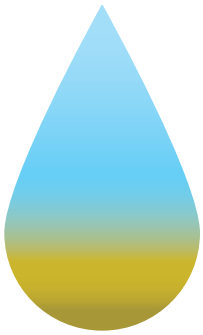
AFFIRMATIVE LITIGATION

# The Persistent Cost of Forever Chemicals: Municipal PFAS Litigation

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## INTRODUCTION

On September 4, 1995, a twin-engine Piper Aztec overshot runway 10-28 at East Hampton airport. The plane's nose gear buckled, grinding its propellers into the soil and bringing the craft to a violent stop. The Village of East Hampton Fire Department (EHFD) sped to the wreck, assisting the occupants and dousing the smoke in a thick lather to snuff incipient flames.

No lives were lost in the incident, which might have passed into oblivion but for the first responders' choice of firefighting remedy—aqueous film-forming foam, otherwise known as AFFF. The EHFD had been using the substance for years, quelling liquid fuel and aircraft fires, spraying large quantities during mass-casualty training sessions, and washing it off their vehicles at days' end. Hundreds of gallons of AFFF were stockpiled in drums on EHFD premises in anticipation of future needs.

**Forever Chemicals:** Likely unknown to EHFD firefighters at the time was the considerable hazard spawned by their highly effective flame suppressant: AFFF is one member of a large family of manmade chemicals known as per- and polyfluoralkyl substances (PFAS). Invented in the 1940's by Dupont and 3M, PFAS combine varying ratios of carbon and fluorine to produce compounds that stubbornly repel water, grease, and stains. Dupont would develop one variant-PFOA-which became better known for its use in Teflon. And one 3M subspecies-PFOS-would be a primary component of Scotchgard. In the 1960's, PFAS were adapted in AFFF to fight petroleum fires, of particular interest to the military after a horrific jet fuel conflagration aboard the USS Forrestal claimed the lives of 134 pilots and sailors.

Despite PFAS' many benefits, over time it became increasingly clear that they were freighted with an undeniable downside: PFAS move with ease through substrates, rapidly infiltrating aquifers. Once there, these "Forever Chemicals" become a permanent odorless and colorless additive to drinking water, easily absorbed into human tissues and highly toxic at low concentrations. Today, it is known that PFAS cause a variety of cancers and harm fetal development, and may produce other deleterious effects not yet fully understood.

Federal authorities had become concerned about the threat long ago. In May 2000, the EPA exerted its authority, forcing the following joint announcement from 3M:

> Following negotiations between EPA and 3M, the company today announced that it will voluntarily phase out and find substitutes for perfluorooctanyl sulfonate (PFOS) chemistry used to produce a range of products, including some of their Scotchgard lines. 3M data supplied to EPA indicated that these chemicals are very persistent in the environment, have a strong tendency to accumulate in human and animal tissues and could potentially pose a risk to human health and the environment over the long term. EPA supports the company's plans to phase out and develop substitutes by year's end for the production of their involved products.[1]

**Warfare in the Hamptons:** Despite growing publicity about PFAS' dangers after the 3M announcement, nearly 20 years would pass before EHFD's use of AFFF generated controversy. It

arose in Wainscott, a hamlet extending inward from the dunes of the Atlantic in a thin rectangle directly south of the East Hampton airport, the EHFD and its training facility. Inhabiting 520 dwellings, most valued in the millions, Wainscott's residents had drawn water from their own wells for more than a century.

In October 2017, the Suffolk County Department of Health Services began sampling Wainscott's private water supplies. It determined that more than 230 wells contained PFOA and/or PFOS; of these, 75 contained the substances in excess of New York State's recommended maximum contamination levels (MCLs) for drinking water. Concentrations in a dozen wells exceeded the EPA's 70 parts per trillion health advisory level. Wainscott denizens had been drinking and bathing in contaminated water for decades.

The Town of East Hampton, a separate municipality of 21,000 residents encompassing the Village and owning the property which the airport and EHFD occupy, immediately advised Wainscott homeowners not to drink, cook, or shower from their private wells, and began distributing bottled water. One month later, the Town received a letter from New York State environmental authorities stating in part:

> We have received information that certain perfluorinated compounds (PFCs) have been detected in nearby water supply wells, which may be attributable to current or past operations on your property. These compounds are known components of firefighting foams, and are listed as hazardous substances in New York State (6 NYCRR Part 597). This information leads us to suspect that hazardous waste may have been disposed of at [the Airport]. Therefore, this letter constitutes DEC's notification to you as the identified property owner that this property is considered a potential inactive hazardous waste disposal site.[2]

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The only viable solution was to connect all Wainscott homes to the Suffolk County Water Authority (SCWA), whose public water system was free from PFAS. It would not be inexpensive. The Town rapidly authorized raising the $24.3 million cost via a 20-year municipal bond, assuaged in part by Governor Cuomo's $9.7 million grant for the project.[3] SCWA and the Town worked in record time. By early 2019, nearly 8.5 miles of water main had been laid beneath the roads of Wainscott, bringing PFAS-free water to all 520 homes.

That accomplishment cleared one hurdle, but more ominous challenges lay ahead. In mid-2019, New York State notified the Town that portions of the airport and the EHFD grounds were a Superfund Site,[4] setting in motion an inevitable and far more costly trajectory: the Town was ultimately ordered to remediate the contaminated acreage.[5]

The massive responsibility would not be assumed without a fight. In April 2020, the Town sued the Village (*East Hampton v. Incorporated Village of East Hampton, d/b/a East Hampton Fire Department*, No. 20-cv-01787 (E.D.N.Y. Apr. 14, 2020), under the citizen suit provisions of the Resource Conservation Recovery Act (RCRA). It also sought injunctive relief and damages under sections 107 and 113 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), naming Alternative American Insurance Corporation as an Interested Party in its capacity as insurer of EHFD. The Town demanded that EHFD immediately disclose "all locations where EHFD used AFFF, stored AFFF and washed AFFF equipment at the Airport and/or within the boundaries of the Superfund Site," and remediate or pay for remediation of "all PFOA/PFOS contamination at and emanating from the Superfund Site caused, in whole or in part, by EHFD's storage of AFFF, use of AFFF and washing of AFFF equipment." It also demanded compensation for "all past and future costs incurred or to be incurred by Plaintiff responding to the PFOA/PFOS contamination at and emanating from the Superfund Site."[6]

Among other evidentiary matters cited in the Town's complaint was EHFD's use of AFFF to smother the smoking Piper Aztec 25 years earlier at East Hampton airport.[7]

**The AFFF MDL:** While the architecture of that case, pitting one municipal entity against the other, may have been somewhat unusual, the basic ingredient in the dispute—PFAS groundwater contamination—was hardly unique. By 2020, PFAS cases numbered in the thousands, filed around the country by state attorneys general, individuals and homeowners, water utilities, and local governments. Redress was being demanded for a wide spectrum of harms:

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personal injury, reduced property values, and remediation expense; shareholders have sued for failure to disclose material information about PFAS liability;[8] rural water providers have formed a class action seeking injunctive relief for testing and data collection;[9] and a nationwide class action was proposed to establish a panel of experts studying PFAS.[10]

In December 2018, the Joint Panel on Multidistrict Litigation (JPML) transferred 75 AFFF actions from Colorado, Delaware, Florida, Massachusetts, New York, Pennsylvania, and Washington to a newly-formed AFFF Multi-district Litigation (AFFF MDL) before Judge Richard Gergel in the District of South Carolina. The JPML identified material elements common to the cases:

> In each of these actions, plaintiffs allege that AFFF products used at airports, military bases, or certain industrial locations caused the release of PFOA or PFOS into local groundwater and contaminated drinking water supplies. With some minor variations, the same group of AFFF manufacturer defendants is named in each action. *These actions thus share factual questions concerning the toxicity of PFOA and PFOS and their effects on human health; the chemical properties of these substances and their propensity to migrate in groundwater supplies; the knowledge of the AFFF manufacturers regarding the dangers of PFOA and PFOS; their warnings, if any, regarding proper use and storage of AFFFs; and to what extent, if any, defendants conspired or cooperated to conceal the dangers of PFOA and PFOS in their products.* (italics in original).

The East Hampton lawsuit fit those parameters. On April 28, 2020, less than two weeks after it sued EHFD, the Town learned that its case had also been transferred to the South Carolina court, joining more than 500 other AFFF actions. That number now exceeds 1160 cases. The vast majority are brought by individuals, but nearly four dozen, including the Town's, involve municipal plaintiffs. Some of these, such as Dayton's $300 million claim against 3M, Tyco, and Buckeye Fire Equipment, brought in the Southern District of Ohio on diversity jurisdiction[11] were rapidly transferred. State court actions with a federal nexus were also subsumed: Tucson and Marana, Arizona initially filed in Pima County Superior Court, seeking to hold 3M, Tyco Fire Products, Chemguard, National Fire Equipment, and Fire Foam accountable for their manufacture, marketing, and sale of AFFF which had infiltrated the localities' aquifers.[12] That action was summarily removed to federal court on the basis of diversity and federal officer jurisdiction;[13] weeks later it too joined the AFFF MDL docket. In California, six municipalities and five water districts joined to file a multi-hundred million dollar AFFF suit before Orange County Superior Court in late 2020; in June 2021 that action was also removed under 28 U.S.C. § 1442 federal officer grounds.[14]

**Early Wins for PFAS Plaintiffs:** While the cases transferred to Judge Gergel's South Carolina federal courtroom are stayed as the complex multi-district machinery slowly progresses, others have moved ahead, achieving settlement. These include a trio of personal injury-based actions brought by Robert Billot, the unyielding Cincinnati litigator of "Black Water" movie fame: In 2017, Dupont and Chemours agreed to contribute equally to a $671 million settlement to 3,550 West Virginia plaintiffs suffering the effects of PFOS released into their groundwater by a Parkersburg Teflon facility.[15] Those same companies announced a massive settlement in January 2021, establishing a $4 billion fund to be utilized over the next 20 years on PFAS-related expenses, while also settling 95 personal injury claims docketed in an Ohio MDL for another $84 million.[16] And a May 2021 personal injury settlement brought a new tortfeasor to the table, as Georgia Pacific joined 3M in paying $11.9 million in a class action brought by residents of Parchment, Michigan whose health and property values have been damaged by PFAS dumped in local landfills.[17]

Governmental plaintiffs have also succeeded in obtaining PFAS compensation. In April 2021, diminuitive Bemidji, Minnesota (population 15,678 as of 2020) announced a $12.5 settlement with 3M, whereby the company will build and pay for the operation of a water treatment facility to remove AFFF-borne PFAS.[18] That result was modest in comparison to a much larger victory by Minnesota, where Attorney General Lori Swanson obtained an $850 million settlement from 3M in 2018, resolving a $5 billion *parens patriae* PFAS case brought in state court under the Minnesota Environmental Resource Liability Act.[19]

(As with many large statewide settlements, the devil may be in the details once Minnesota's deployment of PFAS recoveries begins. Its suit had asserted that 3M's discharges polluted more than 100 square miles around the Twin Cities metro area, including numerous lakes and nearly 140 miles of the Mississippi River. The state's plans to allocate $700 million of the 3M

recovery to remediation ($125 million went to outside counsel) have now hit considerable headwinds.[20] The way forward is further complicated by revelations that Minnesota's PFAS problem is far more widespread than previously known, with recent detections of unacceptable levels at 98 of the State's 101 closed landfills.)[21]

**Other States Follow Suit:** Minnesota's massive settlement inspired similar actions by other state AGs. Most have seen their cases slowed by transfer to the AFFF MDL. New York's Letitia James sued PFAS defendants in Albany County in November 2019. That suit was soon removed on federal officer grounds[22] and then transferred to South Carolina. Vermont AG T.J. Donovan filed an AFFF action in State Superior Court in July 2019;[23] that case too was removed and swept into the AFFF MDL. And in January 2020, Michigan Attorney Dana Nessel filed against 17 defendants in Washtenaw County Circuit Court, alleging that they "deliberately concealed the dangers of PFAS and withheld scientific evidence, and intentionally, knowingly and recklessly sold, distributed, released, transported, supplied, arranged for disposal or treatment, and handled and used PFAS and PFAS-containing materials in Michigan in a way that they knew would contaminate natural resources and expose Michigan residents to harm."[24] Although Nessel had not referenced AFFF specifically, 3M successfully argued that the suit involved federal government contracting and removed it to the Western District of Michigan. Inevitably, it was then named in a Conditional Transfer Order and moved to the AFFF MDL.[25]

In July 2020, Michigan doubled down, upgrading its water quality standards and imposing more restrictive MCL thresholds for PFAS. The new limits impact more than 2700 water treatment utilities, schools, hospitals and large businesses that supply water to the public. That move drew resistance from 3M. In May 2021, it sued the State in Michigan's Court of Claims, arguing that the new water standards were promulgated through a "rushed and invalid regulatory process" without properly assessing the cost of compliance for water suppliers.[26] The company has similarly challenged new water standards adopted in New Jersey and New Hampshire. In the latter, 3M found an unlikely ally in tiny Plymouth Village Water and Sewer District, whose legal fees 3M paid as the utility joined in an effort to challenge the process which led to more stringent MCL limits on PFAS.[26]

Alabama took an alternate path in pursuing 3M to redress PFAS[27] contamination in Decatur and other sites in the northwest part of the State. In July 2020, the Alabama Department of Environmental Management (ADEM) announced a consent order with 3M, describing the result as "the most far-reaching and significant enforcement action to date taken in regard to PFAS in the country. . . . In short, this is the quickest and surest route to accomplish the goals of reducing public exposure to PFAS now and preventing exposure in the future, while holding 3M accountable."[28] Under the order, 3M will assume all costs of environmental assessment, water treatment plant upgrades, remediation, ongoing research of PFAS contamination, and more, without a dollar limit.[29]

**The Federal Government's Role:** While states, localities, water districts, homeowners and others battle to recover costs for PFAS remediation, federal inaction—and even complicity—is revealed. As noted earlier, the EPA has been aware of PFAS' dangers for three decades or more, yet the Agency has never promulgated actual MCL standards for America's drinking water, and PFAS have never been included as "hazardous substances" under CERCLA or RCRA. That is now changing. In March, the House passed H.R. 2467, designated the PFAS Action Act of 2021, "To require the Administrator of the Environmental Protection Agency to designate per- and polyfluoroalkyl substances as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980."[30] That same month, the EPA reissued its final regulatory determinations for PFAS under the Safe Water Drinking Act, beginning a process where the Agency will propose national MCL standards for PFOA and PFOS.[31]

These steps may illustrate Washington's redoubled commitment to limit PFAS, but one notable federal outlier remains. The Department of Defense relies on the superior firefighting qualities in AFFF, and despite DoD's highly promoted efforts to reduce usage and protect water sources, it has not located a suitable substitute. Maureen Sullivan, Deputy Secretary of Defense for Environment was quoted last September: "Unfortunately, none of the commercially available PFAS-free foams meets DoD's strict safety standards for putting out fires quickly . . . besides putting out aircraft fires quickly, foams with PFAS are particularly effective at putting out large industrial or structural fires and overturned vehicles that are on fire."[32] This posture is reiterated on 3M's website discussing the history of PFAS, which recounts, "To this day, the military specification governing AFFF can only be met by the use of PFAS-based surfactants, given their

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unique and life-saving properties."[33]

It is not surprising, then, that DoD airports are an increasing target of PFAS litigation. In May, Dayton filed a $300 million suit against Wright-Patterson Air Force Base and the DoD, accusing them of failing, after more than four years of requests, to take steps preventing PFAS from infiltrating wellfields that provide water to more than 400,000 residents. New Jersey sued the United States in January 2021 for PFAS emanating from Joint Base McGuire-Dix-Lakehurst, Naval Weapons Station Earle, and the Naval Air Warfare Center in Trenton, following New Mexico's lead two years earlier.[34]

## CONCLUSION

As the race to develop an AFFF substitute is being run, all evidence suggests that America's PFAS problem is far greater than initially suspected, with new trouble spots being discovered almost daily. Municipalities will be under continuing pressure to provide clean water to their constituents and to prevent further contamination, requiring massive amounts of money and effort. While consent decrees such as that obtained by Alabama may provide recourse, litigation will remain a critical mechanism for local governments seeking to fund their battle against forever chemicals. ML

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