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# Parties Seeking to Overturn Superfund PFAS Rule Explain Bases of Their Challenge

Greg A. Christianson, Hillary Sanborn, Megan Ault, and Frankie Brown*

*In this article, the authors discuss a court challenge to the Environmental Protection Agency's rule placing PFOS and PFOA on the Superfund "hazardous substances" list.*

In April 2024, the U.S. Environmental Protection Agency (EPA) issued a new rule designating perfluorooctanoic acid, or PFOA, and perfluorooctanesulfonic acid, or PFOS, and their salts and structural isomers as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The U.S. Chamber of Commerce and other parties have sought to reverse the designation by challenging the rule in a case pending before the U.S. Circuit Court of Appeals for the District of Columbia. In a November 2024 filing, the Chamber and co-petitioners explained the basis of their challenge as summarized below.

## The EPA's Alleged Misinterpretation of the Standard for Designation

In designating a substance as hazardous under CERCLA, the EPA must first determine that, "when released into the environment[, it] . . . may present substantial danger to the public health or welfare or the environment."[1] In applying this standard to PFOA and PFOS, the EPA, the petitioners alleged, construed the phrase "may present substantial danger" as granting it authority to designate a substance as hazardous if it created any possibility of substantial danger. The petitioners argue that this interpretation is far too broad, asserting that it essentially gives the EPA unlimited power to declare almost anything, even substances like salt, as hazardous.

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Instead, the petitioners argue, the EPA's interpretation must have "fixed boundaries" to comport with Congress's intent. Furthermore, the petitioners argue that the EPA erred by listing several factors they "may consider" when evaluating a substance without explaining how those factors are weighed or prioritized.

The petitioners also argue that the EPA's broad interpretation of the substantial danger criterion clashes with how CERCLA defines "pollutants or contaminants," a separate category of substances the EPA can address under the statute under certain circumstances. The petitioners argue that, under the EPA's current interpretation, the requirements for "pollutants or contaminants" are actually stricter than for "hazardous substances," which, they posit, makes no sense. The petitioners further argue that the EPA's proposed approach contradicts the agency's own earlier practices and proposals, which included clear, measurable standards for what constitutes a "substantial danger."

## Purported Flaws in the EPA's Cost Analyses

The petitioners also argue that the EPA's cost analysis, assessing the implications of its rule, is deeply flawed. The EPA initially took the position they were not allowed to consider costs when making the proposed rule. After reviewing public comments, the EPA added a cost analysis in the final rule. However, because the cost analysis was not provided in the public comment version, the petitioners argue that they had been prevented from providing feedback, which, they asserted, constituted a violation of standard administrative procedure.

The petitioners also identified several other alleged problems with the EPA's cost analysis. The petitioners argue the EPA improperly treated cleanup costs paid by companies as a benefit of the rule on the rationale that these costs otherwise would have fallen to the government. The petitioners argue that this is illogical and assumes the EPA would have otherwise incurred these costs by cleaning up these chemicals, which they contend is not supported by evidence. Further, the petitioners asserted that the EPA significantly underestimated the number of sites that would require cleanup, potentially by thousands, dramatically understating the true cost of the rule.

The petitioners argue that the EPA also ignored several important elements of the cost analysis.

First, they contend that the EPA completely ignored the cleanup costs at federal facilities, which are expected to be substantial, and violated the Regulatory Flexibility Act, which requires agencies to consider the impact of their rules on small businesses.

Second, they contend that the EPA failed to address comments from various industries, including waste management, construction, and recycling, about the significant costs they would face and improperly classified major costs as "indirect," excluding them from their analysis of impacts on small businesses.

And finally, the petitioners argue that the EPA's actual calculation of the rule's benefits was flawed and overstated.

## The EPA's Alleged Failure to Consider Far-Reaching Implications

The petitioners argue that the EPA failed to adequately assess the broad implications of their decision, including the impact on real estate transactions, given the widespread presence of PFOA and PFOS. The EPA admits uncertainty about where these chemicals are located, how much cleanup will cost, and the best way to clean them up. Property owners, the petitioners argue, could face unexpected cleanup liabilities, and buyers would need to conduct extensive environmental assessments before purchasing property. While the EPA suggests using "enforcement discretion" to mitigate these issues, the petitioners argue this potential constraint is insufficient because it is not legally binding and does not prevent lawsuits from states or private parties. And the petitioners argue that this uncertainty, combined with the strict liability imposed by CERCLA, makes the rule arbitrary and capricious.

The petitioners conclude that the appropriate action is for the court to vacate the rule entirely. They contend that the alleged problems with the rule are too serious to be fixed through revisions. They further argue that vacating the rule would not cause significant disruption because other regulatory tools are available to address PFOA/PFOS contamination.

The case presents a compelling test of the DC Circuit's approach to reviewing agency rules following the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*.[2] In *Loper*, the Supreme Court overruled the long-standing practice of affording *Chevron* deference to agencies' interpretations of ambiguous statutory terms

if those interpretations were reasonable. The petitioners here specifically invoke the Supreme Court's decision in *Loper* to argue that the EPA's interpretation of when a substance may present substantial danger "is entitled to no deference" and to instead urge the court to apply the "best reading" of the statutory language.

Some reports indicate that the Trump administration might consider reversing the EPA's position on PFOA and PFAS. In particular, the Project 2025 "blueprint" for a second Trump administration compiled by the Heritage Foundation calls on the EPA to "revisit" the designation decision. While the Trump administration has recently clarified its position on certain PFAS issues, it remains to be seen whether it will seek to continue to defend the CERCLA rule, particularly in light of the petitioner's arguments.

## Notes

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1. CERCLA § 102(a).
2. Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).