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EPA's PFAS Hazardous Substance Designation Survives Challenge

BY: HENRY R. POLLARD, V

In the latest step of federal regulation of so-called "forever chemicals" known as per- and polyfluoroalkyl substances (PFAS), the U.S. Court of Appeals for the D.C. Circuit has denied industry challenges to EPA's 2024 designation of PFOA (perfluorooctanoic acid) and PFOS (perfluorooctanesulfonic acid) as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The decision affirms EPA's authority to regulate these chemicals based on their link to serious health conditions and persistence in the environment but also helps set the stage for other regulatory actions addressing PFAS.

Background

PFOA and PFOS are human-made chemicals that have been used in the United States since the 1940s to create water- and oil-resistant products like cookware, rain-repellent clothing, and firefighting foam. Given their wide-ranging uses, they are fairly ubiquitous in many environmental media, even if at low concentrations.

EPA issued a final rule designating PFOA and PFOS as hazardous substances in May 2024, triggering additional reporting requirements, cleanup obligations, and cost-recovery mechanisms under CERCLA associated with their releases into the environment. Industry groups then petitioned the D.C. Circuit for review of EPA's final regulation, arguing that EPA (1) misinterpreted CERCLA's "may present substantial danger" standard, (2) failed to provide adequate notice of its cost-benefit analysis, and (3) acted arbitrarily by regulating despite uncertainties about future cleanup costs.

The Court's Analysis

Quoting CERCLA, the court noted that "CERCLA authorizes EPA 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.'" The court then rejected petitioners' argument that the clause "may present substantial danger" requires certainty of harm upon release, holding that "may" carries its plain meaning of contingency or possibility and that requiring absolute scientific certainty "would have been to legislatively paralyze CERCLA." In addition, the court found compelling the scientific evidence of such risk of substantial danger supporting EPA's regulatory action.

The court also held that EPA's final Regulatory Impact Analysis was a "logical outgrowth" of the Economic Assessment published with the proposed rule and so was duly noticed to the public. It found that EPA's cost-benefit methodology was reasonable, giving deference to the agency's technical expertise in estimating cleanup costs. The court also upheld EPA's treatment of cost-shifting from taxpayers to polluters as an "advantage" of the designation, consistent with CERCLA's core purpose to ensure cleanup costs are "borne by those responsible for the contamination."

The court summarily rejected petitioners' nondelegation and void-for-vagueness arguments, holding that Congress provided an "intelligible principle" by requiring EPA to regulate substances that may present "substantial danger" to public health – a standard satisfied by linking agency decisions to scientific findings.

Key Takeaways

As we have discussed in our prior articles addressing this EPA action (linked here and here), the designation of PFOA and PFOS as hazardous substances means CERCLA's liability of potential responsible parties for releases of hazardous substances is applicable to PFOA and PFOS. As the court noted, however, CERCLA's narrow defenses to such liability still remain where applicable. In addition, under CERCLA, parties releasing more than one pound of either PFOA or PFOS must report such a release to national authorities.

Beyond CERCLA's immediate scope, though, designation as a hazardous substance can also trigger obligations under other regulatory programs. For example, such

designation yields labelling and other duties under the Hazardous Materials Transportation Act for shipments of PFOA and PFOS in amounts exceeding one pound. As we reported in May 2024, EPA has already included certain PFAS compounds in the list of chemicals subject to Toxic Release Inventory reporting under the Emergency Planning and Community Right to Know Act. It could also lead to regulation of PFOA and PFOS as pollutants under the Clean Water Act (CWA). Indeed, certain states are already leaning into studies and regulation of certain PFAS as pollutants under CWA and state wastewater discharge permits, including monitoring of PFAS in industrial wastewater discharges to publicly owned treatment works (POTWs). (See, for example, North Carolina's efforts and Virginia's efforts in this regard.) As a hazardous substance, PFOA and PFOS may also qualify as hazardous waste under the Resource Conservation and Recovery Act. Despite these regulatory program implications presented by the hazardous substance designation, EPA has nonetheless proposed certain exemptions for PFAS under the Toxics Substances Control Act, as we discussed in a prior article.

Given the D.C. Circuit's decision, EPA's designation of PFOA and PFOS as hazardous substances will stand, barring reversal on rehearing before the full D.C. Circuit panel or on appeal to the U.S. Supreme Court. The decision also supports the increasing trend of regulation of certain PFAS in different regulatory programs. Affected industry should therefore evaluate their reporting obligations and potential exposure under CERCLA's liability framework for past and present PFOA and PFOS uses and releases. They should also consider other regulatory obligations for any new or ongoing management, releases or discharges of PFOA and PFOS arising from this designation.

***Chamber of Commerce of the United States of America v. EPA*, No. 24-1193 (D.C. Cir. August 18, 2026)**

EPA Clarifies Timing of Emission Reduction Credit Requirements Under the Nonattainment NSR Program

BY: TANNER N. BRANTLEY

The U.S. Environmental Protection Agency (EPA) on July 1, 2026, issued new guidance (the "Guidance") addressing the timing of emission reduction credit (ERC) obligations under the New Source Review (NSR) permitting program for facilities located in nonattainment areas (NNSR Permits) under the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (CAA). The Guidance addresses a longstanding question regarding when offsets must be obtained under the CAA and clarifies EPA's interpretation of provisions governing offsets for new and modified major stationary sources located in nonattainment areas and may provide increased permitting flexibility for facilities planning new construction projects or major modifications.

The CAA[1] establishes a permitting framework for stationary sources in locations designated as "nonattainment areas" that do not meet the National Ambient Air Quality Standards (NAAQS) codified under 42 U.S.C. § 7409.[2] Part D of Title I of the CAA establishes the NNSR Permit program, which subjects facilities in nonattainment areas to additional requirements, such as obtaining an NNSR Permit before constructing a new or modified major stationary source in a nonattainment area.[3]

42 U.S.C. § 7503(a) sets out the core requirements for permit issuance: the applicant must obtain sufficient offsetting emission reductions, apply the Lowest Achievable Emission Rate (LAER)[4], demonstrate that its other major sources in the State are in compliance, and show that the project's benefits outweigh its environmental and social costs. ERCs are the mechanism used to satisfy the offset requirement and must be surplus, permanent, quantifiable, and federally enforceable.[5] 42 U.S.C. § 7503(a)(1) provides that required emission reuctions (including ERCs) must be in effect by the time the source commences operation. However, certain permitting agencies have required applicants to secure ERCs prior to commencing construction for permit issuance, even where operation would not begin for years, a practice the Guidance now clarifies is not required by the CAA.[6]

The Guidance provides several important clarifications regarding the timing and enforceability of ERC requirements in the NNSR permitting process. The key points are summarized below, with a brief explanation of the practical significance of each:

1. **The CAA does not require all ERCs to be actually acquired before an NNSR permit is issued.**

   The Guidance focuses on the distinction in 42 U.S.C. § 7503 between permit issuance and commencement of operations. While 42 U.S.C. §§

7503(a)(1)(A) and (c) require offsetting emission reductions to be obtained and in effect before a new or modified source begins operating, EPA interprets the federal-enforceability requirement in § 7503(a) as applying to the permittee's obligation to obtain offsets rather than to the prior acquisition of specific ERCs. As a result, EPA concludes that an NNSR permit may be issued before the required ERCs are identified and secured, provided the permit contains enforceable conditions requiring the permittee to obtain the necessary offsets before operation and prohibiting operation until those offsets are secured. This interpretation provides greater flexibility in the timing of ERC procurement while preserving the statutory requirement that offsets be in place before operations commence.

2. **Rather, the NNSR Permit must (a) include an enforceable obligation to obtain ERCs before the facility (or any relevant modification) commences operation, and (b) prohibit operation until the required ERCs are secured in compliance with the NNSR Permit conditions.**

   This approach shifts the key timing requirement from permit issuance to operation, while preserving enforceable protection against uncompensated emissions increases. This gives permitting agencies the discretion to issue an NNSR Permit while ERCs are still being identified or finalized, so long as the NNSR Permit includes the noted enforceable conditions. For a new facility or a facility planning a major modification, this may allow the permitting process and construction planning to move forward pending purchase of qualifying ERCs.

3. **For phased construction projects, ERCs may be secured by phase rather than for the entire facility.**

   This may provide additional flexibility where construction and operation will occur in stages over an extended period. A facility expanding capacity in multiple phases, for instance, may be able to secure offsets for the first phase before that phase begins operation and address later-phase offsets closer to the applicable operational dates.

4. **Permit conditions included in an NNSR Permit issued under EPA-approved State Implementation Plan regulations are federally enforceable.**

   Accordingly, EPA and, where applicable, qualifying citizen plaintiffs may enforce the offset-related commitments if the permittee fails to comply. If a facility were to begin operating before satisfying an ERC condition, EPA and qualifying citizen plaintiffs may have a basis to pursue enforcement under the CAA.

For facilities planning major modifications, including cement clinker kilns, the Guidance provides meaningful clarity for permitting flexibility to meet emission obligations. In particular, facilities located in areas designated nonattainment for PM under the NAAQS may be able to move permitting and construction planning forward while qualifying offsets are identified, approved, or finalized. It does not eliminate the need to obtain ERCs before operation. Still, in practical terms, the Guidance may allow facilities to separate the timing of permit issuance from the timing of operation in securing ERCs, which can help reduce front-end permitting delays and provide a clearer framework for aligning permitting, construction planning, and ERC procurement.

The Guidance offers helpful policy clarification that may benefit new facilities and facilities with planned major modifications located in nonattainment areas. While the Guidance is not legally binding and permitting decisions remain case-specific, it provides a clear interpretation of 42 U.S.C. § 7503(a) that NNSR Permits may be issued and construction may commence before ERCs are actually obtained. That said, each facility and modification may present unique issues, so affected parties should consult with legal counsel to assess how the Guidance may apply to planned projects and to develop strategies for incorporating its framework into particular NNSR Permit applications.

1. The Guidance refers to the nonattainment NSR offset provisions as CAA § 173. This article cites the corresponding codified provisions in the United States Code, 42 U.S.C. § 7503. References to CAA § 173 and 42 U.S.C. § 7503 are

interchangeable and refer to the same statutory requirements.
2. See also, 42 U.S.C. § 7407.
3. 42 U.S.C. § 7502(c)(5).
4. The term "lowest achievable emission rate" is defined in 42 U.S.C. § 7501(3) as "any source, that rate of emissions which reflects (A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or (B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent."
5. 42 U.S.C. § 7503(c).
6. See, e.g., Memorandum dated June 14, 1994, from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Air Division Directors, EPA Regions 1-10, Subject: "Offsets Required Prior to Permit Issuance" ("1994 Seitz Memo") at 1, 5-6 (stating that, "[I]n such circumstances, creditable offsets have been identified, quantified, adopted as a matter of State law, and submitted to EPA, but the EPA administrative process to approve the measure may not be completed by the time the source seeks to commence construction," and, accordingly, "it may not be feasible for EPA's administrative process needed to make the offsets federally enforceable . . . within the ordinary timeframe for issuing a construction permit.").

What's in a List? EPA Eyes PFAS, Pharmaceuticals and Microplastics in Drinking Water

BY: SUSIE A. BRANCACCIO

Under the Safe Drinking Water Act (SDWA), EPA is required to publish a list of contaminants meeting the following criteria: the contaminants are not subject to any proposed or promulgated primary drinking water regulations, are known or anticipated to occur in public water systems and may require regulation under the SDWA. In developing this list, EPA must consult the scientific community, consider data in EPA's national drinking water contaminant occurrence database, and may include contaminants regulated under other environmental programs, including hazardous substances identified in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, and substances registered as pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Every five years, EPA must publish an updated list and make regulatory determinations for at least five contaminants on the list.

In April 2026, EPA published its draft Contaminant Candidate List 6 (CCL 6), the sixth iteration of the list required under the SDWA. The proposed CCL 6 includes 75 chemicals, four chemical groups (disinfection byproducts (DBPs), microplastics, per- and polyfluoroalkyl substances (PFAS), and pharmaceuticals), and nine microbes.

This article answers "what's in a list?" through six key takeaways from EPA's proposed CCL 6.

1. The CCL Is a "First Step" – But Not a Prerequisite or Guarantee of Regulation

EPA describes inclusion on the CCL as the "first step" toward potential regulation under the SDWA. However, a contaminant does not necessarily have to appear on the CCL before EPA can regulate it in drinking water. The SDWA expressly recognizes that EPA can determine to regulate an unlisted contaminant, so long as the criteria for making a positive regulatory determination are met.

The converse is also true: inclusion on the CCL does not mean EPA will ultimately determine a contaminant should be regulated in drinking water. Instead, EPA separately determines whether selected CCL contaminants warrant regulation. EPA makes a positive regulatory determination (*i.e.*, a determination to regulate in drinking water) when it determines three statutory criteria are satisfied: (1) the contaminant may have an adverse effect on the health of persons; (2) the contaminant is known to occur or there is a substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern; and (3) regulation of the contaminant presents a meaningful opportunity for health risk reduction for persons served by public water systems. Conversely, EPA makes a negative regulatory determination (*i.e.*, a determination not to regulate in drinking water) when it determines one or more of these criteria are not met.

Thus, while CCL inclusion may be a "first step" toward regulation, it is neither a prerequisite to nor a guarantee of regulation under the SDWA.

2. A Negative Regulatory Determination Does Not Necessarily End a Contaminant's CCL Story

Once EPA determines a contaminant will not be regulated in drinking water and removes it from the CCL, EPA retains the authority to consider that contaminant for inclusion on a future CCL. EPA exercised this authority in developing the proposed CCL 6. In developing the proposed CCL 6, EPA reconsidered twelve (12) contaminants that had previously received negative regulatory determinations. EPA explained that this approach is consistent with the "purpose of CCL as an iterative process that aims to improve each time."

To that end, EPA evaluated whether any new health or occurrence data since the original determination indicated a positive regulatory determination could result if relisting occurred. For nine of these contaminants, EPA determined that the currently available data did not support consideration for draft CCL 6.

3. Microplastics Make Their CCL Debut, but EPA Says Data Gaps Remain

For the first time, EPA has included microplastics as a group on a draft CCL. In 2022, while EPA was developing CCL 5, EPA's Science Advisory Board encouraged the agency to consider assessing and including microplastics on future CCLs. EPA described their inclusion on draft CCL 6 as a "first step toward defining and better understanding potential public health risk from exposure via drinking water."

Nevertheless, EPA specifically noted because "significant data gaps" for microplastics remain, further research will be required to better understand the potential risks of microplastics in drinking water. EPA identified several of these gaps, including which characteristics of microplastics (color, size, shape, etc.) are associated with adverse health effects from exposure through drinking water; which sources contribute to the formation of microplastics in drinking water; and how microplastics interact with other substances in drinking water.

Thus, for microplastics, CCL 6 identifies not only a potential candidate for regulation, but also the specific research questions EPA views as important to future regulatory decisions.

4. EPA Casts a Wide Net for Pharmaceuticals

For the first time, EPA has proposed adding "pharmaceuticals" as a group to the CCL. However, EPA cast a wide net in defining this new group. For purposes of draft CCL 6, EPA defined the pharmaceuticals group by reference to the Federal Food, Drug, and Cosmetic Act's (FDCA) definition of a "drug," which includes, among other things, articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; non-food articles intended to affect the structure or function of the human or animal body; and articles intended for use as components of either.

Despite the breadth of this definition, EPA's discussion of pharmaceuticals provides some indication of how the agency may prioritize individual substances for further study. In evaluating pharmaceuticals for CCL 6, EPA considered new occurrence data regarding pharmaceutical products in water and referenced that it added a data source used to identify chemicals with "estrogenic activity" (*i.e.*, the ability to mimic or otherwise affect estrogen activity in the body).

EPA's further evaluation of this broad group should shed more light on how this information, along with any other considerations, will shape the prioritization of specific pharmaceuticals.

5. PFAS and DBPs: Familiar Groups Return to CCL 6 with Some Minor Changes

PFAS and DBPs both return as chemical groups on draft CCL 6, although their composition has changed since CCL 5: the PFAS group has narrowed, while the DBP group has expanded.

For PFAS, EPA retained the structural definition used for CCL 5, which defines the universe of PFAS considered part of the group, while proposing to exclude any PFAS subject to national drinking water regulations at the time final CCL 6 is published (including PFOA and PFOS, for which EPA established Maximum Contaminant Levels (MCLs) in 2024).

For DBPs, EPA added four additional unregulated DBPs (bromochloroacetonitrile, chloral hydrate, chloronitramide anion, and trichloroacetonitrile) to the group, bringing the total to 27, based on consultation with subject matter experts at the agency.

6. Not Every CCL 6 Contaminant Is Equally Ready for Regulatory Review

CCL 6 does more than identify contaminants that may ultimately warrant regulation. EPA acknowledged that multiple contaminants on draft CCL 6 lack occurrence or health information needed to support a future regulatory determination, whether positive or negative. To help identify those gaps, EPA categorized chemical and microbial contaminants into four groups based on the availability of occurrence

data and health assessments. EPA did not assess data availability for the PFAS and DBP groups because the availability of occurrence and health-effects data varies among the individual chemicals within each group.

EPA described this categorization as a "starting point for identifying the data needs of the CCL 6 contaminants." In doing so, EPA is also communicating to stakeholders where additional research may be needed to inform future regulatory decisions.

For example, draft CCL 6 includes 75 individually listed chemicals. Although these chemicals appear on the same list, EPA's Chemical Technical Support Document indicates that they are not necessarily equally ready for regulatory review. Group A chemicals, which include 1,4-dioxane, have nationally representative finished-water data and qualifying health assessments that derive oral toxicity values. According to EPA, Group A contaminants currently have the data needed to proceed to further evaluation during the regulatory determination process, although this designation does not indicate whether EPA will ultimately make a positive or negative regulatory determination. By contrast, Group D chemicals, which include nicotine, lack a qualifying health assessment (*i.e.*, a peer-reviewed, publicly available health assessment developed by EPA or another comparable health agency) and have various occurrence data gaps.

So, what's in a list? As draft CCL 6 showcases: more than a roster of contaminants that may someday be regulated. The proposed Contaminant Candidate List also provides insight into EPA's evolving priorities, the information it believes is still needed, and where drinking water regulation may be (or not be) headed next.

The final version of CCL 6 is expected to be signed for publication by November 17, 2026.

"Trickling-In": Second Circuit Refines the 401 Water Quality Certification Scope and Procedures

BY ETHAN R. WARE

For years, courts have incrementally expanded the scope and nature of restrictions on developments at or near waters of the United States (WOTUS), including wetlands, using a state's authority to issue deny, or approve with conditions the required 401 water quality certification (401 WQC). It appears the pendulum may be swinging the other way.

Most projects impacting WOTUS require the affected state to issue 401 WQC before it may proceed. In *Raritan Baykeeper, Inc., et al. v. New York State Department of Environmental Conservation (DEC), et al.*, 2026 WL 2453538 (August 21, 2026), the United States Court of Appeals for the Second Circuit rejected environmentalists' petition for review and set new boundaries for challenges to a state-issued 401 WQC. Petitioners sought to reverse the 2025 grant of 401 WQC for planned placement of the Transcontinental Gas Pipeline Company's (Transco) proposed Northeast Supply Enhancement (NESE) pipeline underwater in Raritan Bay and Lower New York Bay to approximately three miles offshore of Queens. Ultimately, the Court found the New York decision did not violate the Clean Water Act (CWA), was not arbitrary and capricious or otherwise contrary to law and did not violate the notice and comment principles or state procedural requirements.

The Court rejected "petitioners' argument that NYSDEC was required to provide **a more substantial justification** [for the pipeline project because it had previously denied 401 WQC]. An agency is not required to give more reasoning than is otherwise required [by Clean Water Act]." *Id.* At *5 [Emphasis added]. Accordingly, procedural deficiencies resulting in a 401 WQC denial should not deter applicants.

The 2nd Circuit also rejected petitioners' claim that the State that issued the 401 WQC was not permitted to rely on a **post-certification compliance plan** in granting the water quality certification. The Court did not agree: "WQC is based on NYSDEC's extensive technical review of Transco's application and the agency's determination that the NESE project will comply with New York water quality standards if certain conditions are met, including continuous water quality monitoring, specific construction windows and employment of an independent third-party monitor with stop-work authority [after issuance of the 401 WQC]." The 401 WQC requires Transco to comply with specific water quality standards as to roughly a dozen pollutants for each segment of the proposed pipeline, based on best usages and anticipated environmental conditions of each segment. The Court found post-certification compliance plans do not constitute a deferral of the agency's obligation to ensure the project would meet water quality standards. "Rather, the agency discharged that obligation by incorporating additional protections into the WQC."

Lastly, the Court rejected the argument that additional public participation was required for review and comment of the 401 WQC compliance plans. "But a general policy favoring public participation cannot be read to impose public notice and comment requirements over and above those already contained in federal and state law, which mandate public notice and comment only on complete § 401 'applications,'" the order opinion said.

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