

Judicial Challenges to U.S. EPA's PFAS Regulations: Are EPA's Regulations Too Much, Too Little, or Just Right?

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Per- and poly-fluoroalkyl substances (PFAS), known as “forever chemicals” due to their persistence in the environment, have been manufactured and used in a variety of industries for nearly 80 years. Following decades of concerns with human health effects and environmental contamination, the United States Environmental Protection Agency (EPA) laid out its *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024* (PFAS Roadmap) and emphasized the need to ensure science-based decision making. *PFAS Strategic Roadmap: EPA's Commitments to Action, 2021-2024*, at 7 (October 2021)

https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf. As EPA notes: “Regulatory development, either at the state or federal level, would greatly benefit from a deeper scientific understanding of the exposure pathways, toxicities, and potential health impact of less-studied PFAS.” The most researched of the tens of thousands of PFAS are PFOA and PFOS, so EPA's initial regulatory efforts focused on those two compounds. But, as described below, the regulations developed under EPA's PFAS Roadmap go beyond PFOA and PFOS, inviting scrutiny by the public, regulated entities, and various stakeholders.

PFAS are a group of manmade chemicals identified by chains of extremely durable fluorine and carbon bonds that have been manufactured and used in the U.S. since the 1940s. While the PFAS family of chemicals includes the more commonly known and used PFOA, PFOS, and GenX, thousands of additional compounds are also classified as PFAS. Because of their useful properties, including their resistance to heat, water, oil, and stains, PFAS have been utilized in many different industries and incorporated into numerous consumer products over the years. Examples include firefighting foam (known as “AFFF”), roofing materials, coatings, stain-resistant carpets, water-resistant outdoor clothing and gear, food packaging, nonstick cookware, and personal care products, among others. Unfortunately, PFAS do not degrade via normal chemical, physical, or biological processes, and depending on the type, may build up in people, animals, and the environment over time. Decades of PFAS production and use on a vast scale have resulted in releases to the environment, and these chemicals can now be found in water, soil, air, and food as well as common materials found in homes and workplaces.

This spring, EPA finalized two of the most significant measures described in its PFAS Roadmap. On April 10, 2024, EPA finalized a National Primary Drinking Water Regulation for certain PFAS under the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f *et seq.* See PFAS National Primary Drinking Water Regulation, 89 *Fed. Reg.* 32,532 (Apr. 26, 2024) (codified at 40 CFR Parts 141 and 142). The final rule, which took effect on June 25, 2024, establishes the first-ever nationally enforceable drinking water standards (known as Maximum Contaminant Levels, or MCLs) for six PFAS compounds. The final rule also requires public water systems to test for these PFAS, notify the public of the results, and implement solutions if monitoring shows levels exceeding the MCLs.

Shortly thereafter, on April 19, 2024, EPA finalized a rule designating the two most studied PFAS, PFOA and PFOS, and their salts and structural isomers as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.* See Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 *Fed. Reg.* 39,124 (May 8, 2024) (codified at 40 CFR Part 302). CERCLA provides EPA with the authority to address releases or potential releases of hazardous substances into the environment and holds polluting parties responsible for response costs incurred. Notably, EPA's CERCLA rule, which took effect on July 8, 2024, is the first time EPA has made such designations using its authority to directly identify hazardous substances under CERCLA Section 102. Previously, all CERCLA hazardous substances had been designated by reference to other environmental statutes.

These significant rulemakings have spawned several judicial challenges against EPA and, in early June, three separate petitions for review of the SDWA rule were filed in the U.S. Court of Appeals for the District of Columbia Circuit by trade groups representing water utilities and chemical manufacturers, as well as The Chemours Company, a PFAS manufacturer.

The petition filed by the National Association of Manufacturers and American Chemistry Council on June 10, 2024, asserts that EPA has gone beyond its authority under the SDWA, that its action is arbitrary and capricious, and that the rule was promulgated without observing the required legal procedures. Petition for Review, *Nat'l Association of Manufacturers, et al. v. U.S. EPA, et al.*, No. 24-1191 (D.C. Cir. Jun. 10, 2024).

The American Water Works Association and Association of Metropolitan Water Agencies' petition, filed June 7, 2024, repeats these claims and notes the petitioners' concern about "the impact of this rule on water affordability, particularly for households that struggle to pay for essential needs" because EPA has "significantly underestimated the costs of this rule and the adverse impact that it will have on individual water users." Petition for Review, *American Water Works Association, et al. v. U.S. EPA, et al.*, No. 24-1188 (D.C. Cir. Jun. 7, 2024).

The Chemours Company's petition, filed June 10, 2024, focuses in particular on the scientific rationale underlying the MCL for GenX, another common PFAS compound. Among other things, Chemours argues that EPA based the MCL on the same toxicity assessment that supported a "fundamentally flawed" 2022 Drinking Water Health Advisory, which Chemours is currently challenging in the Third Circuit Court of Appeals. Petition for Review, *The Chemours Company FC, LLC v. U.S. EPA, et al.*, No. 24-1192 (D.C. Cir. Jun. 10, 2024).

As of June 12, 2024, all the SWDA petitions were consolidated and now appear at docket No. 24-1188, and the parties recently filed individual non-binding statements of issues (SOI). A common theme in these SOIs is EPA's choice to adopt MCLs for mixtures of PFAS, specifically using a novel "hazard index" approach, which the petitioners claim was procedurally improper and not based on the best available science. See, e.g., Petitioners' Statement of Issues to Be Raised, *Nat'l Association of Manufacturers, et al. v. U.S. EPA, et al.*, No. 24-1188 (D.C. Cir. Jul. 10, 2024). On June 28, 2024, two motions for leave to intervene in support of U.S. EPA were filed: one by a number of community groups and another by the Natural Resources Defense Council (NRDC).

Meanwhile, the Chamber of Commerce of the USA, Associated General Contractors of America, Inc., and National Waste & Recycling Association filed a petition on June 10, 2024, challenging the CERCLA hazardous substance listing. Their July 12, 2024, Non-Binding SOI indicates they will challenge whether EPA must consider costs prior to a CERCLA § 102(a) designation, whether the hazardous substance listing is based on EPA's erroneous interpretation of CERCLA, and whether EPA violated the U.S. Constitution "by, for example, imposing retroactive liability through the Final Rule." Non-Binding Statement of Issues, *Chamber of Commerce of the USA, et al. v. U.S. EPA, et al.*, No. 24-1193 (D.C. Cir. Jul 12, 2024). On July 10, 2024, community groups and the NRDC filed an unopposed motion for leave to intervene in support of U.S. EPA. Because CERCLA allows 90 days from the date a regulation is promulgated to seek review, it is certainly possible that additional lawsuits will be filed before the deadline of August 6, 2024.

Despite this flurry of recent regulatory activity, some feel that EPA has not gone far enough to regulate PFAS. For example, on June 6, 2024, a group of farmers and ranchers based in Texas filed a citizen suit under the Clean Water Act (CWA) (33 U.S.C. § 1251 *et seq.*) in the U.S. District Court for the District of Columbia claiming that EPA violated its non-discretionary duty to regulate PFAS in biosolids. Complaint, *Farmer, et al. v. U.S. EPA, et al.*, No. 24-cv-1654 (D.D.C. Jun. 6, 2024). According to their complaint, the plaintiffs' "property, livelihoods, and health have been harmed by PFAS contamination in sewage sludge spread on a neighbor's property." The plaintiffs request that the court declare EPA's actions to be in violation of the CWA and the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*), order EPA to regulate eleven different PFAS compounds in biosolids by the earliest practicable date, and award them reasonable attorneys' fees, among other things.

All of these cases are in their earliest stages, and as of this writing on July 15, 2024, upcoming filings in each will impact how they proceed through the judicial system. Further complicating the evolving regulatory and litigation landscape, the United States Supreme Court's June 28, 2024 landmark decision *Loper Bright Enterprises, et al. v. Raimondo, Secretary of Commerce, et al.*, No. 22-451 (Jun. 28, 2024) (together with No. 22-1219, *Relentless, Inc., et al. v. Department of Commerce, et al.*), struck down the legal standard known as "Chevron deference," which for years provided that judges should defer to a federal agency's interpretation of its statutory authority when the law is silent or ambiguous on the statutory question at issue. The *Loper Bright* decision means that lower courts evaluating challenges to EPA rulemakings, such as those described here, will no longer apply Chevron deference to EPA's interpretation of the environmental statutes implicated in the litigation.

Challenges to new environmental rules, especially when those rules relate to emerging contaminants, are to be expected. As EPA and others are aware, only a handful of the thousands of compounds that have been identified as PFAS have been studied closely, and the science related to PFAS health effects is still developing. As the science proceeds and EPA implements the actions outlined in its PFAS Roadmap, the PFAS regulatory environment will remain uncertain, and additional litigation will follow.

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