

MEALEY'S®

Pollution Liability Report

Mitigating Exposure To PFAS Liability

by
Andrew P. Van Osselaer

Haynes and Boone LLP
Austin, TX

and

Leslie C. Thorne

Haynes and Boone LLP
New York, NY

**A commentary article
reprinted from the
September 2022 issue of
Mealey's International
Pollution Liability Report**



LexisNexis®

Commentary

Mitigating Exposure To PFAS Liability

By
Andrew P. Van Osselaer
and
Leslie C. Thorne

[Editor's Note: Andrew P. Van Osselaer is an associate and Leslie C. Thorne is a partner. Haynes and Boone LLP is an international corporate law firm with offices in Texas, New York, California, Charlotte, Colorado, Illinois, Washington, D.C., Shanghai, London, and Mexico City. Any commentary or opinions do not reflect the opinions of Haynes and Boone or LexisNexis®, Mealey Publications™. Copyright © 2022 Andrew P. Van Osselaer and Leslie C. Thorne. Responses are welcome.]

Almost all industries and businesses have used or made products containing PFAS (“per- and polyfluoroalkyl substances”). Unfortunately, some studies now suggest certain PFAS compounds pose significant health risks.¹ This discovery presents legal and regulatory peril of a magnitude that is difficult to comprehend. What we do know is that state and federal governments are rapidly ramping up to regulate PFAS and address what they deem to be existing contamination.² Meanwhile, in the private sphere, it seems every day a new lawsuit is filed against companies in industries running the gamut from fire-protection, to cosmetics, to fast food.³ This surge in activity, and PFAS’s ubiquitous presence, has led some commentators to conclude PFAS will be the “new asbestos.”⁴

As the shadow of litigation and regulation looms, it is essential for companies interacting with PFAS to think about risk-mitigation—both going forward, mitigating future risk, and looking back, bracing for existing liabilities based on past conduct. In truth, while insurance is a crucial and quintessential tool for risk mitigation, there are many methods companies can adopt to protect themselves, including self-audits and voluntary remedial actions. Given the potential

for liability, companies would be wise to consider all options.

I. Why should I be worried?

The term PFAS refers to a group of non-naturally-occurring chemicals widely used for decades (and to this day) as a surfactant (a substance that reduces surface tension) and as an adsorptive agent, water-repellant, and non-stick additive in the manufacture of numerous products, including clothing, other fabrics, paint, paper products, waterproofing materials, disposable food containers, cookware, cosmetics, and, most notoriously, firefighting foam.⁵ According to some researchers and state and federal agencies (including EPA), PFAS chemicals pose serious health risks, including the risk of cancer, and autoimmune and thyroid issues, and may not be safe for human consumption at any level.⁶ This comes as unpleasant news because PFAS chemicals are already present in most human beings and is suspected to exist in most drinking water sources and even rainwater.⁷

The ubiquity of PFAS, and the unwelcome news that it may pose risks to human health, has created a potential health crisis—one for which there is no easy solution. Even if PFAS use were to cease immediately, these so-called “forever chemicals” center around a chain of neigh indestructible carbon-fluorine bonds, making them break down extremely slowly—if at all.⁸ PFAS’s inability to break down has many concerning implications. For example, the runoff from airports that use PFAS-containing fire-fighting foam and snowmelt from mountains that host skiers using PFAS-laden ski wax carry PFAS compounds, which do not break down on their journey, into natural bodies of water.⁹ Further,

because these chemicals do not break down, they readily, and quickly, bioaccumulate in humans and other animals upon consumption.¹⁰ PFAS has even found its way into our food—particularly animal products, like meat and dairy.¹¹ For these reasons, EPA has declared securing the public's safety against the potential dangers of PFAS to be one of its top priorities.¹²

II. PFAS liability may prove as far-reaching as PFAS itself.

A. *Private litigation*

As would be expected, from the moment PFAS was suspected to pose health risks, lawsuits have cropped up pointing the finger at the biggest manufacturers of PFAS products, including DuPont and 3M, and the biggest users of PFAS-laden products, including the US Military.¹³ But recently, as early PFAS plaintiffs have secured settlements, new industries have come under fire.¹⁴ For example, cosmetics manufacturers have become the target of class actions alleging certain waterproof makeup products, which contain PFAS, are harmful to their users.¹⁵ Fast food companies too have come under fire, including most recently and notably Burger King.¹⁶

While it is easy to speculate about the next industry to be targeted, such speculation is hardly necessary. If long-tail toxic tort litigation has taught us one thing, it is that the first targets are never the last, and few targets are too small. As the big players' coffers begin to run dry, plaintiffs will invariably work their way down the supply chain, targeting smaller and smaller users and manufacturers of PFAS products. *Any company* that has interacted with PFAS in a meaningful way should therefore feel pangs of apprehension about what is to come.

As for the magnitude of the risk, given the ubiquity of PFAS, we could see massive judgments against the biggest players if it proves to be as hazardous to human health as some have suggested—not to mention millions spent in defense costs regardless of ultimate liability.¹⁷ Naturally, as with most toxic tort claims, there is also the looming threat of punitive damages, which grows ever more menacing for those companies that continue to use PFAS despite the available information about its risks.

B. *Regulation and Enforcement*

While staggering judgments garner much attention in the news, companies should not myopically fixate on

tort exposure. At the federal level, EPA has promised a swift and comprehensive response to PFAS risks.¹⁸ EPA has already issued test orders to manufacturers under the Toxic Substances Control Act, requiring companies to conduct testing on the risks posed by PFAS compounds and submit their findings to EPA.¹⁹ EPA also recently lowered the health advisory levels for certain PFAS chemicals, which in turn inform drinking water standards, to the barely detectable levels—a threshold most troubling considering most drinking water sources are already likely affected.²⁰ EPA also instituted Regional Screening Levels for certain PFAS compounds under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which allows the presence of PFAS to be considered in determining Superfund site remediation plans.²¹

Most prominently on the radar of environmental lawyers, however, is how EPA intends to treat PFAS under the Resource Conservation and Recovery Act (RCRA) and its future plans for PFAS under CERCLA. With regards to RCRA, although EPA has not announced any plan to list certain PFAS compounds or PFAS products as Hazardous Waste under RCRA, many suspect that given EPA's repeated statement it is considering all tools available to address PFAS, it may do so. If EPA lists certain PFAS compounds (or certain PFAS products) as Hazardous Waste under RCRA, it would trigger RCRA's "cradle-to-grave" tracking and regulation for those materials.²² This would require generators of such waste to, among other things, document and track that waste throughout its life (from cradle to grave), including its storage, transportation, and ultimate disposal. Conceivably, given PFAS's ubiquity, this may impose on companies (for example, clothing retailers and restaurants) tremendous regulatory burdens they may wish to avoid.²³ As it stands now, however, not only are PFAS compounds not listed as Hazardous Waste under RCRA, due to certain requirements imposed on deeming waste "characteristic waste" based on a toxicity profile, they are unlikely to be considered Hazardous Waste absent EPA intervention. Thus, unless and until EPA acts, companies are currently under no obligation to track their PFAS-laden waste absent the presence of another regulated material.

Despite not yet going so far as to list certain PFAS compounds or products as Hazardous Waste under RCRA,

EPA has announced it intends to list certain PFAS chemicals as “Hazardous Constituents” under RCRA, a term referring to those elements imparting characteristics causing waste to be hazardous.²⁴ Companies that have contributed to PFAS’s presence at a site where other RCRA waste is present should therefore anticipate RCRA corrective actions, as has been the case for other non-Hazardous Waste toxic substances, like PCBs.²⁵ Further, companies may become the target of RCRA citizen suits based on PFAS’s presence in solid waste where it “present[s] an imminent and substantial endangerment to health or the environment.”²⁶

EPA also announced it intends to list certain PFAS compounds as Hazardous Substances under CERCLA.²⁷ This would allow EPA to add sites sufficiently contaminated with PFAS to the National Priorities List.²⁸ CERCLA liability is particularly worrisome for many reasons, although two are most pronounced. First, CERCLA provides strict and (generally) joint and several liability for the entire cleanup of a Superfund site for all meeting the definition of a “Potentially Responsible Party” (PRP). PRPs include generators, transporters, facility owners and operators, and even landowners, who may not have engaged in any wrongful conduct themselves, that owned the property at the time of its contamination, subject to limited exceptions and defenses.²⁹ Second, Superfund liability never truly goes away. Although PRPs may enter consent agreements with EPA in which EPA covenants not to sue the PRP following cleanup, those agreements almost always contain a reopener—an exception to EPA’s covenant not to sue.³⁰ Reopeners may be triggered by many things, but a typical reopener is at least triggered by previously unknown conditions or new scientific information indicating a previously unknown imminent and substantial endangerment to public health.³¹ This means that we may see shuttered Superfund sites reopening based on PFAS contamination, and companies that thought their troubles were over held back over the fire.

At the state level, legislative and regulatory actions have so far mostly involved establishing drinking water Maximum Contaminant Levels.³² However, since 2019, hundreds of statutes addressing PFAS’s manufacture, use, and disposal have been proposed. For example, Colorado recently enacted legislation that regulates PFAS in consumer products.³³ In particular, it bans (as of 2024) the sale of certain products

with intentionally added PFAS, including carpets, cosmetics, fabric treatments, food packaging, juvenile products, oil and gas products, and furniture.³⁴ California has also begun regulating PFAS compounds, including by designating PFAS-treated textiles and leathers “Priority Products”—a product identified by the California Department of Toxic Substances Control to contain hazardous chemicals that harm people or the environment.³⁵

II. The first step is admitting you have a problem.

The most obvious users and manufactures of PFAS-containing products are, in a sense, in a better position to assess their risk than many. They, at least, understand their uses of PFAS and should now be well-aware of the coming storms. Many companies, however, have not come to grips with the nature of their interactions with PFAS. For example, a retailer may inadvertently be exposing the public to PFAS through products it did not understand contain such chemicals. Or a company may be unknowingly exposing its own employees to PFAS through the use of PFAS-containing products. For that reason, the first step to mitigating PFAS-related risk is figuring out whether or not your company interacts with PFAS and in what manner.

III. Risk-mitigation begins at home.

After companies determine the extent to which they use PFAS products, companies should evaluate their use of PFAS going forward. For example, Wendy’s and Chipotle recently announced they would cease using PFAS in their food packaging.³⁶ Companies who cannot justify abandoning the use of PFAS entirely should evaluate whether changing to an apparently more benign variant is appropriate. Companies should also be aware that in recent years there has been growing public concern about a practice referred to as “chemical whack-a-mole,” where a company swaps one toxic substance for another after the first product comes under scrutiny.³⁷ Companies should therefore, when choosing new PFAS products or compounds, research the safest suitable alternative and be prepared to defend that choice rather than simply choose a PFAS compound that has yet to come under fire.

While companies are evaluating their ongoing use of PFAS, they should simultaneously evaluate their

potential for liability with an eye towards regulatory compliance, tort, and even contractual liability both past and future. Wherever possible, companies should ensure that this assessment is protected as privileged. A PFAS audit, therefore, should pair non-lawyer consultants with outside counsel—ideally counsel with environmental investigations and toxic tort experience. Companies should also inquire whether their states offer a safe harbor program for environmental compliance issues uncovered during good faith compliance audits (as Texas does) and consider beginning those audits either before or in conjunction with their liability assessment, depending on the requirements of the safe harbor statute.³⁸

Where the presence of PFAS is known to exist, companies should also consider, in an effort to preempt an enforcement action, beginning site assessments and cleanup. Companies might also investigate potential third-party claims against suppliers and consider reaching out to them to see if an agreement can be struck regarding defense and indemnity obligations prior to being sued. Under limited circumstances, companies may even consider suing preemptively to establish those rights in a declaratory action, although they should consider whether the issue is ripe for adjudication and whether such a suit would attract undue attention and scrutiny. Finally, for those companies that fear they may constitute a PRP under CERCLA for a given site, it may be wise to determine what other PRPs exist to help share the load should EPA come knocking. Regardless of what tact a company chooses to adopt, the best plan is ultimately one guided by the company's business needs and the company's unique potential for liability given its interaction with PFAS. There is certainly no one-size-fits-all solution.

IV. When it comes to risk, insurance is king.

There are many ways to mitigate risk, some of which are rather creative. For example, some companies faced with an onslaught of claims, most notably with respect to talc, have opted to employ so-called Texas two-step mergers in which a company performs a divisive merger under Texas law, assigns its tort liabilities, certain assets, and insurance benefits to one company, then that company files for bankruptcy.³⁹ At the other end of the spectrum, there is insurance—the most conventional and arguably most tailorable tool for risk-shifting. Thus, while companies would be remiss not to consider alternative risk-mitigation

mechanisms like the Texas two-step, they would be utterly reckless not to consider the availability of insurance.

A. Looking forward: Securing coverage.

The issue with insuring against PFAS-related liabilities is that such liability may come in any number of forms—for example, environmental contamination, products liabilities, and property loss and cleanup—for which no one traditional line of insurance is capable of providing full coverage. For example, claims based on exposure to products fall under products liability coverage afforded by default in GL policies (if not excluded) and available under stand-alone products policies. The insured's losses, like the cost to cleanup one's own property and business interruption losses, fall within the purview of first party coverage. Claims premised on executives' decisions regarding PFAS, for example in a shareholder derivative suit, and even government investigations in certain circumstances may be addressed through directors' and officers' liability coverage. And finally, prototypical contamination issues—for example, unintended releases—fall under pollution liability coverage, which should cover personal injury and cleanup.

Naturally, all these types of coverage, save pollution liability coverage and arguably products coverage, are complicated by the existence of pollution exclusions (discussed below). Fortunately, there is a straightforward solution. Unlike many lines of insurance, carriers' pollution policy offerings can often be made sufficiently bespoke, or at least sufficiently comprehensive, to address any number of risks associated with alleged contaminants.⁴⁰ This may include coverage for typical contamination and exposure claims, cleanup, products liabilities, first party losses, and even defense against enforcement actions.⁴¹

Regardless of how companies choose to assemble their coverage to address PFAS, there are a few issues worth addressing with a broker to ensure proper coverage is procured. First, brokers must be provided a fulsome description of the company's exposure regarding PFAS, making a liability assessment all the more useful. Second, careful attention should be paid to the breadth of any pollution exclusion if the insured intends to rely on GL or other non-pollution coverage. Third, companies should specifically clarify that the coverage they are procuring covers PFAS and other

emerging contaminants. Some carriers have already begun excluding such contaminants from their standard policies.⁴²

B. Looking back: Shoring up.

Unfortunately, knowing how to build the perfect insurance program to combat PFAS-related liability only aids companies going forward. When it comes to coverage for claims that have already accrued, which may go back decades, companies should review their historical policies to determine what coverage they afford. Absent a pollution policy on point or a products policy that covers exposure to contaminants in products, general liability (GL) policies are typically the first line of defense for a company facing tort liability. Their use against PFAS-related liability is tricky, however, due to the advent of the pollution exclusion.

Older GL policies without pollution exclusions (circa pre-1970) are in most jurisdictions understood to apply to environmental damage due to contaminants and to personal injury caused by toxic substances.⁴³ They are further understood, absent an exclusion, to extend to product liability claims, likely covering exposure to PFAS through the use of PFAS-containing products. The increased number of pollution liability claims in the 1960s and 70s, however, led to the invention of pollution policies and various pollution exclusions to shift pollution liability off of GL and other policies.⁴⁴ Although pollution exclusions vary in terms and must be evaluated on a case-by-case basis, certain forms are common.

Older versions of the pollution exclusion often apply only to “sudden and accidental” releases of pollutants—not applicable to intentional exposures or consistent contamination—for example, the systematic use of fire-fighting foam on airport runways.⁴⁵ In the 1980s, however, insurers began deploying a stricter pollution exclusion—typically referred to as the “absolute” pollution exclusion.⁴⁶ This exclusion dispensed with the “sudden and accidental” requirement, excluding, for example, any discharge or release of pollutants with only certain enumerated exceptions.⁴⁷ Some courts have held that these types of provisions barred coverage for continuous exposures and contamination—for example seepage—but they should not apply in situations where PFAS is used intentionally as a useful product, rather than released as a deleterious substance.⁴⁸ Another limitation on

the scope of the absolute pollution exclusion is the requirement that the pollutant cause the injury—creating a type of proximate cause requirement.⁴⁹

Insurers again revamped the pollution exclusion in the 1990s, deploying what is now called the “total” pollution exclusion.⁵⁰ The total pollution exclusion is the most restrictive variant of the pollution exclusion, and typically eliminates the carveouts found in the absolute pollution exclusion.⁵¹ The total pollution exclusion further removes the requirement that a pollutant cause the subject injury and instead merely requires but-for causation between the pollution event and the injury in question—not that the injury be caused by a pollutant.⁵²

Although underwriters typically attempt to include total pollution exclusions in GL policies, the total pollution exclusion has proved less ubiquitous than the absolute pollution exclusion in part due to changes between hard and soft markets. Companies should therefore not assume its presence in modern policies. Further, pollution exclusions, like pollution policies, can vary wildly across carrier lines (and even within the same carrier line), and state law varies wildly when it comes to their interpretation. For that reason, even when faced with a facially daunting pollution exclusion, it may be wise to obtain a coverage assessment from outside counsel before giving up the ghost.

Finally, when evaluating historical coverage, companies should be cognizant that their available coverage has not existed in a vacuum since its inception. Policies may have been lost, carriers may have become insolvent, and claims (for example, decades of asbestos claims) may have eroded policy limits. Further, these old policies may interact in ways not originally understood. For example, excess policies may not afford defense once the underlying primary policy exhausts, and excess coverage may exclude certain risks—like products liabilities—covered under an underlying primary policy. For these reasons, it may be worth contacting one’s carriers, brokers, and even coverage counsel (particularly in the case of interpreting policies) to determine the present shape of one’s coverage.

Conclusion

The strength of resolve shown by EPA and the plaintiffs’ bar is as strong as any fluorine-carbon bond. PFAS compounds, which have been used ubiquitously for decades, have come under fire to a degree

that harkens back to the era of asbestos and there is only indication that it will get worse. What will come next is difficult to say with certainty. However, companies that interact with PFAS to any meaningful degree should prepare for the worst. Those that will fare best are those that think critically about risk management—both looking forward to improving their operations and risk-management plans, and looking backwards to shore up existing exposures. There is still time to do this legwork, but that may not be the case for long. In the end, the greatest risk takers will be those that do nothing.

Endnotes

1. *Research on Per- and Polyfluoroalkyl Substances (PFAS)*, EPA.GOV, <https://www.epa.gov/chemical-research/research-and-polyfluoroalkyl-substances-pfas>.
2. EPA has even published a strategic roadmap for addressing PFAS, the execution of which it says is a top priority. *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024*, EPA.GOV, <https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024>.
3. For example, Burger King was recently sued for the use of PFAS in its burger packaging. See Lauren Berg, *Burger King Asks to Chuck Whopper Package Chemicals Suit*, LAW360.COM (July 26, 2022), <https://www.law360.com/articles/1515277/burger-king-asks-to-chuck-whopper-package-chemicals-suit>.
4. Aidan Thomson, *PFAS: The new asbestos?*, JDSUPRA (Dec. 15, 2021), <https://www.jdsupra.com/legalnews/pfas-the-new-asbestos-7188499/>.
5. Andrew Wallender, *Companies Face Billions in Damages as PFAS Lawsuits Flood Courts*, BLOOMBERG L. (May 21, 2022), <https://news.bloomberglaw.com/pfas-project/companies-face-billions-in-damages-as-pfas-lawsuits-flood-courts>.
6. *Our Current Understanding of the Human Health and Environmental Risks of PFAS*, EPA.GOV, <https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas>.
7. *PFAS in the U.S. Population*, ATSDR.CDC.GOV, <https://www.atsdr.cdc.gov/pfas/health-effects/us-population.html> (“Most people in the United States have been exposed to PFAS and have PFAS in their blood, especially perfluorooctane sulfonic acid (PFOS) and perfluorooctanoic acid (PFOA).”); Alissa Cordner et al., *Guideline Levels for PFOA and PFOS in Drinking Water: The Role of Scientific Uncertainty, Risk Assessment Decisions, and Social Factors*, 29 J. EXPOS. SCI. & ENVIRO. EPID. 157 (Mar. 2019) (“PFAS were found in the drinking water of more than 16 million Americans in 33 states, and a recent analysis indicates that PFAS-contaminated drinking water is much more widespread than previously reported.”); Ian T. Cousins, et al., *Outside the Safe Operating Space of a New Planetary Boundary for Per- and Polyfluoroalkyl Substances (PFAS)*, 56 ENV. SCI. & TECH. 11172 (Aug. 2, 2022) (finding PFAS in rainwater throughout the world).
8. *The Science of PFAS: Finding strength in the Single Bond*, WASTE 360 (May. 13, 2021), <https://www.waste360.com/pfas-pfoas/science-pfas-finding-strength-single-bond> (“Therefore, the bond strength is the primary reason PFAS is known to be persistent in the environment, bioaccumulates, does not degrade in conventional treatment processes for both wastewater and drinking water, and is thermally stable.”).
9. See, e.g., Gail L. Carlson & Skylar Tupper, *Ski Wax Use Contributes to Environmental Contamination by Per- and Polyfluoroalkyl Substances*, 261 CHEMOSPHERE 128078 (Dec. 2020).
10. *Id.*
11. *'Forever Chemicals' Contaminate Milk on Maine Dairy Farm*, WGME.COM (Feb. 17, 2022), <https://wgme.com/news/local/albion-farm-pulls-milk-from-store-shelves-due-to-harmful-forever-chemicals>.
12. *Aggressively Addressing PFAS at EPA*, EPA.GOV (Jan. 7, 2020) <https://www.epa.gov/newsreleases/aggressively-addressing-pfas-epa>.
13. *E.g., Zimmerman v. 3M Co.*, 542 F. Supp. 3d 673 (W.D. Mich. 2021); *SUEZ Water New York Inc. v. E.I. du Pont de Nemours & Co.*, No. 20-CV-10731 (LJL), 2022 U.S. Dist. LEXIS 1483, 2022 WL 36489 (S.D.N.Y. Jan. 4, 2022); *Giovanni v. United States Dep't of Navy*, 906 F.3d 94, 121 (3d Cir. 2018) (holding medical monitoring claims not barred by sovereign immunity).

14. Deep Dive, *Companies Face Billions in Damages as PFAS Lawsuits Flood Courts*, BLOOMBERGLAW.COM (May 23, 2022), <https://news.bloomberglaw.com/pfas-project/companies-face-billions-in-damages-as-pfas-lawsuits-flood-courts> (“Chemours, DuPont, and Corteva reached a settlement in January 2021 that includes a \$4 billion cost sharing arrangement for PFAS liabilities.”).
15. John Gardella, *PFAS and Cosmetics: Another Lawsuit, Another ESG Lesson*, NAT. L. REV (Feb. 28, 2022), <https://www.natlawreview.com/article/pfas-and-cosmetics-another-lawsuit-another-esg-lesson>.
16. See Lauren Berg, *Burger King Asks to Chuck Whopper Package Chemicals Suit*, LAW360.COM (July 26, 2022), <https://www.law360.com/articles/1515277/burger-king-asks-to-chuck-whopper-package-chemicals-suit>.
17. Wallender, *supra* note 5.
18. *EPA Actions to Address PFAS*, EPA.GOV, at <https://www.epa.gov/pfas/epa-actions-address-pfas>.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Resource Conservation and Recovery Act (RCRA) Compliance Monitoring*, EPA.GOV, <https://www.epa.gov/compliance/resource-conservation-and-recovery-act-rcra-compliance-monitoring>.
23. *Id.*
24. Jennifer Giblin & Henry Leung, *EPA to Initiate Regulation of PFAS Under RCRA*, CROWELL & MORING LLP, <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/EPA-to-Initiate-Regulation-of-PFAS-Under-RCRA#:~:text=November%209%2C%202021&text=EPA's%20announcement%20responded%20to%20a,PFAS%20chemicals%20as%20hazardous%20wastes>.
25. Peter Hayes, *PCB Suit Gets Green Light Under Federal Waste Law*, BLOOMBERGLAW.COM (Nov. 3, 2017), <https://news.bloomberglaw.com/environment-and-energy/pcb-suit-gets-green-light-under-federal-waste-law>.
26. 42 U.S.C.A. § 6972(a)(1)(B).
27. *EPA Actions to Address PFAS*, EPA.GOV, at <https://www.epa.gov/pfas/epa-actions-address-pfas>.
28. *Superfund: National Priorities List*, EPA.GOV, <https://www.epa.gov/superfund/superfund-national-priorities-list-npl>.
29. *Superfund Liability*, EPA.GOV, <https://www.epa.gov/enforcement/superfund-liability>.
30. Frederick W. Addison III, *Reopener Liability under Section 122 of CERCLA: From Here to Eternity*, 45 SMU L. REV. 1081, 1088–91 (Jan. 1991), <https://scholar.smu.edu/cgi/viewcontent.cgi?article=2567&context=smulr>.
31. *Id.*
32. See, Michael Scanlon, et al., *What Are PFASs And What Actions Are Being Taken in The US To Regulate Them?* (Mar. 21, 2022), available at <https://www.mondaq.com/unitedstates/environmental-law/1174184/what-are-pfass-and-what-actions-are-being-taken-in-the-us-to-regulate-them/>.
33. John Gardella, *PFAS Products Ban Set to Hit Colorado*, NAT. L. REV. (May 13, 2022), <https://www.natlawreview.com/article/pfas-products-ban-set-to-hit-colorado>.
34. *Id.*
35. *CA PFAS Timeline*, CALIFORNIA WATER BOARDS, https://www.waterboards.ca.gov/pfas/ca_pfas_timeline.html#:~:text=On%20October%205%2C%202021%2C%20Governor,parts%20per%20million%20total%20fluorine.
36. Julia John, *Wendy's, Chipotle Remove PFASs from Consumer Packaging*, CHEMICALWATCH (May 9, 2022), <https://chemicalwatch.com/478611/wendys-chipotle-remove-pfass-from-consumer-packaging>.
37. Lynne Peeples, *The Toxic Chemical Whack-a-Mole Game*, FAIRWARNING (Jan. 9, 2018), <https://www.fairwarning.org/2018/01/whack-mole-regulation/#:~:text=The%20aim%20is%20to%20end,host%20of%20American%20household%20items>; Joseph Allen, *Stop Playing Whack-a-Mole with Hazardous Chemicals*, WASH. POST (Dec. 15, 2016), https://www.washingtonpost.com/opinions/stop-playing-whack-a-mole-with-hazardous-chemicals/2016/12/15/9a357090-bb36-11e6-91ee-1addfe36cbe_story.html.

38. Texas Commission on Environmental Quality, *A Guide to the Texas Environmental, Health, and Safety Audit Privilege Act*, Revised Nov. 2013, available at <https://www.tceq.texas.gov/downloads/rules/publications/rg-173.pdf>.
39. Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, MICH. L. REV. ONLINE (June 2022), <https://michiganlawreview.org/texas-two-stepping-out-of-bankruptcy/>.
40. See, e.g., *Premises Pollution Liability Portfolio (PPL Port) Policy*, CHUBB.COM, <https://www.chubb.com/us-en/business-insurance/premises-pollution-liability-portfolio-ppl-port-policy.html>.
41. *Id.*
42. Jim Hamilton, *PFAS: The Next Asbestos?*, CRC GROUP, <https://www.crcgroup.com/Tools-Intel/post/pfas-the-next-asbestos>.
43. Craig Stanovich, *The CGL Pollution Exclusion*, IRMI.COM (May 2021), <https://www.irmi.com/articles/expert-commentary/the-cgl-pollution-exclusion>.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. See e.g., *Colony Insurance v. Buckeye Fire Equipment*, 2020 U.S. Dist LEXIS 194709 (W.D.N.C. Oct. 20, 2020) (holding a policy's hazardous material exclusion did not apply to direct exposure to firefighting foam because the exclusion was intended only to apply to "prototypical environmental harms").
49. Christopher J. Boggs, *Understanding the Absolute Pollution Exclusion*, MyNewMarkets (Sept. 28, 2009), <https://www.mynewmarkets.com/articles/104065/understanding-the-absolute-pollution-exclusion#:~:text=For%20pollution%20to%20qualify%20as,or%20place%20of%20the%20loss>.
50. Craig Stanovich, *The CGL Pollution Exclusion*, IRMI.COM (May 2021), <https://www.irmi.com/articles/expert-commentary/the-cgl-pollution-exclusion>.
51. *Id.* However, total pollution exclusions that do not specifically address products liability may still be argued to cover products liabilities due to the nature of the injury: exposure not as a deleterious pollutant but as a useful product.
52. *Total Pollution Exclusion*, IRMI ONLINE, <https://www.irmi.com/term/insurance-definitions/total-pollution-exclusion>. ■

MEALEY'S: POLLUTION LIABILITY REPORT

edited by Samantha Drake

The Report is produced monthly by



1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA

Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)

Email: mealeyinfo@lexisnexis.com

Web site: <http://www.lexisnexis.com/mealeys>

ISSN 1528-5383