

California Water District PFAS Lawsuit – \$1 Billion At Stake

Article By:

John Gardella

In August 2020, we flagged the possibility that local water boards in [Orange County, California](#) would file a lawsuit alleging that certain PFAS manufacturers were responsible for PFAS contamination found in the local drinking water sources, with possible damages of over \$1 billion dollars in cleanup costs. On December 1, 2020, eleven local water districts, including the Orange County Water District, filed a [lawsuit in Orange County Court](#) alleging that PFAS manufacturers (DuPont, 3M, Chemours and Corteva) and one consumer product manufacturer (Decra Roofing Systems) are responsible for the costs of cleanup and decontamination related to PFAS in the districts' water. The California water district PFAS lawsuit is significant not only because it is one of the largest PFAS lawsuits filed to date by a water district, but also because it is one of the first times that a consumer product manufacturer is being targeted for PFAS cleanup costs.

What Are PFAS and Why Are They a Concern?

Per- and poly-fluoroalkyl substances ("PFAS") are a class of over 7,000 manmade compounds. Chemists at 3M and Dupont developed the initial PFAS chemicals by accident in the 1930s when researching carbon-based chemical reactions. During one such experiment, an unusual coating remained in the testing chamber, which upon further testing was completely resistant to any methods designed to break apart the atoms within the chemical. The material also had the incredible ability to repel oil and water. Dupont later called this substance PFOA (perfluorooctanoic acid), the first PFAS ever invented. After World War II, Dupont commercialized PFOA into the revolutionary product that the company branded "Teflon."

Only a short while later, 3M invented its own PFAS chemical – perfluorooctane sulfonate (PFOS), which they also commercialized and branded "Scotchgard." Within a short period of time, various PFAS chemicals were used in hundreds of products – today, it numbers in the thousands.

The same physical characteristics that make PFAS useful in a plethora of commercial applications, though, also make them highly persistent and mobile in the environment and the human body – hence the nickname, "forever chemicals." While the science is still developing regarding the extent of possible effects on human health, initial research has shown that PFOA and PFOS are capable of causing certain types of cancer, liver and kidney issues, immunological problems, and reproductive and developmental harm.

Why Now For This California Water District PFAS Lawsuit?

The Orange County lawsuit is not the first lawsuit brought by a water district seeking to recoup the costs of cleanup and decontamination of PFAS. In fact, on October 27, 2020, another California water district (the [Santa Clarita Valley Water Agency](#)) brought a similar, albeit much less extensive, lawsuit for PFAS cleanup costs. However, it was a lawsuit in 2010 brought by the state of Minnesota alleging environmental pollution against PFAS manufacturers that began the ever-increasing litigation brought by states, municipalities, and water districts for PFAS cleanup costs.

In 2010, Minnesota brought the first PFAS pollution claim against 3M for negligently discharging PFAS used in the manufacture of Scotchgard into sources of drinking water. The lawsuit resolved in 2018 for \$850 million, which the state used to fund drinking water and water sustainability projects in the areas affected by contamination. Several states have since followed suit, including Michigan, whose Attorney General sued 17 companies that manufactured PFAS in January 2020 alleging causes of action under the Natural Resources and Environmental Protection Act, the Michigan Fraudulent Transfer Act, and Michigan's laws of negligence, trespass, public nuisance, and unjust enrichment. This case will likely take years to resolve, but will shape the future of PFAS litigation, especially since the lawsuit involves a much broader list of defendants than the Minnesota case. The below chart shows the amounts of reported settlements in environmental pollution cases related to PFAS:

Year of Settlement	Amount	State
2018	\$850 million	MN
2018	\$4 million	AL
2019	\$2.7 million	MN
2019	\$35 million	AL
2020	\$55 million	MI
2020	\$113 million	MI

More recently, water districts from coast to coast either have or are contemplating bringing lawsuits similar to the one filed in Orange County. Ever-increasing public and media pressure have caused PFAS to be one of the most (if not the most) prevalent toxic tort agents discussed in mainstream media. The result has been a slew of passed and proposed legislation in states to regulate PFAS, as well as increased pressure on the EPA to regulate PFAS at the federal level. In turn, agencies such as water districts and wastewater treatment facilities fear that they could be the targets of lawsuits for allegedly contributing to the dispersion and spread of PFAS pollution. Such lawsuits could assert claims under the Clean Water Act and the Resource Conservation and Recovery Act. In short, the allegations would state that the facilities failed to install costly technology that would adequately filter PFAS from water sources. By failing to do so, these facilities (either knowingly or unknowingly) sent PFAS-contaminated water further downstream to other water districts.

As the lawsuits pile up, some water district and wastewater treatment facilities have begun to proactively install state-of-the-art multi-million-dollar filtration systems that eliminate PFAS. However, districts have also begun to fight back and, like some states, are looking to companies that discharge PFAS into the air, water, or soil for contribution. More municipalities, water boards, and treatment facilities are likely to follow in Orange County's footsteps, as the costs of cleanup continue to increase, and parties look to municipalities and treatment facilities to pay damages for PFAS pollution to drinking water.

Consumer Product Manufacturer Liability Aspect of Lawsuit

In addition to three PFAS manufacturers sued by the California water districts, one consumer product company was named as a defendant in the lawsuit – Decra Roofing, a manufacturer of roofing products located in California that allegedly used PFAS in its products. This is a significant piece of the lawsuit that is likely to not receive much media attention – yet, will have significant impact on any manufacturer that uses any of the 7,000+ PFAS chemicals in its manufacturing processes.

To date, aside from the firefighting foam litigation that is ongoing with respect to PFAS pollution, the only industrial company that has been sued for PFAS environmental contamination claims was Wolverine, a company that used PFAS in its manufacturing processes in the 1960s and 1970s. The state of Michigan sued Wolverine for PFAS cleanup costs, and in 2020, the parties reached a \$113 million settlement. This settlement amount should be especially eye-opening and concerning for manufacturing companies.

Now, the California water districts allege that Decra’s manufacturing processes and products further contributed to PFAS environmental pollution. Decra is likely to defend the lawsuit by arguing that it purchased any PFAS chemicals without knowledge of the harmful effects of the substances, and the company may also latch on to the water district’s claims that the PFAS manufacturers deliberately concealed the hazards. Yet, with the prevalence of PFAS in thousands of consumer products, no one should optimistically believe that Decra will be the last manufacturing company to be sued for PFAS cleanup and decontamination costs.

Compliance Programs Critical For Manufacturing Sector

Companies involved in the stream of commerce must pay attention to lawsuit such as the Orange County water district lawsuit, so they do not get caught off guard. While there is ample time to adjust R&D, purchasing, manufacturing, and distribution, it will be important for companies not to fall victim to believing that they will never become embroiled in a PFAS lawsuit. More regulations are likely in the future, data is being collected constantly on potential sources of PFAS pollution, and staying informed and ensuring that strong compliance programs are in place are essential to business continuity.

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