A Brave New World: Trying Causation in PFAS Cases Under CERCLA

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Key Takeaways

- The D.C. Circuit recently held that the EPA reasonably classified PFOA and PFOS as hazardous substances under CERCLA, clearing the way for additional cleanup and cost-recovery claims involving PFAS contamination.
- Companies facing PFAS allegations can expect to see plaintiffs pursue parallel tort and CERCLA claims. Because the CERCLA causation standard is distinct from traditional proximate causation, defenses that successfully defeat traditional PFAS claims may not be enough to dispose of CERCLA liability.
- Causation defenses in PFAS cases will now have to be fashioned to account for both the traditional proximate cause standard and the more nuanced, elusive CERCLA causation standard. Early case assessment and jurisdiction-specific causation analysis will be increasingly important, and expert strategies that address both traditional tort and CERCLA standards should be considered.

The D.C. Circuit Recently Held That PFOA/PFOS Are Properly Classified as Hazardous Substances Under CERCLA

In *Chamber of Commerce of the United States v. Environmental Protection Agency*, No. 24-1193, 2026 WL 2409748 (D.C. Cir. Aug. 18, 2026), the U.S. Court of Appeals for the District of Columbia Circuit ruled that the EPA's designation of perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under CERCLA was within its authority and reasonable. Seven petitioners, including the U.S. Chamber of Commerce, brought the appeal. *Id.* at *4. The petitioners advanced three positions: (1) the EPA's inclusion of PFOA and PFOS as hazardous substances was contrary to law; (2) the EPA's cost-benefit analysis was arbitrary and capricious; and (3) the EPA's decision to regulate PFOA and PFOS despite future uncertainty was arbitrary and capricious. *Id.* at *4-5. The Court found that none of the Petitioners' claims succeeded and affirmed in favor of the EPA. *Id.* at *23.

First, the petitioners argued that the EPA's designation was contrary to statutory language and established constitutional principles. Specifically, they contended that the EPA was required to find that, upon release of the two forever chemicals, substantial danger will occur. *Id.* at *5. Petitioners insisted that "may" in the statutory clause "may present substantial danger" meant that the danger *will* manifest. *Id.* at *5. If substantial danger did not actually arise, then the designation of PFOA and PFOS would risk overinclusion and exceed EPA's constitutional authority. *Id.* But the Court rejected these arguments outright and adopted the EPA's reading of the statute: The plain language and use of "may" illustrates contingency and the *possibility*, not certainty, for future public harm. *Id.* at *5-6. Further, the negative health consequences of exposure to PFOA and PFOS are so well-established that public harm is probable if exposure occurs. *Id.* at *7. The Petitioners also argued that the EPA's statutory reading violated the nondelegation and void-for-vagueness doctrines and did not provide enough notice to interested parties. *Id.* at *8-9. But the Court found no such constitutional violations. The Court applied the intelligible principle test and held that CERCLA's standard provided sufficient guidance to the EPA, and the EPA's decisions satisfied the nondelegation requirements. *Id.* It also concluded the petitioners' void-for-vagueness objection was inconsequential because the EPA already designated PFOA and PFOS as pollutants or contaminants, providing fair notice to interested parties. *Id.* at *9.

Second, the petitioners argued that the EPA conducted its cost-benefit analysis in an arbitrary and capricious manner by failing to disclose all critical information and miscalculating or inaccurately weighing variables in the rulemaking process. *Id.* at *9-14. In response, the EPA explained that it published an Economic Assessment with the proposed rule-which included qualitative and quantitative estimates-and invited the public to comment on whether it should complete a fuller analysis. *Id.* at *10. The public, including the Chamber of Commerce, submitted comments. *Id.* at *11-12. The EPA's ultimate methodology arose from these assorted comments, and no novel or unforeseeable methodologies were deployed. *Id.* at *13. The Court held that the final analysis was a "logical outgrowth" of the Economic Assessment and its accompanying comments. *Id.* at *9. The Court agreed with the EPA on all points, finding that the EPA acted reasonably throughout the decision-making process. *Id.* at *10, *14.

Third, the petitioners argued that the EPA acted arbitrarily and capriciously because it did not adequately consider future uncertainties. *Id.* at *19. Among other vagaries, it is unclear where PFOA/PFOS contamination exists and how it would impact defendants' economic interests or response actions. *Id.* at *19-20. However, the EPA explained that uncertainties are inherent in any CERCLA action because they are site-specific, discretionary and contingent. *Id.* at *20. Further, local and state governments may play roles in the cleanup process, which falls outside the EPA's jurisdiction. *Id.* at *16. The EPA also explained that despite the difficulty of forecasting CERCLA actions, the rule's impact on regulated parties could be mitigated through agency discretion and liability limitations set forth in the statutory language. *Id.* at *22. The Court walked through the extensive regulatory process that occurs before a private party faces liability, including such steps as National Priorities List scoring, notice-and-comment rulemaking, remedial site evaluation, action plans and a second round of public comment. *Id.* at *20-22. Ultimately, the Court once again sided with the EPA, finding it acted reasonably and that petitioners' arguments were unavailing. *Id.* at *23. Because the Court upheld the designation, plaintiffs may now bring Section 106 or Section 107 CERCLA actions for cleanup and cost-recovery actions related to PFOA/PFOS. *Id.*

The *Chamber of Commerce* Result Will Alter the way that Causation Is Tried in PFAS Cases

The *Chamber of Commerce* result portends a shift in the way that PFAS claims are pursued. Plaintiff lawyers can now be expected to pair traditional tort claims (e.g. nuisance, negligence, product liability) with CERCLA cost recovery claims at alleged contamination sites where PFOA/PFOS are present. The plaintiffs' bar may be incentivized to do so, since the structure and application of CERCLA is often pro-plaintiff. As courts are prone to repeat, the text of CERCLA should be read to "further its remedial purpose"-i.e. in a way that holds polluters responsible and expedites environmental clean-ups. *Sylvester Bros. Dev. Co. v. Burlington N. R.R.*, 133 B.R. 648, 653 (D. Minn. 1991) ("Among the purposes of CERCLA are the prompt cleanup of hazardous waste sites, the protection of health and the environment, and making those who pollute pay for the cleanup of that pollution.").

Notably, unlike standard torts, CERCLA cost recovery claims do not require traditional proximate causation. *United States v. Saporito*, 684 F. Supp. 2d 1043, 1060 (N.D. Ill. 2010). Put another way, to prevail under CERCLA, a plaintiff does not need to prove that alleged contamination is attributable to any particular defendant. *Id.* Rather, the CERCLA plaintiff need only demonstrate that its clean-up was occasioned by a release (or threatened release) of hazardous materials generally. *Id.* This distinction is best illustrated by an example: a landfill that receives hazardous substances disposed of by numerous potentially responsible parties. Subsequently, contaminants seep from the landfill into subsurface waters, which the plaintiff investigates and remediates. The plaintiff sues defendants A through Z under CERCLA. To hold defendant C liable, the plaintiff need not adduce evidence that the groundwater contamination specifically originated from defendant C, as might be true in a typical toxic tort case. Instead, plaintiff establishes liability under CERCLA where it proves that (a) defendant C disposed of some (potentially even *de minimis*) amount of hazardous substance at the landfill; and (b) remediation was caused by some type of release (or even threatened release) of hazardous substance from the landfill.

The relaxed CERCLA causation standard may have profound implications for how PFAS claims are litigated and tried. Historically, specific causation has been one of the primary defenses to PFAS contamination claims. For example, in cases brought by public water districts alleging that PFAS from upstream industry contaminated potable water sources, manufacturing defendants expend significant resources developing expert opinions that any PFAS released from their facilities did not reach the water source, given prevailing hydrogeological conditions.

Such a showing effectively forecloses a traditional PFAS toxic tort claim, but it may or may not dispose of a parallel CERCLA PFAS claim. In a CERCLA case, allegations that a contaminant migrated from one locale to another are governed by a unique, convoluted, and frequently inconsistent strain of so-called "two site" precedent. Courts applying CERCLA have not converged on a unanimous causation standard in two site cases. Certain courts have held that the plaintiff must only establish the "possibility" of some *de micromis* migration. Others have required plaintiffs to prove a "plausible" theory of inter-site migration and contamination. Yet others have reversed the burden of proof, placing the ultimate onus on defendants to establish that there was no migration between sites. Various additional formulations of the causation test have been advanced.

The upshot is that as CERCLA PFAS claims proliferate in the wake of the *Chamber of Commerce* decision, defendants must fashion causation defenses which satisfy two distinct but potentially overlapping standards: quintessential proximate causation and the more nebulous CERCLA causation test. At the outset of litigation, it will be critical to conduct thorough jurisdiction-specific research to identify the most favorable CERCLA causation standard available. Defendants should consider filing early motions to persuade the court to adopt the defendants' interpretation of the governing law. Fact depositions must be taken with both proximate cause and the CERCLA standard in mind. Similarly, expert opinions must be structured to satisfy both standards at summary judgment and trial. Defendants in dual CERCLA-tort PFAS cases who neglect the nuances of CERCLA causation risk squandering substantial resources on orthodox causation defenses that prove ineffectual.

Benesch's Environmental Litigation team has extensive experience navigating and applying CERCLA causation standards in two-site cases. It is one of the few firms in the country to have tried both traditional toxic tort cases and CERCLA two-site cases to verdict. Among other matters, it prevailed in a billion-dollar CERCLA bench trial by demonstrating that emissions from a lead smelter did not cause contamination in nearby residential communities. Please contact the Benesch team for additional information and advice.