



City Council Memorandum

To: Mayor Fasbender & City Councilmembers
From: City Administrator Dan Wietecha
Date: November 20, 2023
Item: National Class Action Settlements - PFAS

Council Actions Requested:

Opt out of national class action settlements against 3M Company and EI DuPont de Nemours and Company.

Background Information:

Recently, multi-district litigation against 3M and DuPont has resulted in two proposed class action settlements being overseen by the US District Court in South Carolina. These national settlements are approximately \$10.5B to \$12.5B by 3M and \$1.2B by DuPont. The amounts will be reduced by legal costs, fees, and administrative costs. Settlement payments would be paid over 9 years.

The City of Hastings, as a public water system that has PFAS, is eligible to participate in the settlement. Under the settlement “calculator,” Hastings would receive between \$2.7M and \$4.6M from 3M and \$260K and \$440K from DuPont, likely on the lower end of these ranges. Please note: this is more than we had previously estimated but still far less than the estimated \$69M to construct three treatment plants plus operation and maintenance of \$880K to \$1M per year, increasing over time.

Participation in the class action settlement would preclude the City making additional claims against 3M and DuPont. We are presently working with the Minnesota Pollution Control Agency “superfund” process for additional investigation to determine if there is a direct link from the 3M Cottage Grove disposal site and Hastings’ drinking water supply.

The opt out deadline for the DuPont settlement is December 4, 2023. The opt out deadline for the 3M settlement is December 11, 2023. If the City does not affirmatively opt out, the City will automatically be included in the settlement.

Financial Impact:

N/A

Attachments:

Settlement Analysis by Peder Larson and Sarah Greening (11/14/2023)



Memorandum

To: Dan Wietecha
Hastings City Administrator

From: Peder Larson
Sarah Greening

Date: November 14, 2023

Re: June 22, 2023 Proposed Class Action Settlement Agreement Analysis

The memorandum analyzes the June 22, 2023 Proposed Class-Action Settlement Agreement (“Settlement Agreement”) between 3M and certain “Active Public Water Systems” in the United States. Hastings has rights and obligations under the Settlement Agreement as an “eligible claimant.” We analyze the allocation procedures for determining the amount of funding available to Hastings, the required release of future claims by claimants receiving funds, the process for opting out of the Settlement Agreement, and relevant exclusions from the Settlement Class. This memorandum also describes at a general level ways Hastings can fund its drinking water project to remediate PFAS contamination in its well water through state funding or by directly suing 3M to fully fund its drinking water remediation project.

Summary

Hastings is an eligible claimant under the June 22, 2023 Settlement Agreement. In total, 3M has agreed to pay between \$10,500,000,000 to \$12,500,000,000 to the Settlement Fund, which in turn will make payments to eligible claimants. This money will be allocated pursuant to allocation procedures that diminish the amount any individual claimant will receive. Using those allocation procedures, Hastings Public Works calculates potential class action funds in a very rough range of \$1,300,000 to \$3,000,000 (in 10 payments over 9 years) if it submits a claim in accordance with the claims procedure outlined in Settlement Agreement.

If Hastings does not opt out of the Settlement Agreement, it will be precluded from pursuing any future claims against 3M, its affiliates, predecessors, and successors related to PFAS contamination that occurred before the Effective Date of the Settlement Agreement, subject to limited exceptions. Thus, Hastings would not be permitted to pursue litigation against 3M even if Hastings could trace contamination in its drinking water supply directly to a 3M Manufacturing Site. The Settlement Agreement explicitly includes a Covenant Not to Sue 3M and its affiliates based upon the released claims.

If Hastings does not timely opt out of the Settlement Agreement, it will be bound by its terms, including the Release and Covenant Not to Sue. To opt out, Hastings must file a written and signed “Request for Exclusion” statement and serve the same on the appropriate parties **no later than December 11, 2023**.

There are alternative ways Hastings can pursue funds for its drinking water project. If Hastings opts out of the Settlement Agreement, it could separately pursue 3M for damages. If Hastings can trace its contamination to a 3M manufacturing site, it has a greater chance of bringing 3M directly to the table to discuss a settlement specifically for Hastings. But, without a full understanding of the source of contamination, it is hard to predict the likelihood of successful litigation. Also, any litigation will likely involve a fair amount of upfront costs for research and drafting in order to prepare and initiate a lawsuit.

After considering the costs and benefits of each option, if Hastings intends to commence a treatment and remediation project for its drinking water that is projected to cost nearly \$70,000,000, it may be prudent for Hastings to opt out of the June 22, 2023 Settlement Agreement to avoid waiving its rights against 3M while also continuing to pursue funds potentially available from the 2018 3M Settlement Grant and from the Minnesota legislature.

ANALYSIS

June 22, 2023 Proposed Class Action Settlement Agreement

a. General Overview

In August 3M secured preliminary court approval for a Proposed Class-Action Settlement to resolve drinking water claims by public water systems involving per- or poly-fluoroalkyl substance (“PFAS”) contamination. Final court approval will not occur until a “fairness hearing” is held on the settlement in early 2024. Hastings is a “Class One Eligible Claimant” and will be bound by the final settlement unless it opts out of the settlement.

Settlement Amount. 3M has agreed to pay between \$10,500,000,000 to \$12,500,000,000, subject to final approval by the Court. Each Class Member that has not opted out of the Settlement Class will be eligible to receive settlement check(s) from the Claims Administrator based on the allocation procedures set forth in the Settlement Agreement. The Settlement Agreement calls for 3M to make payments annually from 2024 through 2036.

Release of Claims Against 3M. All Class Members that have not opted out of the Settlement Class will release certain claims against 3M, its affiliates, predecessors, and successors. This includes claims arising out of, relating to, or involving PFAS that has entered or may enter drinking water or the Class Member’s drinking water system. Some claims unrelated to public drinking water systems are not waived, such as claims for damages related to a government directive to remove contamination from real property unrelated to a public water system (such as an airport or fire training facility), claims related to potable water continuation not premised on the need to protect public water system sources and claims related to stormwater and wastewater treatment systems.

Covenant Not to Sue. Class Members agree not to sue 3M or its affiliates for damages, loss, or injury arising out of, related to, or involving any act, error, omission, event, or thing within the scope of the Release described in the agreement, including claims arising from PFAS that has entered a public entity's drinking water system.

(1) Settlement Allocation Procedures For Class Members Who Do Not Opt Out

The Allocation Procedures for settlement funds use formulas to determine amounts due to eligible Class Members and are designed to equitably compensate Class Members for PFAS-related treatment. Eligible Class Members fall into one of two categories: Phase One Qualifying Class Members and Phase Two Qualifying Class Members. A Phase One Qualifying Class Member is a Public Water System that has one or more Impacted Water System as of June 22, 2023. Hastings is a Phase One Qualifying Class Member. Phase One Qualifying Class Members will be allocated approximately \$6,875,000,000. The deadline for Phase One Qualifying Class Members to submit a Public Water System Settlement Claims Form for all Impacted Water Sources is sixty (60) calendar days after the Effective Date.¹

Attached hereto is **Exhibit Q** to the Settlement Agreement, titled "Allocation Procedures." The information below provides a brief summary of the relevant procedures.

(a) Baseline Testing

Each Phase One Qualifying Class Member must perform Baseline Testing. Baseline Testing requires each Class Member to test each of its Water Sources for PFAS; request from the laboratory that performs the analyses all analytical results, including the actual numeric values of all analytical results; and submit detailed PFAS test results to the Claims Administrator on a Claims Form(s).

Class Members that have tested Water Sources on or before June 22, 2023, using a state- or federal-approved methodology and found to contain a Measurable Concentration of PFAS, do not need to test again. 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.

(b) Base Scores for Water Sources

Settlement funds are allocated based on factors that dictate the costs of water treatment. Costs associated with water treatment generally consist of 1) capital costs and 2) operations and maintenance costs. The Allocation Procedures utilize proxies for capital costs and operations and maintenance costs to generate a "Base Score" for each Impacted Water Source. The Claims

¹ The Effective Date is five business days after the date of "Final Judgment," which is the earliest date after the Court approves the Settlement Agreement, enters judgment terminating the action, and the time to appeal the Court's approval of the Settlement Agreement has expired.

Administrator will input the flow rates and PFAS concentrations from the Claims Forms into an EPA-derived formula that calculates a Base Score for each Impacted Water Source.²

(i) PFAS Score

For purposes of calculating each Impacted Water Source's PFAS Score, the Claims Administrator will determine the highest concentration, expressed in parts per trillion, that the Impacted Water Source has shown on the Settlement Claims Form, according to one or more Qualifying Test Results, for PFOA, for PFOS, and for any other single PFAS analyte listed on the Claims Form. The PFAS score is the greater of either (i) the sum of maximum levels for PFOA and for PFOS, or (ii) the sum of maximum levels of PFOA and PFOS averaged with the square root of the maximum level of any other single PFAS analyte listed on the Claims Form.

(ii) Adjusted Flow Rate

Impacted Water Sources' flow rates can be reported in the Claims Form in either gallons per minute ("gpm") or Million Gallons per Day ("MGD"). The Claims Administrator will convert the MGD reported flow rates into gpm for all calculations. Groundwater sources should report flow rates from the groundwater well.

The Claims Administrator will determine the Adjusted Flow Rate for each Impacted Water Source by averaging the three highest annual average flow rates that the Class Member drew from the groundwater Impacted Water Source. The three highest annual average flow rates can be selected from a ten-year period from 2013-2022. This average will then be averaged with the verified maximum flow rate of the groundwater Impacted Water Source.

As mentioned above, the Base Score is equal to the Capital Costs Component plus Operation and Maintenance Costs Component. The Capital Cost Component takes into account, in part, the flow rate; The Operation and Maintenance Cost takes into account, in part, the PFAS Score.³

(iii) Adjustments to Base Scores

Certain Class Members are eligible for increases to their Base Scores. There are three available enhancements to the score: the Litigation Bump, the Public Water Provider Bellwether Bump, and the Regulatory Bump. The only potentially applicable bump here is the Regulatory Bump. The Regulatory Bump will apply when an Impacted Water Source exceeds (i) an applicable state Maximum Contaminant Level (MCL) for a PFAS analyte or (ii) the proposed federal MCL for a PFAS analyte. The Claims Administrator will consider all Proposed Federal PFAS MCL and existing state MCLs for PFAS chemicals existing on the date the Court issues a Final Approval to determine if an Impacted Water Source has ever exceeded any applicable standard during the Class Period.

² Page 8 of Exhibit Q provides a table with an example of determining a Class Member's PFAS score.

³ Pages 9-11 of Exhibit Q provides calculations to assist in determining a Class Member's Base Score.

(c) Settlement Award

The Claims Administrator will divide the Impacted Water Source's Adjusted Base Score by the sum of all Adjusted Base Scores. This number gives each Impacted Water Source its percentage of the Phase One Action Fund. Then, that percentage is multiplied by the Phase One Action Fund to provide the Settlement Award for each Impacted Water Source. The information required to calculate Settlement Awards is not publicly available and is only obtainable through the Claims Forms submitted by Class Members. Therefore, the Settlement Awards that each Class Member will receive is not determinable until the Claims Administrator analyzes all the Claims Forms submitted by the Claims Form deadline.

Payments will be made in multiple installments over time. 3M will pay the first installment within sixty (60) calendar days after the Effective Date, but in any event no earlier than July 1, 2024. 3M will make nine (9) subsequent payments annually, for nine (9) years, on April 15 of each calendar year. The Settlement Agreement contemplates that within fourteen (14) calendar days, but no later than sixty (60) calendar days (or in the first year of Phase One Action Fund payments, one hundred twenty (120) calendar days), after each payment by 3M, each Phase One Qualifying Class Member shall receive a payment from the Phase One Action Fund.

b. Opting Out of the Settlement Agreement

Unless an eligible Class Member timely opts out, the Class Member will be bound by the Settlement Agreement and any final disposition related to the Settlement Agreement, including the Release and Covenant Not to Sue. The Class Member will be precluded from pursuing claims against 3M if those claims are within the scope of the Release.

A Class Member that wishes to opt out of the Settlement Class must file a written and signed "Request for Exclusion" (the "Request") statement and serve the same on the Notice Administrator, the Special Master, the Claims Administrator, Counsel for 3M, and Class Counsel, and comply with all Opt-Out provisions of the Settlement Agreement. **The Request for Exclusion must be received by the Notice Administrator no later than December 11, 2023.**

The Request for Exclusion must certify, under penalty of perjury, that the filer has been legally authorized to exclude the Class Member from the Settlement Agreement and must provide: (i) an affidavit or other proof of the Settlement Class Member's standing; (ii) the filer's name, address, telephone, facsimile number and email address (if available); and (iii) the name, address, telephone number, and e-mail address (if available) of the Class Member whose exclusion is requested.

Any Class Member that submits a timely Request for Exclusion shall not (i) be bound by any orders or judgments effecting the Settlement; (ii) be entitled to any of the relief or other benefits provided under the Settlement Agreement; (iii) gain any rights by virtue of the Settlement Agreement; or (iv) be entitled to submit an Objection.

If a Class Member owns or operates more than one Public Water System, it may submit a Request for Exclusion on behalf of some of those Public Water Systems but not others. A Request must be submitted on behalf of each Public Water System that the Class Member wishes to opt out of the Settlement. Any Public Water System that is not specifically identified in a Request will remain in the Settlement Class.

Exclusions from the Settlement Class

Not all Public Water Systems are potential Settlement Class Members. Already excluded from the Settlement Agreement are Afton, Cottage Grove, Denmark Township, Lake Elmo, Lakeland Municipal Water, Oakdale, Newport, Saint Paul Park, West Lakeland, and Woodbury Public Water Systems. They are recognized as being associated with the Cottage Grove 3M facility. Those facilities are excluded from the Settlement Class and listed in Exhibit G to the Settlement Agreement.

Section 5.2 of the Settlement Agreement states: “Any person or entity that has been erroneously listed in or omitted from any of these six Exhibits (including Exhibit G) should promptly submit a notice of the error to the parties and (once appointed by the Court) to the Special Master, the Claims Administrator, and the Notice Administrator.” From what we have read, neither the Settlement Agreement nor any other Court documents discuss how these Public Water Systems were chosen to be excluded in Exhibit G.

It is our assumption, however, that this relates to the February 2018 3M Settlement Grant, where 3M agreed to provide the State of Minnesota with a \$850 million to be used for safe drinking water and natural resource projects - particularly in the East Metropolitan Area, which includes but is not limited to, Afton, Cottage Grove, Lake Elmo, Lakeland, Lakeland Shores, Maplewood, Newport, Oakdale, St. Paul Park, Woodbury, and the township of Denmark. It is possible that the cities specifically listed in Exhibit G were excluded because they are already receiving sufficient funding from 3M to remediate contamination.

Hastings Pursuit of Separate Litigation Against 3M

Alternatively, if Hastings opts out of the Settlement Agreement, Hastings could pursue litigation directly against 3M for the contamination its drinking water source. Of course, without a complete understanding of the source of Hastings’ contamination, it is hard to predict the likelihood of success of potential litigation. But if Hastings can trace contamination to a 3M manufacturing site, it has a chance of directly litigating against and settling with 3M.

Litigation will likely involve a significant upfront costs that are typically involved in initiating a lawsuit, and litigation is not without risk. It is notable that 3M has been defending against these claims for years and likely has defenses and/or stall tactics to create hurdles for challengers. But the previous lawsuit between the State of Minnesota and 3M may serve as a base for Hastings’ complaint. Based on review of the previous action, potential claims that Hastings could reasonably allege against 3M likely include: (1) violations of MERLA; (2) common law trespass; (3) common law nuisance; (4) statutory nuisance; and (5) negligence, subject to each claims’ statute of limitations.

Moreover, Hastings can continue to seek funding through the State of Minnesota’s grant funds and the legislature as it considers pursuing a separate action against 3M. Neither the 2007 Consent Order between the Minnesota Pollution Control Agency and 3M, nor the 2018 Settlement between the State of Minnesota and 3M preclude Hastings from bringing a separate action against 3M related to the PFAS contamination. Hastings can also till seek funds from the State of Minnesota

while also pursuing a separate action. Although a court may not allow Hastings to recover twice, both are viable routes to take until one of them pays off.

Conclusion

If Hastings intends to pursue a treatment and remediation project that is estimated to cost nearly \$70,000,000 for its drinking water system, it may be prudent to opt out of the June 22, 2023 Settlement Agreement to preserve its ability to pursue 3M separately while continuing to investigate the source of the contamination and pursuing funds from the 2018 3M Settlement and the legislature. Conversely, if Hastings fails to timely opt out of the Settlement Agreement by December 11, 2023, it will be bound by all of its terms, including the Release and Covenant Not to Sue.

While there can be significant costs associated with litigation, if Hastings confirms that the contamination came from the 3M manufacturing site, Hastings could also push for early mediation between the parties in an attempt to quickly settle the matter. We would be happy to provide a more in-depth analysis of claims that can be asserted against 3M if Hastings chooses to go this direction.