

LEGAL UPDATES

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DC Circuit Upholds Designation of PFOA and PFOS as Hazardous Substances Under CERCLA

Overview

On August 18, 2026, the DC Circuit Court of Appeals handed the Environmental Protection Agency (EPA) a victory in the latest court battle over the future of PFAS regulations. The dispute, *Chamber of Commerce of the United States of America v. Environmental Protection Agency*, Case No. 24-1193, stemmed from EPA's May 2024 designation of two specific PFAS chemicals, commonly referred to as PFOA and PFOS, as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court's decision to uphold this designation could have sweeping impacts across multiple industrial sectors as it grants EPA a powerful tool in pursuing remediation efforts.

Industry Challenge

Petitioners comprised seven interest groups representing companies that use, distribute, or discharge PFOA and PFOS. Petitioners raised three primary challenges to EPA's designation. **First**, petitioners argued that EPA's interpretation of PFOA and PFOS as hazardous substances was contrary to law. **Second**, petitioners argued that EPA's cost-benefit analysis was arbitrary and capricious and violated the notice requirements of the Administrative Procedure Act (APA). **Third**, petitioners contended that EPA's decision to regulate PFOA and PFOS in the face of alleged uncertainty was arbitrary and capricious.

EPA's Interpretation of "Hazardous Substances"

CERCLA in part defines a hazardous substance as a substance that "may present substantial danger." Petitioners argued this definition required EPA to

show that substantial danger will occur upon release of the substance. The court firmly rejected this interpretation, finding that the basic definition of the word “may” denotes a possibility, not a certainty. It pointed out that petitioners had not and could not dispute that PFOA and PFOS posed threats to human health and the environment if released and therefore found that such a risk of harm existed.

The court also rejected petitioners’ arguments that the definition of hazardous substances must be read more narrowly than that of pollutants, and that the nondelegation and void for vagueness doctrines necessitated a rejection of EPA’s interpretation. It found that nothing in CERCLA’s text required an “inflexible hierarchy” between the definitions as promoted by petitioners. The court further found that petitioners’ constitutional challenges were refuted by CERCLA’s clear language and structured delegation of powers to EPA.

Lack of Notice

The court likewise rejected petitioners’ argument that EPA’s designation of PFOA and PFOS as hazardous substances violated the APA’s notice requirements. It held that EPA’s cost-benefit analysis met the APA’s “logical outgrowth” standard finding that the initial cost-benefit analysis included in the economic assessment put petitioners on notice that EPA was considering a full cost-benefit analysis.

Arbitrary and Capricious

Finally, the court rejected petitioners’ assertion that EPA failed to carefully assess or understand the consequences of its decision. The court pointed out that EPA adequately acknowledged the existence of uncertainties at several steps throughout the rulemaking process. The court further held that the numerous regulatory safeguards required for any action under CERCLA were sufficient to guard against unchecked or excessive enforcement under the law.

Why This Matters

CERCLA mandates strict joint and several liability and grants EPA broad powers to address contaminated sites across the U.S. These powers include the ability to force potentially responsible parties to perform or pay for remediation of hazardous substances released to the environment. Whether or not a contaminant is defined as a hazardous substance is vital. Under Section 106, EPA may only force parties to perform remediation where a designated hazardous substance has been released. In addition, pursuant to Section 107, EPA has the power to seek cost recovery only for the remediation of hazardous substances. Because the costs of remediating sites can often extend into the millions, whether a party can be held responsible for those costs has serious monetary implications.

PFAS are notoriously difficult to remediate. They readily migrate through the environment, escalating potential expenses. By classifying PFOA and PFOS as hazardous substances, EPA's May 2024 designation potentially opens the door to future enforcement actions which could have significant financial impacts on manufacturers and downstream entities that receive or handle materials that contain PFOA and PFOS.

Implications and Recommendations for Manufacturers and Downstream Entities

Environmental Due Diligence: Heightened levels of due diligence should be employed in any transaction involving the purchase of properties at high risk for PFOA and PFOS contamination.

Reporting and Labeling Obligations: As hazardous substances, releases of PFOA and PFOS are now subject to mandatory reporting requirements under CERCLA. The current reportable quantity for each substance is one pound, meaning any release of one pound or more of either substance within a 24-hour period must be reported to the National Response Center. Additionally, shipments containing one pound or more of PFOS or PFOA must be labeled in accordance with the Hazardous Materials Transportation Act.

Evaluate Potential Liabilities: Companies that currently use, or in the past have used or handled material containing PFOA or PFOS, should review their records to evaluate potential liability. Companies should also implement policies and infrastructure upgrades to prevent the release or mismanagement of PFOA or PFOS.

Contact Us

Husch Blackwell continues to track and monitor all PFAS developments nationwide. If you have questions about this article or any other PFAS related matters, please contact Dominique Savinelli, Leah Kaiser, or Adam Kosmicki, or your Husch Blackwell attorney.