Did EPA Violate Statutory Authority in Promulgating PFAS MCLs?

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On October 7, 2024, two groups of plaintiffs challenged the United States Environmental Protection Agency's (EPA) April 26, 2024, rule that established Maximum Contaminant Levels (MCLs) for certain per-and polyfluoroalkyl substances (PFAS) in drinking water (the Rule), claiming that the Rule violates the Safe Drinking Water Act (SDWA). EPA's Rule created the first-ever national, legally enforceable MCLs for six PFAS in drinking water. EPA established MCLs for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) at 4 parts per trillion (ppt), the lowest level that current technology can reliably detect. The rule also set MCLs of 10 ppt for perfluorononanoic acid (PFNA), hexafluoropropylene oxide dimer acid (HFPO-DA) (commonly known as GenX chemicals) and perfluorohexane sulfonic acid (PFHxS). In addition, based on EPA's assertion that certain PFAS are often found together in various combinations, the rule regulates the mixture of PFNA, HFPO-DA, PFHxS and perfluorobutane sulfonic acid (PFBS) through the use of a Hazard Index of 1 to determine if the combined levels of these PFAS pose a potential risk to human health.

In their opening briefs, plaintiffs American Water Works Association (AWWA), Association of Metropolitan Water Agencies (AMWA), American Chemistry Council (ACC) and National Association of Manufacturers (NAM) (collectively Plaintiffs) voiced their support for EPA's efforts to protect public health, but argue that its Rule violates the SDWA and "is neither feasible nor cost-effective . . . and creates significant risks for water system compliance and water affordability."[1] Similarly, plaintiffs argue that "rational"[2] PFAS regulation "requires a measured and evidence-based approach that the Rule lacks."[3]

Plaintiffs argue that there were errors in the rulemaking process.
Plaintiffs argue that EPA violated the SDWA by disregarding the six-step process required for rulemaking—instead opting for a four-step process in which it published the Determination to Regulate "concurrently"[4] with the proposed regulation. This "concurrent"[5] publication, according to plaintiffs, was not only a "procedural error"[6] based on EPA's faulty interpretation of when to "publish the Determination to Regulate,"[7] but also ignores Congressional intent and "decades of prior policy."[8]

This procedural error significantly shortened the public's comment period. AWWA and AMWA explained that combining "the two comment periods into one had the practical effect of giving the public only 60 days to comment on two complex issues, instead of the two 60-day comment periods to which they were entitled."[9] These limitations on the comment period also extended to those made by the Science Advisory Board (SAB). Plaintiffs allege that EPA failed to adequately consult with the SAB on its use of a hazard index, and this failure was unlawful.

Plaintiffs argue that the hazard index is another EPA first that violates the SDWA.
Rather than setting a separate MCL for each regulated PFAS chemical, the Rule regulates the mixture of four PFAS—PFNA, HFPO-DA, PFHxS and PFBS—through the use of a hazard index. Plaintiffs argue that EPA's unprecedented attempt to use a hazard index to regulate "undifferentiated mixtures of substances"[10] exceeds EPA's authority and "is not permitted by the statute's text."[11] Moreover, plaintiffs argue that the hazard index is not supported by substantial evidence, as "EPA did not demonstrate a substantial likelihood of co-occurrence among the Index Substances, nor did it prove that combinations of Index Substances below the Levels adversely affect human health."[12]

Plaintiffs flag flaws in EPA's cost analysis.
As EPA did with the hazard index, plaintiffs argue that EPA wrongfully combined cost-benefit analyses for individual MCL into a group determination. The NAM plaintiffs explained that this "allow[ed] the net positive effect of some to offset the net negative effects of others."[13] Additionally, plaintiffs argue that EPA ignored additional costs, including $82 million yearly treatment costs for three contaminants. Plaintiffs are concerned that this failure to consider costs will negatively impact lower-income Americans. The AWWA and AMWA plaintiffs believe the Rule "creates significant risks for water system compliance and water affordability."[14] EPA also failed to adequately consider the Rule's feasibility, including the lack of laboratory capacity to measure compliance and insufficient water system staff and facilities that make compliance prohibitively expensive.

EPA has not yet filed its response, nor has the court set a date for oral arguments. It will be interesting to see what impact Loper Bright Enterprises v. Raimondo, in which the US Supreme Court abrogated the policy of deferring to an agency's statutory interpretation that was laid out in Chevron U.S.A v. Natural Resources Defense Council, has on the arguments made by EPA in defense of its Rule and on the ultimate decision of the DC Circuit. This is particularly so given plaintiffs' arguments that EPA misinterpreted the statutory requirements of the SDWA.

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[1] Brief of Petitioner at 2, *American Water Works Association v. United States Environmental Protection Agency*, No. 24-1188 (D.C. Cir. Oct. 7, 2024) [hereinafter American Water Works Association Brief].

[2] Brief of Petitioner at 1, *National Association of Manufacturers v. United States Environmental Protection Agency*, Nos. 24-1188, 24-1191, & 24-1192 (D.C. Cir. Oct. 7, 2024) [hereinafter *National Association of Manufacturers* Brief].

[3] *Id.*

[4] *American Water Works Association* Brief, *supra* note 1 at 22.

[5] *Id*. at 29, n. 6.

[6] *National Association of Manufacturers* Brief, *supra* note 2 at 35.

[7] American Water Works Association Brief, supra note 1 at 22.

[8] *Id.* at 25.

[9] *Id.* at 31.

[10] *National Association of Manufacturers* Brief, *supra* note 2 at 2.

[11] *Id.*

[12] *Id.* at 11.

[13] *Id.* at 16.

[14] *American Water Works Association* Brief, supra note 1 at 2.

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