

**MEMORANDUM TO
PMAA STAFF, BOARD OF DIRECTORS, AND EXECUTIVE COMMITTEE**

FROM: Steven A. Hann, Esquire, PMAA East Solicitor

DATE: August 27, 2026

RE: D.C. Circuit Upholds EPA Regulation Designating PFOA and PFOS as CERCLA Hazardous Substances

For those of you who have attended the numerous PFAS-related seminars and webinars presented by PMAA, you have heard me discuss certain EPA regulations that are of interest to Pennsylvania municipal authorities. One of those regulations is a 2024 rule in which EPA designated certain PFAS contaminants, PFOA and PFOS, as hazardous substances under CERCLA, otherwise known as Superfund (“Regulation”). During these presentations, updates were given as to the status of the Regulation and the ongoing litigation involving an industry challenge to the Regulation. In early 2026, oral argument was held before the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) and, on August 18, 2026, the D.C. Circuit issued its long-awaited decision. Significantly, of interest to Pennsylvania municipal authorities, the D.C. Circuit upheld the EPA Regulation and denied the challenge designating PFOA and PFOS as hazardous substances under CERCLA. Needless to say, the designation of PFOA and PFOS as hazardous substances has significant potential consequences to many regulated entities, including those in the water, wastewater, stormwater and waste management sectors.

In the petition challenging the Regulation, three specific arguments were asserted. In general, these arguments were that (1) EPA misinterpreted the term “may present substantial danger” in CERCLA’s definition of a hazardous substance, (2) EPA’s cost-benefit analysis provided insufficient notice to the regulated community, and (3) EPA’s cost-benefit analysis and decision to regulate in the face of uncertainty were arbitrary and capricious. The D.C. Circuit rejected each of these arguments, finding that:

“The plain language of [CERCLA] Section 9602 allows EPA to designate as hazardous substances chemicals like PFOA and PFOS that repeatedly have been linked to adverse health effects in myriad peer-reviewed studies. EPA provided adequate notice of its cost-benefit analysis underlying the ultimate Designation through its earlier Economic Assessment and request for comments on it. Finally, EPA acted reasonably based on the record before it in its calculation of costs and benefits, and in its decision to take this regulatory step of designating PFOA and PFOS to be hazardous substances.”

The aforementioned is but one passage in the D.C. Circuit’s 53-page opinion, although it succinctly summarizes the court’s response to petitioners’ arguments. The entire opinion is certainly a must-read for those potentially impacted by the court’s decision. In any event, in the

short-term, the next step in this matter is uncertain. The D.C. Circuit issued a companion order specifically withholding the mandate in its opinion until seven days after disposition of any timely filed petition for rehearing or petition for rehearing *en banc*. Moreover, could there be an appeal (Petition for Certiorari) filed with the United States Supreme Court?

To reiterate, the impact of the D.C. Circuit's opinion is significant for many sectors, including those involved with water, wastewater, stormwater, and waste management. With respect to CERCLA liability, the D.C. Circuit did address certain general liability issues in its opinion germane to arguments raised by the petitioners. However, the court did not have reason to fully address the specific concern that passive receivers of PFAS will be subject to potential liability under CERCLA, despite having no role in introducing PFOA or PFOS into the stream of commerce. (As a reminder, liability under CERCLA is strict, joint and several, and retroactive.) Therefore, with respect to PMAA members who are passive receivers of PFAS chemicals, the possibility of CERCLA liability remains a paramount concern. As discussed at various PMAA seminars and webinars, there have been attempts in Congress to provide an exemption from CERCLA liability for passive receivers of PFAS, but there has not been much progress to date in that regard.

EPA itself has recognized the uncertainty facing passive receivers of PFAS with respect to CERCLA liability. In fact, EPA released a document entitled PFAS Enforcement Discretion and Settlement Policy Under CERCLA ("Policy") simultaneously with the publication of the Regulation. In the aforementioned Policy, EPA indicated that it did not intend to pursue entities where equitable factors do not support seeking response actions or costs under CERCLA. Such entities identified by EPA include community water systems, publicly owned treatment works, municipal separate storm sewer systems, publicly owned/operated municipal solid waste landfills, and farms where biosolids are applied to the land. However, it is significant to note that this EPA Policy is not binding on private parties in CERCLA litigation. Accordingly, it is not inconceivable that passive receivers of PFAS, such as those in the sectors identified by EPA in its Policy, may face liability under CERCLA's broad liability provisions and/or incur sizable financial expenditures resulting from CERCLA litigation. As PMAA members are well aware, those in the water, wastewater, stormwater and waste management sectors already have significant existing financial priorities, ranging from compliance obligations to cybersecurity to infrastructure issues. Nevertheless, PMAA members may soon potentially face an additional financial burden solely in their role as passive receivers of certain PFAS chemicals. Accordingly, it is critical for Congress to enact legislation protecting passive receivers of PFAS chemicals from CERCLA liability.

This Memorandum is provided for informational purposes only and should not be construed as legal advice on any subject matter. If any PMAA Staff, Member of the Board of Directors, or Member of the Executive Committee would like to discuss this matter further, please let me know. Anyone else reading this Memorandum should consult with their own legal counsel.