

# **THE 3M PFAS PUBLIC WATER PROVIDER SETTLEMENT:** **What You Need to Know**

## **I. Introduction**

After over four years of intense, hard-fought litigation and complex negotiations, and on the eve of trial of the nation's first water provider bellwether trial in the *AFFF MDL*, Class Counsel secured a record-breaking settlement with 3M of up to \$12.5 billion for America's Public Water Systems (PWS). This groundbreaking settlement is both the largest water provider settlement in history and potentially the single largest source of PFAS-specific funding for treatment of Drinking Water to date.

The *AFFF MDL* produced this remarkable outcome only after extraordinary efforts including the production and review of approximately 37.4 million pages of documents, 164 depositions, briefing and successful oral argument on 3M's primary legal defense (the government contractor immunity defense), overcoming *Daubert* challenges to nearly all of plaintiffs' experts, defeating multiple summary judgment motions, countless arguments regarding the admissibility of thousands of pages of damaging evidence against 3M, over 60 days of intense mediation sessions, and a trial-ready team that was poised to present the first water provider bellwether trial to a jury.

Importantly, it represents only the beginning of the effort to hold accountable those companies responsible for the widespread PFAS contamination of the nation's Drinking Water. No single source of funding, whether public or private, will ever be sufficient to pay for the totality of the nation's PFAS contamination problem, a problem which is estimated to cost upwards of \$100 billion over the course of the next 40 years. Notwithstanding these astronomical costs, the 3M settlement alone represents perhaps the single largest step towards addressing the PFAS problem thus far, and, notably, accounts for approximately 22% of 3M's current market capitalization.

## **II. PFAS Contamination Is a Massive Concern that Must be Addressed by Public Water Systems Now**

PFAS are estimated to be present in the blood of 99% of the nation's population. Approximately 45% of Americans are drinking water from a PWS that, through no fault of any PWS, is contaminated by PFAS. Based on an exhaustive review of the scientific literature, in March 2023, the United States Environmental Protection Agency (EPA) concluded that PFOA and PFOS, two of the most common and widely studied PFAS chemicals, are likely human carcinogens for which there is no safe level of exposure. Given EPA's position, it has proposed and is expected to adopt enforceable Maximum Contaminant Levels (MCL) for PFOA and PFOS of 4ppt for each. It is presently expected that the currently proposed MCLs will be adopted by the end of 2023.<sup>1</sup> Once adopted, a PWS will have three (3) years to come into compliance.

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<sup>1</sup> EPA website, Per- and Polyfluoroalkyl Substances (PFAS) Proposed PFAS National Primary Drinking Water Regulation, *available at*: <https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas#:~:text=Proposed%20PFAS%20National%20Primary%20Drinking%20Water%20Regulation&text=EPA%20anticipates%20finalizing%20the%20regulation,of%20serious%20PFAS%2Dattributable%20illnesses.>

PWS nationwide, therefore, are now facing the reality of being required to invest enormous sums of money to pay for capital costs to construct treatment facilities capable of removing PFAS. Finding funding sufficient to address a problem of this magnitude will require more than one funding source. The effort to address PFAS contamination to provide safe and clean drinking water for every American will require a years-long effort involving multiple actors and funding sources, including government entities, environmental agencies and private companies.

The settlements recently reached with 3M Company and DuPont for up to \$12.5 billion and \$1.185 billion,<sup>2</sup> respectively, represent just two of those sources, but are sources that will play a large part in addressing the contamination. However, in addition to these settlements, the recently enacted Bipartisan Infrastructure Law set aside approximately \$4 billion dollars in federal funding for PFAS treatment and another \$5 billion was set aside exclusively for underserved communities.<sup>3</sup> While federal funding will supplement the settlements that have already been reached, at the same time, the MDL litigation will continue and Plaintiffs will continue to fight to reach *additional* settlements with the many other defendants in the litigation to secure more sources of funding for PFAS treatment.

The alternative to participating in the 3M settlement is for a PWS to opt out. Any PWS that elects this approach will be left without this much needed funding now, and likely will find itself going down a path of years of litigation with no guaranteed outcome. All this while, at the same time, facing the reality of a looming federally enforceable MCL.

### **III. The Facts: Benefits of Participation in the 3M Settlement**

#### **A. Payments Address Real-World Considerations:**

- 1) The settlement provides for money *now* as well as over time, which reflects how PFAS treatment costs are incurred. The settlement provides for capital costs associated with constructing PFAS treatment systems to be paid now while operation and maintenance (O&M) costs will be paid out over time consistent with when PWS will need such monies.
- 2) The pay-out over time protects 3M's solvency, and multiple bankruptcy provisions ensure that in the event of insolvency, claimants are protected to the greatest degree possible.
- 3) The settlement coincides with a shifting regulatory landscape and the likely enforcement of new standards, including the EPA's proposed MCLs for PFOA and PFOS.

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<sup>2</sup> Plaintiffs' Class Counsel and Co-Lead Counsel have prepared a similar document outlining the DuPont Settlement. This document is likewise available at: [www.afff-mdl.com](http://www.afff-mdl.com).

<sup>3</sup> EPA website, Bipartisan Infrastructure Law: A Historic Investment in Water, *available at*: <https://www.epa.gov/system/files/documents/2021-11/e-ow-bid-fact-sheet-final.508.pdf>

- 4) The settlement addresses the most prevalent source of PFAS contamination in humans, which is via Drinking Water, thus prioritizing for resolution those Claims that most directly bear on human health and safety.

**B. All PFAS-Related Remediation is Taken into Account:**

- 1) If a PWS complies with Baseline Testing requirements (discussed below), then through the Supplemental Fund (discussed below), the 3M settlement allows for compensation for a Water Source<sup>4</sup> that may have had no detections as of the time it submitted its claim form but that later finds PFAS detections. Such a claim to the Supplemental Fund may be made for a Water Source through **January 31, 2030**.
- 2) If a PWS complies with Baseline Testing requirements, then through the Supplemental Fund, the 3M settlement allows compensation for a Water Source that did not exceed an applicable State MCL or Proposed federal MCL at the time of its submission of its claim form but that later did exceed such regulatory standards. Such a claim to the Supplemental Fund may be made for a Water Source up through **January 31, 2030**.
- 3) For either Phase One or Phase Two Qualifying Class Members (defined below), the Special Needs Fund (discussed below) allows for compensation for a PWS that incurred extraordinary expenses as a result of PFAS contamination, including, for example, purchasing water from alternative sources and/or drilling new PFAS-free wells.
- 4) For Phase Two Qualifying Class Members (defined below), the 3M settlement provides compensation for monitoring and/or testing for PFAS up through and including **January 1, 2026**. Notably, this testing will likewise satisfy Baseline Testing requirements for Phase Two Qualifying Class Members.
- 5) Preserves Non-Drinking Water Claims.

**C. Treats All PWS Equally**

- 1) The settlement resolves both *known* PFAS contamination *and* as-of-yet undiscovered PFAS contamination.
- 2) The settlement's "Equalizer Provision" ensures that no PWS is penalized because of when it discovered PFAS contamination. Phase Two Qualifying Class Members (those with no known PFAS detections at the time of settlement) will be eligible for compensation at the same rate as if they had been Phase One Qualifying Class Members (those with known PFAS detections at the time of settlement).

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<sup>4</sup> Under the terms of the settlement, a Water Source is defined as a groundwater well and/or any surface water source.

#### IV. Key Provisions of the Settlement

##### **What is the Difference Between Phase One and Phase Two?**

- **Phase One**: A Phase One Class Member is a Class Member that had a PFAS detection in one or more Water Source(s) as of the date of the Settlement (June 22, 2023).
- **Phase Two**: A Phase Two Class Member is a Class Member that did not have a PFAS detection in one or more Water Sources as of the date of the Settlement (June 22, 2023).

##### **Settlement Amount**

As part of the settlement agreement, 3M has agreed to pay up to \$12,500,000,000 subject to final approval by the Court. For perspective, and as noted above, this amount represents approximately 22% of 3M's current total market capitalization. Approximately \$6 billion of this settlement amount will be paid out over the next 3.5 years (with the first payment due July 1, 2024, the second payment April 15, 2025, and the third on April 15, 2026). These initial three payments are for Phase One infrastructure costs, *i.e.*, capital costs, and Phase Two PFAS testing costs.

Future payments will be made for both Phase Two infrastructure costs, and both Phase One and Phase Two O&M costs. The payments will ultimately result in a minimum of \$10.5 billion payout and a maximum at \$12.5 billion.

Below please find a timeline of the settlement payout.<sup>5</sup>

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<sup>5</sup> Excerpted from 3M Settlement Agreement Exhibit K.

<b>Earliest Possible Payment Date</b>	<b>Purpose</b>	<b>Amount with Phase Two Floor (before adjusting for Stuart, Middlesex, and Rome)</b>	<b>Amount with Phase Two Cap (before adjusting for Stuart, Middlesex, and Rome)</b>
July 1, 2024	50% of Phase Two Testing Fund	52,500,000	52,500,000
	67% of Phase One infrastructure	2,763,750,000	2,763,750,000
April 15, 2025	50% of Phase Two Testing Fund	52,500,000	52,500,000
	33% of Phase One infrastructure	1,361,250,000	1,361,250,000
	14% of Phase One O&M	385,000,000	385,000,000
April 15, 2026	16% of Phase One O&M	440,000,000	440,000,000
April 15, 2027	12% of Phase One O&M	330,000,000	330,000,000
	70% of Phase Two infrastructure	1,478,400,000	2,318,400,000
April 15, 2028	14% of Phase One O&M	385,000,000	385,000,000
	30% of Phase Two infrastructure	633,600,000	993,600,000
	12% of Phase Two O&M	168,960,000	264,960,000
April 15, 2029	12.5% of Phase One O&M	343,750,000	343,750,000
	13% of Phase Two O&M	183,040,000	287,040,000
April 15, 2030	8.5% of Phase One O&M	233,750,000	233,750,000
	15% of Phase Two O&M	211,200,000	331,200,000
April 15, 2031	8.5% of Phase One O&M	233,750,000	233,750,000
	15% of Phase Two O&M	211,200,000	331,200,000
April 15, 2032	7.5% of Phase One O&M	206,250,000	206,250,000
	13% of Phase Two O&M	183,040,000	287,040,000
April 15, 2033	7% of Phase One O&M	192,500,000	192,500,000
	8% of Phase Two O&M	112,640,000	176,640,000
April 15, 2034	8% of Phase Two O&M	112,640,000	176,640,000
April 15, 2035	8% of Phase Two O&M	112,640,000	176,640,000
April 15, 2036	8% of Phase Two O&M	112,640,000	176,640,000
<b>TOTAL</b>	<b>100% of Phases One and Two</b>	<b>\$ 10,500,000,000</b>	<b>\$ 12,500,000,000</b>

Plaintiff's Co-Lead and Class Counsel believe this settlement amount to be fair and reasonable, and, when paid out by 3M over time largely eliminates bankruptcy risk. No stakeholder benefits from a 3M bankruptcy. Period.

Further, as noted, PWS incur O&M costs over time and thus 3M's settlement payments align with when a PWS will incur O&M costs. Conversely, capital costs will be paid in a one-time upfront payment. Thus, a PWS gets the benefit of an upfront lump sum in addition to years of ongoing O&M payments.

### **Bankruptcy Protections**

There are a number of important protections provided to settling PWS under the 3M settlement, should 3M commence bankruptcy proceedings. Among the most important are:

- (1) All Qualifying Class Members' claims will be treated as liquidated, non-contingent and undisputed;
- (2) Waiver of statute of limitations defense of Released Claims to the extent that 3M settlement is not assumed in bankruptcy; and
- (3) Were 3M to obtain recovery as against any Qualifying Class Member pursuant to 11 U.S.C. § 550 related to Released Claims, any such recovery would be limited to a credit as against what is owed to the Qualifying Class Member under the settlement.

## **Allocation Model: How Much Money Will My PWS Receive?**

Co-Lead and Class Counsel have made available an Estimated Allocation Range Table (“Table”) that allows a PWS to use its water system information to calculate an estimated allocation amount for each of its Impacted Water Sources. The information needed to use the Table includes the PWS’s Adjusted Flow Rates and PFAS Scores, and using this information the Table provides a good faith recovery estimate for each Water Source.

The Table itself and information regarding how to calculate your system’s Adjusted Flow Rate and PFAS Score are available at the following website: [www.PFASWaterSettlement.com](http://www.PFASWaterSettlement.com).

These two factors, namely, flow rate and level of contamination, are the primary factors that will drive the value of a PWS’s claim for *each* well and/or groundwater source. These factors make it possible for each PWS to be compensated on an equitable basis. The more wells and/or surface water sources that are affected by PFAS, the more funds that will be allocated to the particular PWS.

Similarly, the greater the flow rates and the higher the PFAS contamination levels for each Impacted Water Source, the greater the allocation of funds for a PWS, both with respect to capital construction costs and O&M. This makes sense because higher flow rates and higher PFAS contamination levels will result in greater capital and O&M costs. By way of example, the greater the PFAS contamination level, the more frequent filtration media changeout will be needed for any treatment system to stay below either existing State MCLs or proposed federal MCLs, which results in increased O&M costs.

### **Additional funding**

- **Special Needs Funds**

The Special Needs Funds (both Phase One and Phase Two) are intended to compensate Class Members that have already spent money to address PFAS, including, but not limited to as a result of pulling water from other sources, purchasing supplemental water and/or drilling new wells.

Application to the Special Needs Fund will require completion of the Special Needs Claim Forms (either Phase One or Phase Two).

- **Supplemental Funds**

The Supplemental Funds (both Phase One and Phase Two) are intended to provide compensation to Class Members that were reported during the Claims Form submission process (whether Phase One or Phase Two) as having no measurable PFAS detections but where subsequent testing following the submission of the relevant Claims Forms shows measurable PFAS detection levels.

Additionally, the Supplemental Funds are available if a Water Source did not test above a State MCL or a proposed Federal MCL but later tests above such regulatory standards or the Water

Source exceeds a State MCL or proposed Federal MCL because of these regulatory standards were lowered.

When the above circumstances are present, application to the Supplemental Funds is open and available through **January 31, 2030**.

Application to the Supplemental Funds will require completing the Supplemental Fund Claim Forms (either Phase One or Phase Two).

### **Indemnity Provisions**

When preliminary approval was initially sought from the MDL Court, several States objected to the Settlement Agreement's indemnity provisions. Those provisions have now been removed, mooting this issue entirely.

### **Baseline Testing Requirements Explained**

Each Phase One and Phase Two Class Member (defined above) must perform Baseline Testing to be eligible to participate in the settlement and become Qualifying Class Members. Baseline Testing requires Class Members to test *each* of its Water Sources for PFAS.

However, any Water Source tested on or before the date of the settlement (June 22, 2023), using a state- or federal-approved methodology and found to contain a Measurable Concentration (*i.e.*, any level) of PFAS, does not need to be tested again for purposes of Baseline Testing.

Any Water Source tested prior to January 1, 2019, that did not result in a Measurable Concentration of PFAS, must retest to meet Baseline Testing requirements. If a Water Source tested January 1, 2019, or later, and it did not result in a Measurable Concentration of PFAS, no further testing of that Water Source is required.

Baseline Testing requires the following:

- i. PFAS tests must be conducted at a minimum for PFAS analytes for which UCMR-5 requires testing, and
- ii. the PFAS test results must report any Measurable Concentration of PFAS, regardless of whether the level of PFAS detected in the water is above or below UCMR-5's relevant minimum reporting level.

Each Phase One and Phase Two Qualifying Class Member will verify in its Claims Form that it has tested all its Water Sources for PFAS. Failure to test and submit Qualifying Test Results for Water Sources will disqualify Water Sources from consideration for present and future payments.

Although Baseline Testing may be performed by any laboratory accredited or certified by a state or federal regulatory agency whose analytical method is consistent with (or stricter than) than the requirements of UCMR-5, Class Counsel has nonetheless arranged for discounted testing with

Eurofins laboratory to assist with Baseline Testing requirements. Eurofins will likewise forward the test results to the Claims Administrator.

**Eurofins Contact Information:**

**Eurofins:** (916) 374-4499 <https://www.eurofinsus.com/environment-testing/pfas-testing/pfas-water-provider-settlement/>

**Release Provisions: Which Claims Are Being Released and Which Are Not?**

The following Claims are released:

- (1) Claims related to a PWS's Drinking Water (water intended for human consumption);
- (2) Representations about PFAS; and
- (3) Punitive Damages for all claim types are released.<sup>6</sup>

The following Claims are preserved assuming the below criteria are met:

- (1) Real Property Exceptions:
  - (a) Claims related to remediation, testing, monitoring or treatment to remove PFAS from the real property are preserved if:
    - i. The real property is owned by the Class Member;
    - ii. The real property is separate from the PWS (e.g. airport or fire training facility; **AND**
    - iii. The Class Member seeks damages unrelated to Drinking Water.
  - (b) If the Claims relate to groundwater under the real property, Class Member must either:
    - i. Identify another potable water system (aside from the PWS) that may be affected; **OR**
    - ii. subject to a state or federal directive, order or permit condition not premised on protecting the Class Members' PWS.<sup>7</sup>

**EXPLANATORY NOTE:** For example, if you assert groundwater remediation as the basis of your damages and that groundwater is used for public Drinking Water, that damages claim is not

<sup>6</sup> Settlement Agreement, at §11.1.1

<sup>7</sup> Settlement Agreement, at 11.1.2.1.



viable because such claim was released. This is because that claim is considered under the settlement agreement to be one in the same as the PWS that is already being compensated. Under the settlement, this is seen as essentially a double recovery. However, the identification of another potable water source at risk or a state or federal order not premised on the PWS is not released.

(2) Wastewater and Stormwater Exceptions:

(a) Claims related to discharge, remediation, testing, monitoring, treatment, or processing of PFAS at a permitted wastewater facility or stormwater system are preserved where:

- i. Class Member owns or operates the facility or system;
- ii. Such facility and system are not related to the PWS; **AND**
- iii. Class Member seeks damages unrelated to Drinking Water or the PWS

(b) Claims related to groundwater impacted by a permitted facility or system are preserved where the Class Member either:

- i. identifies another potable water system (aside from the Class Member's PWS) that may be affected; **OR**
- ii. subject to a state or federal directive, order or permit condition not premised on protecting the Class Member's PWS.<sup>8</sup>

(3) Pleading Requirements: Pleadings **must disavow** Claims relate to the Drinking Water or PWS.<sup>9</sup>

(4) Excepted Claims **cannot seek** Punitive Damages.<sup>10</sup>

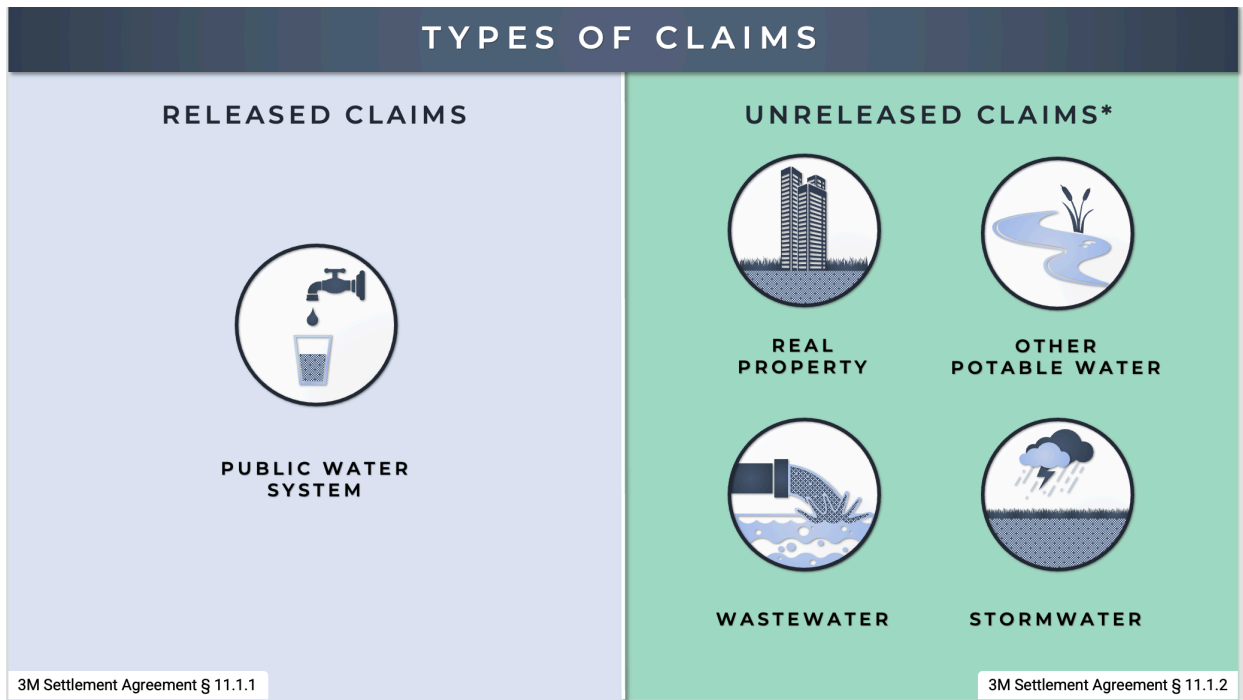
**Please be sure to review the release provisions of the Settlement Agreement carefully to ensure that you fully appreciate the distinctions of the released claims. There is no substitute to a careful review of the source documents.**

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<sup>8</sup> Settlement Agreement, at 11.1.2.2.

<sup>9</sup> Settlement Agreement, at 11.1.3-11.1.4.

<sup>10</sup> Settlement Agreement, at 11.1.4.3.



\* Subject to the exceptions set forth in the Master Settlement Agreement §11.1.2-2

**What Is the Current Status of the Settlement?**

- A. Preliminary Approval: The 3M Settlement was preliminarily approved by the Court on **AUGUST 29, 2023**.
- B. Key Dates:

Date	Activity
September 12, 2023	Notice Plan to Commence
November 11, 2023	Last Day to Object to 3M Settlement
December 11, 2023	Opt-out period closes
December 18, 2023	Motion for Attorney Fees and Motion for Final Approval
January 2, 2024	Briefs in Response to Motion for Attorney Fees and Final Approval
January 9, 2024	Class Counsel file response to any objections to settlement or attorney’s fees
February 2, 2024	Final Fairness Hearing

**Claims Submission**

The Claims Forms will be available online at the Settlement website ([www.PFASWaterSettlement.com](http://www.PFASWaterSettlement.com)) and can be submitted to the Claims Administrator

electronically or on paper. The Claims Administrator's comprehensive guide as to how to submit a claim is likewise available at this web address.

For further information, do not hesitate to contact Co-Lead and Class Counsel: Michael A. London ([mlondon@douglasandlondon.com](mailto:mlondon@douglasandlondon.com)), Scott Summy ([SSummy@baronbudd.com](mailto:SSummy@baronbudd.com)), Paul J. Napoli ([PNapoli@NSPRLaw.com](mailto:PNapoli@NSPRLaw.com)) and Joseph F. Rice ([jrice@motleyrice.com](mailto:jrice@motleyrice.com)) or Class Counsel Elizabeth A. Fegan ([beth@feganscott.com](mailto:beth@feganscott.com)).

Further, the Public Water System Settlement page contains several settlement resources and is available at: [www.PFASWaterSettlement.com](http://www.PFASWaterSettlement.com). In addition, the AFFF MDL Plaintiffs' Executive Committee maintains a website ([www.afff-mdl.com](http://www.afff-mdl.com)) which likewise contains important settlement resources.

**Disclaimer:**

This document is intended to be a helpful guide to understanding the Master Settlement Agreement and its amendments. It is not intended to replace the original source, *i.e.*, the Master Settlement Agreement, as entered into on June 22, 2023, and as amended on August 28, 2023. There is no substitute for reading and understanding the Master Settlement Agreement and its amendments themselves, which are the documents that contain the controlling provisions. It is further recommended to consult an attorney regarding the legal implications of the Settlement Agreement.