

ANDERSON KILL NEW JERSEY

ALERT

Insurance Coverage for PFAS, the 'Forever Chemical'

By Robert D. Chesler and Nicholas M. Insua

The New Jersey Department of Environmental Protection (NJDEP) just sued Solvay and Arkema, two of the main manufacturers of per- and polyfluoralkyl substances (PFAS), the so-called “forever chemical,” to remediate groundwater contamination caused by PFAS. PFAS is a man-made chemical, manufactured since the 1930s, that does not degrade and spreads quickly in groundwater. It is ubiquitous, appearing in everything from firefighting foam to textiles to paint. It is now a major priority of NJDEP and regulators around the country, and is already a major source of environmental liability.

Fortunately, in New Jersey, PFAS groundwater liability may be covered by historical general liability policies.

General liability policies provide coverage for property damage. Under New Jersey law, groundwater is property and contamination of groundwater is property damage. That is black letter law. Moreover, a company does not need to be sued by NJDEP to have coverage. Whether NJDEP proceeds through litigation or regulatory action, whether the company “voluntarily” conducts the cleanup or is ordered by the government, insurance coverage can exist.

The key issue is timing. The insurance industry added an “absolute” pollution exclusion to general liability policies in about 1986. That exclusion forecloses coverage for groundwater contamination that commenced after 1986. However, in New Jersey, general liability policies should provide coverage for groundwater contamination if that contamination commenced prior to 1986. Dating the commencement of the contamination therefore becomes a priority, particularly because PFAS use can either pre-date or post-date 1986.

Sometimes, plant operational history will reveal when PFAS use first occurred, but often this is shrouded in the long-forgotten past. Companies will need to rely on their experts to date when the contamination began, and this may not be easy. For many chemicals, experts rely on the degree to which the chemical has degraded and produced breakdown chemicals in order to date the contamination. However, PFAS do not perceptibly degrade. Another method used is to date the distance that the groundwater plume has traveled. If a plume travels 10 feet a year and has reached

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100 feet, then the contamination is 10 years old. Dating PFAS contamination may be more of an art than a science.

If a company does succeed in dating its PFAS groundwater contamination to prior to 1986, then the company has full coverage. Let us assume that a company had a fire in 1984, and used foam containing PFAS to put out the fire. The groundwater contamination would have commenced in 1984, and continued until 2020, when NJDEP detected it. The company's 1984-86 insurance policies will provide coverage for the entire cleanup. This is because of the "unavailability rule." New Jersey assigns responsibility for those years in which insurance coverage was unavailable in the marketplace to the insurance company that previously provided coverage — not to the policyholder. Thus, since environmental insurance was unavailable after 1986, the insured is not penalized by being made responsible for those years.

The discovery of pre-1986 groundwater contamination results in a second issue — the need to discover pre-1986 insurance policies. Many companies do not have information on their historical insurance policies, and do not know where to look for it. Companies in this situation often retain the services of insurance archaeologists, experts in locating old insurance policies, who can have a high rate of success.

In the hunt for historical coverage, it's worth underscoring that a company does not need to produce its actual insurance policies. A company can prove the existence and terms and conditions of its policies through secondary evidence. The standard for proof is the preponderance of the evidence, which can be met by surprisingly little evidence. Moreover, experts exist who can reconstruct the terms and conditions of an insurance policy based on insurance companies' use of standardized forms and language.

A company confronted with PFAS liability should try to date that contamination at the earliest opportunity. If it is possible the PFAS in the groundwater precedes 1986, the company should immediately seek out its historical insurance policies. Frequently, a company will find that it cannot place its insurance companies on notice of the claim against it until months or even years have elapsed. However, under New Jersey law, late notice will only foreclose coverage if the insurance company can demonstrate appreciable prejudice, a burden that an insurance company can rarely meet in the environmental context.

To conclude, a company seeking insurance coverage for PFAS liability can expect a fight from its insurance companies. The company will need to make sure it has lined up experienced counsel and experts. It must be aggressive in pursuing coverage,



and be prepared for litigation. While some companies may look askance at the prospect of coverage litigation, they should remember that New Jersey law allows for the recovery of attorneys' fees by the successful policyholder. ▲

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