

# GenX/Safe Drinking Water Act: Federal Appellate Court Addresses Reviewability of Health Advisory



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09/25/2024

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The United States Court of Appeals, Third Circuit (“Court”) addressed in a July 23rd Opinion an issue arising out of publication of a health advisory by the United States Environmental Protection Agency (“EPA”). See *Chemours Co. FC, LLC v. United States Env’t Prot. Agency*, 109 F.4th 179 (3d Cir. 2024).

The question addressed was whether the health advisory was a final agency action under the federal Safe Drinking Water Act (“SDWA”).

In the absence of a final agency action the Court would not have subject matter jurisdiction.

The SDWA was originally enacted in 1974 to protect public health by regulating the nation’s water supply. The statute authorizes EPA to set national health-based standards for drinking water to protect against both naturally occurring and man-made contaminants that may be found in drinking water. Such health-based standards are established by promulgation of a rule through notice and comment.

EPA can also publish SDWA health advisories. These are nonbinding documents that provide information about safe levels of contaminants. The advisories are intended to inform decision-making concerning contaminants at a local level.

EPA issued a health advisory for Hexafluoropropylene Oxide Dimer Acid and its ammonium salt (collectively “HFPO-DA”) in 2022. The chemical is also known as GenX.

HFPO-DA was stated to have been detected in drinking water. Polymer manufacturers were identified as a possible source. Through development of a toxicity assessment EPA determined that HFPO-DA would not cause adverse human health effects over a lifetime if the concentration in drinking water remained at or below 10 nanograms per liter.

Chemours is a company that uses HFPO-DA to manufacture polymers. In July 2022, Chemours petitioned the Court for review of the HFPO-DA health advisory. Indirect consequences of this health advisory of concern to the company was its triggering of new obligations under other federal or state laws (i.e., use as a cleanup standard or action level).

The Court has limited subject matter jurisdiction over EPA actions pursuant to the SDWA. It can only review drinking water regulations and other “final actions of the Administrator” under the SDWA.

SDWA health advisories are definitionally not regulations. Thus the Court only would have jurisdiction if a health advisory constitutes a “final action” of the EPA.

There are two standards that must be met for an agency action to be considered a “final action.” First, the action must be the “consummation of the agency’s decision-making process.” This means it is not “tentative or interlocutory” in nature. Second, the action must create either rights, obligations, or legal consequences.

The HFPO-DA health advisory was held to fail the second of these standards.

States or other local decision makers may use information within the health advisory to change rules and regulations. However, these are not direct consequences flowing from the health advisory. A separate actor must take an additional action before any obligation, prohibition, or restriction would occur.

The Court rejected Chemours argument that the health advisory created obligations under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). While CERCLA can require a party that introduces a hazard to clean it up, nothing in the health advisory requires inclusion of HFPO-DA in the clean up plans required by CERCLA. Any changes would have to flow from another agency’s actions, not the health advisory itself.

Any agency or state incorporating the health advisory inherently are not direct consequences as it requires another action to occur. Accordingly, there are no direct consequences of the health advisory, only indirect consequences.

Since there are no repercussions or consequences directly from the health advisory, the Court concluded it is not a final agency action. Since it is not a final agency action, the Court dismissed the complaint based on a lack of subject matter jurisdiction.

A copy of the Opinion can be downloaded [here](#).