

D.C. Circuit Applies 'Loper Bright' and Uses Textual Interpretation to Uphold Designation of 2 PFAS Compounds as Hazardous Under CERCLA

By Charles J. Dennen

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On April 19, 2024, the U.S. Environmental Protection Agency (USEPA) designated two per- and polyfluoroalkyl substances (PFAS) compounds as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The designation applies to perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers.

This article discusses the process for designating hazardous substances under CERCLA, a recent decision by the U.S. Court of Appeals for the D.C. Circuit addressing challenges to PFOA and PFOS as hazardous substances under CERCLA, and the implications of that decision, including the D.C. Circuit’s reliance on *Loper Bright*.

In particular, the D.C. Circuit’s decision in *Chamber of Commerce of the United States of America v. EPA* conducted its own “best reading” of CERCLA and relied heavily on the plain text and ordinary meaning of the statutory



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provision. Future challenges to analogous USEPA actions are likely to be approached in the same manner by reviewing courts.

USEPA’s Designation of PFOA and PFOS as Hazardous Substances Under CERCLA

CERCLA classifies hazardous substance as those substances listed in or designated as hazardous under other environmental laws, such as the Clean Water Act, Clean Air Act, and the Toxic Substances Control Act. Separately, Section 102(a) of CERCLA authorizes USEPA to designate as additional hazardous substances those

elements, compounds, mixtures, solutions, and substances that, when released into the environment, “may present substantial danger to the public health or welfare or the environment.”

In determining that PFOA and PFOS qualify as hazardous substances under CERCLA, USEPA considered two primary factors: the potential harm to humans or the environment from exposure to the substance (i.e., hazard); and how the substance potentially moves, persists, and changes when in the environment (i.e., environmental fate and transport).

The direct effects of the final designation on the regulated community include the following:

- releases of PFOA and PFOS that meet or exceed the reportable quantity within a 24-hour period must be reported to the National Response Center, state or tribal emergency response commission, and the local or Tribal emergency planning committee for the areas affected by the release; and
- owners or operators of any vessel or facility must provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area of any release of these substances.

Although the designation of PFOA and PFOS as CERCLA hazardous substance does not automatically require any investigation or cleanup obligations, it makes CERCLA’s enforcement tools and cost recovery mechanism available to USEPA for PFOA and PFOS releases. It also enables USEPA to shift responsibility for cleaning up PFOA and PFOS contamination from the Superfund to those responsible for contamination.

Challenge to Designation of PFOA and PFOS as Hazardous Substances

The designation of PFOA and PFOS as hazardous substances under CERCLA was

challenged by seven industry interest groups, including the Chamber of Commerce of the United States. As stated above, the applicable provision of CERCLA’s definition of a hazardous substance says substances that “may present substantial danger to human health or welfare of the environment” are able to be designated accordingly.

The industry groups argued that USEPA misinterpreted this language and asserted that USEPA was required to find that substantial danger “will” occur if a substance is released into the environment, rather than the “possibility” of substantial harm, in order to comply with the nondelegation and void-for-vagueness doctrines. The interest groups also advanced arbitrary and capricious arguments.

Applying the Supreme Court’s decision in *Loper Bright*, the D.C. Circuit independently determined the best reading of CERCLA’s text without deference to USEPA, concluding that the word “may” in the statute denotes the possibility, not certainty, of substantial danger. As a reminder, the Supreme Court in *Loper Bright* curtailed long-standing *Chevron* deference, holding that courts may no longer defer to a federal agency’s reasonable interpretation of an ambiguous statute simply because the statute is ambiguous. Instead, courts must exercise independent judgment in interpreting statutes.

In upholding the designation, the D.C. Circuit relied on ordinary meaning, statutory context, and contemporaneous dictionary definitions to interpret “may present substantial danger” as a scientifically possible substantial risk upon release of PFOA or PFOS. In reaching this interpretation, the court rejected arguments by the interest groups for narrowing “hazardous substances” relative to “pollutants or contaminants,” finding no textual hierarchy and distinct

cleanup pathways. The court explained that “to require absolute scientific certainty as to what will happen upon every individual release of a dangerous chemical would have been to legislatively paralyze CERCLA.”

The court also found no nondelegation or void-for-vagueness problem because Congress supplied an intelligible principle and regulated entities had fair notice.

The D.C. Circuit’s decision seems to cement PFOA and PFOS as CERCLA hazardous substances, which carries reporting and marking obligations and expanded cost recovery potential.

Interestingly, while the D.C. Circuit’s legal interpretation of the challenge to the hazardous substance designation was *de novo*, the court applied a more deferential review to the interest group’s arbitrary and capricious argument, citing the *FCC v. Prometheus Radio Project* and *Meritor v. USEPA* decisions by the Supreme Court.

The court repeatedly deferred to USEPA’s technical evaluations—such as cost modeling ranges, marginal cost “premium” assumptions, site counts for nonNPL enforcement—as within a permissible range given complexity and data constraints. It also accepted USEPA’s reliance on peerreviewed health literature and carcinogenicity assessments as a reasonable scientific basis for finding hazard and environmental persistence/bioaccumulation.

Implications of D.C. Circuit’s Decision

The D.C. Circuit’s express reliance on *Loper Bright* to conduct its own “best reading” of

the statute signals that future challenges to CERCLA hazardous substance designations and analogous USEPA actions will turn heavily on plain text, structure, and ordinary meaning rather than deference to the federal agency’s interpretation. Indeed, the D.C. Circuit stated that it would independently determine the “best” reading of CERCLA’s text by “applying all relevant interpretive tools.” Where USEPA builds a robust hazard and fate and transport record and reasonably addresses costs, courts will likely uphold hazardous substance designations without requiring proof of certain harm.

Future challenges of USEPA designations may be well served by leading with rigorous textual and structural arguments that pinpoint statutory limits. If the D.C. Circuit’s recent opinion is any indication, arguments that effectively rewrite “may” to “will” or that ignore express temporal or contextual cues are unlikely to succeed.

Challengers should also target unreasonable assumptions made by USEPA with counterevidence tied to the record.

In a post-*Loper Bright* world, courts will decide legal meaning themselves, but federal agencies that pair a textual statutory interpretation with a transparent, dataresponsive record can still defend designations and standards against arbitraryandcapricious challenges.

Charles J. Dennen is a partner at Archer & Greiner in the environmental law group. He can be reached at cdennen@archerlaw.com and 856-673-3932.