

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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IN THIS ISSUE

Jeffrey Karp and Edward Mahaffey discuss the difficulties facing the U.S. military in adequately addressing PFAS-contaminated water resources from firefighting foam at hundreds of bases and surrounding communities. The article also highlights DOD's task of identifying both safe and effective methods for disposing of millions of gallons of the PFAS-laden aqueous film forming foam (AFFF).

Pentagon Faces Quandary in Adequately Addressing PFAS-Contaminated Water Resources at Hundreds of Bases and Surrounding Communities



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Perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA) are found in firefighting foam used by the military since the 1970's for training exercises and to extinguish liquid and gas fires. These compounds are part of a larger class of toxic chlorinated chemicals called per- and polyfluoroalkyl substances (PFAS). Similarly, airports and municipal fire departments have used the aqueous film forming foam (AFFF) for decades to extinguish fires caused by flammable liquids.¹

Firefighting foams are divided mainly into two classes. Class A foams are used to fight wildfires and structural fires. Class B foams are used to extinguish fires caused by flammable liquids. While not all Class B fire extinguishing agents contain PFAS, all AFFF does, and AFFF has special characteristics that make it difficult to find adequate replacements. When mixed with water, AFFF produces an aqueous spreading film that extinguishes burning hydrocarbon fuel and prevents reignition by cutting off oxygen from the fuel source.²

PFAS compounds are believed to cause multiple health problems. Studies link the

chemicals to immune system and endocrine disorders, thyroid problems and some cancers, at fairly low doses (measured in parts per trillion).³ In 2016, EPA issued a lifetime health advisory for PFOS and PFOA of 70 parts per trillion (ppt) in drinking water.⁴ Also, in 2018, ATSDR reported that exposure to lower levels of PFOS and PFOA could cause increased cancer risks and other health issues in humans.⁵ In late 2019, EPA issued a separate health advisory setting 70 ppt as the recommended cleanup level for these PFAS compounds in groundwater.⁶

PFAS chemicals, including those in AFFF, are labeled "forever chemicals" because they are ubiquitous and extremely difficult to remove from environmental media. It is believed that most people have PFAS compounds in their blood serum – from drinking water and a variety of other consumer products – although there is a lack of consensus at what threshold PFAS may trigger health risks.⁷

In the early aughts, manufacturers started phasing out AFFF containing PFOS, one of the most common PFAS compounds. However, AFFF formulations containing

¹ US Department of Defense, "Aqueous Film Forming Foam Report to Congress," October 2017, <https://www.denix.osd.mil/derp/home/documents/aqueous-film-forming-foam-report-to-congress/>, 1.

² Interstate Technology Regulatory Council, "Aqueous Film-Forming Foam (AFFF)," <https://pfas-1.itrcweb.org/wp-content/uploads/2019/03/pfas-fact-sheet-aff-10-3-18.pdf>, 1.

³ US Environmental Protection Agency, "Fact Sheet: PFOA and PFOS Drinking Water Health Advisories," [https://www.epa.gov/sites/production/files/2016-](https://www.epa.gov/sites/production/files/2016-06/documents/pfas_drinking_water_health_advisories.pdf)

[06/documents/drinkingwaterhealthadvisories_pfoa_pfos_updated_5.31.16.pdf](https://www.epa.gov/sites/production/files/2016-06/documents/pfas_drinking_water_health_advisories.pdf), 2.

⁴ Id.

⁵ ATSDR, "Toxicological Profile for Perfluoroalkyls," Draft for Public Comment, <https://www.atsdr.cdc.gov/toxprofiles/tp200.pdf>, 4.

⁶ <https://www.epa.gov/newsreleases/epa-releases-pfas-groundwater-guidance-federal-cleanup-programs-fulfilling-pfas-action>.

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https://www.cdc.gov/biomonitoring/PFAS_FactSheet.html.

other long-chain PFAS compounds, including trace amounts of PFOA, continued to be made in the United States until at least 2016.⁸ AFFF has a long shelf life, and the military stockpiled the agent for continued use, although the Department of Defense officially ended the use of AFFF in training exercises in January 2016, and Congress, in the National Defense Authorization Act of 2020, directed DOD to develop an effective PFAS-free Class B firefighting foam to replace AFFF no later than October 2024. In the meantime, several state legislatures have banned the use of AFFF.⁹

The ubiquitous use of AFFF for many years by the military has contaminated potable water sources on and near numerous military bases across the United States, resulting in a proliferation of lawsuits and technological challenges as the Department of Defense has sought to address the overwhelming problem in fits and starts. Major legal developments continue to occur, including a recent lawsuit filed by the state of Michigan and ongoing pretrial motions in an enormous group of consolidated cases in the District of South Carolina.

The 2020 National Defense Authorization Act

The National Defense Authorization Act (NDAA), the annual Congressional spending bill for the Department of Defense (DOD), is considered a “must-pass” bill, and thus members of Congress often propose their favored policies as amendments to it. The NDAA for Fiscal Year 2020 included several PFAS-related provisions, including requiring the DOD to develop a PFAS-free firefighting foam to replace AFFF by October 2024¹⁰ and forbidding the use of firefighting foams containing PFAS for training exercises immediately.¹¹ The law also requires the military to remediate existing PFAS contamination of federal facilities, including by entering into cooperative agreements with communities surrounding military bases where the bases’ activities are believed to be the source of PFAS contaminated drinking water sources.¹²

The law also imposes a costly requirement on public water systems, to monitor for all forms of PFAS for which the EPA has approved a sampling method.¹³

The Department of Defense’s Response and Criticism of Its Activities

Not surprisingly, the DOD itself has expressed doubts about the viability of its

⁸ https://pfas-1.itrcweb.org/fact_sheets_page/PFAS_Fact_Sheet_A_FFF_April2020.pdf, 3.

⁹ https://pfas-1.itrcweb.org/fact_sheets_page/PFAS_Fact_Sheet_A_FFF_April2020.pdf, 5.

¹⁰ National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 § 322.

¹¹ Id. § 324.

¹² Id. § 331-32.

¹³ Id. § 7311.

PFAS cleanup efforts. Based on investigations conducted by the DOD,¹⁴ as well as the Environmental Working Group¹⁵ and the Social Science Environmental Health Research Institute,¹⁶ there now are upward of 600 military bases nationwide where PFAS either has been discovered or is suspected of having been released. In its March 2020 PFAS Task Force Report, DOD states: “While our initial focus was on installations with potentially significant historic AFFF use this is a more comprehensive estimate of installations where PFAS may have been used or released.”¹⁷ Thus, there is PFAS in soil and/or groundwater at hundreds of military installations, which has migrated to drinking water systems on and off the bases.¹⁸ According to Maureen Sullivan, Deputy Assistant Secretary of Defense for Environment, the Department will need more than \$3 billion to clean-up the sites where PFAS was used.¹⁹ However, the 2020 NDAA provided only \$350 million total for PFAS cleanup across the country,²⁰ of which \$60 million already is earmarked to remediate AFFF contamination at

decommissioned military bases.²¹ A Pentagon report in March 2020 predicted that removing PFAS from the water supply near military bases might take decades, leading some critics to accuse the DOD of acting with insufficient urgency.²² In response, Ms. Sullivan has stated that DOD will act more quickly in cases of drinking water sources with PFAS concentrations greater than EPA’s 70 ppt lifetime health advisory for PFOS and PFOA.²³

However, DOD already had sparked controversy in October 2019, when it issued an internal guidance document setting screening levels for PFOS and PFOA at military bases of 400 ppt, 10 times higher than EPA’s recommended screening levels for those two PFAS compounds. This DOD guidance was roundly criticized by lawmakers and environmentalists.²⁴

Moreover, a growing number of states have taken issue with EPA’s lifetime health advisory of 70 ppt for PFOS and PFOA in drinking water, and set lower Maximum

¹⁴ PFAS Task Force Progress Report March 2020, <https://media.defense.gov/2020/Mar/13/2002264440/-1/-1/1/PFAS-TASK-FORCE-PROGRESS-REPORT-MARCH-2020.PDF>, 6;

<https://armedservices.house.gov/hearings?ID=BB82E130-2F33-4425-A110-D359517E51B9>.

¹⁵ <https://www.ewg.org/news-and-analysis/2020/04/updated-map-suspected-and-confirmed-pfas-pollution-us-military-bases>.

¹⁶ <https://pfasproject.com/2020/04/07/dozens-more-military-bases-have-suspected-forever-chemical-contamination/>.

¹⁷ Id.

¹⁸ <https://www.ewg.org/news-and-analysis/2020/04/updated-map-suspected-and-confirmed-pfas-pollution-us-military-bases>.

¹⁹ <https://www.startribune.com/military-s-use-of-disputed-firefighting-foam-scrutinized-at-u-s-house-hearing/568722742/>.

²⁰ <https://www.timesunion.com/news/article/PFAS-remediation-wins-federal-funding-but-14922634.php>.

²¹

<https://www.detroitnews.com/story/news/local/michigan/2020/02/27/air-force-funds-pfas-cleanup-oscodas/4891722002/>.

²² <https://thehill.com/policy/energy-environment/488723-pentagon-cleanup-of-toxic-forever-chemicals-likely-to-last-decades>.

²³ Id.

²⁴ <https://taskandpurpose.com/news/military-ignored-epa-pfas-recommendations>.

Contaminant Levels (MCLs) for such PFAS compounds in drinking water. New York, for example, has established MCLs of 10 ppt each for PFAS and PFOA.²⁵

The DOD also faces scrutiny both in developing a replacement firefighting foam and disposing of its existing stocks of AFFF. As noted, the NDAA has banned the use of AFFF for any purpose beginning in October 2024. However, some state legislatures already are taking their own steps to eliminate or alter permissible use of AFFF on a faster track than Congress, by outright banning AFFF (e.g., in Indiana, Kentucky, and New Hampshire) or by placing restrictions on its use (e.g., in Arizona, Colorado, New York, and Virginia).²⁶ Most recently, in October 2020, the Wisconsin Department of Natural Resources, implementing a state law that took effect in September 2020, established strict standards for containment, treatment, and disposal of AFFF; facilities that do not meet these standards cannot use AFFF.²⁷

The DOD's March 2020 PFAS Task Force Report expressed concern about "the

potential risks, including fatalities that would result from replacing AFFF with another material with lower performance standards," but acknowledged that the DOD's current specification for firefighting foam "contains additional requirements for shipboard use that may not be necessary for fighting fires on installations."²⁸

Meanwhile, the DOD's attempts to dispose of existing stockpiles of AFFF by incineration have sparked controversy and lawsuits stemming from worries about the health effects of PFAS air pollution.²⁹ Due to the strength of the carbon-fluorine bonds in PFAS, these chemicals may not be completely destroyed by methods of incineration designed for other forms of hazardous waste.³⁰ The DOD's approval of the incineration of millions of gallons of AFFF is alleged in a lawsuit by the environmental organization Earthjustice to violate the NDAA of 2020 and the National Environment Policy Act (NEPA), in the absence of conducting required environmental reviews and complying with environmental regulations.³¹ The NDAA requires the

²⁵ <https://www.asdwa.org/pfas/>. Note that MCLs, unlike health advisories, are directly enforceable.

²⁶ <https://aboutblaw.com/Rvj>.

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https://madison.com/wsj/news/local/environment/on-split-vote-natural-resources-board-approves-rule-on-pfas-foam-treatment/article_0a3af506-5c5f-5fea-ac17-93ac125362ac.html.

²⁸

[https://media.defense.gov/2020/Mar/13/2002264440/-1-/1/1/PFAS Task Force Progress Report March 2020.pdf](https://media.defense.gov/2020/Mar/13/2002264440/-1-/1/1/PFAS%20Task%20Force%20Progress%20Report%20March%202020.pdf), 4.

²⁹ <https://www.wsj.com/articles/air-contamination-from-forever-chemicals-sparks-concern-11584792001>.

³⁰ 2 Taylor, P.H., T. Yamada, R.C. Striebich, J.L. Graham, and R.J. Giraud. 2012. "P23—Investigation of Waste Incineration of Fluorotelomer-Based Polymers and Fluoropolymers as a Potential Source of PFOA in the Environment." *Reproductive Toxicology* 33 (4): 606–7. <https://doi.org/10.1016/j.reprotox.2011.11.057>.

³¹ *Save Our County et al. v. United States Logistics Agency et al.* (N.D. Calif., filed February 20, 2020), Complaint, <https://www.dispatch.com/assets/pdf/OH34295220.pdf>.

Secretary of Defense to ensure that PFAS are incinerated at adequate temperatures to break down the chemical compounds.³² In its complaint, Earthjustice contends that: “Even after the passage of that law, Defendants continued to incinerate firefighting foam and other PFAS-containing material without specifying the temperatures needed to destroy PFAS, much less ensuring that all incinerators attain those temperatures.”³³

In its lawsuit, Earthjustice addresses the incineration of AFFF at a plant run by Heritage Thermal Services in East Liverpool, Ohio. According to the complaint, the “incinerator is less than 400 feet from the nearest home, in a neighborhood where the majority of the African Americans in East Liverpool reside, and approximately 1,100 feet from the nearest school.”³⁴ The case came to trial in September 2020,³⁵ but as of September 25, no final decision has been issued.³⁶

At a Congressional hearing in September 2020, Dr. Herb Nelson, director of DOD’s Strategic Environment Research and Development Program, explained the areas of PFAS- and AFFF-related scientific research

DOD is funding. The most directly PFAS-related research involves sampling and analysis of PFAS, finding safe methods of transporting it, determining its ecotoxicity,³⁷ and developing remediation methods. The AFFF-related research involves formulating new PFAS-free foams, testing the performance of these replacements, testing the ecotoxicity of the replacements, and developing methods of cleaning out firefighting hardware. Due to the urgency of the problem, all these lines of research are being pursued simultaneously rather than sequentially.³⁸

Problems and Responses Across the Nation

Over the past several years, many lawsuits have been filed by states, individuals and others, including municipalities and water utilities, seeking to compel the cleanup by DOD of PFAS contamination, payment for natural resource damage, or reimbursement of costs incurred to filter harmful substances from the potable water supply, caused by the use of AFFF at military bases.

These cases have been difficult to pursue against the military due to limits on available causes of action. Where states have found a

³² National Defense Authorization Act for Fiscal Year 2020, § 7361.

³³ *Save Our County* Complaint at 3.

³⁴ *Id.* at 20.

³⁵ <https://wtov9.com/news/local/lawsuit-against-east-liverpool-incinerator-company-to-be-heard-next-week>.

³⁶ https://www.pacermonitor.com/public/case/32444771/Save_Our_County_et_al_v_United_States_Defense_Logistics_Agency_et_al,

³⁷ Ecotoxicity has been defined as “potential adverse effects that a chemical causes to an aquatic or terrestrial receptor...based on the toxicological properties of the chemical and the susceptibility of the organism,”

<https://www.ncbi.nlm.nih.gov/books/NBK253975/>.

³⁸

<https://armedservices.house.gov/hearings?ID=BB82E130-2F33-4425-A110-D359517E51B9>.

regulatory hook, they have brought enforcement actions directly against a military base for failure to obtain or comply with the terms of a required permit. For example, in January 2020, the New Mexico Environment Department fined the Cannon Air Force Base \$1.7 million for releasing wastewater without a permit, reflecting concern about PFAS migrating from the Base. In September 2020, the Base settled with the Department, paying a \$251,000 “administrative fee” instead of the fine, although this settlement did not resolve a separate lawsuit by New Mexico against the DOD concerning the use of AFFF for decades at both the Cannon and Holloman Air Force Bases.³⁹

The difficulty of pursuing claims against the military has been exacerbated in the absence of a determination by either Congress by statute or the EPA by rulemaking that PFAS compounds are “hazardous substances” under CERCLA.⁴⁰ For example, in a suit against the Navy in which plaintiffs unsuccessfully sought a medical monitoring remedy based upon alleged exposure to PFAS from AFFF used at the Willow Grove Naval Air Station in Montgomery, Pennsylvania, the court found that the plaintiffs lacked a cognizable cause

of action because PFAS had not yet been designated as a hazardous substance.⁴¹

In other cases, DOD has sought dismissal of claims against it, arguing that it is protected from liability by federal sovereign immunity. The Air Force did agree, however, to reimburse a local government in Colorado for the cost of a filtration system installed to protect potable water supplies from PFAS contamination caused by the use of AFFF at the Peterson Air Force Base.⁴²

Given the difficulties in pursuing remedial and reimbursement claims against the military for contaminating water sources, an investor-owned utility has taken a different tact. In *California-American Water Co. v. United States of America*, a water company brought a claim for damages under the Federal Tort Claims Act (28 U.S.C. Sections 2671-2680) seeking reimbursement from the federal government for the cost of installing a treatment system to clean-up a drinking water well that the Air Force is alleged to have contaminated from its use of AFFF in the 1970s and 1980s at the Mather Air Force Base (E.D. Calif. January 2020). The case has been transferred to the District of South Carolina “for coordinated or

³⁹

<https://nmpoliticalreport.com/2020/09/15/cannon-air-force-base-to-pay-250k-for-pfas-permit-violations-contamination-cleanup-slow/>.

⁴⁰ For the CERCLA “hazardous substances” designation procedures, see 42 U.S.C. § 9602. While the EPA has announced plans to designate PFAS as “hazardous substances,” its failure so far to follow through with this and other PFAS regulation has led to accusations of “regulatory foot-dragging,”

<https://theintercept.com/2020/09/29/epa-white-house-pfas-pfoa-pfos/>.

⁴¹ *Kristen Giovanni et al. v. U.S. Department of the Navy*, case number 2:16-cv-04873; *Dorothy Palmer et al. v. U.S. Department of the Navy*, case number 2:17-cv-00765;

<https://www.jdsupra.com/legalnews/federal-judge-s-comments-in-willow-97490/>.

⁴² <https://www.latimes.com/politics/story/2020-01-30/california-pfas-water-contamination-colorado>.

consolidated pretrial proceedings” with other AFFF litigation.⁴³

Managing Litigation

In light of the foregoing, states, local governments and other water supply entities, and individuals have turned to manufacturers, distributors and others in the AFFF supply chain to pursue remediation of contaminated environmental media; payments for natural resource and property damage, reimbursement for costs incurred to protect potable water supplies, and medical monitoring and other health-related remedies due to harm caused by the release and migration of PFAS. Since 2018, over 500 AFFF-related cases have been consolidated by the Judicial Panel on Multidistrict Litigation into *Aqueous Film-Forming Foams (AFFF) Products Liability Litigation*, MDL No. 2873, with the District of South Carolina as the forum.⁴⁴ The district court has focused on consolidating various pre-trial aspects of the cases, with an eye toward avoiding unnecessary duplication of the discovery process, as well as organizing monthly status conferences to keep the cases on track.⁴⁵

These cases are ongoing; in early August, for example, the state of New Mexico moved the court to require the Air Force to offer blood tests for people living near two of its

bases in that state and to close a nearby lake likely to be contaminated by PFAS compounds.⁴⁶

PFAS cases continue to be filed around the country. Most recently, the state of Michigan brought suit against numerous chemical companies, asserting that “Defendants had full knowledge of the health and environmental risks of Commercial AFFF, which they intentionally hid from the public and the State.”⁴⁷ Also noteworthy are class action lawsuits filed against PFAS manufacturers by the National Rural Water Association (NRWA), a non-profit organization on behalf of itself and its member public water providers (D.D.C., filed Feb. 25, 2020), and by West Virginia residents (N.D. W.Va., filed April 2020). The complaint in the NRWA case alleged companies that made and sold firefighting foam containing PFOA and PFOS knew these chemicals were harmful to human health and the environment, but hid the information from the government and the public. The suit seeks payment for testing and treatment of PFAS-contaminated water supplies.

The West Virginia case was filed against seven companies on behalf of City of Martinsburg (City) residents who allegedly were exposed to firefighting foam used by

⁴³ Case 2:20-cv-00144, Conditional Transfer Order.

⁴⁴ <https://www.scd.uscourts.gov/mdl-2873/index.asp>.

⁴⁵ <https://www.scd.uscourts.gov/mdl-2873/orders/CMO%201.pdf>, <https://www.scd.uscourts.gov/mdl-2873/orders/CMO%202.pdf>.

⁴⁶ <https://www.law360.com/articles/1298592>.

⁴⁷

<https://www.eenews.net/greenwire/stories/1063712247/>; https://www.michigan.gov/documents/ag/Commercial_AFFF_Complaint_699962_7.pdf, 29.

the Air National Guard at the Eastern Regional Airport to extinguish oil-based fires. Previously, in 2019, the Air Force agreed to reimburse the City \$4.9 million for expenses incurred to clean-up PFAS from the City's water supply.⁴⁸

The residents' complaint alleges negligence, battery, failure to warn, and design defect by the PFAS companies, and claims the companies knew AFFF was dangerous and the contamination preventable. The plaintiffs seek unspecified monetary damages and medical monitoring. On May 4, 2020, the case was transferred to and consolidated with the other multi-district litigation assigned to the federal district court in South Carolina.

Technologies

Cleanup of PFAS may involve one or more of several different technologies. Common methods of removing PFAS from water include adsorption to activated carbon, ion exchange, and reverse osmosis.⁴⁹ Reverse osmosis involves pressurizing water and forcing it through a semipermeable membrane to filter out PFAS, the granular activated carbon method involves the adsorption of PFAS to carbon molecules, and

the ion exchange method uses granular resins in a similar manner to activated carbon.⁵⁰ All of these methods can fail to catch smaller PFAS molecules, however. Moreover, instead of destroying PFAS, these methods trap it in a concentrated form (liquid in the case of reverse osmosis, solid in the case of activated carbon or ion exchange), which must be disposed of.⁵¹

Each of these techniques can be quite costly, especially reverse osmosis. For example, installing granular activated carbon filters at a treatment plant in Ridgewood, New Jersey cost \$3.5 million and reverse osmosis upgrades to a treatment plant in Brunswick County, North Carolina, are expected to cost \$137 million.⁵²

Further, as discussed, incineration of AFFF as a disposal method can cause the airborne release of PFAS. Thus, scientists are seeking new methods of PFAS removal, using methods such as plasma or sound waves, that actually may destroy PFAS.⁵³ In August 2020, EPA, in partnership with the DOD and several other government agencies, announced a competition that would award

⁴⁸ https://www.journal-news.net/journal-news/federal-lawsuit-filed-against-companies-alleged-with-contaminating-city-water/article_92c2cb55-f341-51a0-8079-d63ab561e954.html.

⁴⁹ <https://www.sciencedaily.com/releases/2019/12/191205130602.htm>.

⁵⁰ <https://cen.acs.org/environment/persistent-pollutants/Forever-chemicals-technologies-aim-destroy/97/i12>.

⁵¹ Id.

⁵²

https://cdn3.ewg.org/sites/default/files/u352/Stoiber_Evans_WaterSolutions_2020.pdf?_ga=2.265172623.1410024112.1587557845-752655008.1562697417f, 44.

⁵³ Id.

\$50,000 for developing a reliable method of destroying PFAS in AFFF.⁵⁴

The Future

In February 2020, the DOD Office of the Inspector General (OIG) began a congressionally requested investigation of the DOD's handling of PFAS issues;⁵⁵ however, as of September 17, 2020, the OIG has not released its report.⁵⁶ Also, during a February 2020 hearing before the House Armed Services Committee regarding its plans to address PFAS contamination at military installations, Defense Secretary Esper reported that the Department had three priorities: to find a replacement for AFFF, understand its impact on communities, and move forward with mitigation methods.⁵⁷ However, as the pressure mounts on DOD from members of Congress, states, and non-government organizations to adequately address the potential negative impacts of PFAS on human health and the environment with a sufficient degree of alacrity, it will be difficult for the military to fulfill these priorities without the benefit of substantial budgetary allocations in future annual NDAs and other Congressional legislation. In light of the foregoing, the military's ability to successfully resolve its AFFF problems remains uncertain.

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<https://www.eenews.net/greenwire/stories/1063712437>.

⁵⁵

<https://media.defense.gov/2020/Feb/03/2002242925/-1/-1/1/D2020-DEV0SR-0088.000.PDF>.

⁵⁶ <https://www.dodig.mil/reports.html/>.

⁵⁷ <https://about.bgov.com/news/military-may-be-bound-by-state-laws-on-forever-chemicals/>.

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