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Shifting Costs from Water Suppliers to Polluters

PFAS Contamination in Michigan: Impact of Regulation & What Utilities Can Do

MI-ACE 2023

85th Annual Conference & Exhibits

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- Born and raised in a suburb of Flint, MI and graduated with honors from both college and law school at the University of Michigan in Ann Arbor
- Represents public entities in water contamination litigation
- Almost two decades of complex commercial litigation and regulatory experience
- Former Senior Enforcement Counsel, federal law clerk, and professor of legal writing



Disclaimer



This presentation and my comments are not legal advice, and are being given solely in my role as a partner for SL Environmental Law Group, P.C.



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Agenda

01

**PFAS REGULATORY
UPDATES**

State of regulation and
impact on water suppliers

02

PROPOSED SETTLEMENTS

What to expect from the
3M and Dupont
settlements?

03

KEY TAKEAWAYS

How can water systems
maximize their cost recovery
strategy?



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Latest Regulatory Developments

- EPA issued proposed draft maximum contaminant level (MCL) for:
 - PFOA and PFOS: 4 ppt
 - PFNA, PFHxS, PFBS, and/or GenX Chemicals: Hazard Index calculation
- EPA to announce final MCLs by end of 2023
- PFOA and PFOS to be listed as hazardous materials
- New EPA guidance on addressing PFAS through NPDES permits



“...the EPA will seek to hold polluters and other responsible parties accountable for their actions, ensuring that they assume responsibility for remediation efforts and prevent any future releases.”

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Hazard Index

- Systems will use calculator tool provided by EPA to calculate their Hazard Index for PFNA, PFHxS, PFBS, and/or GenX Chemicals.
- Same process used at contaminated Superfund sites.
- Proposed Health-Based Water Concentrations (“HBWC”) (i.e., the level at which no health effects are expected for that PFAS):

Compound	Health-Based Water Concentration (ppt)
PFHxS	9
GenX Chemicals	10
PFNA	10
PFBS	2000

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State of Michigan



Specific PFAS	Drinking Water MCL
PFNA	6 ppt
PFOA	8 ppt
PFHxA	400,000 ppt
PFOS	16 ppt
PFHxS	51 ppt
PFBS	420 ppt
HFPO-DA	370 ppt

Source: <https://www.michigan.gov/pfasresponse/drinking-water/mcl>
MCL = maximum contaminant level
ppt = parts per trillion

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Status of the AFFF MDL



Proposed 3M drinking water class action settlement (filed with the MDL court on 7.3)

- \$10.3-\$12.5 billion fund (depending on participation) for impacted public water systems
- Applies only to claims against 3M for impacted drinking water
- Does NOT apply to claims against other PFAS manufacturers, or to claims for contaminated wastewater, soil, etc.
- Preliminary approval received in August 2023
- 90-day opt-out period, with deadline of December 11th, 2023



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Status of the AFFF MDL



Proposed DuPont drinking water class action settlement (filed with the MDL court on 7.11)

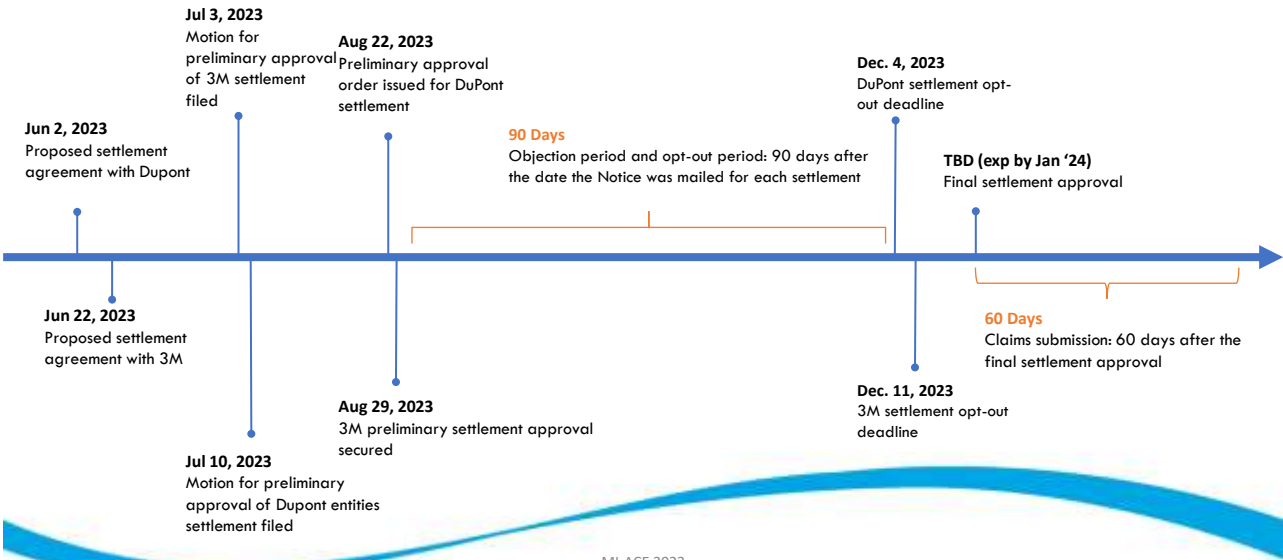
- \$1.185 billion fund for impacted water systems
- Applies only to claims against DuPont, Chemours, and Corteva for impacted drinking water
- Does NOT apply to claims against other PFAS manufacturers, or to claims for contaminated wastewater, soil, etc.
- Preliminary approval received in August 2023
- 90-day opt-out period, with deadline of December 4th, 2023



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Anticipated Timeline



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Are We In or Out?

3M Settlement

Phase I
Community PWS with PFAS detection before June 22, 2023

Phase II
PWS required to test for PFAS under UCMR5 or serving more than 3,300 people

OUT: Transient Non-Community Systems, NTNCs serving less than 3,300

DuPont Settlement

Phase I
PWS with PFAS detection before June 30, 2023

Phase II
PWS required to test for PFAS under UCMR5

TNCs/NTNCs:
Eligible for "Very Small Water System Payments"
\$1,250 for TNCs
\$1,750 each of NTNCs (unless serving more than 3,300 people)



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Settlement Allocation Procedures



- Assign a "score" to each well (or surface water intake) in every water system with at least one reported PFAS detection
- Score depends on highest levels of PFAS detections and size (both production capacity and production history) of each source
- "Bumps" can enhance score, including whether PFAS levels exceed proposed EPA MCLs, and whether/when system filed a lawsuit
- No reductions to score for pre-existing treatment, presence of non-PFAS contaminants
- Score used to generate pro rata share of settlement for distribution



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Other Settlement Features



- Separate sub-funds created for interim PFAS response costs (e.g., water purchases made when wells shut down), to be awarded in addition to allocations
- PFAS detection at any level qualifies source to participate; if below proposed MCLs now but exceeds them before 2030, claim for additional funds can be made
- Wells that are ND for PFAS now but have detections before 2030 can also make claims, but wells without recent NDs need to re-test!
- No need for proof that PFAS came from any specific manufacturer, product, source



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Hot Topics



- Opt-out deadlines: set by court
 - DuPont: December 4th
 - 3M: December 11th
- Payment schedule for 3M - bulk of payment due mid-2024 (subject to delays), but balance paid out over several years; idea is to provide funds to install treatment, then funds for O&M
- Claims against other manufacturers – MDL judge looking for another bellwether trial



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Frequently Asked Questions



- Will all eligible water systems receive a notice for settlement participation?
- Will my water system know how much money we are entitled to receive before the opt out deadline?
- How can a water system access the settlement funds?
- What is the expected timeline for the settlement process?
- Why should a water system hire a law firm instead of handling the process in-house?



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Key Takeaways

- All eligible water systems will be automatically included in the settlements unless they opt out within the specified time window.
- Eligible water systems won't know how much money they stand to receive from either settlement until after the opt-out deadline, but a good-faith estimate will be possible.
- The settlements are binding unless water systems opt out. Water systems that do not opt out will waive their right to pursue future litigation against 3M and DuPont for PFAS contamination.
- Participating water systems without counsel are likely to be assessed attorneys' fees paid to class counsel as a tax on the settlement. Water systems with counsel should not have to pay this fee—only fees to their own counsel.

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Thank You

Questions?

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