

PFOA and PFOS Are Upheld as CERCLA Hazardous Substances: D.C. Circuit Rejects Industry Challenge

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In a closely watched PFAS decision, the D.C. Circuit upheld EPA's designation of PFOA and PFOS as hazardous substances under CERCLA. In its decision issued on August 18, 2026, the court rejected consolidated challenges to the agency's statutory interpretation and rulemaking process, leaving intact the first new hazardous substance designations since the statute's 1980 enactment.

In the [final rule](#), EPA concluded that PFOA and PFOS may present a substantial danger to public health or welfare or the environment when released, citing evidence of known adverse health effects, long-term environmental persistence, mobility, bioaccumulation, and widespread environmental contamination. Following the evaluation of costs and benefits, EPA determined that designation of the two PFAS as hazardous substances was warranted.

The designations have automatic, direct impacts on regulated entities. For instance, parties must report releases of more than one pound of PFOA or PFOS; federal agencies selling land contaminated with PFOA and PFOS must provide notice; and shipments containing over one pound of PFOA and PFOS must be identified and marked as containing hazardous material.

The designation also creates the legal framework for strict, joint and several, *retroactive* liability for PFOA and PFOS releases, enabling a host of federal and state agencies and private litigants to order cleanup and/or bring claims for damages and cost-recovery. Such actions are frequently very costly and take years (sometimes decades) to resolve.

Takeaways from the Decision

Industry groups challenged the rule on three principal grounds – statutory interpretation, cost-benefit analysis, and uncertainty of impacts – all of which the court rejected.

Petitioners argued EPA needed to show that harm *will* occur, not merely that it *may*. The court disagreed, finding that Congress chose language in CERCLA requiring only the *possibility* of substantial danger. The court also rejected constitutional challenges, holding that the statutory standard provides an intelligible principle and adequate notice to sophisticated, regulated industries.

Petitioners also argued that EPA materially altered the Regulatory Impact Analysis in the final rule from the Economic Assessment that accompanied the proposed rule, in violation of the Administrative Procedure Act. The court rejected this argument as well, applying the “logical

outgrowth” test to conclude that the final Regulatory Impact Analysis built on—rather than departed from—the economic framework published at the proposed-rule stage. Further, the court found EPA’s incremental-cost methodology and its treatment of indirect impacts to be within the agency’s discretion.

Importantly, the court also held that some uncertainty does not bar action under CERCLA. The court emphasized that CERCLA’s own structure—site-specific prioritization, cost-effectiveness review, liability defenses, de minimis settlements, and multiple rounds of public participation—operates as a built-in check against the unfair or disproportionate outcomes petitioners raised.

Looking Ahead

With judicial challenge no longer a near-term shield, regulated entities should take steps in consideration of the designations, such as: identifying current and legacy uses, storage, and disposal of PFOA and PFOS; confirming that release-reporting protocols capture the one-pound threshold and that property-transfer disclosures are up to date; and evaluating where operations may be susceptible to cleanup orders or cost-recovery actions.

Petitioners have until October 2, 2026 to seek rehearing en banc, and the Supreme Court certiorari deadline is later this fall. Though subject to significant legal differences, the court’s reasoning may also inform outcomes in related PFAS litigation, including challenges to EPA’s Safe Drinking Water Act Maximum Contaminant Levels for certain other PFAS.