

**Special Counsel Contract – AFFF Litigation – Keller Rohrback,
Napoli Shkolnick, Edelson and Miner, Barnhill & Galland**

General Description

The firms will provide professional legal services in pursuing claims for damages against companies who manufactured, distributed, marketed, and sold AFFF (“aqueous film-forming foam”)/Component Products with the actual knowledge and/or substantial certainty that AFFF containing PFOS, PFOA, and/or their chemical precursors would, through normal use, release PFAS that would migrate into the soil, sediment, surface water, and groundwater, causing contamination.

Term

January 1, 2023 – conclusion of all assigned litigation or December 31, 2026, whichever occurs later.

Special Counsel RFQ Timeline

September 12, 2022:	Request for qualifications issued
September 26, 2022:	Deadline to submit qualifications statement
October 3, 2022:	Notification of invitation to interview
October 27 and 28, 2022:	Outside counsel interviews with selection committee
November 14, 2022:	CAO meeting with selected litigation team -- Keller Rohrback, Napoli Shkolnick, Edelson and Miner, Barnhill & Galland (“AFFF Team”)

Payment Mechanism

Payment to AFFF Team is based on a flat rate contingency fee. 15% net of sums recovered up to \$500 million, and 10% for recovery in excess of \$500 million. Costs and expenses will be deducted from sums recovered before the fee is calculated. Because the AFFF Team is made up of four separate law firms, attorneys’ fees will be divided, with Keller Rohrback to receive 30% as lead attorney and the other three firms to receive 23.3%.

Scope of Problem

Per- and polyfluoroalkyl substances (collectively, “PFAS”) are a class of highly toxic “forever” chemicals that persist in the environment indefinitely. These chemicals are human-made and do not occur naturally in the environment. PFAS are dangerous to human health and the environment even at fleetingly low levels. Because these compounds bio-accumulate and bio-magnify in human and animal tissues, there may be no safe level of exposure to PFAS. PFAS exposure interferes with human immune system functioning, disrupts mammalian reproductive and endocrine systems, and is associated with increased risks of kidney and testicular cancer. In addition to being highly toxic, these “forever chemicals” are highly mobile. When they enter the environment, they travel through soil and eventually work their way into groundwater.

Two of the most used PFAS are perfluorooctanoic acid (“PFOA”) and perfluorooctane sulfonate (“PFOS”). For many decades, PFOA was used in the manufacturing of DuPont’s non-stick coating, Teflon. Another common use of both PFOA and PFOS is as a component of a fire-suppressant material called AFFF.

AFFF is used in training and firefighting activities for fighting liquid-based fires, including those involving jet fuel, gasoline, or other fuels. The FAA requires AFFF to be used at commercial airports, including the Denver International Airport (“DEN”). When used in firefighting training, emergency response activities, and federally mandated testing of firefighting equipment, AFFF is sprayed over structures and onto the ground. In other words, AFFF directly enters the environment from its intended use.

Like fluorine-free firefighting foam, AFFF contains water, solvents, and hydrocarbon surfactants. Unlike

fluorine-free firefighting foam, however, AFFF also contains fluorosurfactants. A surfactant is a chemical compound that acts to break up the surface tension between two materials; in the context of firefighting foam, surfactants allow the foam to spread over the material fueling the fire, thus blanketing and extinguishing the fire. A fluorosurfactant is a surfactant that contains a perfluoroalkyl group (i.e., PFAS).

At various times from the 1950s through today, certain companies such as 3M and Dupont, designed, manufactured, marketed, distributed, and/or sold AFFF products containing PFOS, PFOA, and/or their chemical precursors, and/or designed, manufactured, marketed, distributed, and/or sold the fluorosurfactants and/or poly- and perfluorinated chemicals contained in AFFF (collectively, "AFFF/Component Products"). These companies did so despite knowing that PFAS are toxic, persist indefinitely, and would be routinely released into the environment during firefighting training, emergency response activities, and federally mandated testing of firefighting equipment, even when used as directed and intended.

Like numerous other communities across the country, Denver is now facing the problem of pervasive PFAS contamination from AFFF use. This problem is particularly acute for Denver as the operator of DEN, the second-largest airport in the world by land area. Denver also knows that PFAS contamination exists in soils and groundwater at the Roslyn Fire Training Facility and may be present in other Denver-owned properties, as well. The defendant companies, with their extensive knowledge of the properties and risks of PFAS, had all the information necessary to know that their products would contaminate the environment. PFAS cleanup is difficult, expensive, and will take Denver years to complete. Denver should not be left to shoulder this burden. The defendant companies, who continued to manufacture and sell these chemicals for decades despite their knowledge, should pay to help clean up the mess that they created.

Litigation as an Option

Environmental attorneys within the City Attorney's Office and environmental engineers working for DDPHE and DEN have known about the growing problem of PFAS contamination for several years. This issue has attracted greater scrutiny from the media, the U.S. Environmental Protection Agency and state and local governments. Hundreds of cases alleging various injuries related to the use and release of AFFF throughout the country were centralized in a multidistrict litigation in federal court in South Carolina. The first case management order in those cases was entered in 2019. Although the Colorado Attorney General filed his own AFFF-related lawsuit in 2022, the decision to pursue Denver's own AFFF lawsuit was logical given the fact Denver operates DEN and conducted its own testing at its Roslyn Fire Training Facility.

Potential recovery will help offset some of the programmatic costs inherent in a potentially difficult and wide-ranging environmental cleanup.

Litigation Claims

Denver plans to assert several claims against the companies who manufactured, distributed, marketed, and sold AFFF, including but not limited to, certain product liability claims such as defective design and failure to warn. These claims assert that the defendant companies had a legal duty not to market a product that was unreasonably dangerous in design for its reasonably anticipated use and a legal duty to provide adequate warnings of the risks of their products to those who might foreseeably be injured by them. Denver also plans to assert a claim for negligence, private nuisance and trespass. The private nuisance and trespass claims assert injuries to Denver as the owner and operator of property and the contamination to that property. Denver will claim that it has suffered and continues to suffer property damage and that it has and will continue to suffer monetary damages due to the costs of site investigations, remediation and the potential need to replace equipment, including firefighting equipment at DEN that has previously used AFFF in its operations.
