

PFOA/PFOS/CERCLA: D.C. Circuit Court of Appeals Upholds U.S. EPA Final Rule Designating as Hazardous Substances



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The United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) addressed in an August 18th Opinion a challenge to the United States Environmental Protection Agency’s (“EPA”) designation of Perfluorooctanoic Acid (“PFOA”) and Perfluorooctanesulfonic Acid (“PFOS”) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). See *Chamber of Commerce of the United States of America, et al., v. Environmental Protection Agency*, No. 24-1193.

The final rule was promulgated at 89 Fed. Reg. 39124 (July 2024).

The D.C. Circuit denied the Petitioner’s challenge of the CERCLA hazardous substance designation.

The Trump Administration United States Department of Justice subsequently, on behalf of EPA, as part of ongoing litigation related to this designation defended the listing and stated it intended to retain the rule that had been promulgated during the Biden Administration.

CERCLA authorizes EPA to promulgate regulations designating as hazardous substances:

... Elements, compounds, mixtures, solutions, and substances which, when released in the environment, may present substantial danger to the public health or welfare of the environment.

Seven interest groups for various companies that use, transport, or discharge PFOA and PFOS in their manufacturing, transportation, and waste management (“Petitioners”) petitioned the D.C. Circuit to vacate the CERCLA hazardous substance designation, arguing:

1. Interpretation of “hazardous substances” to include PFOA and PFOS is contrary to law;
2. Cost-benefit analysis as arbitrary and capricious, and in violation of Administrative Procedure Act’s notice requirement; and,
3. Decision to regulate in the face of uncertainties is arbitrary and capricious.

The D.C. Circuit rejects each of those arguments, holding in part:

1. Plain language of 40 U.S.C. Section 9602 allows EPA to designate as hazardous substances chemicals like PFOA and PFOS that repeatedly have been linked to adverse health effects in myriad peer-reviewed studies.
2. EPA provided adequate notice of its cost-benefit analysis underlying the ultimate Designation through its earlier Economic Assessment and request for comments on it.

3. EPA acted reasonably based on the record before it in its calculation of costs and benefits, and in its decision to take this regulatory step of designating PFOA and PFOS to be hazardous substances.

Note that the upholding of the CERCLA hazardous substance designation will likely spur additional efforts by various organizations to address passive liability concerns. The designation as hazardous substance triggers certain corresponding CERCLA requirements such as:

- Application of the potentially responsible liability categories (i.e., current owner or operator, former owner or operator [in certain circumstances], transporter [in certain circumstances], and generators).
- Hazardous substances release reporting requirements (if reportable quantities are released).

For example, water, wastewater, and waste management sectors have expressed concern about their potential liability despite the self-described status as passive receptors. The National Waste and Recycling Association and Solid Waste Association of North America have stated that regulation under CERCLA would assign environmental cleanup liability to essential public services and their customers.

Wastewater and drinking water trade associations have argued that liability would be imposed upon them but not on chemical manufacturing companies who placed the substances into commerce as products. They also argue that wastewater, stormwater, and water reuse systems passively receive PFAS from various sources.

Simultaneously with the hazardous substance designation, EPA released a document titled:

PFAS Enforcement Discretion and Settlement Policy Under CERCLA (“Memorandum”).

The Memorandum states in part that EPA does not intend to:

... pursue entities where equitable factors do not support seeking response actions or costs under CERCLA, including, but not limited to, community water systems and publicly owned treatment works, municipal separate storm sewer systems, publicly owned/operated municipal solid waste landfills, publicly owned airports and local fire departments, and farms where biosolids are applied to the land.

Note however, that the Memorandum is not binding on private parties who pursue CERCLA contribution actions.

As a result, it is likely that various organizations will continue to seek some type of legislative action addressing their concerns.

A copy of the Opinion can be found [here](#).