

DC CIRCUIT UPHOLDS EPA'S PFAS HAZARDOUS-SUBSTANCE DESIGNATIONS UNDER CERCLA

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By: Dawn M. Lamparello, Maureen O'Dea Brill, Cliff L. Rothenstein, B. David Naidu, David L. Rieser, Julia A. McGowan

On 18 August 2026, the US Court of Appeals for the DC Circuit (the Court) denied consolidated industry petitions challenging the Environmental Protection Agency's (EPA) 2024 designation of perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The decision leaves the designation—and its release-reporting and potential Superfund-liability consequences—fully in place.¹ See our [alert](#) (dated 7 May 2024) for more details on the final rule.

The petitioners advanced three grounds to support the rule be vacated: (1) EPA exceeded its statutory authority in its interpretation of the term “may present substantial danger” in CERCLA's definition of a hazardous substance, (2) EPA failed to provide adequate notice of its cost-benefit analysis, and (3) EPA allegedly acted arbitrarily by regulating despite uncertainty over future response actions and costs. The Court rejected all three, ultimately deferring to EPA's expertise.

First, the Court explained the plain language of CERCLA allows EPA to designate as hazardous substances chemicals like PFOA and PFOS that repeatedly have been linked to adverse health effects in peer-reviewed studies. Petitioners had argued that EPA had to establish that substantial danger *will* occur upon release. Section 102(a) of CERCLA authorizes EPA to designate materials as hazardous substance if they “may present substantial danger...” The Court concluded that this language denotes uncertainty; EPA must only show a scientifically *possible* substantial risk of harm upon release, but the risk must still be serious and real—not hypothetical.

Second, petitioners contended that EPA violated the Administrative Procedure Act (APA) by first disclosing its final Regulatory Impact Analysis when it issued the final designation, rather than providing a separate opportunity for public comment. The Court applied the logical-outgrowth standard, under which notice is adequate if affected parties reasonably could have anticipated the final rule from the proposal; an agency meets that standard when it expressly seeks comment on an issue or otherwise makes clear that it is contemplating the change. The Court found the APA requirement satisfied because EPA's proposed rule and earlier Economic Assessment specifically sought comment on whether and how costs should be considered, and the final analysis developed the record in response to those comments. The additional data and calculations supplemented EPA's earlier analysis rather than introducing a novel methodology central to its final decision.

Finally, petitioners argued that EPA acted arbitrarily and capriciously in its cost-benefit analysis. The Court applied deferential arbitrary-and-capricious review and held that EPA reasonably evaluated the costs and benefits, and it acknowledged uncertainties on the record before it. In reviewing EPA's technical cost estimates,

the Court noted that the burden to show error is particularly high given the complex nature of regulatory economic analysis. The Court also emphasized that CERCLA response, liability, allocation, and settlement decisions are discretionary and site-specific, so EPA's estimates from other sites were reasonable despite petitioner's assertion that they were ignored. Perhaps most notable on this point, the Court found that EPA's conclusion that the costs of adding PFOA and PFOS to a list of more than 800 existing hazardous substances would be "marginal" because infrastructure may already be in place at most sites already on the National Priorities List.

The Court's conclusion that the costs of adding PFOA and PFOS are not significant because they are just two more hazardous substances directly conflicts with the widely recognized understanding that identifying PFOA and PFOS as hazardous substances will not only add substantial costs for investigating and remediating the substances at CERCLA sites but will also add potential substantial liabilities for entities not currently burdened with CERCLA exposure, which could be vast and far-reaching. The designation will also add costs to real estate and corporate transactions that will have to evaluate potential liability for properties on which PFOS and PFOA have been released. Although these costs are primarily a function of the extraordinarily expensive and expansive CERCLA liability scheme and process, it is incumbent on EPA to thoroughly consider those costs in performing its gateway function of designating additional hazardous substances.

Practically, the ruling reinforces EPA's authority to use CERCLA's existing response and cost-recovery framework to address per- and polyfluoroalkyl substances (PFAS). Companies that manufacture, use, transport, recycle, manage, or dispose of materials that may contain PFOA or PFOS should evaluate their material management and disposal practices to mitigate and avoid further CERCLA liability. They should also evaluate their past practices in order to mitigate liability, including reviewing potential insurance claims. Such companies should also evaluate alternative substances to avoid such liability in the future.

This decision requires a full evaluation of potential liability and mitigation practices. The firm's Emerging Contaminants group will continue to monitor EPA implementation and related federal and state PFAS developments.

FOOTNOTES

¹ 89 Fed. Reg. 39,124 (Apr. 19, 2024).

KEY CONTACTS



DAWN M. LAMPARELLO
PARTNER

NEWARK
+1.973.848.4148
DAWN.LAMPARELLO@KLGATES.COM



MAUREEN O'DEA BRILL
PARTNER

HARRISBURG
+1.717.231.5832
MAUREEN.ODEABRILL@KLGATES.COM



CLIFF L. ROTHENSTEIN
GOVERNMENT AFFAIRS ADVISOR

WASHINGTON, DC
+1.202.778.9381
CLIFF.ROTHENSTEIN@KLGATES.COM



B. DAVID NAIDU
PARTNER

NEW YORK
+1.212.536.4864
DAVID.NAIDU@KLGATES.COM



DAVID L. RIESER
OF COUNSEL

CHICAGO
+1.312.807.4359
DAVID.RIESER@KLGATES.COM



JULIA A. MCGOWAN
ASSOCIATE

NEWARK
+1.973.848.4138
JULIA.MCGOWAN@KLGATES.COM

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