Business Contracts
  - Board Meeting Minutes
  - Defense counsel
  - Incident Reports
  - Broker(s)
  - Insurer(s)

Putting the pieces together: Sample Coverage Chart



Give Notice

To Whom

- Any insurer with potential coverage – provisional notice for remote/excess
- Tender of defense may be more targeted

Timing

- “As soon as practicable”
- Preferably before you start incurring costs
- Don’t wait till end of your claims-made policy
- Supplement notice as needed

Content

- Incorporate “all potentially applicable policies”
- Be wary of “date of loss” questions

By Whom

- Additional insureds -- don’t rely on the named insured to give notice

Handling RORs and Denials

- Once notice is provided, carriers will acknowledge claim
- Sometimes say need more information; begin requesting data. Respond strategically
- Generally either accept coverage (often subject to ROR) or deny coverage
- Consider how to respond

Work Toward Resolution

- Time Considerations
  - Contractual limitation period?
  - Statutory limitations
    - Breach of contract: 5 years? 10 years?
    - Bad Faith
    - Vexatious Refusal to Pay
    - Jurisdiction specific
- Confidentiality, Standstill and Tolling Agreements
- Settlement vs. Litigation (or Arbitration)

Common Coverage Issues

- The insured has the initial burden to prove a claim falls within coverage. If met, the burden shifts to the insurer to prove that an exclusion applies to bar coverage.
- **Issues:**
  - **Pollution Exclusions**
  - **What constitutes a "suit?"**
  - **What law governs?**
  - **How many occurrences are there?**
  - **Allocating damages**

“Sudden & Accidental” Exclusion

“This insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release, or escape of smoke, vapor, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants, or pollutants into or upon the land, the atmosphere or any water course or body of water; **but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.**”

Majority: Requires an abrupt event

Minority: Ambiguous; gradual discharge still supports coverage

“Absolute” or “Total” Pollution Exclusion – - Not actually Absolute or Total

- Introduced in mid-1980s in attempt to remove all doubt that no coverage was intended for pollution losses under CGL policies whatsoever
- Focus was on the material released, not “how” it was released or whether it was quick, expected or intended.
- Some courts apply the exclusion only to traditional industrial pollution, narrowly construing terms “contaminant,” “irritant “or “pollutant”: leaching landfills, releases at oil refineries, damages imposed by CERCLA. This interpretation is consistent with a policyholder’s reasonable expectations
- Courts divided on what substances constitute a “pollutant” in other contexts

What constitutes a “suit” or “claim”?

“We will have the right and duty to defend the insured against any ‘claim’ or ‘suit’ seeking . . . damages.”

- Majority of courts say company does not have to be sued to have coverage
- In most states, regulatory and administrative actions are covered claims
- Coverage exists for “voluntary” cleanups
- Majority of courts say Potentially Responsible Party (PRP) letters from EPA or equivalent state entities are “suits” if sufficiently adversarial
- PRP letters and state compliance orders attempt to "gain an end by legal process." Even when a "suit" is defined in the policy as "a civil proceeding."
- What about a 104(e) Request for Information?

  Ash Grove Cement Co v. Liberty Mutual Insurance Co, et al. (13-35900, 9th Cir. 2016).

Which state's law applies?

- Each state has its own insurance law
- **Choice of law provision in policy? If so, generally enforceable.**
- **If not, the forum's "choice of law" rules apply:**
  - Majority: Restatement 2d of Conflicts (most significant contacts) (MO)
  - Minority: the state in which the contract was issued or "made" (KS)

Which state's law applies?

- In one case, a Texas company had a hazardous waste site in New Jersey
- New Jersey court would apply New Jersey law → coverage would exist
- Texas court would apply Texas law → no coverage
- Insurance company sued in Texas → no coverage for claim
- In some cases, the company might need to sue the insurance company quickly to obtain a favorable forum on insurance coverage issues

Allocation of Damages

- **All sums or vertical (insured's preference**)
  - Based on the insurer's agreement to pay "all sums," the insured becomes legally obligated to pay
  - Theory is that insured should get to choose any triggered year of coverage and exhaust vertically first, before moving to next
  - Insurers are in a better position to seek contribution from other insurers

Sample “All Sums” Language

The company will pay on behalf of the insured *all sums,* which the insured shall become legally obligated to pay as damages because of

A. Bodily Injury, or
B. Property Damage

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigations and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment nor defend any suit until after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements. (Emphasis added.)

Allocation of Damages (cont.)

- Pro rata or horizontal (insurer's preference)
  - All loss divided by the years of alleged harm/wrongdoing. Paid by the primary insurers (or insured for years without coverage) until those policies are exhausted before moving to excess layer
  - Issues with regard to insolvent coverage, coverage with exclusions, etc.—who bears burden?
- Pro rata by limits/other variations
  - Some courts apply a variation of the typical pro rata and apportion the loss by year and policy limit

What are PFAS?

What are PFAS?

- PFAS is the acronym for perfluoroalkyl and polyfluoroalkyl substances, a group of approximately 5,000 man-made chemicals
- Since the 1950s, many products commonly used by consumers and industry have been manufactured with or from PFAS
  - Nonstick cookware
  - Waterproof or stain resistant fabrics
  - Firefighting foam
- PFAS are persistent (*which is why they were used in so many industries!*) and resistant to environmental degradation
- They are in your house and most likely in you
  - The National Center for Biotechnology Information says that PFOA has been detected in the blood of more than 98% of the population in the United States

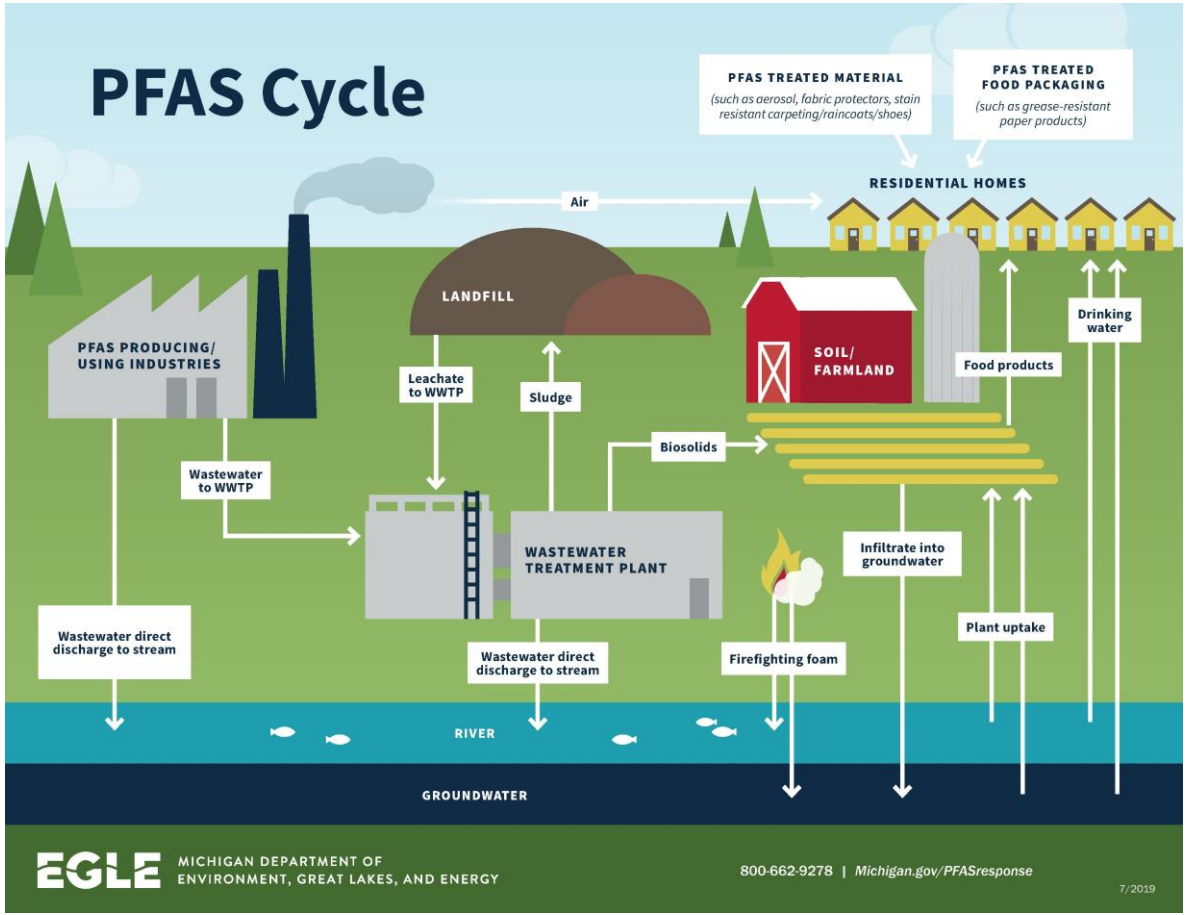
Where are PFAS used?

- **Common Industries**
  - **Aviation & Aerospace**
  - **Automotive**
  - Building & Construction
  - Cable & Wiring
  - Cosmetics & Personal Care Products
  - Electronics
  - Energy
  - **Firefighting/Safety**
  - Food Processing
  - **Household Products**
  - Medical Products
  - Metal Plating and Etching
  - **Paper, Packaging & Plastics**
  - Semiconductors
  - **Textiles**
- **Common Consumer Products**
  - **Carpet**
  - **Cleaning Products**
  - **Clothing**
  - Dental Floss
  - **Food Packaging**
  - Furniture
  - **Fire Fighting Foams**
  - Industrial Surfactants
  - Industrial Resins, Plastics
  - Industrial Molds
  - Metal Plating & Etching
  - **Non-stick products**
  - Paper Products
  - **Polishes, Waxes, Paints**
  - **Textile & Leathers**

How are people exposed to PFAS?

How are People Exposed to PFAS?

- **FOOD:** People can be exposed to low levels of PFAS through food
  - E.g., Contaminated soil and water used to grow the food; food packaging containing PFAS (e.g., fast food wrappers); equipment that used PFAS during food processing
- **WATER:** Drinking water in communities where PFAS chemicals have contaminated water supplies
- **CONSUMER USE:** People can be exposed to PFAS chemicals if they are released during normal use, biodegradation or disposal of consumer products that contain PFAS
  - E.g., Exposure to products commercially-treated to make them stain- and water-repellant or nonstick
- **OCCUPATIONAL EXPOSURE:** People who work at PFAS production facilities or facilities that manufacture goods made with PFAS


PFAS Cycle
PFAS TREATED MATERIAL
(such as aerosol, fabric protectors, stain resistant carpeting/raincoats/shoes)
PFAS TREATED FOOD PACKAGING
(such as grease-resistant paper products)
RESIDENTIAL HOMES
Air
LANDFILL
PFAS PRODUCING/ USING INDUSTRIES
SOIL/ FARMLAND
Drinking water
Food products
Leachate to WWTP
Sludge
Biosolids
Wastewater to WWTP
WASTEWATER TREATMENT PLANT
Infiltrate into groundwater
Plant uptake
Wastewater direct discharge to stream
Wastewater direct discharge to stream
Firefighting foam
RIVER
GROUNDWATER
EGLE
MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY
800-662-9278 | Michigan.gov/PFASresponse
7/2019

Health Impacts of PFAS Exposure

- People are exposed to PFAS from many different sources, increasing cumulative risk
- According to US EPA, certain PFAS can accumulate in the human body for extended periods
- Adverse health effects include:
  - Liver effects (e.g., higher cholesterol)
  - Immunological effects (e.g., decreased vaccination response, asthma)
  - Developmental effects (e.g., birth weight)
  - Endocrine effects (e.g., thyroid disease)
  - Reproductive effects (e.g., lower fertility)
  - Cardiovascular effects (e.g., pregnancy induced hypertension)
  - Cancer (e.g., testicular, kidney – documented PFOA only)

How is PFAS regulated?

Current Regulation of PFAS

- Rapidly changing, especially at the state level
- Regulations address different types of PFAS and in different media, e.g., drinking water, surface water, groundwater, soil, etc.

Federal Regulation – SDWA & Clean Water Act

SAFE DRINKING WATER ACT

- Drinking Water Health Advisory – 70 ppt
  - Non-enforceable, non-regulatory
  - Only applies to drinking water, not ingestion of food containing PFAS
- February 22, 2021: EPA issued Final Regulatory Determinations for PFOS and PFOA in drinking water
  - Determined that PFOA and PFOS require primary drinking water standards

CLEAN WATER ACT

- Could create effluent limitations and Water Quality Standards
- 2020 EPA Guidance instructs permit writers to include PFAS monitoring requirements and control discharges through Best Management Practices

Federal Regulation – CERCLA

CURRENT

- PFAS are not currently regulated under CERCLA as hazardous substances
- EPA CERLCA clean up recommendations
  - 40 ppt screening level for PFOA and PFOS individually
  - 70 ppt preliminary remediation goal for PFOA, PFOS individually or combined (unless more stringent state standard applies)
  - Applies to groundwater that is a “current or potential” source of drinking water

FUTURE

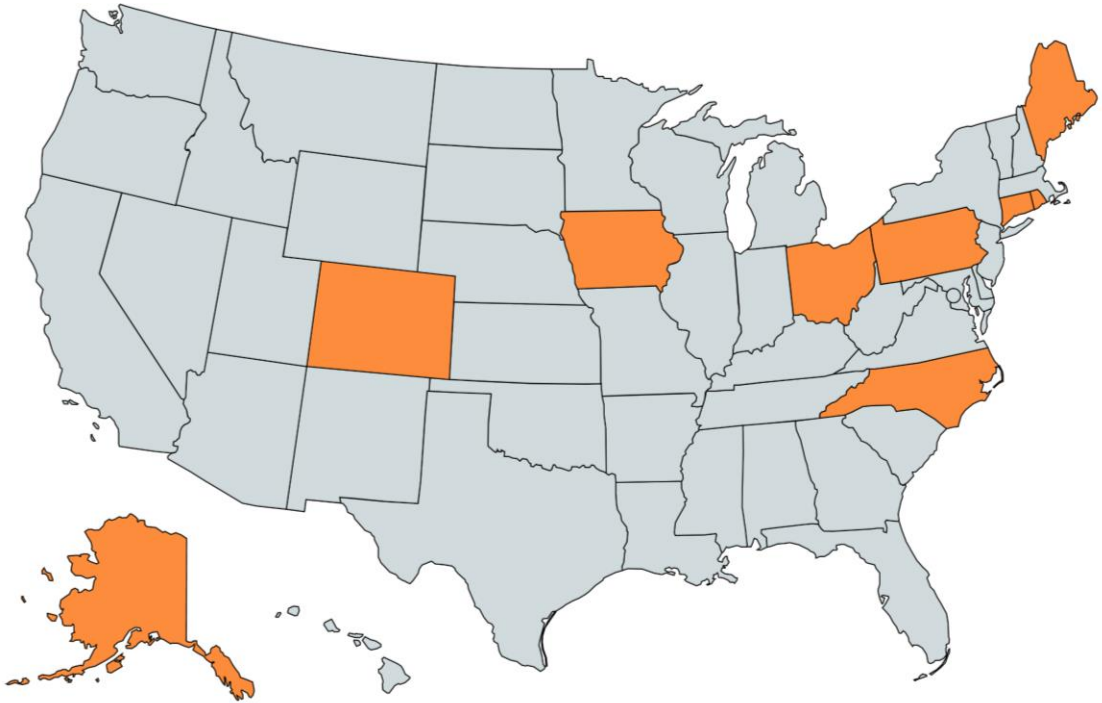
- Biden environmental justice plan committed to designating PFOA and PFOS as hazardous substances
- Pending legislation to require EPA to designate all PFAS as hazardous substances under CERCLA

Proposed Federal Regulation: H.R. 535, the PFAS Action Act

- Requires EPA to add PFOA and PFOS to the Superfund list of hazardous substances within one year and to assess all other PFAS within five years
- Sets air emission limits, prohibiting unsafe incineration of PFAS, and limiting the introduction of new PFAS chemicals into commerce
- Requires monitoring for drinking water, authorizing grants for local water systems, pausing approval of new commercial uses and permitting a "PFAS-free" label for nonstick cookware

States with standards or guidance at EPA's 70 ppt health advisory level

Alaska: Action Level
Colorado: Site GW Quality Standard
Connecticut: Drinking Water Standard
Delaware: Reporting Level
Iowa: State GW Standard
Maine: Remedial Action Guidelines
Maximum Exposure Guidelines
New Hampshire: GW Quality Standard
North Carolina: Recommended GW Standard
Ohio: Proposed Drinking Water Standard
Pennsylvania: Medium Specific Concentration
Rhode Island: Health Advisory

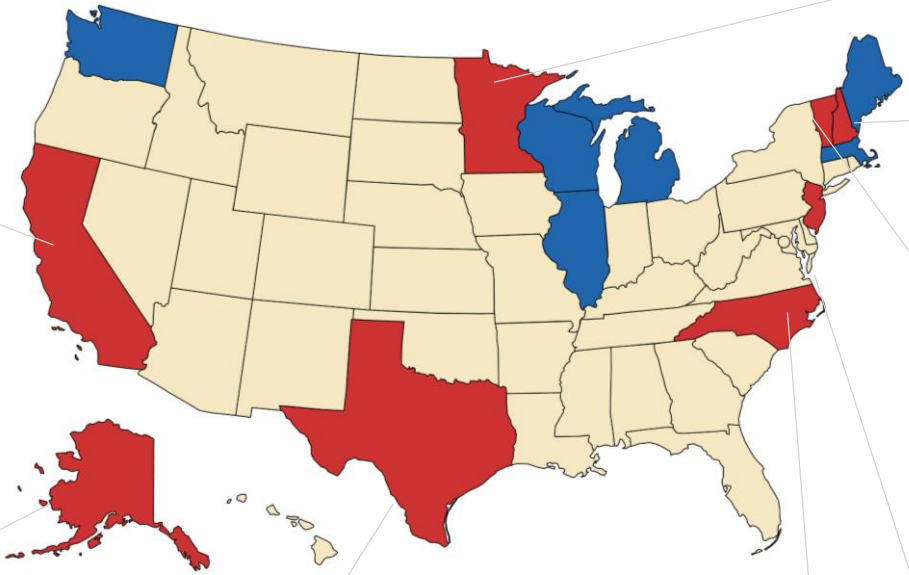


States with more stringent numeric criteria

California (drinking water notification and (response level))
5.1 (10) ppt for PFOA
6.5 (40) ppt for PFOS

Proposed Standard

Enacted Standard



Alaska (Cleanup Standard)
400 ppt for PFOA and PFOS

Texas Tier I Protective Concentration Level for 14 different PFAS, in addition to PFOA and PFOS

North Carolina GenX: (health goal) 140 ppt

Minnesota (health based standard)
35 ppt for PFOA
15 ppt for PFOS

New Hampshire (DW standard (stayed per court order))
12 ppt for PFOA
15 ppt for PFOS
18 ppt for PFHxS
11 ppt for PFNA

Vermont (GW enforcement standard)
20 ppt for PFOA and PFOS, HAL for sum of 5

New Jersey (MCL)
14 ppt for PFOA
13 ppt for PFOS
Interim Class II GW
10 ppt for PFOA and PFOS

Primary Challenges with PFAS

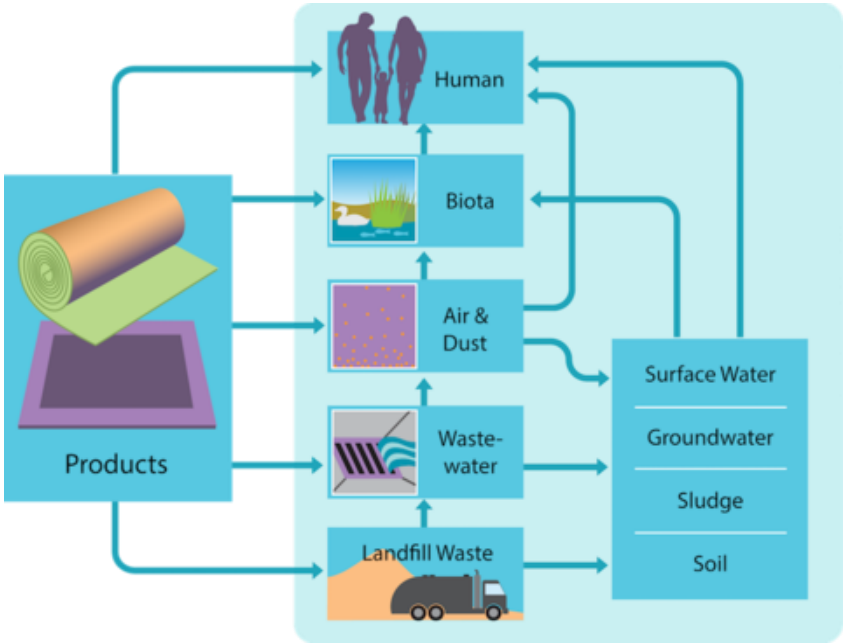
- Testing is expensive due to limited laboratory testing methodologies and capabilities
- Cleanups are even more costly due to very low regulatory levels and cleanup options
- Low regulatory and guidance levels mean minimal use and release can be problematic
- Closed sites may be reopened
- PFAS laws will change
- Destruction technologies are untested and may result in additional contamination

1 ppt is equivalent to one square foot of tile on a kitchen floor the size of Indiana

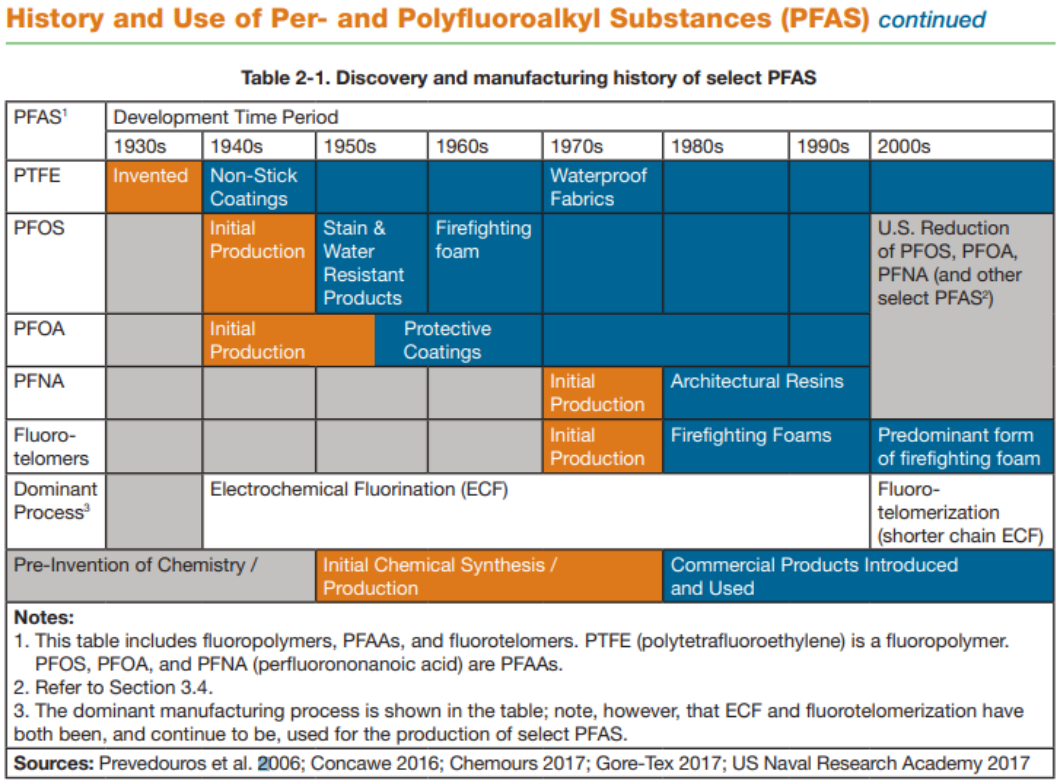
PFAS and Insurance Considerations

Screening for PFAS Risks

- What is the industry?
  - E.g., Plating operations (mist suppressant and in plating baths); Airports (firefighting foams); Landfills (sites that have accepted PFAS containing products)
- What is the historical property use and location?
  - Is there a history of fires at the site? Was it used for land application? Industrial history?
- Water supply testing data?
  - States have only recently required testing
- Phase I Environmental Site Assessments
  - PFAS are not general classified as a "Hazardous Substance"



Comparison of Pollution Exclusions to Use of PFAS



History and Use of Per- and Polyfluoroalkyl Substances (PFAS) *continued*

Table 2-1. Discovery and manufacturing history of select PFAS

PFAS[1]	Development Time Period							
	1930s	1940s	1950s	1960s	1970s	1980s	1990s	2000s
PTFE	Invented	Non-Stick Coatings			Waterproof Fabrics			
PFOS		Initial Production	Stain & Water Resistant Products	Firefighting foam				U.S. Reduction of PFOS, PFOA, PFNA (and other select PFAS[2])
PFOA		Initial Production		Protective Coatings				
PFNA					Initial Production	Architectural Resins		
Fluoro-telomers					Initial Production	Firefighting Foams		Predominant form of firefighting foam
Dominant Process[3]		Electrochemical Fluorination (ECF)						Fluoro-telomerization (shorter chain ECF)
Pre-Invention of Chemistry /			Initial Chemical Synthesis / Production			Commercial Products Introduced and Used		

Notes:
1. This table includes fluoropolymers, PFAAs, and fluorotelomers. PTFE (polytetrafluoroethylene) is a fluoropolymer. PFOS, PFOA, and PFNA (perfluorononanoic acid) are PFAAs.
2. Refer to Section 3.4.
3. The dominant manufacturing process is shown in the table; note, however, that ECF and fluorotelomerization have both been, and continue to be, used for the production of select PFAS.

Sources: Prevedouros et al. 2006; Concawe 2016; Chemours 2017; Gore-Tex 2017; US Naval Research Academy 2017

- **Chart from ITRC website**
- PFAS invented 1930's
- PFOS, PFOA, PFNA used from 1940s-1990s
- Sudden & Accidental Pollution Exclusion first introduced in 1973
- Absolute Pollution Exclusion introduced in 1986

How can you prove pollution started pre-1986?

- Policyholder has burden of demonstrating that groundwater contamination occurred during the policy period by a preponderance of the evidence
- Sometimes, operational history will show when pollutant was used
- Otherwise, expert testimony
  - Length that plume has traveled
  - Degradation of chemicals