

PFAS Contamination in the  
New England and New York Areas:

# Update on Regulations, Litigation and What Utilities Can Do



**NYWEA**  
LEADING THE WAY IN  
WATER QUALITY MANAGEMENT



**NEWEA**  
WORKING FOR WATER QUALITY



**ENVIRONMENTAL  
LAW GROUP**



Ken Sansone

- Partner, SL Environmental Law Group
- Former Assistant Attorney General (NH)
- Extensive trial and appellate experience (lead trial and appellate counsel, *City of Pomona v. SQMNA* – won \$48 million jury verdict, September 2021)
- Exclusively represents communities and other water systems in contamination cases against polluters
- *Jeopardy!* champion (one game, 2016)

# AGENDA

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01

## PFAS REGULATIONS

**How do new regulations impact water suppliers?**

02

## LEGAL RESPONSIBILITY

What is the legal responsibility of manufacturers when their products harm others?

03

## WHAT WE CAN DO

How are water suppliers using the law to make PFAS manufacturers pay?

# HOW PFAS ENTERS OUR ENVIRONMENT

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## IMPACTED UTILITIES FACE SUBSTANTIAL COSTS

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Increased Biosolid  
Transfer  
Costs

New Wells

Expanding  
Media Disposal  
Costs

New Treatment  
Plants

Replacement  
Water



## LATEST DEVELOPMENTS

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The U.S. EPA has issued its proposed National Primary Drinking Water Regulation (NPDWR), also known as a draft maximum contaminant level (MCL) for the following:

**PFDA and PFOS at 4 parts per trillion (ppt) and PFNA, PFHxS, PFBS, and/or GenX Chemicals through a Hazard Index calculation.**



## Hazard Index

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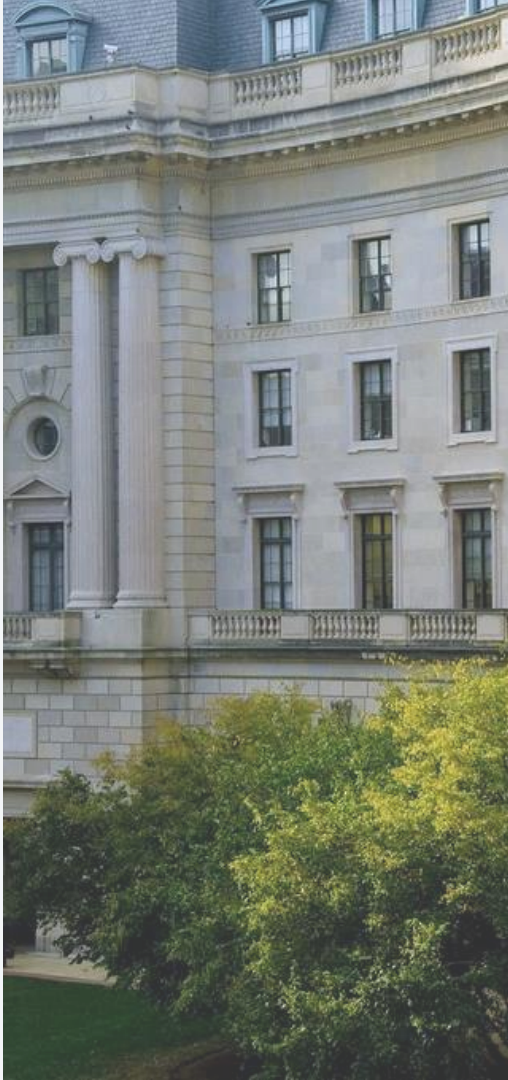
Systems will use calculator tool provided by EPA to calculate their Hazard Index for PFNA, PFHxS, PFBS, and/or GenX Chemicals.

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

Source: [EPA PFAS Fact Sheet 2023](#)



## EPA's PFAS Strategic Roadmap

- ▶ 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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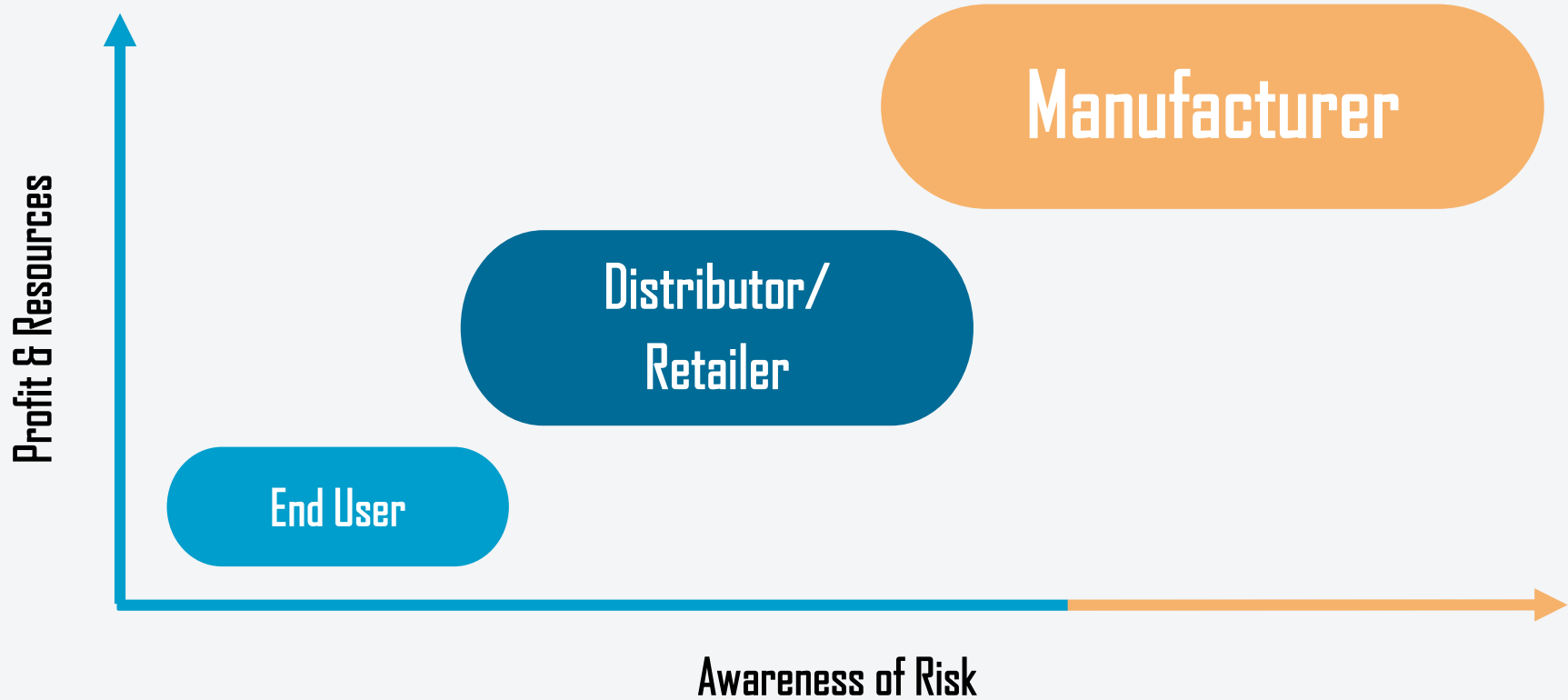
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## PRODUCT LIABILITY PRINCIPLES

“If the product fails to live up to the ordinary consumer’s reasonable expectations as to safety, the manufacturer should be liable for the damage caused by its product. Even if the chance of injury is slight, the burden of any resulting injury should be borne by the party best able to bear the loss.”

— Finn v. G. D. Searle & Co., 35 Cal. 3d 691, 720–21, 677 P.2d 1147, 1166–67 (1984)



## FAILURE TO WARN LIABILITY

It is well settled that a manufacturer has duty to warn users of foreseeable latent dangers associated with ordinary uses of its products.

- *Powell v. Standard Brands Paint Co.*, 166 Cal. App. 3d 357, 362, 212 Cal. Rptr. 395, 397 (Ct. App. 1985)

## FAILURE TO WARN



The foreseeable risks could have been reduced or avoided by providing reasonable instructions or warnings.

**AND**

The failure to provide those instructions or warnings makes the product unreasonably dangerous.



# SUCCESSFUL WATER CONTAMINATION LITIGATION

## AGAINST MANUFACTURERS

Perchlorate



MTBE



1,2,3-TCP

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International Research and Development Corporation

SPONSOR: 3M Company

COMPOUND: Fluoro® Fluorochemical Surfactant FC-95

SUBJECT: 90-Day Subacute Rhesus Monkey Toxicity Study.

*Handwritten:* T-3351

*Signature:* Eric S. Spang

Collaborators:  
 D. C. Jessup, Ph.D., Area Director of Research  
 R. G. Bell, D.V.M., Vice and Director of Pathology  
 J. S. Wehring, Ph.D., DVM of Large Animal Toxicology

137-087

27-CV-15-00002  
 Subject: *Subacute Acute*  
 From: 130024/USDC/USDOJ/DOJ  
 To: 130024/USDC/USDOJ/DOJ  
 Date: 1/1/1998

TO: CHOWMAN, JOH N WIFE'S ROOMS BLDG111  
 TO: KILLIAN, ROBERT E WIFE'S ROOMS BLDG111  
 TO: FINE, WIFE'S ROOMS BLDG111

Subject: FC-129 Biodegradability

TO: USDOJ/DOJ - WIFE'S ROOMS BLDG111  
 FROM: USDOJ/DOJ - WIFE'S ROOMS BLDG111

FROM: JOH CHOWMAN - WIFE'S ROOMS BLDG111  
 SUBJECT: FC-129 Biodegradability  
 DATE: 1/1/1998

IF YOU DECIDE TO PROCEED WITH THIS TESTING, PLEASE MARK THE SAMPLES IDENTIFIED THROUGH ME, BY NUMBER OF THIS MEMO, IN AN APPROPRIATE MANNER THAT WOULD ALLOW JOH CHOWMAN AND THE RESPONSIBLE PARTIES FOR THE SUBJECT LINE OF PRODUCTS.

REMARKS:  
 \*\*\* Forwarding memo from USDOJ/DOJ - WIFE'S ROOMS BLDG111 \*\*\*  
 FROM: KILLIAN, ROBERT E  
 TO: USDOJ/DOJ - WIFE'S ROOMS BLDG111  
 SUBJECT: FC-129 Biodegradability

MEMO TO: JOH CHOWMAN

1) Requesting USDOJ/DOJ authorization to conduct BEEB screening tests to clarify the biodegradability of fluorochemical surfactants FC-129 and FC-129. The proposed tests will use both temperature-10C, 10C-10C, and 10C-10C analysis.

2) Comments on point 4, all of the attached memo from Detlef Pense dated 12/10/97.

I don't think it is in 3M's long-term interest to perpetuate the myth that these fluorochemical surfactants are biodegradable. It is probable that this misconception will eventually be discovered, and when that happens, 3M will likely be embarrassed, and we will do ourselves no good by trying to immediately withdraw products from the market.

3) 3M wants to continue to sell and use fluorochemical surfactants in the level specialty components in various products. I believe that 3M has to acceptably address the environmental perception of these chemicals and then lobby in each SEC action for the addition of regulations that exempt low level specialty uses. The already adopted Surfactant biodegradation regulation suite clearly does not exempt specialty uses in nonbiodegradable surfactants.

Memo Available by 3M for Inspection and Copying as Confidential Information  
 Subject to Protection Order in *Patterson v. 3M*, No. C2-04-6300

3MNA1005995



## 3M KNEW THE RISKS

"[PFOS] was administered to rhesus monkeys.... The study was terminated after 20 days because of the early deaths of the monkeys in all treatment groups."

"I don't think it is in 3M's long-term interest to perpetuate the myth that these fluorochemical surfactants are biodegradable."

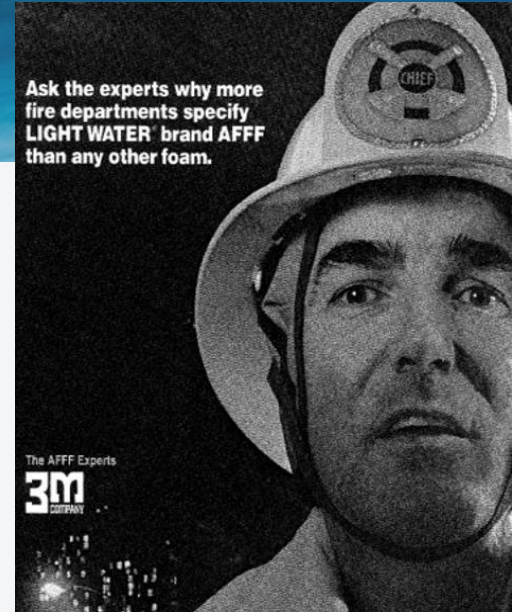
— 3M Internal Memos, 1979 & 1988



## 3M KNEW THE RISKS

"[AFFF] is biodegradable, low in toxicity, and it can be treated in biological treatment systems. ... Tests and actual use situations have shown that animal and aquatic life are not adversely affected."

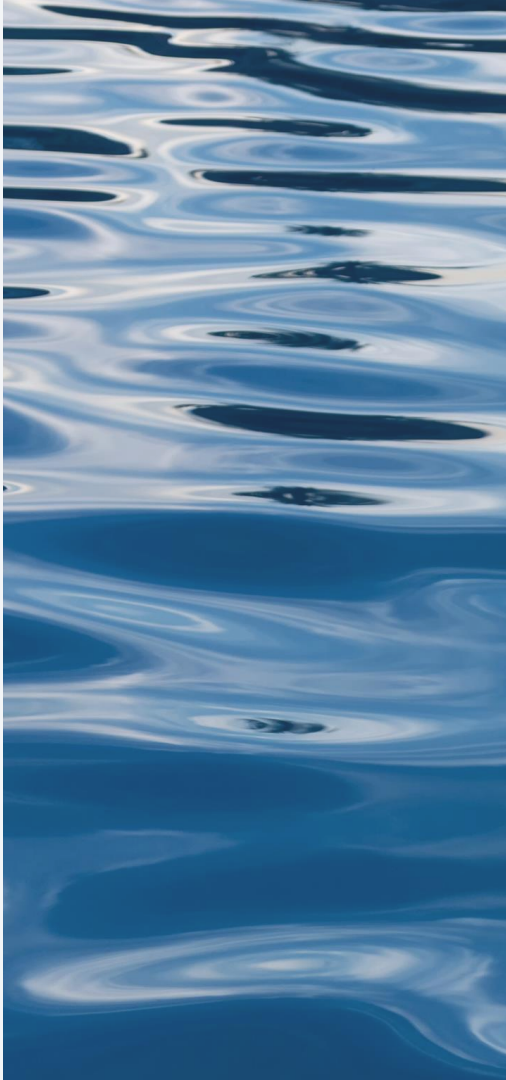
— 3M Marketing Brochure





***Aqueous Film-Forming Foams (AFFF) Products Liability Litigation  
MDL No. 2873***

- ▶ Located in the United States District Court of South Carolina
- ▶ Water system “bellwether” cases selected
- ▶ Systems who file need only to complete a brief “fact sheet” for now
- ▶ Goal is to attempt mass resolution – other cases will be sent “home” for trial



## **Proposed DuPont drinking water settlement (announced June 2)**

- ▶ Would create \$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 against anyone for contaminated wastewater, soil, etc.
- ▶ Requires court approval



*Stuart v. 3M Company et al*, the first bellwether trial

- ▶ Scheduled to start June 5, 2023 – but postponed to allow parties to focus on settlement negotiations
- ▶ Parties required to report back to court on status within 3 weeks!

## THE LITIGATION PROCESS

### CONCERN

01. Expensive?
02. Negative public perception?
03. Burdensome?
04. Do we need to sue our local airports, fire departments, or customers?

### TRUTH

- Contingency basis.
- Sends the message that public resources are being protected.
- MDL allows only very limited "fact sheet" discovery.
- Sue national PFAS manufacturers.

## THE LITIGATION PROCESS - PFAS

### CONCERN

01. We don't know the source.
02. The regulations aren't set yet.
03. We haven't incurred costs yet.
04. Why not just wait?

### TRUTH

- There were only two domestic manufacturers of PFOA and PFOS – 3M and DuPont
- Regulation will likely be in place by the time the case can be resolved
- Counsel will work with experts to calculate all likely future costs
- The statute of limitations may be running out!



# Thank You

## Questions?

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