DC Court of Appeals Dismisses Advocacy-Group Challenge to EPA's Safe Drinking Water Act for Lack of Standing

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A federal court has dismissed an industry challenge to the EPA's Safe Drinking Water Act (SDWA), which establishes health advisory levels (HALs) for perfluoroalkyl and polyfluoroalkyl substances (PFAS) in drinking water. The case arises from the EPA's June 2022 reduction of its HALs for perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) in drinking water. In 2016, the EPA established HALs of 70 parts per trillion (ppt) for both PFOA and PFOS. Six years later, based on alleged new scientific evidence concerning the adverse health effects of those PFAS substances, EPA issued new HALs of 0.004 ppt for PFOA and 0.02 ppt for PFOS—17,500 and 3,500 times lower than the 2016 HALs. EPA's HALs do not represent binding regulations, but EPA recommends that utility providers notify customers when PFOA and PFOS in drinking water exceed the HALs. Moreover, the HALs likely portend the levels that are being considered by EPA as it proposes Maximum Contaminant Levels (MCLs) for PFOA and PFOS, as well as other PFAS chemicals.

The EPA HALs have been widely criticized, particularly because the levels chosen are below the levels that can be detected with current technology—essentially rendering them as zero. In addition, many have argued that the levels chosen are not supported by science. That criticism grew much louder following the World Health Organization's (WHO) publication of its own advisory health limit late last year. WHO's draft guidance recommends a limit of 100 parts per trillion (ppt) for both PFOA or PFOS in drinking water.

In July 2022, The American Chemistry Council (ACC), an advocacy group that represents approximately 200 chemical-manufacturing companies, filed a lawsuit challenging the EPA's HALs for PFOA and PFOS. The ACC alleged that the HALs reflect EPA's failure to follow accepted practice for scientific integrity, and the studies on which EPA relied fail to demonstrate causation or a minimum level of exposure that will result in adverse health effects. On January 23, 2023, the US Court of Appeals for the District of Columbia Circuit dismissed the suit for lack of standing. The court held that the ACC lacked standing because it failed to allege “that the challenged conduct affects all of its members nor identified any specific member who would have standing to pursue this action.” While the ACC “pointed to an alleged harm facing an indirect subsidiary of one of its members,” the court held that the ACC failed to demonstrate that the member itself suffered an injury or would have standing based on its subsidiary. Based on this lack of standing, the court did not address the merits of the ACC's arguments concerning the foundation for EPA's challenged conduct. As such, it is likely that this issue will be revisited in courts later this year following the EPA's issuance of MCLs for PFOA and PFOS.

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