

Business Insurance: Drinking Water Rule Sparks Litigation Fears

The U.S. Environmental Protection Agency's recent establishment of safe levels of so-called forever chemicals in drinking water will likely lead to litigation between organizations and their insurers to potentially recover costs for updating municipal water supplies, experts say.

Lawsuits alleging personal injury and property damage caused by PFAS are also likely to increase, they say.

PFAS, an abbreviation for perfluoroalkyl and polyfluoroalkyl substances, are potentially harmful substances that have been found in numerous commercial and household products ranging from firefighting foam to nonstick cookware. They have also been found in drinking water and soil.

Under the EPA's drinking water regulation, finalized last month, the agency restricted PFAS to four parts per trillion in drinking water — "the lowest levels that are feasible for effective implementation," according to the agency.

While municipal utilities will be most affected by the regulation, it will have a "trickle-down" effect that reaches wastewater treatment facilities and companies that are permitted to discharge wastewater containing forever chemicals, said Susanne Deegan, vice president of environmental services at Marsh McLennan Agency, a unit of Marsh LLC.

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Historic policy language key in covering 'forever chemicals' liabilities

Wordings in historic and current liability insurance policies will likely determine where companies seek coverage for property damage and injury claims related to exposure to “forever chemicals,” experts say.

Companies will look to their insurers for coverage as suits related to perfluoroalkyl and polyfluoroalkyl substances, known as PFAS, reach the courthouse, said John Ewell, an insurance coverage attorney at Cozen O’Connor in New York.

Commercial general liability policies are most likely to respond to lawsuits alleging bodily injuries and property damage were caused by PFAS, said insurance recovery attorney Marc Ladd, a partner at New York-based Cohen Ziffer Frenchman & McKenna.

“They are occurrence-based policies that respond to long-tail, progressive injury claims covering multiple years, and they cover allegations of bodily injury caused by an insured’s products, and property damage that may require costs and expenses to remediate and remove such chemicals,” he said.

Pollution exclusions promulgated in 1986 may not bar all PFAS-related injury claims if they resulted from an individual’s direct exposure to the chemicals as opposed to exposure to traditional environmental pollution, which is what the pollution exclusion is intended to exclude, Mr. Ladd said.

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