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R/ John

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## **Lawsuits take aim at chemical giants over poisoned drinking water...Blame game**

By Nat Stein

It was only a matter of time.

Several avenues for legal recourse are now available to residents in the Fountain, Security, Widefield area who learned earlier this year that toxic chemicals have been seeping into their drinking water for decades. Three class-action lawsuits were filed in the past week — two by Denver-based Hannon Law Firm and one by Springs-based McDivitt Law Firm in partnership with New York-based Napoli Shkolnik PLLC — against a half dozen chemical manufacturers.

They share a central allegation: The companies "knew or should have known" about the danger their products posed to the environment, human health and private property, and were therefore wrong to keep making, distributing and profiting off them for decades.

This issue trickled into public awareness in January when routine but unrequired testing found concerning levels of perfluoroalkyls — or PFAs, which belong to the broader category, perfluorinated chemicals, or PFCs — in 94 public water systems nationwide, including three that serve 70,000 customers locally.

The actual amounts weren't enough to mandate action, but they were enough to raise flags among a community of researchers, public health experts and watchdogs who have long argued that the federal government's regulatory standards for these man-made, industrial chemicals are far too lenient given their documented links to cancer, liver damage and low birth weights.

Those January results put more pressure on the Environmental Protection Agency to act, so in May came a new provisional health advisory that lowered the level of PFCs considered potentially hazardous to 70 parts per trillion down from 400 ppt for PFOA and 200 ppt for PFOS. The action was not regulatory or enforceable, but did catalyze movement that's beginning to gain steam.

**Locally, the contamination** is likely coming from Peterson Air Force Base, where personnel have used a fire suppressant called Aqueous Film-Forming Foam (AFFF) to extinguish petroleum-based flames in both emergency and training situations. AFFF was originally developed in the 1960s through a partnership between the **U.S. Naval Research Laboratory** and 3M chemical company. Since then, other manufacturers have come up with their own formulations, used by military and municipal firefighters nationwide to save lives.

But, because it's full of PFCs, AFFF may also threaten lives. That's why its manufacturers now stand accused.

The Hannon complaints name 3M, Ansul and National Foam as defendants. The McDivitt/Napoli Shkolnik complaint does too, adding Angus Fire, Buckeye Fire Protection Co. and Chemguard.

Peterson AFB spokeswoman Shellie-Anne Espinosa tells the *Indy* that the base currently has 2,404 gallons in stock, still authorized for emergency use, nearly half purchased from Ansul in 2013-2014. Bases across the country will replace the foam with a more environmentally friendly alternative by the end of the year.

Investigative findings released by the Air Force Civil Engineer Center in August revealed several accidental

discharges of AFFF at Peterson over the years (including one in which personnel tripped the manual release while playing basketball). But otherwise, the foam was used according to the manufacturers' instructions. And that, plaintiffs argue, is exactly what went wrong. The chemical companies developed and sold a defective product without adequate warning about its dangers. Not only that, the suits allege, but the companies did so knowingly and recklessly.

Both law firms offer the same evidence (though more is likely to surface during discovery). First, 3M started monitoring its own employees' health in the mid-1980s and determined the fluorochemicals did indeed bioaccumulate in their bodies. Also, an EPA internal memo in 2000 about 3M's voluntary phaseout of PFOA and PFOS stated that "3M data supplied to EPA indicated that these chemicals are very persistent in the environment, have a strong tendency to accumulate in human and animal tissues and could potentially pose a risk to human health and the environment over the long term."

In 2000, 3M took those products off the market but didn't issue a recall while other manufacturers continued to produce PFC-laden AFFF. In 2010, EPA launched a stewardship program "inviting" major chemical companies to cease production. Other than 3M, none of the named defendants agreed to participate.

3M's attorney William A. Brewer III expressed confidence about his defense, saying by email, "We believe these legal actions against 3M in connection with AFFF lack merit, and fail to appreciate that 3M sold these products with instructions regarding their safe use and disposal," adding that "3M acted responsibly at all times."

The other defendants either ignored or declined the *Indy*'s request for comment.

**Though the lawsuits** are similar in essence, there are subtle differences. Both list shared grounds for legal action — negligence, defective product design, failure to warn about that defective product design and unjust enrichment from the whole enterprise — but McDivitt includes nuisance, i.e., that the defendants' actions caused plaintiffs "inconvenience or annoyance" and "unreasonably interfered with the use and enjoyment of their property."

Both suits want the chemical companies to pay for personal injury and property damage, including costs of medical monitoring for those who drank the contaminated water, compensation for loss of property value and surrender of profits made off the wrongdoing.

The Hannon complaints identify the injured parties as residing in a particular geographic area bounded by the southern edge of the Fountain Water District on the north, Interstate 25 on the west, the southernmost point of Hanover Road on the south and the eastern boundary of Widefield Water District extended to Hanover Road to the east. Anyone who lives in that region and consumed municipally supplied water could be considered a member of that class action.

McDivitt sets forth multiple, overlapping classes: Fountain Creek Watershed Area residents who drink from the municipal water supply; residents of that same area who drink from private wells; and all area property owners.

Kevin Hannon, the Denver attorney whose firm has waged class-actions against big-name energy, insurance and car companies, chose not to comment, but Mike McDivitt, of the local personal injury firm, did go on record to say his and Hannon's firms are cooperating, not competing.

"The fact that there's more than one lawsuit just indicates the severity of the problem," McDivitt says. He expects the suits to be consolidated eventually because "at the end of the day, we're all on the same side" and indicated it's not out of the question for the litigation to eventually connect with others nationwide. (Around 5.2 million Americans drink water that contains more PFCs than is advised, according to a *New York Times* estimate.)

Private tort remedies of the sort now pursued seem to be all that's available to local residents given that PFCs are still unregulated. Congress recently overhauled the decades-old Toxic Substances Control Act (TSCA), the primary federal statute relevant to manmade toxins, but environmental advocates remain cynical that the reforms really have much teeth.

D.C.-based National Resource Defense Council's Public Health Director Erik Olson offers why lobbying for tougher protections of Americans' drinking water has been an uphill battle: Regulating chemicals already on the market is a "complex and burdensome" administrative process that the EPA doesn't have "the stomach" to take on.

EPA officials didn't reply to the *Indy*'s request for comment by deadline, but PFCs have been designated a "contaminant of concern."

The reformed law's risk evaluation process now includes the opportunity to consider health effects specific to vulnerable populations (in the case of PFCs, newborns and the elderly). But Olson feels these improvements are more nominal than substantive. "Most people don't realize," he said, "that the entire regulatory system for toxic chemicals relies on studies done by the industry itself. And that's a really huge problem."

For the time being, local residents who think they may qualify as class members can contact the firms heading the litigation to learn about their options.

McDivitt believes "it would really be to your disadvantage to sit back and do nothing."