

Michigan PFAS Drinking Water Case Is Appealed

Article By:

John Gardella

On several occasions, [we wrote](#) regarding a Michigan state court ruling that struck down Michigan's PFAS regulations related to drinking water enforceable limits, with the ensuing appeal in December 2022 by the state. We last updated that on August 22, 2023, the Appeals Court ruled in a 2-1 decision that the state's PFAS drinking water regulations were invalid, as regulators did not properly determine compliance costs from groundwater cleanup that would be automatically triggered by the proposed drinking water rules. Now, the state has [appealed](#) to the [Michigan Supreme Court](#) asking the state's highest court to accept the case for review. 3M's briefing on the issue is due to be filed this week.

The significance of the Michigan PFAS challenge is that the arguments and court rulings provide clues as to similar arguments that we predict will be advanced when certain companies challenge federal drinking water standards and the CERCLA PFAS designation in courts.

Michigan PFAS Challenge

Last year, Michigan enacted PFAS drinking water standards for seven types of PFAS – PFOA (8ppt), PFOS (16ppt), PFNA (6ppt), PFHxA (400,000ppt), PFHxS (51ppt), PFBS (420 ppt) and the Gen-X chemical HFPO-DA (370 ppt). 3M challenged the regulations in court on three grounds: (1) Michigan had not shown that the standards were necessary, (2) the standards were enacted in a manner such that they were arbitrary and capricious and (3) there were deficiencies in the state's regulatory-impact statement (a

required part of the regulatory process). The lower court dismissed the first two arguments; however, it found in favor of 3M on the third ground. In short, the Court found that Michigan had not properly considered the cost impacts of the standards to companies and so the impact statement that was written was faulty.

Michigan filed [legal briefing](#) with the Michigan Court of Appeals at the end of February 2023. In relevant part, the state argued that the regulatory impact statements that it submitted with the PFAS drinking water regulations already have all required information in them and that “unsupportable cost estimates” such as the ones it feels 3M is asking for are not required. In addition, the state argues that the lower court improperly inserted itself into the rulemaking process and improperly overrode the substantial administrative process that the state undertook in drafting the drinking water standards. The state’s [Reply brief](#) added that Michigan had the authority to enact drinking water standards related to PFAS and that its actions in doing so were reasonable, such that the Court should give deference to the state’s regulations.

In its August 22, 2023 [ruling](#), the Court, in a 2-1 decision, found that while the state did consider costs to businesses to comply with the proposed drinking water standards, the state failed to account for the costs to businesses for complying with groundwater remediation requirements that would be automatically triggered if the drinking water standards were finalized. As a result, the majority held, the state failed to follow proper administrative requirements in assessing costs from the proposed rule. The dissenting Judge felt that Michigan law did not require the state to consider the groundwater remediation costs that would be triggered by the implementation of drinking water standards.

Impact On PFAS Developments

The Michigan court ruling certainly demonstrates to companies contemplating whether to legally challenge the EPA’s upcoming PFAS drinking water MCLs or the proposed CERCLA designation of PFOA and PFOS that there are courts willing to scrutinize the undertaken legislative process to ensure that all necessary procedures were followed. This will be

especially important as we have previously predicted that the drinking water standards are likely to be challenged on grounds similar to the Michigan lawsuit (as well as others) and the CERCLA designation is likely to be heavily opposed in court proceedings due to the EPA not conducting a rigorous RIA process.

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