



# Guide to Navigating PFAS Risks





# Guide to Navigating PFAS Risks

Businesses, manufacturers, the government, the judicial system, and the insurance industry are currently in the early-to-intermediate stages of dealing with the effects and treatment of PFAS, which have been dubbed the “forever chemicals.”

Litigation over these “forever chemicals” is no longer solely focused on lawsuits against PFAS manufacturers, but now includes as defendants, companies that incorporate PFAS into their finished products or industrial safety processes. An aggressive plaintiff’s bar, the rise of private, third-party litigation funding and shifting make up of jury pools, along with the desensitized nature of jurors, have contributed to the prevalence and severity of these awards. At the same time, agencies and legislatures at the federal and state levels are accelerating their review of PFAS, and their effects on the population, leading to increased government regulation. In this context, clients of different industry classes, sizes and operations might not be aware of their exposure to this risk, or the potential for losses involving these products. There are several proactive steps that can be taken to address these risks and address coverage concerns surrounding these exposures.

## What are PFAS?



Per and polyfluoroalkyl substances, more commonly known as PFAS, is the name given to thousands of manufactured chemicals used in industrial and consumer applications to impart water, heat, stain, or grease resistance qualities onto certain finished products.<sup>1</sup> Industrial and household products that may contain PFAS include, but are not limited to, adhesives, packaging, clothing, upholstery, carpets, non-stick cookware and paints.<sup>2</sup> PFAS are also found in certain types of fire extinguishing foams, commonly known as aqueous film-forming foams (AFFFs), used to extinguish flammable liquid-based fires. Airports, military facilities, shipyards, firefighting training facilities, chemical plants and refineries are all locations that could potentially employ PFAS-containing AFFFs in their industrial safety processes.<sup>3</sup>

---

**PFAS have been called “forever chemicals” because the carbon-fluorine components of PFAS break down very slowly over time.<sup>4</sup>**

---

Given their slow degradation properties, PFAS has been found in drinking water, ground water, and soil at or near manufacturing and waste sites, and, in some instances, have made their way into finished fish and dairy products made from animals exposed to PFAS.<sup>5</sup> This is in addition to the myriad consumer products which contain or are treated with PFAS. Exposure to PFAS has allegedly been linked to numerous health defects, such as decreased fertility, developmental effects or delays in children, increased risk of some cancers, such as prostate, kidney and testicular cancers, and interference with the body’s natural hormones.<sup>6</sup> However, there is ongoing debate over the causation issues and exactly how PFAS can impact health in specific ways. Corporate manufacturers, governments, and academia are still studying this issue.

## Governmental Response to PFAS



In 2021, the United States federal government announced a variety of new enforcement measures and plans to study and develop guidance for PFAS usages, testing, reporting, restrictions and remediations. For example, the Department of Defense (DOD) is conducting PFAS cleanup assessments at the nearly 700 DOD installations and National Guard locations where PFAS was used or may have been released.<sup>7</sup> The DOD is also partnering with the Environmental Protection Agency (EPA) on research and testing efforts to identify and detect more types of PFAS in the air, groundwater and soil.<sup>8</sup> Similarly, the Food and Drug Administration (FDA) is expanding its testing footprint for food supply,<sup>9</sup> packaging,<sup>10</sup> and other consumer products to quantify exposure to PFAS in diets and consumption with similar efforts being supported by the Department of Agriculture. The Department of Homeland Security, along with the Federal Emergency Management Agency (FEMA) are identifying the presence of PFAS applications in fire-fighting foams, personal protective equipment (PPE) and other emergency response settings.<sup>11</sup>

In October 2021, the EPA announced a comprehensive plan to research, restrict and remediate PFAS contamination in the United States over a three-year period. The federal agency published a national PFAS testing strategy to deepen understanding of the impacts of categories of PFAS, including potential hazards to human health and the environment.<sup>12</sup> In addition to testing, the government is also developing guidelines to probe new PFAS prior to their introduction into the stream of commerce, existing PFAS to ensure they are being used in ways that do not present concerns, and to prevent banned or barred PFAS from re-entering the stream of commerce.<sup>13</sup> Other proposed efforts include the establishment of drinking water regulations with enforceable PFAS limits, issuance of guidelines for cleanup and remediation of PFAS, and an inter-agency collaborative effort to further assess human health and environmental risks from PFAS.<sup>14</sup>

---

<sup>1</sup> U.S. Centers for Disease Control: [https://www.cdc.gov/biomonitoring/PFAS\\_FactSheet.html](https://www.cdc.gov/biomonitoring/PFAS_FactSheet.html)

<sup>2</sup> Id.

<sup>3</sup> U.S. Environmental Protection Agency: <https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas>

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> FACT SHEET: Biden-Harris Administration Launches Plan to Combat PFAS Pollution <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/18/fact-sheet-biden-harris-administration-launches-plan-to-combat-pfas-pollution/>

<sup>8</sup> EPA Announces First Validated Laboratory Method to Test for PFAS in Wastewater, Surface Water, Groundwater, Soils <https://www.epa.gov/newsreleases/epa-announces-first-validated-laboratory-method-test-pfas-wastewater-surface-water>

<sup>9</sup> FDA Releases PFAS Testing Results from First Survey of Nationally Distributed Processed Foods <https://www.fda.gov/news-events/press-announcements/fda-releases-pfas-testing-results-first-survey-nationally-distributed-processed-foods>

<sup>10</sup> FDA Issues Letter to Industry on Fluorinated Polyethylene Food Contact Containers <https://www.fda.gov/food/cfsan-constituent-updates/fda-issues-letter-industry-fluorinated-polyethylene-food-contact-containers>

<sup>11</sup> FACT SHEET: Biden-Harris Administration Launches Plan to Combat PFAS Pollution <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/18/fact-sheet-biden-harris-administration-launches-plan-to-combat-pfas-pollution/>

<sup>12</sup> <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/national-pfas-testing-strategy>

<sup>13</sup> <https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024>

<sup>14</sup> Id.



In April 2022, the EPA proposed certain clean water PFAS actions, which will monitor aquatic life and water quality based on PFAS levels. On June 6, 2022, the EPA issued its first PFAS test order, under the Toxic Substances Control Act, which will deepen the understanding of the impacts of PFAS, including potential hazards to human health and the environment. On June 15, 2022, the EPA released four drinking water health advisories and announced that \$1 billion would be available for states to address PFAS in drinking water in small and disadvantaged communities. And finally, on August 26, 2022, the EPA published a proposed rule that would designate both PFOS and PFOA “hazardous substances” under § 102(a) of the Comprehensive Environmental Response, Compensations, and Liability Act (“CERCLA”).

**Importantly, as of the date of publication, PFAS are not yet banned at the federal level.**

A number of states including New York and California have issued limited bans of PFAS in food packaging, all of which have not yet gone into effect. At the federal level, the FDA phased out the use of certain specific varieties of PFAS in November 2016, which prohibited the use of those chemicals in food contact applications in the United States.<sup>15</sup> On July 31, 2020, the FDA announced a wider agreement with manufacturers to voluntarily phase-out their sales of certain other PFAS varieties in food contact substances, with the phase-out scheduled to be fully in place by January 2024.<sup>16</sup> However, certain PFAS chemicals are still being used in non-stick cookware, food packaging, and in food processing equipment. Similarly, several states have passed legislation banning the use of firefighting foam containing PFAS, and alternatives are being tested and developed, but AFFF is still being used today.

<sup>15</sup> <https://www.fda.gov/food/chemical-contaminants-food/authorized-uses-pfas-food-contact-applications>

<sup>16</sup> <https://www.fda.gov/news-events/press-announcements/fda-announces-voluntary-agreement-manufacturers-phase-out-certain-short-chain-pfas-used-food>

## PFAS Claims



There are currently three “waves” of litigation involving the adverse effects of PFAS and PFAS-containing products in the federal and state courts in the United States. Generally speaking, liability claims seek damages for a variety of claims including property damage and bodily injury, based on a host of allegations such as:

- Public nuisance
- Private nuisance
- Strict liability for defective design and/or defective product
- Strict products liability for failure to warn/instruct
- Negligence
- Trespass
- Discovery of new contaminants
- Toxic tort suits

### Aqueous Film-Forming Foams (AFFF) Litigation

To date, claims involving exposure to AFFFs are the most prevalent type of PFAS litigation. The claims allege bodily injury and property damage caused by exposure to PFAS contained in AFFFs. These usually involve four types of claimants: individual, class actions, water authorities and airports, and municipalities and states.

The most significant lawsuit involving exposure to AFFFs is the AFFF Products Liability multi-district litigation (MDL) in the U.S. District Court for the District of South Carolina.<sup>17</sup> The lawsuit alleges environmental pollution and personal injury claims against a number of manufacturers, which used PFAS as a component in firefighting foams. In total, there are thousands of claimants consolidated in this MDL. Bellwether trials involving local municipalities and water authorities are set to take place in early 2023.

## PFAS Manufacturer Litigation

PFAS litigation has historically been focused on lawsuits against manufacturers of PFAS.

Of note, many companies do not themselves manufacture PFAS, but rather use it in service or manufacturing of another product or incorporate it into a product. Those companies are “further down” the stream of PFAS use, but nevertheless arguably have some exposure to potential claims from an aggressive plaintiffs’ bar and state attorneys general. It remains to be seen whether our judicial system will hold intermediate corporate users of PFAS liable, including for claims such as failure to warn or misrepresentation of their product or service.

### Governmental Litigation

Lawsuits have also been filed by governmental entities against manufacturers of products containing PFAS.

State attorneys general and local municipalities have asserted claims alleging PFAS contamination of natural resources, including soil and drinking water. Many of these suits focus on the areas around manufacturing plants where PFAS are initially created or used in the production process. A number of claims have been resolved via settlements, but many cases are still outstanding and are being actively litigated by government entities and defendant manufacturers.

---

**Many states have brought lawsuits against manufacturers of PFAS containing products.**

---

<sup>17</sup> <https://www.scd.uscourts.gov/mdl-2873/index.asp>

## Insurance Market Response



Insurance carriers are keeping a close eye on this evolving issue, with many insurers opting to broadly exclude PFAS in certain programs, regardless of a client's risk profile involving the substances. Some insurance carriers have indicated a willingness to decline to issue blanket PFAS exclusions where underwriting indicates such an endorsement is unmerited. However, underwriting appetites and practices may evolve over the course of time with regards to PFAS exposures. As such, an insurer's position on PFAS during a previous renewal might not be the same as it will be on an upcoming one.

Of course, a key consideration of underwriters is based on the particular exposure of a client. Insurers are particularly interested in quantifying an insured's product exposure (e.g., whether they manufacture PFAS or incorporate PFAS into a finished product, or utilize packaging that contains PFAS), whether the insured's industrial footprint utilizes AFFFs, or whether the insured installs, maintains, or tests fire protection systems. With regard to products exposure, insurers have requested information regarding the total volume of PFAS or number of finished, PFAS-containing products sold. Similarly, as to industrial safety processes, insurers are interested in understanding the processes and procedures in place to ensure the containment and limited use of AFFFs. Moreover, insurers are interested in better understanding any timelines or plans in place for the phase-out or replacement of PFAS in products or industrial safety processes.

Generally, underwriters have not been unilaterally changing major terms and conditions of a policy currently in-force. However, at renewal, underwriters can address any underwriting concerns or new appetite restrictions. We have seen this with other "emerging risks" over the past 20 years, such as the Y2K date recognition issue, terrorism, mold/fungi risk and MTBE fuel additive and others, where underwriters have added risk-specific restrictions and exclusions across the board. Below are some coverage considerations to note with regards to specific coverage lines:

### Environmental Coverage Considerations

**In-force policy changes** — Environmental coverage-site policies are claims-made and reported. In-force policy is applicable at time claim is made and reported under terms and conditions of that policy, subject to any retroactive date on the policy.

**Change in environmental law trigger** — Policies can respond to claims triggered by changes in environmental law during the policy period, such as a new or more stringent remediation standard for a substance implemented by a regulatory agency for clean-up. Some of the earliest-known PFAS-related environmental policy claims were made on such a scenario.

**Scheduling of locations/properties** — Be certain that your policy insures all locations; i.e., that they are specifically scheduled as locations/properties or that they are defined in the policy or endorsement as such (include any non-owned disposal sites utilized as well).

**Retroactive date(s)** — Pre-existing condition coverage with retroactive date or no retroactive date may be included, so it's important to evaluate how far back in time the exposure could exist.

**Policy term** — Multi-year policy terms are available; however, terms more than three years have been greatly diminished in recent years. Policy terms of five and ten years are still available from a handful of insurers on case-by-case basis.

**Third-party "action over" claims** — Contractors pollution liability policies have mostly been written on an occurrence basis. A key concern is third party action-over/contractual liability coverage for bodily injury of workers of the contractor making claims against the job owner (which, in turn, often get tendered back to the employer, outside of workers compensation). This should be considered in your overall exposure evaluation.

**Products pollution liability** — On rare, case-by-case occasions, a site pollution policy may include a product pollution liability coverage endorsement. Product pollution liability coverage may also be found on combined-form general liability/pollution liability policies. Combined form policies are on an annual basis and the product liability and product pollution liability coverage is primarily occurrence based. Extensive underwriting data and home office approval is typically required to obtain this coverage.



## General Liability Coverage Considerations

**Causation** — One particular coverage concern involves an injury or mode of injury that is not related to or was not caused by the toxic or harmful properties of PFAS (e.g., if a claimant trips over a PFAS-containing product and sustains an injury), or a product contain PFAS was faulty in a completely unrelated manner. A PFAS exclusion on a casualty program should not be drafted to exclude such a loss when the injury was not caused by or related to the toxic or harmful properties of PFAS; put another way, where PFAS is present in a product but the actual or alleged injury would have occurred regardless of the presence of PFAS, the exclusion should not apply.

**Pollution and Other Perils** — Coverage should not be excluded for the entirety of a pollution or other covered peril which only tangentially involves PFAS. Rather, a PFAS exclusion should serve to bar coverage only for the PFAS-related injury or loss, and should not bear on other policy provisions which provide coverage for pollution or other risks.

**Sudden/Accidental Pollution Carve-Back** — A “sudden and accidental” or “time element” carve-back to a pollution exclusion offers coverage for the abrupt, accidental, unexpected, or unintended release of pollutants by the insured, provided the pollution event took place during the policy period, and is known by the insured and reported to the insurer within designated time frames. Some “sudden and accidental” endorsements specifically state that this coverage is provided for a non-routine incident where escape of pollutants was a result of an attempt by insured to mitigate or avoid situation where substantial third-party bodily injury or property damages could occur. This carve-back is important for clients that utilize AFFFs within their industrial safety processes and procedures, as the release of AFFFs to combat, for example, an industrial fire, may result in the type of pollution event this carve-back is meant to insure.



## WTW Resources



Clients should engage their brokers, client advocates, claims professionals and other WTW resources with respect to this evolving issue. In conjunction with WTW resources, clients should review whether there are any PFAS in the manufacturing of finished products, or whether company operations generate PFAS as an impurity or byproduct of the manufacturing process. With regards to potential PFAS exposures in finished products, clients should understand the total output (e.g., volume, units) of product containing PFAS that are manufactured and sold, along with the associated revenues for products sold.

**If available, clients should also describe any plans in place to phase out or replace PFAS used in finished products.**

For clients with AFFFs in industrial safety processes, it is important to ensure that there are appropriate processes and procedures in place to ensure the containment and limited use of PFAS-containing AFFFs in this setting, along with recommendations and plans for phasing out the use of any PFAS-containing AFFFs.

Moreover, clients and claims professionals should understand whether there are any PFAS-related liability claims in the company's overall loss picture.

There will always be different considerations as to different lines of coverage. Please do not hesitate to contact your WTW contact or our resources below with questions regarding this topic, or to review endorsement wordings and their potential impact on a client's casualty coverage program.

## Contact

### **Brian McBride**

Head of Environmental Broking

[brian.mcbride@wtwco.com](mailto:brian.mcbride@wtwco.com)

### **Harris Wiener**

Head Coverage Officer, North America

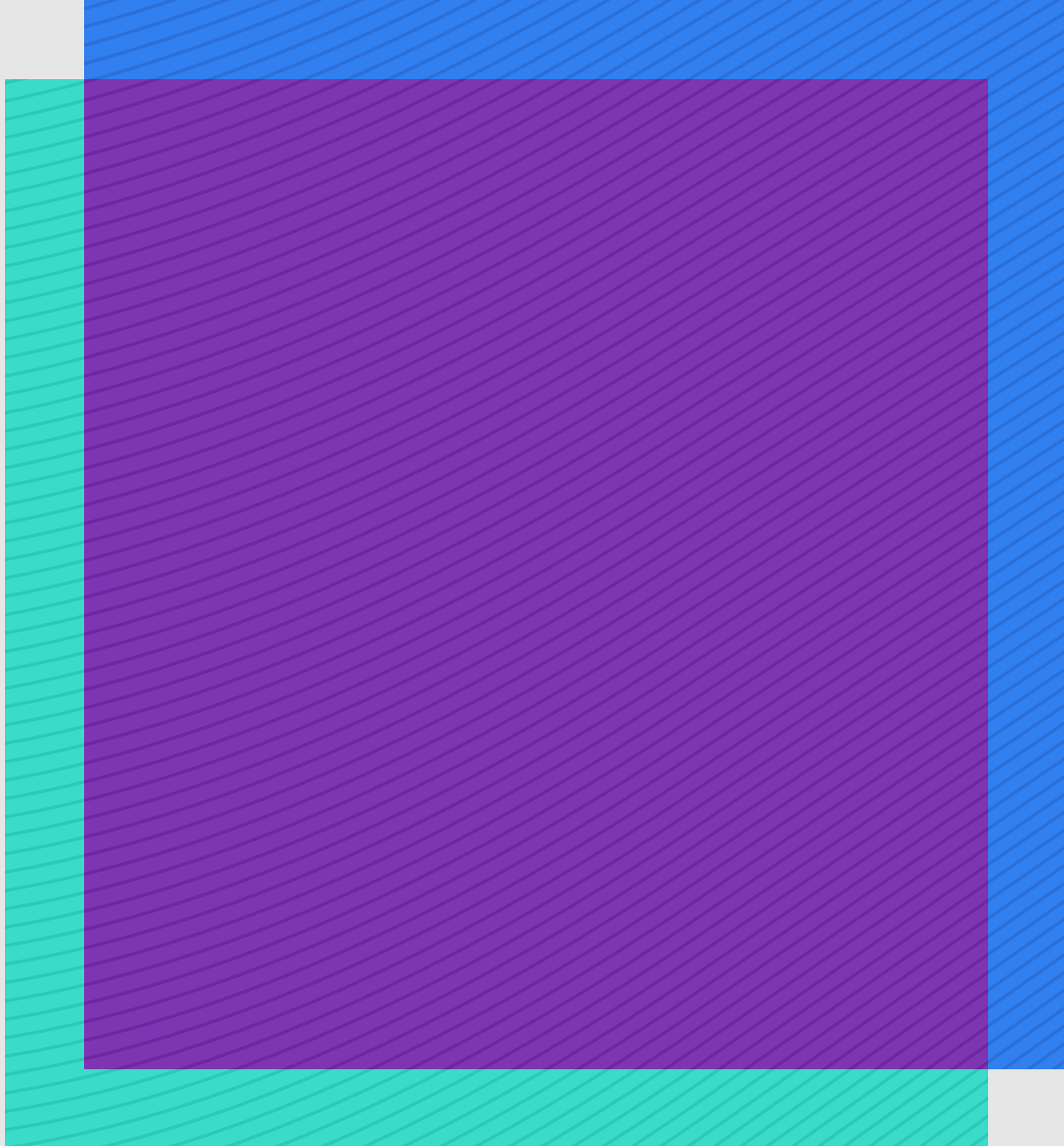
[harris.wiener@wtwco.com](mailto:harris.wiener@wtwco.com)

### **Eduardo Benatuil**

Broker

[eduardo.benatuil@wtwco.com](mailto:eduardo.benatuil@wtwco.com)

***Date published: January 2023***



**About WTW**

At WTW (NASDAQ: WTW), we provide data-driven, insight-led solutions in the areas of people, risk and capital. Leveraging the global view and local expertise of our colleagues serving 140 countries and markets, we help you sharpen your strategy, enhance organizational resilience, motivate your workforce and maximize performance. Working shoulder to shoulder with you, we uncover opportunities for sustainable success — and provide perspective that moves you. Learn more at [wtwco.com](http://wtwco.com).

Willis Towers Watson hopes you found the general information provided in this publication informative and helpful. The information contained herein is not intended to constitute legal or other professional advice and should not be relied upon in lieu of consultation with your own legal advisors. In the event you would like more information regarding your insurance coverage, please do not hesitate to reach out to us. In North America, Willis Towers Watson offers insurance products through licensed entities, including Willis Towers Watson Northeast, Inc. (in the United States) and Willis Canada Inc. (in Canada).



[wtwco.com/social-media](http://wtwco.com/social-media)

Copyright © 2022 WTW. All rights reserved.  
WTW-77150/11/2022

[wtwco.com](http://wtwco.com)

