

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN WATER WORKS
ASSOCIATION and ASSOCIATION
OF METROPOLITAN WATER
AGENCIES,

Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY, and MICHAEL S. REGAN,
in his official capacity as
Administrator, United States
Environmental Protection Agency,

Respondents.

No. 24-1188 (lead; consolidated with
Nos. 24-1191, 24-1192)

**JOINT MOTION TO ESTABLISH
BRIEFING FORMAT AND SCHEDULE**

Petitioners in No. 24-1188, American Water Works Association and Association of Metropolitan Water Agencies; petitioners in No. 24-1191, the National Association of Manufacturers and American Chemistry Council; petitioner in No. 24-1192, The Chemours Company FC, LLC; Respondents the United States Environmental Protection Agency and Michael S. Regan; intervenor Natural

Resources Defense Council (“NRDC”); and intervenors Buxmont Coalition for Safe Water, Clean Cape Fear, Clean Haw River, Concerned Citizens of WMEL Water Authority Grassroots, Environmental Justice Task Force, Fight for Zero, Merrimack Citizens for Clean Water, and Newburgh Clean Water Project respectfully submit the joint proposed briefing schedule and format set forth below.

Each petition for review in the above-captioned consolidated proceeding challenges EPA’s final rule “PFAS National Primary Drinking Water Regulation,” 89 Fed. Reg. 32,532 (Apr. 26, 2024) (“Final Rule”), which establishes national primary drinking water regulations under the Safe Drinking Water Act for six per- and polyfluoroalkyl substances (“PFAS”). NRDC and a group of other non-profit organizations filed motions to intervene as respondents, which were granted on July 23, 2024.

After meeting and conferring, the parties have agreed on a proposed briefing schedule. Despite good faith negotiations, however, the parties were not able to reach agreement on a joint proposal for the format of merits briefing. Accordingly, in Part II, the parties separately set forth their proposals for the format of merits briefing for the Court’s consideration.

I. Joint Proposal for Briefing Schedule

The parties jointly propose the following briefing schedule. The proposed schedule contemplates a single joint brief for the intervenors.

Brief or Filing	Due Date
Certified index of record	July 22, 2024
Petitioners' opening briefs	October 7, 2024
EPA's response brief	December 23, 2024
Respondent-intervenors' brief	January 17, 2025
Petitioners' reply briefs	February 25, 2025
Deferred appendix	March 11, 2025
Final briefs	March 25, 2025

The parties agree that this schedule reflects a reasonably expeditious schedule that both ensures timely resolution of the petitions while also furnishing the parties and their counsel adequate time to prepare the above-described filings.

The parties propose a deadline for the opening briefs of October 7, 2024, which is 77 days after EPA's filing of the certified index of record. While longer than the Federal Rules of Appellate Procedure's default 40-day deadline for opening briefs, the proposed briefing interval is commensurate with other complex litigation in this Court, particularly in light of the breadth of issues in question and the technical nature of many of those issues. It also reflects the consolidated nature of this proceeding, which will require coordination amongst the petitioners.

The parties propose a deadline for EPA's response brief of December 23, 2024, or 77 days after the opening briefs are due. EPA requires the additional time due to the technical nature of the issues presented and to coordinate with necessary officials at EPA and the Department of Justice.

The parties propose a deadline for intervenor-respondents' brief of January 17, 2025, which is 25 days after EPA's response brief is due. The proposal reflects a compromise among the parties, and is intended to allow sufficient time for the respondent-intervenors to coordinate and avoid duplication of EPA's brief. It also reflects that the interval between EPA's brief and the respondent-intervenors' brief will span multiple holidays, including the Christmas and New Year holidays, which provides additional good cause for the extended interval.

The parties propose a deadline for the reply briefs of February 25, 2025, which is 39 days after the respondent-intervenors' brief would be due. This modest enlargement of the default period will allow Petitioners to adequately respond to both EPA's and respondent-intervenors' briefs, as well as to effectively coordinate amongst themselves across the breadth of issues presented.

II. Parties' Proposals for Format of Briefing

The parties were unable to agree on proposed word limits for the briefing. The parties accordingly present their respective positions below. Petitioners have organized into two separate groupings: (1) a grouping of chemical manufacturers

and trade organizations (petitioners in Nos. 24-1191 and 24-1192); and (2) a grouping of entities representing water providers (petitioners in No. 24-1188). Respondent's and Intervenors' positions follow the statements of the two Petitioner groups.

A. Position of the petitioners in Nos. 24-1191 and 24-1192

The Final Rule sets maximum contaminant levels ("MCLs") for six discrete PFAS. The National Association of Manufacturers ("NAM") and American Chemistry Council ("ACC"), petitioners in No. 24-1191, represent manufacturers of PFAS. The Chemours Company ("Chemours"), petitioner in No. 24-1192, manufactures one of the six PFAS at issue here, HFPO-DA.

1. The NAM, ACC, and Chemours are committed to efficient briefing of the issues presented in these rule challenges and have agreed to share in joint briefing. They respectfully submit, however, that it would not be practicable to prepare joint briefing with the petitioners in No. 24-1188, American Water Works Association ("AWWA") and Association of Metropolitan Water Agencies ("AMWA").

AWWA's and AMWA's members are adverse to manufacturers of PFAS in related state-court litigation concerning PFAS and the MCLs established by the Final Rule. Some of these lawsuits have made direct reference to, and depend upon, the rulemaking in this case. The parties are thus squarely adverse on matters with direct relevance to the grounds for relief that will be briefed in these challenges. Although

the petitioners in these cases intend to coordinate carefully to avoid repetition of arguments, their direct and immediate adversity would so hinder their ability to agree on common themes and arguments as to make joint briefing with AWWA and AMWA impossible. We accordingly submit that the Court should allow two sets of petitioner briefing—joint briefing for the petitioners in Nos. 24-1191 and 24-1192, and separate briefing for the petitioners in No. 24-1188.

2. The NAM, ACC, and Chemours request a full-length joint opening brief (13,000 words) and an enlarged reply brief of 8,000 words. Briefs of this length are necessary because the rule in this case is in fact nine rulemakings consolidated into one. Under the Safe Drinking Water Act’s two-step rulemaking process, a determination to regulate a substance under the Act is by itself a standalone rulemaking. *See* 42 U.S.C. § 300g-1(b)(1)(B). Establishing an MCL for that substance must take place in a separate, subsequent rulemaking. *See id.* § 300g-1(b)(1)(E). And the detailed factual analysis at both steps, for each substance, is distinct. Here, the Rule establishes MCLs for two distinct PFAS that EPA already determined it would regulate; it determines to regulate four additional individual PFAS, at the same time that it establishes a distinct MCL for each; and it creates a novel “hazard index” approach to set an MCL for mixtures of four of the six PFAS.

Each of these nine rulemakings could be the subject of its own full-length brief. At the same time, we appreciate the need for more limited and efficient

briefing and will work diligently to present succinct and tightly targeted arguments for the Court's consideration.

The NAM, ACC, and Chemours anticipate allocating a 13,000-word opening brief approximately as follows:

- 1,750 words for introductory matter and a statutory and regulatory statement of background.
- 3,250 words to brief the first issue in the statement of issues for No. 24-1191. This issue concerns both the limits of EPA's statutory authority and the asserted capriciousness of its reasoning with respect to the MCLs for all six substances. There are many unique arguments concerning this issue that we do not anticipate the petitioners in No. 24-1188 will address.
- 750 words to brief the second issue in the statement of issues for No. 24-1191. This issue has limited overlap with the second and third issues presented in the statement of issues for No. 24-1188, and the petitioners will coordinate to avoid duplication of argument.
- 2,000 words to brief the third issue in the statement of issues for No. 24-1191. We anticipate raising additional unique arguments in this portion of the brief, which will not be addressed by petitioners in No. 24-1188.
- 750 words to brief the fourth issue in the statement of issues for No. 24-1191. This issue has limited overlap with the fourth, fifth, and seventh issues presented in the statement of issues for No. 24-1188, and the petitioners will coordinate to avoid duplication of argument.
- 4,500 words for Chemours to address EPA's substantive errors in adopting its MCL for HFPO-DA. We do not anticipate that the petitioners in No. 24-1188 will address any of these arguments. These errors include:
 - basing the MCL for HFPO-DA on unsupported assumptions and misinterpreting data about the chemical's toxicity;

- relying on inflated “uncertainty factors” in a manner that deviates from EPA’s own standard methods; and
- relying on the factually faulty and legally improper assumption that 80% of exposure to the chemical comes from sources other than drinking water.

Petitioners’ prior experience teaches that these words limits are reasonable and not overlong. For example, Chemours briefed the issues appearing in the final bullet above in litigation in the Third Circuit when challenging EPA’s Health Advisory for HFPO-DA, on which this Final Rule is substantially based. Chemours devoted 5,271 words of its 13,000-word opening brief in that case to these issues alone. *See* Pet’r’s Final Brief at 35-60, *Chemours v. EPA*, No. 22-2287 (3d Cir. Aug. 11, 2023), ECF No. 61. Here, Chemours will need to address additional arguments not addressed in the Third Circuit—namely, EPA’s decision to establish an MCL for HFPO-DA prior to obtaining occurrence data for the chemical, the preliminary results of which contradict EPA’s assumptions about HFPO-DA’s prevalence in public water systems. Chemours respectfully submits that 4,500 words is the minimum necessary to brief all of its petitioner-specific issues in a manner that is succinct but still adequate to present them for the Court’s understanding.

In addition, the NAM, ACC, and Chemours respectfully request 8,000 words for their reply brief. We anticipate that EPA will be allotted a response brief with a word length equivalent to the total words accorded for the opening briefs. In addition, the intervenor-respondents will be allowed at least an additional 9,100

words for a joint intervenor brief. We will therefore be responding to answering briefs nearly three times the length of our opening brief. A modest enlargement of 1,500 words (from 6,500 to 8,000) is warranted to ensure that the NAM, ACC, and Chemours are able fully to address the issues presented in the answering briefs and to aid the Court's resolution of these complex issues.

B. Position of the petitioners in No. 24-1188

1. AWWA and AMWA, petitioners in No. 24-1188 and who represent public water systems directly subject to the Final Rule, agree with and incorporate the statement of the NAM, ACC, and Chemours regarding the need for separate briefing—one set of briefs for AWWA and AMWA, and a separate set of briefs for the NAM, ACC, and Chemours. *See supra* Section II.A.1. This is necessary due to the fact that some of AWWA's and AMWA's members are or may become adverse to those members of the NAM and ACC and to Chemours in PFAS-related litigation, including as to the allocation of responsibility and impacts of various PFAS levels on public health. In addition, AWWA and AMWA publicly support the regulation of two of the substances at issue here, PFOA and PFOS, but will raise significant concerns with the process and levels at which EPA determined to regulate.

2. AWWA and AMWA also request a full-length opening brief (13,000 words) and an enlarged reply brief of 8,000 words. As the NAM, ACC, and Chemours correctly note above, the Final Rule effectively represents multiple

distinct agency actions under the auspices of a single “rule” listed under a single *Federal Register* notice. The proposal for two, full-length sets of petitioner briefing would allow all petitioners to present their respective arguments on some or all of the various agency actions represented by the Final Rule in an effective manner, without needing to disregard potentially meritorious arguments because multiple petitions for review have been consolidated.

Moreover, the petitioners’ requested total word count—26,000 words for the opening briefs, 16,000 words for the reply briefs—is comparable to the combined total this Court previously approved for a challenge to a similarly complex EPA final rule under the Safe Drinking Water Act. *See Order, City of Waukesha v. EPA*, No. 01-1028 (D.C. Cir. Feb. 25, 2002), ECF No. 660728 (national primary drinking water regulation for radionuclides; allocating 28,000 and 14,000 words for a joint opening brief and joint reply brief, respectively, filed by petitioners and supporting intervenors). AWWA and AMWA intend to coordinate with the other petitioners to avoid repetition of material in the two sets of briefing.

AWWA and AMWA expect to allocate a 13,000-word opening brief approximately as follows:

AWWA and AMWA expect to need approximately 425 words for the introduction, 75 words for the statement of jurisdiction, 200 words for the statement of issues, 500 words for the summary of the argument, 600 words for the statement

of standing, and 200 words for the statement of the standards of review. All told, for these sections of the opening brief, AWWA and AMWA respectfully submit that they will need approximately 2,000 words.

AWWA and AMWA's statement of the case will necessarily include (1) a summary of the relevant factual background and statutory provisions, regulatory provisions, and judicial holdings; (2) a description of the Final Rule and its procedural background, as well as key scientific and cost-benefit analyses and other pertinent record documents; and (3) a summary of the Final Rule's effects and regulatory burdens on the AWWA's and AMWA's members. AWWA and AMWA respectfully submit that they will need 3,500 words for the statement of the case.¹

As identified in their nonbinding statement of issues for No. 24-1188, several of the issues that AWWA and AMWA expect to brief generally relate to whether EPA's actions in the Final Rule adhere to the regulatory processes laid out in the Safe Drinking Water Act. These include EPA's action to concurrently propose (and then finalize) regulatory determinations and national primary drinking water

¹ In a comparable recent challenge to an EPA action under the Safe Drinking Water Act, the statement of the case comprised approximately 3,100 words. *See* Final Opening Br. of Pet'r at 4-22, *Nat. Res. Def. Council v. EPA*, No. 20-1335 (D.C. Cir. Dec. 6, 2022), ECF No. 1976582. That challenge, though, addressed a single, discrete EPA action, i.e., the withdrawal of a regulatory determination for a single contaminant, perchlorate. *See* 85 Fed. Reg. 43,990 (July 21, 2020). As noted, the Final Rule encompasses numerous distinct agency actions, which will need to be explained as necessary in an opening brief.

regulations for four of the six regulated PFAS (PFHxS, PFNA, HFPO-DA, and PFBS), as well as EPA's actions to regulate these same four PFAS as mixtures rather than individual contaminants and to regulate them according to a novel "hazard index." Several of the issues are arguably matters of first impression for this Court that will require detailed discussion of the relevant parts of the record, the statute and legislative history, and legal principles set out in this Court's opinions. The issues are also of particular importance to AWWA's and AMWA's members who are directly regulated under the Safe Drinking Water Act, and thus have a significant, long-term interest in the integrity of the Safe Drinking Water Act regulatory process. Accordingly, AWWA and AMWA expect to make unique arguments that we do not anticipate the NAM, ACC, and Chemours to make. To brief these issues, AWWA and AMWA respectfully submit that they will need 4,000 words.

AWWA and AMWA also expect to brief issues related to whether EPA adequately justified the Final Rule's primary drinking water regulations and other regulatory requirements for the six regulated PFAS as feasible, taking into particular account public water systems' costs of compliance, and as reflective of the best available science and nationally representative occurrence data, as required by the Safe Drinking Water Act. On these issues in particular, it should be noted that AWWA and AMWA submitted extensive comments to EPA, including studies (commissioned at their expense) of EPA's cost modeling and scientific

assessments.² Before this Court, those issues will require explanation of substantial scientific, technical, and legal evidence; the EPA's justifications for its regulations and its responses to comments; and legal principles set out in the numerous pertinent opinions of this Court. And again, AWWA and AMWA, who represent public water systems, expect to make arguments that the NAM, ACC, and Chemours are not expected to make. AWWA and AMWA respectfully submit that they will need 3,500 words to brief these issues.

For the reply brief, AWWA and AMWA respectfully submit that 8,000 words is reasonable and necessary. We anticipate that EPA would be allotted a response brief with a word limit equivalent to the combined total for the two opening briefs, as well as that the intervenors would be allotted 9,100 words for a joint respondent-intervenors' brief. A modestly enlarged reply brief is therefore necessary for AWWA and AMWA to effectively respond to those briefs, which would comprise almost three times the word count allotted AWWA and AMWA's opening brief, as proposed.

² See generally Comments of American Water Works Association (May 30, 2023), Comment ID EPA-HQ-OW-2022-0114-1759, <https://bit.ly/3W8To4s>; Comments of Association of Metropolitan Water Agencies (May 30, 2023), Comment ID EPA-HQ-OW-2022-0114-1738, <https://bit.ly/3Lsyzfg>.

C. Positions of EPA and the Intervenors

EPA and Intervenors do not oppose Petitioners' proposal to submit two opening briefs and two reply briefs, but disagree with their proposed word limits. Petitioners' request for two full-length opening briefs totaling 26,000 words and two enlarged reply briefs totaling 16,000 words is excessive and unreasonable for this case. There is substantial overlap in the issues Petitioners intend to raise in their briefs, and they have not shown that their interests or arguments are sufficiently distinct to warrant two full-length briefs, much less two reply briefs that are 25 percent longer than a standard reply. *Compare* Nonbinding Statement of Issues, ECF No. 2063366 (AWWA et al.), *with* Pet'rs' Statement of Issues to Be Raised, ECF No. 2064059 (NAM et al.), *and* Non-binding Statement of Issues, ECF No. 2064227 (Chemours). This Court has routinely limited petitioners to opening briefs of less than 20,000 words total in cases involving petitioners more numerous and more diverse than Petitioners in this case. *See, e.g.,* Order, *Kentucky v. EPA*, No. 24-1050 (D.C. Cir. May 14, 2024), ECF No. 2054255 (adopting 19,500-word total limit where petitioners consisted of 8 industry groups and 3 different groups of state government petitioners); Order, *Am. Petroleum Inst. v. U.S. Dep't of Interior*, No. 24-1023 (D.C. Cir. May 24, 2024), ECF 2056291 (limiting industry and environmental petitioners to 9,100 words each despite competing interests in litigation).

Further, EPA disagrees that the Final Rule actually constitutes “nine rulemakings consolidated into one” as Petitioners in Nos. 24-1191 and 24-1192 contend. The Final Rule consists of: (1) a final determination to regulate under the Safe Drinking Water Act for three PFAS compounds, as well as for mixtures containing those contaminants and/or a fourth PFAS compound; and (2) final national primary drinking water standards for those same contaminants and two additional PFAS compounds EPA had previously determined to regulate. 89 Fed. Reg. at 32,532. There is nothing abnormal about an agency promulgating standards for multiple pollutants in a single rulemaking, and this Court does not generally treat that fact as justifying multiple full-length briefs, even in cases involving petitioners with conflicting interests. *See Order, Nat’l Ass’n of Clean Water Agencies v. EPA*, No. 11-1131 (D.C. Cir. July 6, 2012), ECF No. 1382450 (limiting environmental and regulated-source petitioners to 10,000 words each, in challenge to rule promulgating standards for 9 pollutants in 2 different source subcategories).

Likewise, EPA and Intervenors do not agree that enlarged reply briefs are appropriate. Petitioners’ primary cited justification is the participation of Intervenors in this case, which is no basis for departing from the standard practice of allotting reply briefs half the word count of opening briefs. *See, e.g., Order, Newburgh Clean Water Project v. EPA*, No. 21-1019 (D.C. Cir. May 23, 2022), ECF

No. 1947648 (granting 9,000 total words for two petitioner reply briefs responding to 18,000-word respondents' brief plus 9,100-word respondent-intervenor brief).

Petitioners' additional justification for enlarged reply briefs—the fact that EPA's response brief will necessarily be larger due to the fact that EPA is responding to two opening briefs—is similarly unavailing. Standard-length reply briefs will be sufficient for each Petitioner group to reply in support of issues raised in its own opening brief. Petitioners have not intervened in each others' cases and have no right to raise arguments for the first time on reply in response to issues other Petitioners may raise.

Although this Court has routinely ordered consolidated briefing at lower word counts, as a reasonable compromise, EPA and Intervenors propose a word limit of 20,000 total words to be split across Petitioners' two opening briefs, with EPA's response brief limited to the same total number (i.e., 20,000 words) and Intervenor's response brief limited to 9,100 words, consistent with Circuit Rule 32(e)(2)(B). EPA and Intervenors also propose a limit of 10,000 total words for Petitioners' two reply briefs.

CONCLUSION

For the foregoing reasons, the parties respectfully request that the Court enter a briefing schedule and format to govern further proceedings in this case.

Dated: August 16, 2024	Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

1. This motion complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2) because it contains 3,545 words, excluding the parts excluded by Federal Rules of Appellate Procedure 32(f) and 27(d)(2).

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in Times New Roman 14-point font in Microsoft Word.

Dated: August 16, 2024

Respectfully submitted,

/s/ Corinne V. Snow

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that on August 16, 2024, I electronically filed the foregoing Joint Motion to Establish Briefing Format and Schedule with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

Dated: August 16, 2024

Respectfully submitted,

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