Three Large Chemical Companies Agree to Historic PFAS Settlement

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Three large American chemical companies, The Chemours Company, DuPont de Nemours, Inc., and Corteva, Inc., recently announced a massive $1.185 billion settlement deal over complaints about the emerging toxic chemicals of concern known as Per- and Polyfluoroalkyl Substances, or PFAS as they are more commonly referred to. PFAS are synthetic chemicals nicknamed "forever chemicals" because they are persistent and resistant to degradation. They have been used in a wide variety of everyday products and are found in detergents, non-stick pans, stain-resistant and waterproof fabrics, fragrances, drugs, disinfectants, pesticides, and fire-fighting foam.

According to a joint statement issued by the three companies and a corresponding question and answer addendum, the $1.185 billion total will be distributed to a so-called "water district settlement fund." The rate that each company will contribute is consistent with a January 2021 Memorandum of Understanding reached between the companies, in which Chemours agreed to a 50-50 split of qualified expenses with both DuPont and Corteva. Under the settlement, Chemours will pay half (approx. $592 million), and DuPont (approx. $400 million) and Corteva (approx. $193 million) will contribute the remaining 50 percent to the fund. As part of the settlement agreement, the three companies do not admit fault in the cases and deny the allegations.

Once the settlement is finalized, which the parties say is expected within the second quarter of 2023, it will be subject to approval by the United States District Court for the District of South Carolina. As part of the approval process, the court will establish a timetable for notice to class members, hearings on approval and for class members to opt out of the settlement. If the opt-outs exceed specified levels, the three companies will have the right to terminate the settlement and "will continue to assert their strong legal defenses in pending litigation."

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If approved by the court, the settlement would resolve lawsuits involving a defined class of water systems with a current detection of PFAS at any level and those that are currently required to monitor for the presence of PFAS under the Environmental Protection Agency's (EPA) current monitoring rules or other applicable state or local laws. According to the joint statement, the settlement "is expected to comprehensively resolve all PFAS-related drinking water claims (regardless of whether resulting from aqueous film-forming foam usage)" of the defined class of water systems. However, the settlement does not cover water systems owned and operated by a state or the United States government or small systems that have not detected the presence of PFAS and are not currently required to monitor for them under federal or state requirements. In addition, the settlement will not resolve lawsuits emanating from claims of personal injury due to alleged exposure to PFAS or claims by State Attorneys General that allege PFAS contamination has damaged their state's natural resources.

PFAS contamination throughout the United States has been a hot button topic in recent years. In 2019, the EPA prioritized its efforts to understand PFAS contamination and reduce potential PFAS risks to the public through implementation of an Action Plan. In 2021, the EPA followed up on those efforts by creating a council to strategize ways to mitigate and reduce PFAS contamination. PFAS contamination has been a primary concern of the EPA under the Biden Administration, particularly with respect to the impacts of PFAS on community drinking water. The EPA has taken a number of significant actions to address such concerns since January 2021, including:

- October 2021 – EPA announced that the Agency is developing a national PFAS testing strategy that intends to use its Toxic Substances Control Act authorities to require PFAS manufacturers to provide information on PFAS.
- June 2022 – EPA released four drinking water health advisories for PFAS.
- August 2022 – EPA issued a proposal to designate two of the most widely used PFAS, PFOA and PFOS, as hazardous substances under CERCLA.

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- December 2022 – EPA issued a memorandum providing guidance to states on how to use the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program to reduce harmful PFAS pollution.
- February 2023 – EPA announced the availability of $2 billion from the Infrastructure Investment and Jobs Act to address emerging contaminants, including PFAS, in drinking water across the country.

Gibbons will continue to monitor and report developments related to PFAS and in environmental law throughout New Jersey.

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