PFAS/Safe Drinking Water Act: American Water Works Association Opening Brief Challenging U.S. Environmental Protection Agency Drinking Water Regulations

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The American Water Works Association ("AWWA") and the Association of Metropolitan Water Agencies ("ASMWA") have filed their Opening Brief in a challenge to the United States Environmental Protection Agency's ("EPA") Safe Drinking Water Act ("SDWA") regulations setting National Primary Drinking Water Regulations for six per- and polyfluroalkyl substances ("PFAS").

The two trade associations filed a Petition challenging the SDWA regulations in the United States Court of Appeals for the District of Columbia Circuit for the following six PFAS:

- perfluorooctanoic acid ("PFOA").
- perfluorooctane sulfonic acid ("PFOS")
- perfluorohexane sulfonic acid ("PFHxS")
- perfluorononanoic acid ("PFNA")
- perfluorobutane sulfonic acid ("PFBS")
- hexafluoropropylene oxide dimer acid ("HFPO–DA").

The SDWA final rule was published on April 26, 2024. See 89 Fed. Reg. 32,523.

The AWWA describes itself as an international, nonprofit, scientific and educational society whose membership includes more than 4,000 utilities that supply roughly 80% of the nation's drinking water and treat almost half of its wastewater.

The ASWMA describes itself as a nonprofit tax-exempt trade association representing approximately 180 of the largest public drinking water systems in the United States.

The two organizations' initial description of the EPA rulemaking argue:

- The regulations are the most expensive ever promulgated.
- Failure to follow the SDWA's prescribed risk evaluation and standard setting process.
- Utilized a truncated multi-step process without nationally representative occurrence data.
- Made a novel use of a "hazardous index" to regulate combinations of Index PFAS as a "mixture" based on a convoluted formula rather than individual limits for each contaminant.

The specific arguments raised in the Opening Brief include:

1. EPA Violated the Act by Issuing Proposed Regulations for Index PFAS Before Making Final Determinations to Regulate Those PFAS.
    1. Under the plain language of the Act, EPA may not issue a proposed rule before issuing a final Determination.
    2. EPA's new interpretation rests on an unreasoned and unacknowledged departure from decades of prior policy.
    3. EPA's defense of its novel approach is unpersuasive.
2. EPA's Use of the Hazard Index as an Enforceable Level for Mixtures of Two or More Index PFAS Violated the Act and Was Arbitrary and Capricious.
    1. The hazard index is not a Level.
    2. The hazard index is not appropriate for regulating "mixtures" of Index PFAS.
3. EPA's Determinations to Regulate HFPO-DA, PFNA, and Mixtures of Two or More Index PFAS Were Unreasonable and Should Be Vacated.
    1. EPA arbitrarily relied upon limited, piecemeal state-level occurrence information to reach Determinations to Regulate HFPO-DA, PFNA, and mixtures of two or more Index PFAS.
    2. The available occurrence information did not demonstrate that HFPO-DA, PFNA, or mixtures of two or more Index PFAS have a substantial likelihood of occurring in public water systems with a frequency and at levels of public health concern.
4. Based on a Fatally Flawed Cost Analysis, the Rule Arbitrarily Regulates at Levels that Impose Significant Additional Costs Without Commensurate Health Benefits and Are Not Feasible.
    1. The Rule should be remanded to EPA to cure the serious deficiencies in its cost analysis.
    2. The incremental costs of the Rule's Levels are unsupported.

A copy of the Opening Brief can be found here.