LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

What EPA's Continued Defense Of PFAS Rule Means For Cos.

By **Matthew Thurlow, Stephanie Feingold and Drew Jordan** (October 21, 2025, 4:21 PM EDT)


Matthew Thurlow


Stephanie Feingold


Drew Jordan

On Sept. 18, the U.S. Environmental Protection Agency announced its decision to continue fighting a petition in the U.S. Court of Appeals for the District of Columbia Circuit, in Chamber of Commerce of the U.S.A. v. EPA.

The plaintiffs in the case are challenging a Biden-era rulemaking that designated two per- and polyfluoroalkyl substances as hazardous substances under Section 102(a) of the Comprehensive Environmental Response Compensation and Liability Act, or CERCLA — also known as the Superfund law.

The agency's decision came after more than six months of stays in the litigation, while EPA Administrator Lee Zeldin and the agency decided whether to abandon a rulemaking that used new statutory authority to designate two PFAS — perfluorooctanoic acid, or PFOA, and perfluorooctane sulfonate, or PFOS — as hazardous substances.

The legal challenge to the CERCLA rulemaking is ongoing in the D.C. Circuit, and it remains uncertain as to whether the PFOA and PFOS hazardous substance designations will ultimately withstand judicial review. But the EPA's continued defense of the rule significantly increases the likelihood the designations will become permanent.

The agency's reaffirmation of its support for the PFOA and PFOS designations will likely spur increased cost recovery and contribution litigation under CERCLA by both government and private parties that used and released, disposed, or passively received these chemicals onto their property, or incurred remediation costs.

If the rulemaking survives the legal challenge, the long-term regulation of PFOA and PFOS under CERCLA will provide the EPA with significant authority and discretion over national PFAS cleanup policy, and over the scope and potential cost of individual cleanups involving these chemicals in the U.S.

The Rulemaking

In September 2022, the Biden administration issued a notice of proposed rulemaking that aimed to list PFOA and PFOS as hazardous substances under CERCLA Section 102(a).

While the announcement was not surprising in light of general bipartisan support for further regulation of PFAS, the administration's decision to use new authority under Section 102(a) became a flashpoint for industry groups, the EPA and the public.

The EPA issued the draft rule without a regulatory impact analysis, and claimed that it had authority to designate the chemicals as hazardous substances without regard to cost considerations under a "substantial danger to public health or welfare" regulatory framework in Section 102(a) that had never been described by the agency, much less applied.

In April 2024, the EPA announced the final rule designating PFOA and PFOS as hazardous substances. The agency responded to one of the most significant flaws in the rulemaking by issuing a regulatory impact analysis with the final rule.

It also laid out a framework for its decision to designate PFOA and PFOS as hazardous substances based on the agency's determination the chemicals pose a substantial danger to public health or welfare. In addition to the substantial danger analysis, the EPA performed a discretionary analysis assessing the advantages and disadvantages of regulation of the chemicals under CERCLA.

Critically, the agency determined that there was sufficient information available to designate PFOA and PFOS as hazardous substances because, under its statutory authority, it only needed to determine "there is a possibility" that the substances present a substantial danger.

The EPA noted that CERCLA Section 102(a) does not require the agency to be certain that chemicals pose a substantial danger, nor does it require proof of actual harm, before it makes a designation decision.

In the final rulemaking, the EPA remained noncommittal as to whether it would consider costs in future designations of hazardous substances under Section 102(a).

Legal Challenge to Designations

In June 2024, several petitioners challenged the PFOA and PFOS rulemaking in the D.C. Circuit under the Administrative Procedure Act.

Among other challenges, the petitioners argued that the EPA significantly underestimated the costs of the designations in the final rule, exceeded the scope of its statutory authority in applying Section 102(a), and violated notice and comment procedures under the APA in issuing the proposed and final rules.

Following initial briefing, the litigation was stayed following the change in administration. One stay of the litigation followed another, as the agency debated the current administration's approach to the regulation of PFAS.

The EPA has now made a final decision regarding the immediate future of the designations. But many questions remain regarding how PFOA and PFOS will be addressed at thousands of potential sites across the country.

Enforcement Policy and Passive Receivers

Coinciding with the EPA's April 2024 announcement of the final rule designating PFOA and PFOS as CERCLA hazardous substances, the agency published its PFAS enforcement discretion and settlement policy under CERCLA.

The enforcement discretion policy made clear that the EPA's focus would be on holding "responsible entities who significantly contributed to the release of PFAS contamination into the environment" — including PFAS manufacturers, manufacturers that used PFAS in their processes, industrial parties and federal facilities.

The policy also explicitly stated that the agency does not intend to pursue response actions or costs against such "passive receivers" as farmers, municipal landfills, water utilities, municipal airports and local fire departments.[1] Notably, the Biden-era enforcement discretion policy remains in effect.

The potential impact on, and need to address, issues relating to such passive receivers has continued to be an issue of concern for the agency under the current administration. In his April 28 PFAS agenda, for example, Zeldin expressed his support for maintaining the law's "polluter pays" model, and plans to work with Congress on targeted liability carveouts for passive receivers.

And while the EPA's Sept. 17 announcement of its plans to defend the designation does not explicitly reference the enforcement discretion policy, the underlying principle of protecting passive receivers was made clear, as well as the agency's acknowledgement that action from Congress is needed to fully address concerns with passive receiver liability.

As Zeldin noted, "EPA intends to do what we can based on our existing authority, but we will need new statutory language from Congress to fully address our concerns with passive receiver liability," and has offered the EPA's technical assistance to Congress on this issue.

The issue of potential carveouts for passive receivers remains a thorny one, with many regulated parties expressing concerns about where the lines will be drawn and the ramifications of opening the door to such limitations to CERCLA's otherwise strict joint-and-several regulatory scheme.

Meanwhile, bills previously introduced in Congress by Sen. Cynthia Lummis, R-Wyo. (S. 2226, as amended, in the 118th Congress), and by Reps. Marie Gluesenkamp Perez, D-Wash., and Celeste Maloy, R-Utah, (H.R. 1267, in the 119th Congress) have not advanced.

Implications of Regulation Under CERCLA

Now that the EPA has confirmed its support of the PFOA and PFOS hazardous substance designations, parties can expect to see an increase in litigation for cost recovery and contribution under CERCLA by government and private parties.

Litigation that was paused while waiting to see which direction the agency would take has already begun moving forward — including potentially in the aqueous film-forming foam multidistrict litigation — and other parties that may have been waiting in the wings may now begin advancing their claims.

Meanwhile, parties engaging in remediation of PFAS face laboratory capacity challenges, as well as the absence of clear guidance from the EPA as to how to dispose of the associated wastes, since the agency has issued only interim guidance on destruction and disposal of PFAS-contaminated wastes.

Related Regulatory Decisions on PFAS

The EPA's announcement of its intention to move forward with this rule comes against the backdrop of a large deregulatory push by the agency.

And while it has taken steps to relax some PFAS-related regulations — including the announcement of its decisions to pull back on the regulation of four PFAS under the Safe Drinking Water Act, and to extend the deadline for compliance with the PFOA and PFOS maximum contaminant levels by two years — addressing PFAS contamination remains an issue with bipartisan support and a clearly stated priority for the administration.

It remains to be seen whether the rule will withstand judicial review, as the litigation challenging the rule will still have to run its course.

The rule will remain in effect through the course of the litigation, and potentially implicated parties should begin preparing for potential response and cost recovery actions under CERCLA Sections 106 and 107, as well as other compliance requirements for PFOA and PFOS, including reportable release notifications under CERCLA Section 103.

Matthew D. Thurlow and Stephanie R. Feingold are partners, and Drew Cleary Jordan is an associate, at Morgan Lewis & Bockius LLP.

[1] Of note, while the EPA's enforcement discretion policy remains in effect, this policy statement does not affect private parties' ability to pursue cost and contribution actions against potentially responsible parties.