

# PFAS (Pee-fas) — Per-and Polyfluoroalkyl Substances

An emerging risk no matter  
how you say it!



More concerning than the pronunciation of PFAS are the long-term environmental concerns, human health effects and potential legal liability resulting from the historical widespread use of these compounds. This synthetic chemical class has been produced since the 1940s and has had numerous practical applications in the construction industry.

They were once called “wonder chemicals” because of their non-stick, water-repellant, heat/grease/oil/stain-resistant characteristics, which have been used extensively in surface coating and protectant formulations. Other major applications include roofing materials, paints and coatings, sealants, caulks, adhesives, and in firefighting foams. However, a new name has been adopted by scientists which they have termed “forever chemicals” because they are highly resistant to degradation, very stable, extremely persistent and bioaccumulate in the environment and in organisms, including humans.



Levels of concern of some PFAS compounds are in the order of “part per trillion” which is analogous in magnitude of less than one drop in ten Olympic-size swimming pools.



According to the American Chemistry Council, PFAS-containing building materials represent more than a \$26 billion market.



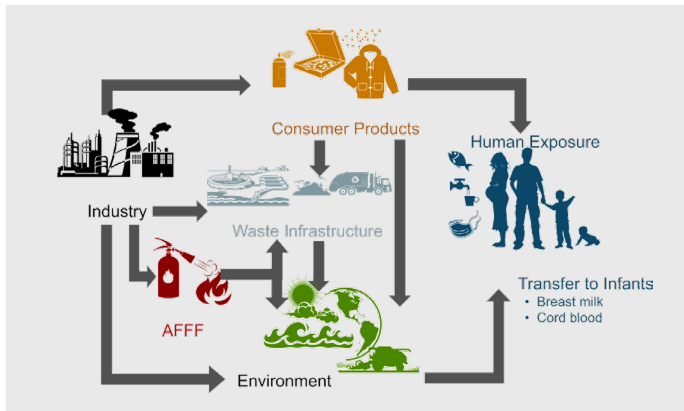
PFAS represent about 5000 or more specific and unique chemical compounds with about 3000 in commercial use.



Note that with an addition or subtraction to the number of carbons in chain and or change in functional group, the result is a different molecule and different properties.

This risk has been lingering for decades. However, it has more recently picked up momentum due to a flurry of regulatory activity surrounding remediation in many state government agencies, increased Environmental Protection Agency scrutiny, and a new emergence of third-party toxic tort claims (Figure 1).

Figure 1. **Potential major exposure pathways of PFAS to humans**



Government regulators, plaintiff attorneys, environmental consultants and insurance underwriters are paying particular attention. Liability claims have already been made on environmental site policies, commercial general liability and excess casualty policies for product liability and/or site pollution (at insured's locations and non-owned disposal sites). Liability claims run the full spectrum and have alleged:

- 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 (consequently, other regulated pollutants may be discovered during an investigation and remediation driven by the PFAS concern at industrial, waste and water supply/water treatment locations).
- Toxic tort suits

## Risk management considerations/ recommendations

**Tracking your exposure “cradle to grave”** – Evaluate your PFAS risk through the project life-cycle, including subcontractors. Also consider any PFAS fire foam systems at your premises or where it may have been used in responding to a fire or chemical reaction.

**Looking for one thing and finding another (historic pollutants)** – Other pollutants may be discovered on, at or migrating from a project during the course of investigating/remediating PFAS.

**Landfill operators/unanticipated treatment costs** – Landfill operators may be in a unique position of having to incur costs for testing, recovery, treatment and/or disposal of PFAS so as to limit long-term liability. Expect such costs to be passed on to customer/end-users (likewise with drinking water treatment utilities). The most conservative, and perhaps the most expensive approach for assured destruction/disposal is hazardous waste incineration at extremely high temperatures. Currently US EPA has not specified treatment and remediation options.

**Consider environmental insurance** – Consider environmental insurance to “test-drive” what might be available in terms of coverage grants specific to PFAS, exclusions and definitions as well as pre-existing conditions in general. In addition, consider and evaluate the availability of a long policy term/period from a financially sound insurer with a track record of stable environmental underwriting management, claim response, legal defense support and payment.

## Environmental insurance policy considerations/ coverages to contemplate

**In-force policy changes** – Generally environmental underwriters do not unilaterally change 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 and MTBE fuel additive and others, where underwriters added risk-specific restrictions and exclusions across the board). Note: 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 cleanup. 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.

## Key takeaway

The underwriting and claim departments at major insurance carriers are quickly taking steps to understand the overall PFAS potential exposure, catch up with the science and modify their underwriting process accordingly. It is difficult to predict how historical general liability or excess casualty policies may be implicated. Multiple scenarios could take place which involve various types of claims alleging third-party liabilities, cleanup/remediation obligations and legal defense costs associated with product liability or product pollution liability. With each scenario, multiple occurrence policies spanning multiple years and policy limits could be contemplated respectively. Some environmental insurers are beginning to modify their appetite via “case-by-case” underwriting and adding exclusions or declining to write the risk altogether.

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