

PFAS MDL Settlements Face Additional Questions

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In June 2023, news outlets of all varieties reported on the proposed settlements by DuPont ([\\$1.185 billion](#)) and 3M (up to [\\$12.5 billion](#)) to resolve the water utility claims pending on the PFAS MDL in South Carolina. Both proposals were significant steps towards resolving contentious and extremely costly litigation for both sides, with the aim to provide finality to both sides and not have cases tied up in litigation for years or even decades.

Since the breaking news, though, questions have rightly been raised regarding whether the settlements will cover the true costs needed by water utilities and, if not, what the impact will be on other entities. Recent comments by the Judge overseeing the PFAS MDL and a challenge by state Attorneys General underscore that resolving the water utility litigation is not as simple as it may seem.

PFAS MDL – Overview

The PFAS MDL is currently home to over 3,000 cases and is being presided over by Judge Richard Gergel of the United States District Court of South Carolina. Cases that involve allegations of exposure to or pollution from PFAS-containing aqueous film-forming foam (AFFF) are litigated on the consolidated docket. There are three categories of cases that are currently on the MDL: (1) claims brought by water utilities seeking costs of necessary testing and remediation technology for PFAS; (2) state Attorney General lawsuits filed for environmental PFAS pollution (broadly, not limited to only drinking water issues) within state borders seeking monetary relief for necessary testing and remediation; and (3) personal injury claims brought by fire fighters and their loved ones alleging that PFAS in the AFFF products used by the fire fighters led to an injury.

In June 2023, one bellwether case was set to begin trial specifically dealing with a claim focused on water utilities. However, shortly before the case was set to begin trial, DuPont and 3M announced their proposed settlements, which obviated the need for the trial. The settlement proposals were subject to Court approval with hearing dates set to approve or reject the proposed settlements.

Attorney General Opposition To Portion of Proposed PFAS MDL Settlements

On July 26, 2023, a bipartisan coalition of 22 state Attorneys General filed a motion to intervene in the settlement approval proceedings and an [opposition](#) to the 3M settlement proposal. At issue for

the Attorneys General is an indemnity provision in 3M's proposed settlement, which is felt by some to be so overbroad as to cause issues down the road for water utilities. More specifically, the Attorneys General feel that the indemnity provision would leave water utilities obligated to indemnify 3M if cancer clusters later develop in the water utilities' areas and the citizens in those impacted areas sue 3M for personal injury. Such a result would of course open water utilities up to significant litigation costs, which would diminish the value of any settlement they receive from the current litigation for cleanup costs. While it is likely that negotiations will ultimately reach an agreement on revised language for the indemnity provision, the move nevertheless shows how Attorneys General are working in tandem with water utilities to ensure that future PFAS MDL settlements do not lead to additional issues for water utilities.

Similarly, a group of five state Attorneys General sent a letter to the presiding Judge of the AFFF MDL on August 7, 2023 urging him to consider the adequacy of the settlement proposal from a financial perspective. While the AGs generally support the settlement agreement, they point out that the language as proposed would enable DuPont to be released from liability for PFAS issues well beyond AFFF products to other products that might be the subject of future litigation. The AGs urge the Court to do what is necessary to ensure that the settlement only addresses PFAS issues related to AFFF. Further, the AGs explained their concern over whether the settlement amount proposed was sufficient. The AGs pointed to an American Water Works Association (AWWA) study that found that the costs for compliance to water utilities far exceeded the proposed settlement amount. They wrote "for all public water systems across the United States, complying with the proposed federal maximum contaminant level ('MCL') for PFOA and PFOS would cost about \$47.3 billion for capital costs *alone*....For these systems, the combined capital, operating, and maintenance costs of complying with the proposed PFOA and PFOS MCL are projected to be about \$5.2 billion per year. If these systems are subject to state MCLs with more stringent requirements or are required to remove other PFAS, even bare-minimum compliance would cost many billions more."

PFAS MDL Judge Raises Concerns About Costs

At a preliminary hearing on whether to approve the 3M and DuPont settlement proposals, Judge Gergel made statements that suggested that while the proposals for the settlement of water utility claims may ultimately make sense for all parties involved, he had concerns regarding the future costs of other types of litigation and the impact that it would have on both sides. More specifically, the Judge urged both sides of the litigation to come together and consider jointly retaining lobbyists to explain to Congress the "true costs" needed to resolve all of the complex angles of PFAS testing, remediation and treatment nationwide. Judge Gergel signaled a concern that given that it was costing 3M and DuPont over \$13 billion to resolve only water utility claims, that other lawsuits for other avenues of needed remediation may bankrupt numerous companies. While unstated, the Court was likely considering the costs associated with potentially resolving lawsuits with state Attorneys General and trying to address potential settlement funding vehicles for private citizen class action lawsuits for PFAS environmental pollution to land and water.

The Court's concerns are certainly merited, as we have previously discussed the issue of the "true costs" of PFAS remediation that companies will face.

Impacts On Downstream Companies

All of these issues absolutely must raise the question for downstream companies (which I define as a company that did not make PFAS, but which either intentionally or unintentionally used PFAS and discharged it in some fashion into the environment) of how the current settlement proposals and

future litigation will impact them.

First, it should be noted that the formulas for determining how much in financial resources each water utility would receive from the proposed PFAS MDL settlements are complex and have many variables. Some utilities will receive far more than others, for sure. However, assuming that 4,000 water utilities receive funding from the settlements and assuming all do so equally, that permits for each utility to receive a bit more than \$3 million. Again, there will be variability in the settlements allotted, but the exercise is at least informative for a baseline understanding of what some utilities can expect. It was surely never intended for these settlements to fund 100% of the financial needs for each water utility, but in return, the utilities receive much needed money immediately and do not have to wait years, if not decades, for funding.

What, though, will utilities do to obtain the remainder of the needed funding? With passing along the costs to utility users being one option, it is also one that will not be popular among citizens. It is therefore plausible to imagine that water utilities willing to wait a bit longer for funding than the immediacy that having utility users pay would provide will turn to litigation against downstream companies that placed PFAS into the drinking water sources either intentionally or unintentionally. The federal Clean Water Act, Safe Drinking Water Act, CERCLA, and also state equivalents of the same could provide viable legal claims under which to bring such lawsuits. So, too, would more traditional claims such as trespass or negligence.

Should PFAS manufacturers ever begin seeking bankruptcy protection from PFAS-related claims, downstream companies face an additional level of risk, since state Attorneys General (assuming no settlements have been reached between PFAS manufacturers and those states) might seek to obtain remediation costs from downstream companies that historically discharged PFAS. There is precedent for this taking place, with Michigan being a notable state that has pursued individual corporate polluters over PFAS issues.

Key Takeaways

The proposed PFAS MDL settlements by 3M and DuPont undoubtedly provide near-term relief to some degree for water utilities as they try to grapple with PFAS contamination to drinking water sources. However, knowing that all water utilities will not receive 100% of needed funding should cause downstream companies to pay very close attention to settlements actually received by water utilities in their areas once the settlements are approved and begin to be paid out. Companies must also pay close attention to what happens with the state Attorneys General lawsuits related to PFAS on the MDL, as the results of these lawsuits could also have impacts on downstream companies in the future. Further, it needs to be remembered that the proposed settlements and any the state Attorneys General lawsuits technically only deal with PFAS pollution claims related to AFFF. States or other parties could file additional lawsuits against downstream companies for remediation costs needed above and beyond what the current day settlement might offer, with the lawsuits claiming pollution from PFAS for non-AFFF reasons. The state of Maine already showed us that such an approach is being considered by some, as the state filed two lawsuits – one claiming damages specifically from AFFF products while the other claiming damages more broadly from PFAS in non-AFFF applications.

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