



MEMORANDUM

TO: Boards of Directors
FROM: Brian Thompson, Government Affairs Administrator
DATE: November 28, 2023
RE: November 30, 2023, Board Meeting

This memorandum shall serve as notice of a Special Joint Meeting of the Boards of Directors of the Eagle River Water & Sanitation District and the Upper Eagle Regional Water Authority:

**Thursday, November 30, 2023
09:00 a.m.**

This meeting will be held at:

Walter Kirch Room
Eagle River Water & Sanitation District Vail office
846 Forest Road
Vail, Colorado

The meeting can also be accessed on Microsoft Teams. Login information can be requested by sending an email at least 24 hours in advance to info@erwsd.org.

Input from members of the public is welcomed during the meeting's designated Public Comment period consistent with § 18-9-108, C.R.S. Speakers may address the Board on a first-recognized basis by the Chair. Public Comments are limited to three minutes per speaker on relevant matters not listed on the agenda.



BOARDS OF DIRECTORS SPECIAL JOINT MEETING
November 30, 2023
09:00 a.m.
Walter Kirch Conference Room

AGENDA

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| 1. Introductions | <u>Attachment Link</u> |
| 2. Public Comment | |
| 3. Consideration of Exclusion or Inclusion in PFAS Class Action Settlements - Steve Bushong, Water Quality Counsel | Action Item |
| 4. Executive Session | |
| 4.1. Motion to move into executive pursuant to pursuant to §24-6-402(4)(b), C.R.S., to receive legal advice regarding certain PFAS class action settlements | |
| 5. Adjournment | |

Bushong & Holleman PC

A t t o r n e y s • a t • L a w

1525 Spruce Street, Suite 200, Boulder, Colorado 80302

TO: Board of Directors for the Eagle River Water & Sanitation and the Upper Eagle Regional Water Authority.

FROM: Steve Bushong

DATE: November 27, 2023

RE: Decision regarding PFAS Class Action Settlements

As you are aware, there are two pending class action settlements involving the presence of PFAS in Public Water Systems (“PWS”). Unless they opt out by the deadlines (December 4 and 11), ERWSD and UERWA will be subject to those settlement agreements if the settlements are ultimately approved by the Court.

The decision to stay in or opt out of the settlement agreements is complicated by broad and sometimes vague language in the agreements as described below. Some of the issues that arise under the settlement agreements were raised in objections filed by ERWSD and UERWA. Special Counsel obtained an order from the Court clarifying that the filing of objections would not preclude opting out. However, those objections are unlikely to be resolved prior to the opt-out deadlines. The purpose of this Memorandum is to provide a high-level summary of the pros and cons of staying in or opting out of the class action settlement agreements to facilitate a decision.

Scope of the Issue. We don’t fully understand the scope of the PFAS contamination issue. There are 1000s of chemicals that fall within this class of chemicals, but only 29 are currently required to be monitored. UERWA has detected PFAS in 4 out of 5 sources and ERWSD has detected PFAS in 1 out of 6 of its sources. All PFAS detections are less than the current 4 parts per trillion (“ppt”) maximum contaminant level for a PWS. However, EPA states that the goal is 0 ppt. Activated carbon is currently the treatment being used for PFAS. Treatment costs for public water systems will be significant – as will monitoring costs. In the event effluent limits are ever adopted for PFAS, the costs to wastewater treatment providers will also be significant. Given that PFAS has been in use starting in the 1950s, does not biodegrade, and may cause adverse health effects at very low levels, PFAS will be an ongoing issue for PWS for a long time.

Pros of Staying in Class Action Settlement Agreements. The clearest pros of staying in the settlement agreements are as follows:

- Some compensation will be received. It is not possible to calculate the exact amounts of compensation, but estimates are that UERWA would receive about \$400,000 and ERWSD about \$80,000 for the *known* contamination in their water sources. There’s also potential for future compensation for later PFAS detections and monitoring.

- No need to incur costly and difficult litigation.
- It is unknown whether any compensation can be achieved after opting out for the following principle reasons:
 - Uncertainty of litigation.
 - PWS that opts out will likely go to the “end of the line” behind PFAS cases already pending for personal injury and private well owners/small water providers.
 - It is unclear whether the current defendants (3M and DuPont) will survive all the PFAS litigation. 3M is about 70% and Dupont about 5% of the PFAS market share.

Cons of Staying in the Class Action Settlements. The clearest cons of staying in the settlement agreements are as follows:

- The release in the settlement agreements is very broad. Any existing or future claim related to PFAS in a public water system is released against defendants, regardless of any regulatory changes that may occur, and the definition of PFAS appears to capture most if not all PFAS compounds. The release is “as broad, expansive, and inclusive as possible” and would include, for example, personal injury claims.
- The release includes an exclusion for wastewater claims, but only so long as the “facility is separate from and not related in any way to the Class Member’s Public Water System.” One could read that language as not excluding a wastewater facility from the release if it receives wastewater from a public water system, but that would seem to defeat the very purpose of the exclusion.
- By staying in the settlement, ERWSD and UERWA would become a “Releasing Party,” which is broadly and vaguely defined to be releasing not only your claims, but by example, those of any entity or person “acting in privity with or acting on behalf of or in concert with” you or your PWS, or that is “legally responsible for funding” you or your PWS. The definition of Releasing Party is to “be as broad, expansive, and inclusive as possible.” Thus, other parties or individuals could be bound by ERWSD’s and UERWA’s decisions.
- An indemnity clause was replaced with new provisions due to earlier objections, but the new provisions could still require indemnification under some circumstances. Specifically, although the new provision is designed to preclude certain future PFAS litigation, if nonetheless such litigation involving a Class Member’s PFAS in its PWS were to result in a PFAS award against 3M or DuPont, the Class Member may be required to reduce its compensation “by whatever amount is necessary, or take other action as is sufficient, to fully extinguish” the claim against 3M or DuPont.

- 3M is the significantly larger settlement, but payments by 3M are made over time. There is the risk that 3M declares bankruptcy before paying out the full amount.
- The compensation associated with staying in the settlement agreements will not cover costs associated with PFAS for very long and the compensation to PWS from the defendants is capped.

Complication for ERWSD and UERWA Decision. Although ERWSD and UERWA both own and operate their own water treatment facilities and will thus incur their own PFAS costs, they are very interrelated entities. For example, CDPHE treats the two entities as one for purposes of regulatory compliance programs and ERWSD treats wastewater from UERWA customers. That raises a question. If one opts out and the other stays in, will the release agreed to by the party staying in be inferred upon the party opting out for the reasons described above.

Recommendations. The above circumstances make this a very entity-specific determination. I am generally of the opinion that the question comes down to weighing the known compensation and potential for future compensation under the settlements against the potential risks of the broad language in the settlements. Thus, the smaller the known compensation the less value exists in staying in the settlements. However, I have clients with zero known compensation that are staying in the settlement agreements, and I suspect there are some PWS with large compensation that may opt out.