

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE: AQUEOUS FILM-FORMING
FOAMS PRODUCTS LIABILITY
LITIGATION

MDL No. 2-18:mn-2873-RMG

This Document Relates to:

City of Camden, et al. v. 3M Company,
Case No. 2:23-cv-03147-RMG;
*City of Camden, et al. v. E.I. DuPont de
Nemours and Company (n/k/a EIDP, Inc.),
DuPont de Nemours Inc., The Chemours
Company, The Chemours Company FC
LLC, and Corteva, Inc.*
Case No. 2:23-cv-03230-RMG

**MEMORANDUM OF LAW IN SUPPORT OF LEECH LAKE BAND OF OJIBWE'S
MOTION FOR CLARIFICATION OF SETTLEMENT AGREEMENTS**

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I. INTRODUCTION

The Leech Lake Band of Ojibwe (the “Band”) seeks to clarify the settlement class definitions and terms in the pending 3M and DuPont Settlement Agreements (Dkt. Nos. 3620-1, 3393-2) regarding their impact on federally recognized Tribes, including whether Tribes are included in the Settlement Classes, whether natural resource damages claims are included in the Releases, and how the indemnification provisions impact Tribes. In addition, the Band requests that a corrected or clarifying notice be disseminated. Until these ambiguities are resolved, the Leech Lake Band of Ojibwe, as well as over 500 federally recognized Tribes, cannot make informed decisions whether to opt out, remain in, or object to either settlement.

Here is an example of the Band’s uncertainty. The Band has eleven water systems. The water that supplies one of the Band’s schools tested positive for PFAS contamination, but the other ten systems have not tested positive. The Band’s right to a remedy under the 3M Settlement is unclear, because the school water system does not supply enough people to qualify for the 3M Class. Of the Band’s other ten water systems, several would qualify for the 3M Class by number of users, but have not tested positive and are not required to test for PFAS under UCMR-5. In sum, it appears that one of the Band’s water systems has PFAS contamination, and the Band has incurred substantial costs, but it has no remedy under the settlement because none of the Band’s water systems appear to qualify for the 3M Class.

Under the DuPont Settlement, the Band’s contaminated water system supplying the school—which does appear to be within the DuPont Class—is only eligible for a one-time payment of \$1,750. But it is unclear that if the Band accepts the DuPont Settlement for that one water system whether it releases claims the Band may have for costs associated with adverse health effects for the hundreds of students and staff that have for years been drinking contaminated water at the school. As a result of PFAS contamination in this system, the Band has been forced to

provide bottled water to its students and staff and seeks certainty regarding the cost of accepting the DuPont Settlement and releasing claims. In addition, if it accepts the \$1,750 settlement, does the Band also release natural resource claims (for fish, game, wild rice, and soil contamination)?

Specifically, the Band seeks clarification of these issues that impact Tribes:

1. Are federally recognized Tribes, and Public Water Systems owned by Tribes, included in the Settlement Classes? (States and the federal government, which like Indian Tribes are sovereigns, are excluded from the Settlement Classes, but the Settlement Class definitions do not expressly address Tribes.).

2. If yes, are the Class Members Public Water Systems, or the owners of Public Water Systems? (Specifically, is a federally recognized Tribe the Class Member, or is the individual Public Water System that the Tribe owns the Class Member? Whether a sovereign tribal nation that owns multiple Public Water Systems is the Class Member significantly affects the legal implications of opting out of or remaining in the settlement classes.).

3. Can a Tribe that owns multiple Public Water Systems opt out some Systems but have others remain in the Class without releasing the claims of the Systems that opt out?

4. Are future claims of a tribal-owned Public Water System that is not a Class Member released if that same Tribe owns a Public Water System that is a Class Member and that remains in the Class?

5. Are claims for remediation and/or damages resulting from PFAS contaminated natural resources, such as fish, game, and crops (including wild rice) covered by the Releases and Covenants Not to Sue?

6. If a Tribe opts out some Public Water Systems but has others remain in the Class, does the Tribe release all the Tribe's claims for fish, game, crop, and soil remediation and/or damages?

7. Do the release provisions excluding real property claims also exclude release natural resource claims in connection with real property?

8. If a Tribe files an action against 3M or DuPont related to contaminated natural resources, and the source of contamination is a non-tribal Class Member's contaminated water source, would the Class Member (*e.g.*, a city, county, or water district) be liable for the contamination rather than 3M or DuPont?

9. Are claims seeking remediation, monitoring, and/or damages related to costs, such as supplying bottled water, incurred by Tribes and Tribal Health Organizations as a result of PFAS contamination in a Public Water System covered by the Releases and Covenants Not to Sue?

10. How do the indemnity and claims-over provisions of each Settlement impact Tribal Class members? (As sovereign nations, federally recognized Tribes are more akin to states or the federal government than to cities, counties, or water districts. Sovereign nations have different responsibilities, needs, and concerns than a city, county, or water district. If a Tribe remains in a settlement class, it is unclear whether the indemnity provisions shift liability from 3M and DuPont onto the Tribe.).

II. STATEMENT OF FACTS

The Leech Lake Band of Ojibwe is a federally recognized Indian tribe, 88 Fed. Reg. 2112 (Jan. 12, 2023), residing on the Leech Lake Indian Reservation near Cass Lake, Minnesota. The Reservation was established through a series of treaties with the United States and presidential executive orders. *See* Treaties of February 22, 1855 (10 Stat. 1165) & March 19, 1867 (Article I, 16 Stat. 719); Executive Orders of October 29, 1873, November 4, 1873, & May 26, 1874. These

treaties and executive orders promised to make the Reservation the “permanent home” for the Leech Lake people. There are approximately 10,000 enrolled Band members.

Tribes are sovereign nations which existed before the establishment of the United States and continue to exercise sovereignty “over both their members and their territory.” *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (citation omitted); *see also Williams v. Lee*, 358 U.S. 217, 218 (1959). Within their territory, which includes Indian reservations, Tribes maintain traditional ways of life that depend on their natural resources, *see Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), and also develop their lands and resources under the “firm federal policy of promoting tribal self-sufficiency and economic development,” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). To meet their obligations, Tribes operate modern and dynamic governments, which provide infrastructure and government services that promote autonomy and the health and welfare of tribal members and the communities in which they live, and regulate the health of the natural environment that supports their communities’ livelihoods. Tribal infrastructure and services include water systems that Indian tribes—like Plaintiff Water Providers in the Settlement Classes—own and operate and that continue to be affected by the actions of 3M and DuPont.

A. The Band’s School’s Water System Has PFAS Contamination

The Leech Lake Band of Ojibwe owns and operates eleven water systems on the Reservation, including seven Community Water Systems and four Non-Transient Non-Community Water Systems. In late 2022, the Band received a grant from the Bureau of Indian Affairs that funded PFAS sampling of the Band’s water systems. Testing identified detectable levels of PFAS in the Band’s Non-Transient Non-Community Water System that provides water to the Band’s Bug-O-Nay-Ge-Shig School. In April 2023, the Band notified its citizens of the

PFAS contamination, ceased use of the contaminated water system, and began providing bottled water to students and staff.

As a water provider that identified PFAS in its systems prior to the settlement dates, the Band's School's water system should be included the Settlement Agreements. And while the School's water system appears to qualify for the DuPont class, it serves too few people to qualify for the 3M class. (The Band is a putative class member under section 5.1 of the DuPont Settlement (Dkt. No. 3393-1)). However, for reasons discussed below, it is unclear whether Indian Tribes like the Band, or Public Water Systems owned by Tribes, were intended to be included in either Settlement Class.

B. Sovereign Tribal Water Systems Generally Serve Many Fewer People than Class Water Systems

There are 574 federally recognized Tribes in the United States. Many of these Tribes provide water on Indian reservations, and most own and operate more than one Public Water System. In addition, most Tribes provide water to rural populations. As a result, Tribal Water Systems serve fewer people than many of those Systems included in the Settlement Classes.¹

For example, in 2013, the Safe Drinking Water Information System ("S.D.W.I.S.") reported 847 Tribal Public Water Systems serving a total population of 1,269,153.² Of these, only 18 water systems served populations greater than 10,000.³ In comparison, S.D.W.I.S. reported 67,864 Non-Tribal Public Water Systems serving a total population of 306,347,928.⁴ On May 2, 2012, the E.P.A. published its Third Unregulated Contaminant Monitoring Rule ("UCMR-3"),

¹ Summaries of the 3M and DuPont Settlement Class membership requirements are listed in Appendix A.

² Kira Mok et al., *Federal PFAS Testing and Tribal Public Water Systems*, 130 Env't Health Persp. 12 (Dec. 14, 2022), accessible at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9749477/> (last visited Nov. 3, 2023).

³ *Id.*

⁴ *Id.*

requiring public water systems nationwide to monitor from 2013 to 2015 for thirty contaminants, including PFAS.⁵ Analysis completed under UCMR-3 only included 27 of the 847 Tribal Public Water Systems.⁶ Most Non-Tribal Public Water Systems (65,904 of the 67,864) were included under UCMR-3.⁷ As a result, most Tribes were excluded from EPA-required early PFAS testing.

More recently, in 2022, S.D.W.I.S. reported 855 Tribal Public Water Systems serving a total population of 1,400,197.⁸ Of these, only 98 systems serve populations greater than 3,300.⁹ Based on population size, only the largest 98 Tribal Public Water Systems are required to test under UCMR-5.¹⁰ While the EPA began providing grants to test larger water systems, the EPA belatedly recognized a gap in testing Tribal Public Water Systems. The EPA has since implemented a Tribal PFAS Drinking Water Sampling Project. *However, the vast majority of results of the Sampling Project will not be available until after the settlement opt-out deadlines,* adding to Tribes' confusion as to whether they are in the Settlement Classes, and if so, whether the benefits justify not opting-out.¹¹

III. ARGUMENT

A. The Settling Parties Must Clarify Whether Tribes are Class Members, and if so, What Claims They Are Releasing

This Court should grant the Band's Motion for Clarification and enter an order directing the settling parties to explain whether the Settlement Classes include Tribes, if so, what

⁵ E.P.A., *Revisions to the Unregulated Contaminant Monitoring Regulation (UMCR 3) for Public Water Systems*, 77 Fed. Reg. 26072 (May 2, 2012) ("All large community and non-transient non-community water systems serving more than 10,000 people are required to monitor.").

⁶ See Kira Mok, *supra* note 2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See E.P.A., *Tribal PFAS Drinking Water Sampling Project*, accessible at <https://www.epa.gov/tribal-pacific-sw/tribal-PFAS-drinking-water-sampling-project> (last updated Oct. 3, 2023).

consideration is provided to Tribes and *what* claims Tribes are releasing, and how Tribes are impacted by the indemnity provisions. A settlement agreement must identify with specificity the settlement class and the claims intended to be released.¹² Further, a settlement notice¹³ “must ‘fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connections with the proceedings.’” *Masters v. Willhelmina Model Agency, Inc.*, 473 F.3d 423, 438 (2d Cir. 2007).

The principle purpose of Rule 23(e)(1) is “to ensure that absentee class members, for whom a settlement will have preclusive effect, have an opportunity to review the materials relevant to the proposed settlement and to be heard or otherwise take steps to protect their rights before the court approves or rejects the settlement.” 2 *McLaughlin on Class Actions* § 6:17 (10th ed. 2013). “Rule 23(c)(2)(B) specifies information that must be included in a notice, such as the nature of the action, the definition of the class, and the claims, issues, and defenses The rule requires that notices state essential terms ‘concisely and clearly . . . in plain, easily understood language.’” *Manual for Complex Litigation (Fourth)* §21.31 (2004); Fed. R. Civ. P. 23(c) (amended 2018).¹⁴ In failing to

¹² “Defining the class is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled under Rule 23(c)(2) to the ‘best notice practicable’ in a Rule 23(b)(3) action. The definition must be precise, objective, and presently ascertainable.” *Manual for Complex Litigation (Fourth)* §21.222 (2004). Further, “[i]f the definition fails to include a substantial number of persons with claims similar to those of the class members, the definition of the class may be questionable. . . . If the class definition includes people with similar claims but divergent interests or positions, subclasses with separate class representatives and counsel might suffice.” *Id.*

¹³ “Notice . . . provides the structural assurance of fairness that permits representative parties to bind absent class members. In a Rule 23(b)(3) class, notice conveys the information absent class members need to decide whether to opt out and the opportunity to do so.” *Manual for Complex Litigation (Fourth)* § 21.31 (2004) (footnote omitted).

¹⁴ See also Fed. R. Civ. P. 23(e) (amended 2018); Fed. R. Civ. P. 23 Advisory Committee’s Notes to 2018 Amendments (“The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or . . . to object or to make claims.”).

explicitly include or exclude Tribes, the settlement notices and the agreements themselves do not appear to satisfy Rule 23.

B. The Settlement Agreements Are Ambiguous as to Whether Tribes Are Included in the Settlement Classes.

Tribes are more similar to states and the federal government, which are excluded from the Settlement Classes, than the cities, counties, and water districts (“Water Providers”) that the settlements include. Unlike the Water Providers, Tribes are sovereign “and subordinate to, only the Federal Government.” *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 154 (1980). As sovereigns, Tribes have different needs and concerns than the Water Providers. However, both Settlement Agreements fail to address whether or not Tribes are treated in a similar manner as federal and state sovereigns.

The 3M Settlement Agreement fails to address Tribes in the Settlement Class definition. (Dkt. No. 3620-1 ¶ 2.75). Phase One Eligible Claimants are either (1) Community Water Systems providing water to residents of a city or community; or (2) Non-Transient Non-Community Water Systems serving more than 3,300 individuals. *Id.* Phase Two Eligible Claimants are those systems that are subject to UCMR-5 monitoring. *Id.* Water systems subject to UCMR-5 monitoring are Public Water Systems serving more than 3,300 individuals. *See supra* note 2, at 3. The 3M Settlement Agreement mentions Tribes only once: Exhibit F to the 3M Settlement Agreement identifies several water systems owned by Tribes as Phase Two Eligible Claimants.¹⁵ (Dkt. No. 3620-1, Ex. F). But the parties explain that Exhibit F “is illustrative only” and that the parties only “have attempted” to list Phase Two Eligible Claimants in Exhibit F. (Dkt. No. 3620-1 ¶ 5.2). The

¹⁵ It is unclear how the parties established the list in Exhibit F, but the list may have been created from records on the S.D.W.I.S.

lack of clarity as to the actual status of Tribes in the language of the 3M Settlement must be resolved in order to provide Tribes the opportunity to exercise their rights.

The DuPont Settlement Agreement is seemingly more inclusive of all water systems – regardless of size, although like the 3M Settlement Agreement it generally excludes state and federal systems, with exceptions expressly defined in the agreement. (Dkt. No. 3393-2 ¶¶ 5.1.1, 5.1.2(b)-(c)). However, the DuPont Settlement Agreement is limited by the Phase One cut-off date. (Dkt. No. 3393, at 13). A Public Water System of any size qualifies for Phase One of the DuPont Settlement Class only if that water system tested positive for PFAS before the June 30, 2023 cut-off date. *Id.* Prior to June 2023, only a fraction of Tribal Public Water Systems received PFAS testing through the EPA.¹⁶ Additionally, the Phase Two Eligible Claimants are limited to Public Water Systems that are subject to UCMR-5 monitoring or some similar state or federal PFAS testing requirements, and many Tribes have historically been excluded from most federal and state PFAS testing. (Dkt. No. 3393-2 ¶ 5.1.1). Lastly, the DuPont Settlement Agreement and Exhibits do not mention Tribes or any Tribal Water Systems. (Dkt. No. 3393-2). As with the 3M Settlement, the information sought in this Motion is necessary to protect the Tribal rights.

C. The Releases are Ambiguous Regarding Natural Resource Damages Claims.

A crucial part of any class settlement agreement is the description of the release. If Tribes or the water systems they own and operate are members of either Settlement Class, they risk releasing claims unique to sovereigns, including natural resource damages. However, neither settlement agreement addresses whether class members release natural resource claims. Instead, as described below, the release provisions are broad and could be interpreted as either inclusive or exclusive of natural resource damage claims.

¹⁶ See discussion of the belated EPA testing of Tribal water systems, *supra*.

The 3M Settlement Class releases five categories of PFAS-related claims: (1) Potable Water Claims; (2) PFAS Product Claims; (3) Non-Potable Water Claims; (4) PFAS Representation Claims; and (5) Punitive or Exemplary Claims. (Dkt No. 3620-1, ¶ 11.1.1(i-v)). The DuPont Settlement Class releases four categories of PFAS-related claims: (1) PFAS Contamination Claims related to potable water, facilities, and real property; (2) PFAS Product Claims; (3) PFAS Remediation Claims; and (4) PFAS MDL Claims. (Dkt. No. 3393-2, ¶ 12.1.1(i-iv)).

Both settlements include two categories of claims excluded from each release: (1) real property claims, so long as the real property is separate from and not related to a Public Water System, and (2) stormwater and waste water claims. (Dkt. No. 3620-1, ¶ 11.1.2.1(i)-(ii); Dkt. No. 3393-2 ¶ 12.1.2(a)). The system or facility must be separate from and unrelated to the Class Member's Public Water System. (Dkt. No. 3620-1, ¶ 11.1.2.2(i)-(ii); Dkt. No. 3393-2, ¶ 12.1.2(a)).

Neither settlement provides a definition for “real property” or explains whether natural resources, such as fish, game, soil, surface water, and crops are treated separately from real property. If real property, such as a residential home, is contaminated through the use of water from a contaminated Public Water System, it is unclear whether claims for remediation of contaminated fish from a river passing through the property would be released if the river is separate from the Public Water System. Likewise, it is unclear whether claims for contamination of wild rice crops on the property contaminated by a separate water system for irrigation are released.

Because of cultural significance and subsistence lifestyles, natural resource contamination is a significant concern for Tribes. For example, fish, deer, and wild rice are sources of cultural significance and staples of the Leech Lake Band members' diets. The Band has a duty to remediate contamination of its natural resources for tribal members' health and safety and the continuation

of their culture and lifeways. In 2018-2019, the EPA identified PFAS contamination of Northern Pike located in the Leech Lake River on the Leech Lake Band's Reservation.¹⁷ The Band is undergoing testing of other species of fish, deer, and wild rice so that it may issue consumption advisories to tribal members to prevent further health impacts.

As the Settlement Agreements are written, it is not possible for Leech Lake to know whether claims arising from the contamination of these resources, and the Band's obligation to remediate that contamination, are released. For example, it is unclear whether Leech Lake may remain in a settlement class and also bring a legal action against 3M and/or DuPont for the contamination of wild rice or fish if the source of the contamination is related to a contaminated Public Water System that does not fall within the class definitions if another of the Band's Public Water Systems is included. As a result, it is not possible for the Band to make an informed decision to opt out or to remain in the settlement classes. The same is true for many other Tribes that did not have the benefit of PFAS testing in advance of the June 22, 2023 deadlines. The parties must resolve this ambiguity so that Tribes that are eligible Class Members may make an informed decision whether to remain in either Settlement Class.

D. The Indemnification Provisions Remain Overbroad and Ambiguous as to Tribes.

The Settlement Agreements also fail to address how Tribes are impacted by the indemnification provisions. For example, if a Tribe remains in either Settlement Class, the Tribe may be required to indemnify 3M or DuPont from any claim related to the Tribe's contaminated drinking water – exposing the Tribe to an uncapped financial obligation that could easily exceed

¹⁷ In 2018-2019, the EPA surveyed fish from rivers and streams throughout the United States. *See* EPA, *National Rivers and Streams Assessment*, accessible at <https://www.epa.gov/national-aquatic-resource-surveys/nrsa> (last updated Mar. 9, 2023). Although results of the study are not yet available, the data has been published and identifies PFAS contamination in Northern Pike in the Leech Lake River.

any amount the Tribe receives through the settlements. Because the Leech Lake Band's contaminated water system is a Non-Transient Non-Community Water System, the Band is only entitled to \$1,750 from the DuPont settlement. If the Band was required to indemnify DuPont for a surrounding city or county's claims, that amount undoubtedly will exceed the Band's settlement payment.

Conversely, Tribes not included in the 3M or DuPont Settlement Classes would be limited by the indemnity provisions if any PFAS contamination is related to a Class Member's water. For example, if a Tribe files an action against 3M related to contaminated fish, and the source of contamination is a non-tribal Class Member's contaminated water source, the Class Member (*e.g.*, a city, county, or water district) would be liable for 3M's contamination rather than 3M itself.

States too expressed concern for sovereigns' indemnity obligations under the Settlement Agreements. *See* States' & Sovereigns' Omnibus Opp'n to Pls.' Mot. Prelim. Approval of Class Settlement (Dkt. No. 3460). Specifically, the States argued "[t]he Sovereigns [] have the responsibility to protect the health and welfare of their citizens. . . . Because this provision, as written, would require each class member to indemnify 3M as to any such claim by a Sovereign, it would effectively paralyze the class members' ability to accept such funding, thereby leaving them without the full amount needed to protect their customers with effective PFAS treatment." *Id.* at 9. The indemnification provisions in the Settlement Agreements were revised to exclude States. *See* Prelim. Approval Order for 3M Settlement Agreement (Dkt. No. 3626); Prelim. Approval Order for DuPont Settlement Agreement (Dkt. No. 3603).

However, the issues raised in the States' opposition remain concerns for Tribes. As a Class Member of the DuPont Settlement, it is unclear whether the indemnity provision shifts DuPont's liability onto the Leech Lake Band of Ojibwe if the Band remains in the Settlement Class.

Likewise, the 3M indemnity provision could shift 3M's liability onto a Class Member, such as Cass County, to remediate the contamination of water at the Band's Bug-O-Nay-Ge-Shig School. Therefore, for Tribes, the indemnification provisions remain overbroad, or at a minimum, ambiguous, and must be addressed.

IV. CONCLUSION

A class settlement agreement must clearly identify the class, the consideration, and the scope of the claims being released. The 3M and DuPont Settlement Agreements fail to address several issues of concern for Tribes, including whether federally recognized Tribes are included in the settlement classes, whether natural resource damages claims are included in the Releases, and how indemnification provisions impact Tribes. Until these ambiguities are resolved, the Leech Lake Band of Ojibwe, as well as other federally recognized Tribes, cannot make informed decisions whether to opt out or remain in either settlement class. For the reasons set forth above, the Band respectfully requests the Court grant the Band's Motion for Clarification and direct the parties to resolve the several ambiguities described.

Dated: November 3, 2023

Respectfully submitted,

By: /s/ Eric B. Fastiff

**LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP**

Elizabeth Cabraser

Eric B. Fastiff

Dan Drachler

Robert Nelson

275 Battery Street, 29th Floor

San Francisco, CA 94111-3339

Telephone: (415) 956-1000

Facsimile: (415) 956-1008

ecabraser@lchb.com

efastiff@lchb.com

ddrachler@lchb.com

rnelson@lchb.com

Emily N. Harwell
250 Hudson Street, 8th Floor
New York City, NY 10013
Telephone: (212) 355-9500
eharwell@lchb.com

**SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY LLP**

Frank S. Holleman, IV
145 Willow Street
Suite 200
Bonita, CA 91902-1349
Telephone: (619) 267-1306
fholleman@sonosky.com

K. Amanda Saunders
510 L Street
Suite 310
Anchorage, AK 99501
Telephone: (907) 258-6377
amandas@sonosky.net

LEECH LAKE BAND OF OJIBWE

Christopher Murray
Legal Director
190 Sailstar Drive NE
Cass Lake, MN 56633
Telephone: (218) 355-3676
christopher.murray@llojibwe.net

Ralph Overholt
Tribal Attorney
190 Sailstar Drive NE
Cass Lake, MN 56633
Telephone: (218) 407-7229
ralph.overholt@llojibwe.net

Attorneys for Leech Lake Band of Ojibwe

APPENDIX A

A. The 3M Settlement Class

The Proposed Settlement Class includes “[e]very Active Public Water System in the United States of America that—(a) has one or more Impacted Water Sources¹⁸ as of [June 22, 2023]; or (b) does not have an Impacted Water Source as of [June 22, 2023], and (i) is required to test for certain PFAS under UCMR-5¹⁹, or (ii) serves more than 3,300 people, according to SDWIS.²⁰” (Dkt. No. 3620-1 ¶ 5.1). An estimated 12,000 water systems fall within the Proposed Settlement Class definition. (Dkt. No. 3370-1, at 14).

“Each Active Public Water System that qualifies as a member of the proposed Settlement Class is either a ‘Phase One Eligible Claimant’ or a ‘Phase Two Eligible Claimant,’ but cannot be both.” (Dkt. No. 3626 (citing Dkt. No. 3620-1 ¶ 5.1)). Eligible Claimants with one or more Impacted Water Sources as of June 22, 2023, are “Phase One Eligible Claimants,” and Eligible Claimants that do not have one or more Impacted Water Source as of June 22, 2023, are “Phase Two Eligible Claimants.” (Dkt. No. 3620-1 ¶ 2.25).

The Settlement Agreement organizes water systems into the following categories:

¹⁸ An Impacted Water Source is a potable water source that has tested positive for PFAS. (Dkt. No. 3620-1, ¶ 2.30).

¹⁹ UCMR-5 means the U.S. E.P.A.’s Fifth Unregulated Contaminant Monitoring Rule which requires certain Public Water Systems to test for drinking water contaminants. Public water systems serving more than 10,000 people are required to test under UCMR-5. Systems serving 3,300 to 10,000 people, and 800 representative Public Water Systems serving fewer than 3,300 people are required to test, subject to funding and laboratory capacity. *See* Fifth Unregulated Contaminant Monitoring Rule, <https://www.epa.gov/dwucmr/fifth-unregulated-contaminant-monitoring-rule>.

²⁰ S.D.W.I.S. is the U.S. E.P.A. Safe Drinking Water Information System. *See* S.D.W.I.S. Federal Reports Search, https://sdwis.epa.gov/ords/sfdw_pub/r/sfdw/sdwis_fed_reports_public/200.

1. Community Water System. A Community Water System “serves at least fifteen (15) service connections used by year-round residents or regularly serves at least twenty-five (25) year-round residents.” (Dkt. No. 3620-1 ¶ 2.18).

2. Non-Transient Non-Community Water System. This type of water system “is not a Community Water System” and “regularly serves at least twenty-five (25) of the same persons over six (6) months per year.” (Dkt. No. 3620-1 ¶ 2.36).

3. Transient Non-Community Water System. A Transient Non-Community Water System “is not a Community Water System” and “does not regularly serve at least twenty-five (25) for at least (6) months per year.” (Dkt. No. 3620-1 ¶ 2.75).

The Settlement Agreement provides a lengthy, multi-part definition for the term “Public Water System.” (Dkt. No. 3620-1 ¶ 2.54). First, a water system must provide potable water “through pipes or other constructed conveyances,” and the system must (a) have “at least fifteen (15) service connections” or (b) regularly serve “an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year[.]” *Id.*

Second, the definition includes “(a) any collection, treatment, storage, or distribution facilities under control of the operator of such system and used primarily in connection with such system,” and “(b) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.” *Id.* Lastly, a water system must be “a Community Water System of any size or a Non-Transient Non-Community Water System that serves more than 3,300 people, according to S.D.W.I.S[.]” *Id.*

Public Water Systems excluded from the Proposed Settlement Class include Non-Transient Non-Community Water Systems serving 3,300 or fewer people and all Transient Non-Community Water Systems. (Dkt. No. 3620-1 ¶ 2.54). Among those excluded are all Public

Water Systems owned by the federal government and any state government. (Dkt. No. 3620-1, Ex. H); (Dkt. No. 3620-1, Ex. I). However, the Settlement Class definition, as well as other provisions of the Settlement Agreement, fails to clearly identify whether Tribes are intended to be included in the Settlement Class, what consideration is provided to Tribes, what claims Tribes are releasing, and how Tribes are impacted by the indemnity provision.

B. The DuPont Settlement Class

The DuPont Settlement Class includes (1) all Public Water Systems in the United States “that draw or otherwise collect from any Water Source²¹ that, on or before [June 30, 2023], was tested or otherwise analyzed for PFAS and found to contain PFAS at any level”; and (2) all Public Water Systems in the United States “that, as of [June 30, 2023], are (i) subject to the monitoring rules set forth in UCMR 5[.],” or (ii) are “required under applicable state or federal law to test or otherwise analyze any of their Water Sources or the water they provide for PFAS before the UCMR 5 Deadline.” (Dkt. No. 3393-2 ¶ 5.1.1). An estimated 14,000 water systems are included in the DuPont Settlement Class. (Dkt. No. 3393, at 15.)

All active and inactive Community Water Systems, Non-Transient Non-Community Water Systems, and Transient Non-Community Water Systems are included in the DuPont Settlement’s Public Water System definition. (Dkt. No. 3393-2 ¶ 5.1.1). However, all Transient Non-Community Water Systems and Non-Transient Non-Community Water Systems serving fewer than 3,300 individuals are limited to small, one-time payments from the Settlement.²²

²¹ A Water Source is “any groundwater well, surface water intake, and any other intake point from which a Public Water System draws or collects Drinking Water.” §2.16. Drinking Water means “water that has entered or is provided by a Public Water System, including water stored or maintained by a Public Water System for distribution to customers or users.” (Dkt. No. 3393-2 ¶ 2.71).

²² Transient Non-Community Water Systems will receive a one-time payment of \$1,250, and Non-Transient Non-Community Water Systems serving fewer than 3,300 people will receive a one-time payment of \$1,750. (Dkt. No. 3393-2, Ex. C, at 10), (Dkt. No. 3393-2 ¶ 4(f)(ii), at 23), (Dkt.

Public Water Systems excluded from the Proposed Settlement Class include those owned and operated by any state government and by the federal government. (Dkt. No. 3393-2 ¶¶ 5.1.2(b), (c). The Settlement Class definition, as well as other provisions of the Settlement Agreement and exhibits, fails to identify whether Tribes are intended to be included in the Settlement Class, what consideration is provided to Tribes, what claims Tribes are releasing, and how Tribes are impacted by the indemnity provision.

No. 3393-2 ¶ 5(g)(ii)). Recipients of these payments are not eligible for any additional payments other than those for testing eligible water systems in the amount of \$200 per system. *Id.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with this Court's CM/ECF on this 3rd day of November, 2023 and was thus served electronically upon counsel of record.

Dated: November 3, 2023

/s/ Eric B. Fastiff
Eric B. Fastiff