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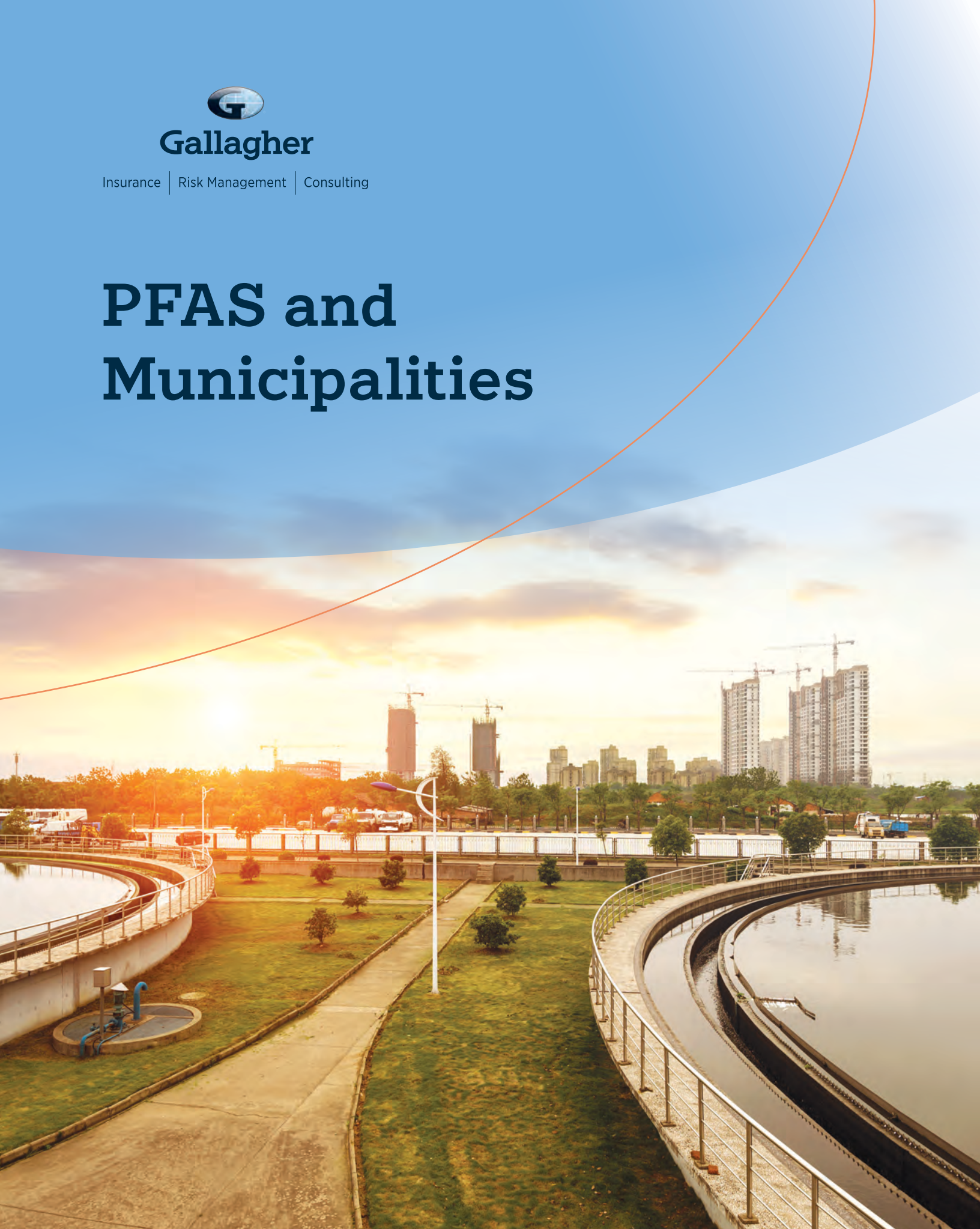
Insurance | Risk Management | Consulting

PFAS and Municipalities



Introduction

The United States Environmental Protection Agency (EPA) has identified per- and polyfluoroalkyl substances (PFAS) as one of the most significant emerging contaminants of concern.

As a result of their long-lasting nature and resistance to degradation, the use of PFAS has resulted in extensive environmental contamination, leading to growing regulatory scrutiny and legal liabilities.

This article explores the concerns associated with PFAS contamination and the implications for municipalities, while examining how environmental insurance can play a crucial role in managing and mitigating the financial risks associated with environmental liabilities.

What are PFAS?

PFAS are a group of more than 12,000 man-made chemicals used in industrial and consumer products worldwide due to the chemicals' resistance to heat, water, and oil. They were originally manufactured in the 1940s for use as nonstick cookware. Eventually, companies began producing a multitude of PFAS-containing products, including aqueous film-forming foam (AFFF), used by the military, airports, and fire departments to extinguish fires.

Over time, PFAS were added to millions of everyday products, including shampoo, dental floss, cosmetics, clothes, carpeting, pizza boxes, food wrappers, cookware, furniture, paints, cleaning products, and rain gear. Due to their heat-resistant, nonstick, and water-repellent qualities, PFAS use proliferated.

However, those same qualities also make PFAS detrimental to human and environmental health. PFAS are known as "forever chemicals" because they do not break down easily and remain in the environment "forever."

Why are PFAS a concern?

Forever chemicals can enter the natural environment through various sources, including industrial discharges, manufacturing facilities, firefighting foams, landfills, and wastewater treatment plants (WWTPs). Once released, PFAS can migrate through soil, enter groundwater, and contaminate drinking water.

The amount of public water systems with PFAS in them is significant; it is very likely that 85% of our public water has PFAS to some extent in it. Due to the widespread use of PFAS and their persistence in the environment, these chemicals have been found in soil, drinking water, lakes, oceans, air, rainwater, food, fish, animals, and humans.

It is believed that 98% of humans have PFAS in their blood, which is concerning as PFAS have been linked to serious health problems such as cancer, immune system suppression, increased cholesterol levels, pregnancy-induced hypertension, liver damage, reduced fertility, and increased risk of thyroid disease.

The health risks associated with PFAS exposure have raised concerns among scientists, regulators, and communities. As a result, regulatory agencies have established strict guidelines and thresholds for PFAS levels. These regulations, and the increased focus on PFAS contamination, have significant implications for municipalities with exposure to PFAS, which may lead to costly cleanup requirements, fines, legal actions, and reputational damage.

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Regulatory road map

Due to the potential human and environmental health risks, regulatory bodies in the United States are implementing stricter regulations and guidelines to address PFAS contamination. For instance, the US EPA established the PFAS strategic road map, which details the agency's concrete actions to protect human and environmental health from PFAS contamination.

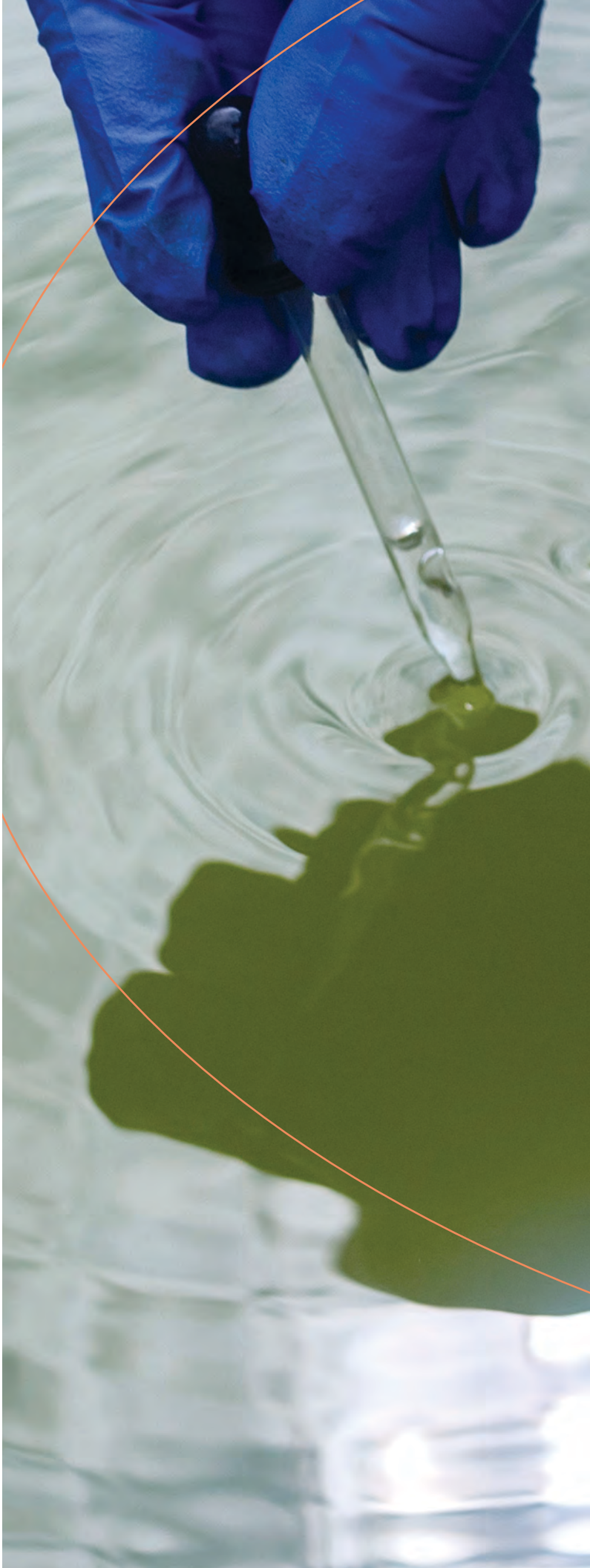
Since the road map's release in October 2021, the EPA has taken several key actions, including the following.

HAZARDOUS SUBSTANCE DESIGNATION (CERCLA)

In August 2022, the EPA released a pre-publication of its anticipated proposed rule to add the two most well-known and well-studied PFAS compounds—perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS)—to the list of "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). After a lengthy comment period, the EPA issued the final rule on April 19, 2024.

The greatest impact of the EPA's rule is that PFOA and PFOS will be subject to the federal CERCLA liability and cost recovery process. The EPA will be able to force responsible parties to either clean up a contaminated site or reimburse the EPA for the full cost of remediation. This will lead to requests for sampling and testing for PFAS at existing Superfund sites, and the potential reopening of closed Superfund sites.

A substantial increase in expensive and time-consuming Superfund litigation for actual or potential releases of PFOA or PFOS is anticipated. CERCLA imposes a strict joint and several liability approach. This means that even entities that might have minimally contributed to contamination at a particular site can be held liable. The designation also triggers considerable reporting requirements for companies, applying to industries beyond PFAS manufacturers.



DRINKING WATER HEALTH ADVISORIES

On April 10, 2024, the first-ever national, legally enforceable drinking water standards were established to protect communities from exposure to PFAS. Specifically, the EPA is establishing legally enforceable levels for several PFAS known to occur individually and as mixtures in drinking water. The new limits in this rule are achievable using a range of available technologies and approaches including granular activated carbon, reverse osmosis, and ion exchange systems.

Additionally, the EPA announced nearly $1 billion in newly available funding to help states and territories implement PFAS testing and treatment at public water systems, as well as to help owners of private wells address PFAS contamination.

A recent study confirmed that at least 45% of the nation's tap water is estimated to have one or more types of PFAS. While this study tested for the presence of 35 different types of PFAS chemicals, more than 12,000 types are currently untested. Moreover, another study found that 83% of the 114 waterways tested in the US contained at least one type of PFAS.

BIOSOLIDS

The EPA is set to draft a biosolids risk assessment, which will estimate high-end exposures for a wide range of chemical contaminants due to the use and disposal of biosolids.

Biosolids are the treated materials produced during wastewater processing at a WWTP. Biosolids are rich in nutrients and organic matter, and may be used as fertilizer or soil amendments. While WWTPs do not generate PFAS chemicals, they may receive discharges from certain industrial or commercial sources that have used PFAS. As a result, PFAS may be found in treated wastewater and biosolids.

If applied to land, these biosolids would allow PFAS to enter the environment, impacting soil, water, and crops. This byproduct is sold to farmers and, when spread across their fields, the hazardous PFAS compounds not only infiltrate crops but can also enter the food chain via cattle.

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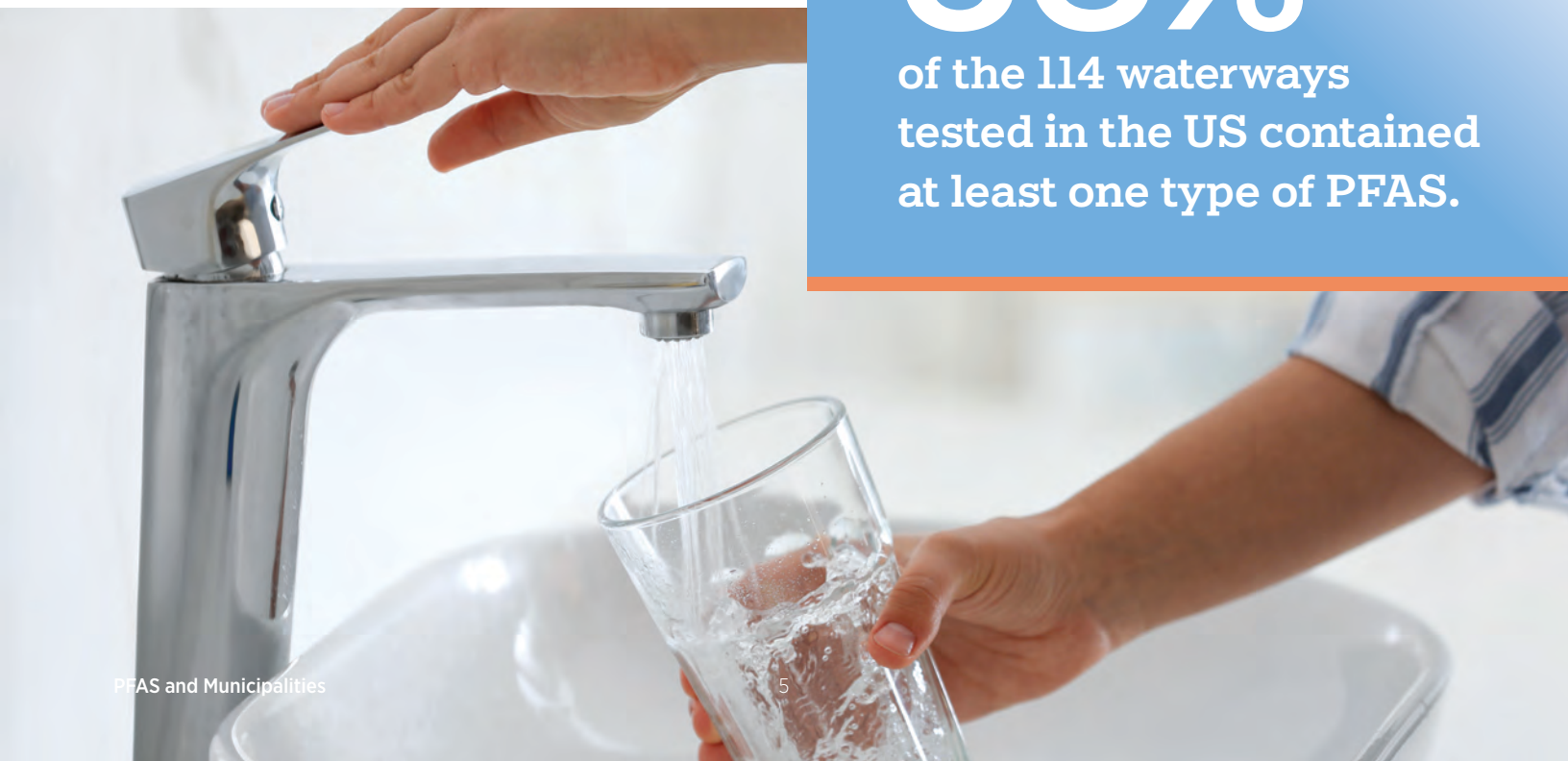

Exposures for municipalities

Public entities are exposed to many environmental liabilities and cost exposures due to their operations. In general, they face third-party liabilities related to contaminants from known and unknown historical usage/operation or neighboring properties, as well as third-party liabilities from ongoing operations.

Significant PFAS-related liabilities have already been imposed against municipalities that:

- Provide drinking water that may include PFAS
- Act as owners and/or operators of landfills potentially containing PFAS from products disposed as waste
- Utilized firefighting foams for any fire extinguishing operations, such as at an airport, fire department during training operations, military bases, or any location that required the use of PFAS-containing AFFF
- Sold and distributed wastewater biosolids as a soil amendment or application, given the likelihood that the biosolids contain PFAS thus leading to the transfer of PFAS to soil

Municipal litigation

As communities across the country face challenges addressing PFAS contamination, many are turning to legal suits for damages and to recover the costs of cleanup. Several large manufacturers of PFAS chemicals have reached settlements with local governments, and other legal cases are still pending in courts.

For instance, the United States District Court Judge Richard Gergel in Charleston presides over the PFAS multidistrict litigation proceeding (MDL). MDLs are utilized in mass tort cases to assist with streamlining litigation and facilitating settlements and consistent rulings on critical issues. There are currently over 5,000 cases total in the MDL, and more cases are added nearly every day. The cases in the MDL fall into the following three distinct categories.

1. **Personal injury plaintiffs claiming injury from exposure to PFAS**
2. **Attorney general lawsuits filed for PFAS pollution within state borders seeking monetary relief for necessary testing and remediation**
3. **Public water utilities seeking costs of necessary testing and remediation technology for PFAS**

Municipal leaders must identify what precise legal claims they may have for their municipal organization in this nationwide legal battle.

Regardless of these legal proceedings, municipalities may end up bearing the cost of PFAS-related liabilities, as many responsible parties may become insolvent and therefore unable to pay their portion of the settlement. Moreover, even when settlements have been established, the future costs borne by the municipality may greatly exceed the amounts of the settlements.

Insurance coverage for PFAS–related liability

Standard liability and property insurance policies have excluded coverage for claims associated with pollution events since 1985, requiring a policyholder to purchase environmental insurance to adequately insure pollution exposures. The growing concerns over PFAS contamination have triggered a surge in environmental insurance claims and a heightened demand for coverage. For any municipality with PFAS-related liabilities, insurance coverage may be available to protect against future losses, whether in the form of regulatory action or third-party lawsuits.

A municipality's commercial general liability (CGL) policy from decades ago (before pollution exclusions being implemented) might respond to a claim associated with PFAS if the contamination occurred during a policy period in which the coverage did not exclude pollutants.

Today, and to fill the coverage gap created by pollution exclusions, environmental insurance policies typically cover liability for third-party bodily injury, property damage, and cleanup costs resulting from pollution events. As PFAS contamination cases increase, insurance carriers face challenges in underwriting and managing environmental risks associated with PFAS. Insurance coverage for PFAS-related liabilities largely depends on policy language and specific endorsements.

Policies that were underwritten before the emergence of PFAS concerns may provide broader coverage, while newer policies are likely to have stricter language, specific conditions, and sublimits.

Conclusion

The interplay between PFAS concerns, regulatory actions, and environmental insurance is a complex and evolving landscape. Continued research, effective risk management strategies, and robust insurance coverage are essential to navigating the challenges posed by PFAS contamination and protect the environment, public health, and businesses from the potential consequences of this persistent class of chemicals.

Municipalities with a suspected exposure to historical PFAS claims are advised to explore potential coverage within legacy general liability policies, particularly coverage that pre-dates 1985 pollution exclusions.

Environmental liability insurance plays a crucial role in managing and mitigating the financial risks associated with PFAS contamination. While Insurers are adapting to the changing landscape by reassessing policy terms, exclusions, and limits, it is important for all municipalities to explore the coverage provided within an environmental insurance policy to address PFAS-related risks adequately, among many other exposures.

With diverse backgrounds ranging from environmental consulting to underwriting, our team of environmental and casualty insurance professionals are experts in helping you find cost-effective risk transfer solutions and innovative ways to manage your company's risk.

Connect with us

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