

## Litigation Combats Hazards of Aqueous Film-Forming Foam Products

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**Aqueous film-forming foam (AFFF) has been used on hundreds of military bases around the country to put out emergency fires and, more often, for training purposes to prepare for those emergencies. Although AFFF manufacturers voluntarily agreed to phase out the manufacture of firefighting foam with perfluorinated compounds (PFCs) several years ago, legacy contamination continues to be found in drinking water systems, a major source of PFC exposure.**

**M**ounting scientific research has linked PFC exposure to a host of health effects on the liver and the immune system as well as testicular and kidney cancer. Given the life-threatening illnesses these contaminants can cause, as well as their persistent nature in the environment, US water providers can no longer assume their drinking water is free from AFFF contamination. That's why a multidistrict litigation (MDL) has been created in which potentially billions of dollars are at stake in the form of claims against AFFF product manufacturers.

### MDL RATIONALE

Research and testing performed by the Minnesota Mining and Manufacturing Company (3M) and DuPont Chemical Solutions Enterprise indicated that per- and polyfluoroalkyl substances (PFASs), because of their unique chemical structure, persist in the environment essentially unaltered and accumulate in people's blood (see "PFASs: Why They Matter and How to Treat Them," *Opflow*, June 2019). Yet both companies downplayed, avoided, and reframed research conclusions about the chemicals they produced, leaving water providers and the communities they served in the dark about these potential risks.

Apart from the well-known Scotchgard product that contained PFASs, 3M was also known to have sold PFASs for use in AFFF products, starting in the 1950s. Throughout this time, overwhelming evidence has

shown that 3M knew these chemicals were unsafe but chose to hide this from the public as well as governmental agencies. In fact, in April 2006, 3M agreed to pay a penalty of more than \$1.5 million to the US Environmental Protection Agency (USEPA) for failing to disclose studies dating back decades that confirmed the potential hazards of these chemicals to public health and the environment, among other things.

DuPont, another company that disregarded the effects of chemicals found in AFFF, manufactures products in its Washington Works plant in Parkersburg, W.Va. For years, starting in the 1950s, DuPont allowed large amounts of perfluorooctanoic acid (PFOA) from its plant to contaminate the drinking water in Ohio and West Virginia. By 2003, DuPont allowed nearly 2.5 million pounds of PFOA from its plant into the Ohio River Valley, harming residents across six water districts. The company also failed to report that some of its pregnant female employees exposed to PFOA had passed it to the bloodstreams of their unborn children. Other residents of Ohio and West Virginia suffered from life-threatening illnesses, including certain cancers, and even death after consuming the PFOA-contaminated water.

When everything is taken into consideration, responsibility for this widespread water contamination lies with the manufacturers, not the local water companies and water authorities, who are themselves victims of these hazardous disposal

practices. Nonetheless, local water utilities face several legal hurdles in seeking recourse against these manufacturers. To help water providers cover these expenses, which can run into the tens of millions of dollars, proper parties must be held accountable. These parties include AFFF manufacturers and sellers that have knowingly sold the dangerous PFC products and failed to inform users or the general public of the products' potential dangers.

### FORMING THE MDL

MDL No. 2873 was created as a result of dozens of lawsuits filed against a variety of other AFFF manufacturers based on allegations that AFFF products harmed humans and contaminated groundwater. These lawsuits sought, among other things, compensatory damages and costs associated with monitoring for cancer and other medical problems.

In October 2018, several defendants filed motions to consolidate the AFFF cases pending in eight districts before a single judge, setting the path to create a single MDL. The cases subject to consolidation included class actions, personal injury claims, and individual lawsuits brought on behalf of municipalities and water districts for costs associated with well head treatment.

The Judicial Panel on Multidistrict Litigation (JPML) heard oral arguments on defendants' motions to consolidate on Nov. 29, 2018. In the following month, the JPML consolidated 75 personal injury cases pending in courts across the country into a single MDL. Throughout this litigation, 3M and other AFFF manufacturers have been vigorously fighting back. Nonetheless, MDL No. 2873 is likely to sweep in other emerging claims against these manufacturers as additional contamination is found.

### FIGHTING FOR WATER PROVIDERS

The serious adverse effects of exposure and the confirmed elevated drinking water concentrations from AFFF require immediate action from water districts across the country. Despite this fact, the USEPA issued nonbinding drinking water health advisories for PFASs in 2016 of 70 ng/L (or parts per trillion). Because these are only health advisories, water providers are left with the responsibility—but not the funding—to monitor their water sources to treat and remediate for contaminants.

Luckily, states and plaintiff attorneys haven't been deterred from suing responsible parties to seek compensation. A handful of states have already taken affirmative actions to implement their

own binding regulatory detection level of PFOA and PFOS in drinking water. For example, New York is recommending a 10 ng/L level for PFOA and PFOS. Expect to see an expansion of this trend as more water supplies become affected and future mandatory standards are put in place on the federal and state levels.

The current situation—the profound effects related to exposure and the lengthy period that PFOA and PFOS remain present in water absent filtration—requires swift treatment. Without MDL No. 2873 or other lawsuits like it, water providers would be left with mounting costs to treat these contaminants on their own. This includes the substantial investigation and up-front capital costs for water providers to install new water filtration

systems, including granulated activated carbon or anion exchange to clean out PFCs. Water providers will also incur significant operational and maintenance costs, given AFFF's reluctance to biodegrade, making litigation necessary for the benefit of communities across the country. Only through this litigation can water districts receive enough funds to treat these chemicals down to nondetect levels in each well of affected water supplies.

MDL No. 2873 will also help spur additional studies on how PFAS chemicals behave and how they affect human health and the environment. Not only will additional research help in the fight against AFFF manufacturers, it will help drive much-needed regulation and litigation for years to come. 