

## **KP LAW AND NAPOLI SHKOLNIK PLLC PFAS FALL 2022 UPDATE**

### **MASS DEP GRANTS:**

November 7, 2022

Today, MassDEP announced a new grant opportunity for small public water systems (PWS) for reimbursement or payment for new long-term treatment of PFAS for supplies that have exceeded the PFAS6 Maximum Contaminant Level (MCL) of 20 parts per trillion.

MassDEP is making \$1.03M available to public or private PWSs serving less than 3,300 users through this program. PWSs that have already received funding for the same project under previous MassDEP funding (Rounds 1 and/or 2 of the PFAS Treatment Grant Program, the State Revolving Fund, or any other state or federal grant or loan) are not eligible for the Small System grant.

**Grant applications are due by December 15, 2022.** Applicants may submit questions regarding the grant opportunity by November 16, 2022.

The procurement schedule and information on the application process, Environmental Justice prioritization, and work eligible for reimbursement can be found on MassDEP's website: <https://www.mass.gov/info-details/water-resources-grants-financial-assistance#small-system-pfas-grant-program->.

### **MEDIATOR APPOINTED IN MULTIDISTRICT PFAS LITIGATION:**

On October 26, Judge Richard Gergel issued a Case Management Order appointing retired Federal Judge Layn Phillips to serve as a Court appointed mediator to assist the parties in this litigation. The order also vests the Plaintiff's Executive Committee, of which our Partner Paul Napoli is co-lead counsel, and the Defendant's Coordination Committee each with the authority to "[e]xplore, develop and pursue all settlement options pertaining to any claim or counterclaim, or portion thereof, in any case filed in this litigation."

In practical terms, this means that Paul and our firm, already deeply involved in the progress of every facet of this case, will be even more critical to favorable resolutions on behalf of our clients.

## **PLAINTIFFS WIN SUMMARY JUDGEMENT MOTION**

We are pleased to report that on September 16, 2022 the Judge Gergel issued an order denying the defendants' summary judgment motion, based on the "government contractor defense." Under certain circumstances, this defense allows private contractors to share the government's immunity from tort liability for products manufactured in compliance with military specifications. Judge Richard M. Gergel, the presiding judge in the AFFF MDL, on Friday issued an order denying motions for summary judgment filed by 3M Company and a group of telomer AFFF manufacturers on the basis of the government contractor immunity defense. His denial of those motions clears the way for the parties to finalize the pre-trial work necessary to hold the first trials in the three remaining water supplier bellwether cases next year. Briefly, the court found that the AFFF Mil-Spec does not immunize the manufacturer defendants from civil liability cases on two bases which have a degree of overlap.

The Court's decision is an overwhelmingly positive development for the Plaintiffs in the MDL. The defendants have emphasized the government contractor defense since the very beginning of this litigation and repeatedly suggested they expected to win summary judgment on this issue. The Court's ruling has proven them wrong, and while defendants may consider an appeal of that ruling, they are not entitled to an immediate appeal "as of right" in these circumstances. Instead, if the defendants wish to appeal at this stage, they must ask for leave to file an interlocutory appeal. In our opinion, it is doubtful that Judge Gergel or the Fourth Circuit will allow them to pursue an interlocutory appeal (i.e., an appeal made prior to a final resolution of the plaintiffs' claims in the MDL). We also remain confident that even if an appeal did ever reach the 4<sup>th</sup> Circuit, Judge Gergel's ruling would be upheld.

Each of these events adds to the urgency of water utilities joining this cost recovery program as soon as possible. Please contact Mark Reich at KP Law for more information or reach out to Hank Naughton of Napoli Shkolnik PLLC directly at (978) 852-3643 or at [hnaughton@napolilaw.com](mailto:hnaughton@napolilaw.com).