EPA Argues PFAS Maximum Contaminant Levels Are Lawful and in Accordance With Statutory Procedure

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On April 10, 2024, the United States Environmental Protection Agency (EPA or Agency) promulgated the first-ever national, legally enforceable maximum contaminant levels (MCLs) for six per- and polyfluoroalkyl substances (PFAS) in drinking water (the Rule). EPA set MCLs for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), at four parts per trillion (ppt), the lowest level that current technology can reliably detect. The rule also set MCLs for perfluorononanoic acid (PFNA), hexafluoropropylene oxide dimer acid (HFPO-DA) (commonly known as GenX chemicals) and perfluorohexane sulfonic acid (PFHxS) at 10ppt, and regulates mixtures of those three PFAS and perfluorobutane sulfonic acid (PFBS) through the use of a hazard index to determine their combined potential risk to human health.

In consolidated cases before the DC Circuit Court of Appeals, industry trade groups (Petitioners) challenged the rule and asked the court to vacate the Rule because, they argue, it violates the Safe Drinking Water Act (SDWA or Act) and "is neither feasible nor cost-effective . . . and creates significant risks for water system compliance and water affordability."[1] Similarly, the groups argue that "rational"[2] PFAS regulation "requires a measured and evidence-based approach that the Rule lacks."[3] Petitioners argue: (1) concurrent publication of the determination to regulate with the final Rule ignores Congressional intent and prior policy; (2) the hazard index violates the SDWA, as the SDWA does not permit regulation of mixtures, and EPA did not prove a substantial likelihood of co-occurrence or that these PFAS adversely affect human health; and (3) EPA wrongly combined its cost/benefit analysis into a group determination that allowed the positive effect of some to offset net negative effects of others, while totally ignoring other costs.

On December 23, 2024, EPA filed its brief in response, arguing that the Rule is founded on "coordinated years-long research and regulatory process across multiple administrations,"[4] and that allegations from the Petitioners "lack merit."[5] EPA contends that its use of a hazard index is lawful and in accordance with the Act's procedures. It argues that the SDWA requires EPA to regulate 'contaminants,' which EPA asserts is "a broad term that Congress itself has recognized encompasses groups or mixtures of individual substances."[6] Moreover, EPA maintains that it appropriately relied on robust national and state occurrence data and the third Unregulated Contaminant Monitoring Rule (UCMR 3) monitoring cycle, which it claims is the best available public health information.

EPA's interpretation of the SDWA permits the Agency to propose a standard "in parallel with the regulatory determination process, rather than waiting for a final determination."[7] EPA asserts that this is the ideal reading of the statute "because it gives effect to all portions of the statutory text and is consistent with Congressional intent."[8] While admitting this to be the first issuance of a regulation prior to a final determination to regulate, EPA claims that it "has never issued a Goal or Standard for a newly listed contaminant after finalizing a determination to regulate either,"[9] and thus, EPA's actions did not depart from any established precedent.

EPA also defends its MCLs, arguing that its standards meet the Act's requirement that they be as close to the Agency's Maximum Contaminant Level Goals, levels of exposure at which no adverse health effects are expected, as feasible. It also avers that it provided a reasoned justification for rejecting Petitioners' suggested alternative standards, and that the court should reject Petitioners' attempt to "second-guess EPA's scientific determinations within its expertise."[10]

Finally, EPA contends that the court should reject Petitioners' challenges to its cost/benefit analysis. EPA maintains

the Act and applicable case law imply that the feasibility of the Rule "does not depend on a comparison of costs and benefits."[11] According to EPA, it can simply determine that the benefits, quantified or not, justify the costs without comparison, and declare the Rule to be feasible on that basis, even if costs exceed proven benefits. Moreover, EPA asserts that "the Act does not permit judicial review of EPA's determination as to whether the Rule's benefits justify its costs,"[12] Even if that were not the case, EPA maintains Petitioners failed to account for the "significant nonquantifiable benefits"[13] associated with the Rule and that it carefully considered costs which demonstrate the "net positive national-level benefits . . . of the Rule justify the costs"[14] As such, EPA Petitioners' claims have no merits and the court should reject them.

Briefing will continue through March 25, 2025, though no hearing date has been scheduled. Petitioners' challenge to the Rule and EPA's response turns on statutory interpretation, which will make this case particularly interesting following the Supreme Court's abrogation of "Chevron deference" in *Loper Bright Enterprises v. Raimondo*. As a result, the court will not defer to EPA's statutory interpretation and will, instead, perform its own independent analysis of the statute. That is one of the reasons some believe Petitioners have a good likelihood of success.

MG+M Intern Tyler Morse is a contributing author of this article.

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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] Brief of Respondent at 2, American Water Works Association et al. v. United States Environmental Protection Agency, No. 24-1118 (D.C. Cir. Dec. 23, 2024) [hereinafter United States Environmental Protection Agency brief].

[5] *Id.*

[6] United States Environmental Protection Agency Brief at 20.

[7] *Id.*

[8] United States Environmental Protection Agency Brief at 20.

[9] United States Environmental Protection Agency Brief at 35.

[10] United States Environmental Protection Agency Brief, at 22.

[11] *Id.*

[12] *Id.*

[13] United States Environmental Protection Agency Brief at 119.

[14] United States Environmental Protection Agency Brief at 106.