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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Activists Sue DOD Over PFAS Foam Burning Contracts

By **Amanda James**

Law360 (February 20, 2020, 10:16 PM EST) -- The U.S. Department of Defense didn't run a proper environmental review before awarding contracts for burning millions of gallons of firefighting foam that could contaminate communities, several nonprofits claimed in a lawsuit in California federal court on Thursday.

The nonprofits represent communities in Ohio, Texas, Illinois and California where incineration sites for per- and polyfluoroalkyl substances — dubbed "forever chemicals" — have been authorized, posing potential health threats. They also claim that the contracts go against a bill passed by Congress in December that imposed new restrictions on burning PFAS to protect citizens.

Some of the sites authorized for burning the toxic chemicals, such as Port Arthur, Texas, are in areas where vulnerable populations already face health hazards from pollution and industrial plants, according to the complaint.

The communities are made up of a high percentage of minority residents whom the groups fear have been showing symptoms of health issues such as higher rates of cancer due to environmental exposure, according to the complaint.

"These communities are already overburdened by pollution, both from those incinerators and from other industrial facilities, which will be made worse by [the government's] unstudied and unlawful PFAS incineration," according to the complaint.

The chemicals are used in non-stick pans, waterproof jackets, and industrial products such as firefighting foam.

In December, Congress passed new restrictions on eliminating stockpiles of PFAS as part of the National Defense Authorization Act, a military spending bill. The legislation required PFAS to be burned at a specific temperature to ensure maximum elimination of the toxic chemicals, and that the incinerations happen at facilities capable of destroying the chemicals.

The DOD hasn't complied with either of those requirements, according to the nonprofits.

"Incineration does not solve the Defense Department's PFAS problems. It just pawns them off on already overburdened communities," Jonathan Kalmuss-Katz of Earthjustice, who represents the groups, said in a statement Thursday.

The Department of Defense, the nation's largest user of the firefighting foam containing PFAS, already faces billions of dollars from lawsuits related to water contamination caused by them.

The nonprofits behind Thursday's lawsuit are part of a more recent resistance front opposing air pollution, according to Kalmuss-Katz. The groups include Save Our County, Community In-Power and Development Association Inc., United Congregations of Metro East and the Sierra Club.

In the past two years, the government's subcontracting agency, the Defense Logistics Agency, awarded three contracts to burn PFAS, but the government failed to follow rules outlined in the

National Environmental Policy Act, passed in 1970, that requires federal agencies to look at the environmental impacts of their proposed actions before approving them, the complaint says.

Earthjustice, the nonprofit legal agency representing the plaintiffs, said in a statement Thursday that it submitted requests under the Freedom of Information Act, and learned that PFAS was already being burned in East Liverpool, Ohio; Arkadelphia and El Dorado, Arkansas; and Cohoes, New York.

The contracts authorized burning sites in more than a dozen states in the Midwest and western parts of the country.

Litigation involving PFAS contamination has been **piling up** in recent years.

Michigan Attorney General Dana Nessel in January sued 3M, DuPont and 15 other chemical companies for financial damages, **saying they withheld** scientific evidence and concealed the dangers of PFAS, allowing them to contaminate the environment and expose the state's residents to harm.

Several other states filed lawsuits of their own in 2019, including New York, New Jersey, New Hampshire and Vermont. Most of the states have sued on behalf of their residents as "parens patriae," a legal concept under which harms to the state's residents can extend to the state itself.

Meanwhile, the U.S. Environmental Protection Agency said Thursday it may have a **framework** for drinking water health standards for two types of PFAS in a step towards regulation of the chemicals. Environmentalists criticized the agency's comment-seeking filing as being too little, too late.

California laid out **stricter oversight** for the chemicals in a regulatory announcement earlier this month that would require water suppliers to notify customers, stop using affected wells, and treat the water.

The Department of Defense declined to comment.

The nonprofits are represented by Greg C. Loarie, Jonathan Kalmuss-Katz, Suzanne Novak and Sophia Jayanty of Earthjustice.

Counsel information for the Defense Logistics Agency was not immediately available.

The case is Save Our County et al. v. U.S. Defense Logistics Agency et al., case number 3:20-cv-01267, in the U.S. District Court for the Northern District of California.

--Additional reporting by Hannah Albarazi, Lauren Berg and Juan Carlos Rodriguez. Editing by Adam LoBelia.