

Using Temporary Advisories to Address Forever Chemicals

INTRODUCTION

In the 1940s, industry started using a new technology that had seemingly endless properties.¹ Per- and polyfluoroalkyl substances (PFAS), a class of over a thousand chemicals, could make products nonstick, anticorrosive, water repellent, and stain resistant.² Companies applied the chemicals to a range of everyday items for hundreds of uses, launching popular product lines of stain resistant carpets, waterproof clothes, and nonstick pans.³ In the 1960s, the United States Navy found that types of PFAS could also suppress fires, and the department patented the fire-fighting foam that all military sites, as well as many fire departments and airports, adopted about a decade later in the 1970s.⁴

While PFAS has undeniable practical applications, studies after 1980 began to link even small amounts of the chemicals with negative health impacts.⁵ Researchers found statistically significant correlations between PFAS and cancers, liver and kidney issues, metabolic diseases, weight gain, and reduced breast milk production.⁶ PFAS exposure has also been linked with increased cholesterol levels, decreased antibody response to certain vaccines, and pregnancy complications.⁷ The chemicals can leak into air, water, and soil, and can accumulate in tissue.⁸ By the twenty-first century, PFAS appeared in blood

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1. See *PFAS and Your Health*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, <https://www.atsdr.cdc.gov/pfas/about/index.html> (last updated July 22, 2025).

2. Juliane Glüge et al., *An Overview of the Uses of Per- and Polyfluoroalkyl Substances (PFAS)*, 22 ENV'T'L SCI.: PROCESSES & IMPACTS 2345, 2357, 2368 (2020).

3. *Id.* at 2345, 2356, 2363.

4. Michael G. Stag, *History and Development of Firefighting Foams*, STAG LIUZZA, <https://stagliuzza.com/news/history-and-development-of-firefighting-foams> (last visited Nov. 9, 2025).

5. See Suzanne E. Fenton et al., *Per- and Polyfluoroalkyl Substance Toxicity and Human Health Review: Current State of Knowledge and Strategies for Informing Future Research*, 40 ENV'T'L TOXICOLOGY & CHEMISTRY 606, 607-16 (2021).

6. *Id.* at 609-13, 615.

7. *How PFAS Impacts Your Health*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, <https://www.atsdr.cdc.gov/pfas/about/health-effects.html> (last updated July 22, 2025).

8. *Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)*, NAT'L INST. OF ENV'T'L HEALTH SCIS., <https://www.niehs.nih.gov/health/topics/agents/pfc> (last updated May 6, 2025).

samples for about 97 percent of people tested.⁹ PFAS has also been detected in all parts of the environment,¹⁰ ranging from locations directly neighboring military sites¹¹ to highly remote areas.¹² Notably, the individuals most affected by PFAS are people of color¹³ and people living under the poverty line.¹⁴

The defining characteristic of PFAS chemicals is a chain of carbon-fluorine bonds.¹⁵ These strong bonds not only give PFAS their versatile applications but also make the chemicals highly persistent, meaning they do not break down readily.¹⁶ Accordingly, PFAS also go by the colloquial name “forever chemicals.”¹⁷ Given their persistence, prevalence, and health risks, PFAS have become the subject of public health advisories,¹⁸ proposed regulations,¹⁹ and large settlements and lawsuits,²⁰ including the case discussed in this In Brief.

Chemours v. EPA did not challenge a traditional final action of the Environmental Protection Agency (EPA).²¹ Rather, Chemours challenged a public health advisory, a non-legally binding notice that informs the public about potential health risks associated with a water contaminant.²² The Third Circuit

9. Ryan C. Lewis et al., *Serum Biomarkers of Exposure to Perfluoroalkyl Substances in Relation to Serum Testosterone and Measures of Thyroid Function Among Adults and Adolescents from NHANES 2011–2012*, 12 INT’L J. OF ENV’T L. RSCH. & PUB. HEALTH, 12(6), 6098, 6103-14 (2015).

10. EPA, NO. EPA/822/R-22/005, DRINKING WATER HEALTH ADVISORY: HEXAFLUOROPROPYLENE OXIDE (HFPO) DIMER ACID (CASRN 13252-13-6) AND HFPO DIMER ACID AMMONIUM SALT (CASRN 62037-80-3), ALSO KNOWN AS “GENX CHEMICALS” 4 (2022), <https://www.epa.gov/system/files/documents/2022-06/drinking-water-genx-2022.pdf> [hereinafter Advisory] (“GenX chemicals have been detected around the globe, in surface water, groundwater, finished drinking water, rainwater, air, soil, and sediment”).

11. Xindi C. Hu et al., *Detection of Poly- and Perfluoroalkyl Substances (PFASs) in U.S. Drinking Water Linked to Industrial Sites, Military Fire Training Areas, and Wastewater Treatment Plants*, 3 ENV’T SCI. & Tech. LETTERS 344, 345, 347 (2016).

12. See, e.g., Christian Sonne et al., *Assessment of Exposure to Perfluorinated Industrial Substances and Risk of Immune Suppression in Greenland and its Global Context: A Mixed-Methods Study*, THE LANCET PLANETARY HEALTH 570, 571, 575 (2023); see *PFAS and Your Health*, *supra* note 1.

13. Kelly L. Smalling & Paul M. Bradley, *Invited Perspective: Per- and Polyfluoroalkyl Substances in Drinking Water—Disparities in Community Exposures Based on Race and Socioeconomic Status*, 132 ENV’T HEALTH PERSPS., no 4, Apr. 2024, at 041302-1.

14. Rosie Mueller et al., *Quantifying Disparities in Per- and Polyfluoroalkyl Substances (PFAS) Levels in Drinking Water from Overburdened Communities in New Jersey, 2019–2021*, 132 ENV’T HEALTH PERSPS., no. 4, Apr. 2024, at 047011-6.

15. *Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)*, *supra* note 8.

16. *Id.*

17. See, e.g., Joseph G. Allen, *These Toxic Chemicals are Everywhere—Even in Your Body. And They Won’t Ever Go Away*, WASH. POST (Jan. 2, 2018), https://www.washingtonpost.com/opinions/these-toxic-chemicals-are-everywhere-and-they-wont-ever-go-away/2018/01/02/82e7e48a-e4ee-11e7-a65d-1ac0fd7f097e_story.html.

18. See, e.g., Advisory, *supra* note 10, at vii.

19. See, e.g., Keep Food Containers Safe from PFAS Act, H.R. 6026, 117th Congress (2021).

20. See, e.g., Settlement Agreement Between Public Water Systems and 3M Company, City of Camden v. 3M Co., No. 2:23-cv-03147-RMG (D.S.C. July 3, 2023).

21. See 109 F.4th 179, 182 (3d Cir. 2024).

22. *Id.*

ultimately dismissed Chemours' petition for lack of subject matter jurisdiction,²³ but in light of the increasing scrutiny of the U.S. Supreme Court on federal agency actions,²⁴ this In Brief reexamines the arguments in *Chemours*. Part I gives an overview of the relevant statutes and case law. Part II provides background on the parties and procedural history in *Chemours*. Part III analyzes how a court could have found jurisdiction to review the health advisory and hypothesizes the case's substantive outcome in a world where Chemours had subject matter jurisdiction. This In Brief concludes with a contention that there is a low risk, and perhaps even a moderate reward, to allowing circuit courts to review health advisories.

I. LEGAL BACKGROUND

This Part will cover two sets of laws. The first set consists of the sources of law that the Third Circuit used to determine the subject matter question. These Subparts introduce the Safe Drinking Water Act (SDWA), define a "health advisory" and "final action," and explain how health advisories interact with other sources of law. The second set overviews the sources of law that Chemours relied on in its substantive arguments, namely the Administrative Procedure Act (APA) and the nondelegation doctrine.

A. Laws Governing Subject Matter Jurisdiction

1. Safe Drinking Water Act

Under the SDWA, the EPA ensures the safety of drinking water by establishing standards for how much of a contaminant may be present in the water.²⁵ The EPA can regulate if a contaminant may adversely affect human health, there is a substantial likelihood the substance will appear in public water systems at a concerning amount and frequency, and the regulation would reduce the risk associated with that contaminant.²⁶ In the alternative, if emerging scientific data provides evidence that a contaminant may pose health risks to the public, the EPA may publish a health advisory.²⁷

23. *Id.* at 184-85.

24. See Selina P. Coleman et al., *Supreme Court Overrules Chevron, Ushering in a New Era of Judicial Scrutiny Over Agency Authority with Ripple Effects Across Regulated Industries*, REED SMITH (July 3, 2024), <https://www.reedsmith.com/en/perspectives/2024/07/supreme-court-overrules-chevron-judicial-scrutiny-authority>.

25. 42 U.S.C. § 300g-1.

26. *Chemours*, 109 F.4th at 182 (citing 42 U.S.C. § 300g-1(b)(1)(A)).

27. *Id.* at 182 (citing 42 U.S.C. § 300g-1(b)(1)(F)).

2. SDWA Health Advisories

A health advisory generally includes “(1) a toxicity assessment, (2) exposure factors, and (3) the relative source contribution.”²⁸ A toxicity assessment details what health impacts a contaminant may have and at what level of exposure an individual may experience health impacts.²⁹ Before the EPA finalizes a toxicity assessment, the assessment undergoes review via a public comment process³⁰ and peer review.³¹ The second part of the health advisory is exposure factors, which are “activity patterns, behavior, and characteristics” that affect how much or how often someone is exposed to a contaminant.³² Relative source contribution is a calculation that estimates how much of a person’s exposure to a contaminant comes from their drinking water as opposed to other exposures, such as consumption and inhalation.³³

Health advisories interact with several other regulations. Chemours highlighted three: the EPA’s section 1431 emergency powers, state Underground Injection Control (UIC) programs, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).³⁴ First, the section 1431 emergency power is a provision in the SDWA that permits the EPA Administrator to take necessary actions against “imminent and substantial” health hazards upon receiving and confirming information that there is a contaminant present in a public water system.³⁵ Such actions can include civil suits against polluters and orders for polluters to take actions such as supplying water to affected communities or paying fines up to \$15,000 per day.³⁶ The EPA has stated that the Administrator can use the emergency power when contaminants exceed their health advisory levels.³⁷

Second, Chemours highlighted SDWA UIC programs.³⁸ Administered by the states, UIC programs enforce the EPA’s water quality standards in underground water sources and may also initiate civil actions against violators.³⁹ At least one state, Utah, requires those who seek a UIC permit to meet the

28. *Id.*

29. *Id.*; *Human Health Toxicity Assessments for GenX Chemicals*, EPA, <https://www.epa.gov/chemical-research/human-health-toxicity-assessments-genx-chemicals> (last updated Dec. 2, 2024).

30. *Chemours*, 109 F.4th at 182.

31. Advisory, *supra* note 1010, at 35.

32. *Id.* at 16; see EPA, NO. EPA/600/R-09/052F, EXPOSURE FACTORS HANDBOOK: 2011 EDITION viii (2011), <https://www.epa.gov/sites/default/files/2015-09/documents/efh-frontmatter.pdf>.

33. *How EPA Regulates Drinking Water Contaminants*, EPA, <https://www.epa.gov/sdwa/how-epa-regulates-drinking-water-contaminants> (last updated Oct. 21, 2024).

34. *Chemours*, 109 F.4th at 186.

35. 42 U.S.C. § 300i(a).

36. *Id.* § 300i(a)-(b).

37. Memorandum from Rosemarie Kelley, Dir., & Karin Leff, Acting Dir., Off. of Enf’t & Compliance Assurance, U.S. EPA, to Enf’t Dirs., U.S. EPA, on Updated Emergency Authority Guidance under Section 1431, 7, 10 (May 30, 2018), <https://www.epa.gov/sites/default/files/2018-09/documents/updatedguidanceonemergencyauthorityundersection1431sdwa.pdf>.

38. 42 U.S.C. § 300h-1.

39. *Id.* § 300h-2(a)(2).

standards set out in EPA health advisories, in addition to standards set by formal regulations.⁴⁰

Third, Chemours discussed CERCLA, which is federal law that assigns responsibility for hazardous contamination.⁴¹ The list of parties who can be held responsible under CERCLA is broad, and each party may be liable for “the full and total costs of response and damages.”⁴² At least two states, Iowa and Alabama, default to EPA health advisory levels if the state has not already set a maximum level for a contaminant.⁴³

3. Final Actions

Aside from granting authority to the EPA, the SDWA also gives circuit courts the ability to hear petitions for review of “any other final action of the [EPA] Administrator.”⁴⁴ This In Brief discusses two legal standards that a court can use to determine finality: (1) the *Bennett* two-prong test and (2) the *Hawkes* “pragmatic” test.⁴⁵

In *Bennett v. Spear*, the Supreme Court asked whether a court could review a Biological Opinion (BiOp) under the APA.⁴⁶ A BiOp is an informative report that advises a federal agency, such as the Bureau of Reclamation (“the Bureau”) in *Bennett*, about what measures would minimize the impact of the agency’s action on a protected species.⁴⁷ Congress did not intend for a BiOp to carry binding legal force.⁴⁸ However, proceeding without implementing the BiOp’s recommendations could have resulted in negative impacts on the population and habitat of two endangered fish species, leading to liability under the Endangered Species Act (ESA).⁴⁹ Since the BiOp “mark[ed] the ‘consummation’ of the agency’s decision making process,”⁵⁰ and because “rights or obligations” or “direct and appreciable legal consequences” flowed from the action, the Court found the BiOp reviewable.⁵¹

More recently, the Supreme Court heard *U.S. Army Corps of Engineers v. Hawkes Co.* to evaluate whether a determination by the Army Corps of Engineers was a reviewable final action under the APA.⁵² In addition to *Bennett*, the

40. UTAH ADMIN. CODE r. 317-7-6.5(C)(4) (2013) (stating “EPA Adult Lifetime Health Advisories must be met at the point of injection while the permit application is under review”).

41. 42 U.S.C. § 9607.

42. *See id.*

43. IOWA ADMIN. CODE r. 567-137.5(4) (2025); ALA. ADMIN. CODE r. 335-6-15-.30(e) (2022).

44. 42 U.S.C. § 300j-7(a)(2).

45. *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 597, 599 (2016).

46. 520 U.S. 154, 157 (1997).

47. *ESA Section 7 Consultation*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/service/esa-section-7-consultation> (last visited Feb. 25, 2025).

48. 50 C.F.R. § 402.14(j).

49. *See ESA Section 7 Consultation*, *supra* note 47; *Bennett*, 520 U.S. at 159.

50. *Bennett*, 520 U.S. at 177-78.

51. *Id.* at 178.

52. *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 597, 599-600 (2016).

Hawkes Court relied on the earlier decision of *Frozen Food Express v. United States*.⁵³ In *Frozen Food*, the Supreme Court held that a commission's determination of a commodity as "agricultural" was reviewable.⁵⁴ Since the Interstate Commerce Act required carrier vehicles to acquire a permit unless the vehicle transported only exempted products, such as agricultural products, designating a good as agricultural or not had "an immediate and practical impact" on carriers even though the order "had no authority except to give notice" and "would have effect only if and when a particular action was brought."⁵⁵ Likewise in *Hawkes*, the Court took a pragmatic approach, finding that "while no administrative or criminal proceeding can be brought for failure to conform to the [decision] itself," the decision is a final determination because it warns parties of "the risk of significant criminal and civil penalties."⁵⁶

B. Laws Governing Substantive Arguments

1. Administrative Procedure Act

The APA is federal law that governs how federal agencies develop regulations.⁵⁷ Section 706(2)(A) of the APA requires that an agency use evidence to ensure it does not make a decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁵⁸ Section 553(b) requires agencies to provide the public "[g]eneral notice of proposed rule making."⁵⁹

2. Nondelegation Doctrine

The nondelegation doctrine is the principle that Congress cannot give its powers to an executive agency without providing an intelligible principle or clarifying both the general policy to pursue and the boundaries of the agency's delegated authority.⁶⁰ Courts have recognized the practical need for Congress to provide federal agencies with discretion.⁶¹ However, courts will not defer to federal agencies' interpretations of ambiguous statutory provisions and may ask if an agency action fell within the scope of discretion Congress intended to delegate.⁶²

53. *Id.* at 599.

54. *Frozen Food Express v. United States*, 351 U.S. 40, 45 (1956).

55. *Id.* at 41, 43-44; *Hawkes*, 578 U.S. at 599-600.

56. *Hawkes*, 578 U.S. at 600.

57. 5 U.S.C. §§ 551-559.

58. *Id.* § 706(2)(A).

59. *Id.* § 553(b). While the APA provides extensive rules about rulemaking and adjudication, these two sections cover the relevant arguments for this In Brief.

60. *Gundy v. U.S.*, 588 U.S. 128, 145-46 (2019).

61. *See, e.g., id.* at 135.

62. *West Virginia v. EPA*, 597 U.S. 697, 768 (2022).

II. CASE BACKGROUND

Through the SDWA, the EPA sets standards for drinking water quality, oversees state and local water systems, and provides guidance to ensure that Americans have access to safe and reliable drinking water.⁶³ Yet even with the SDWA's regulatory framework, the EPA faces an ongoing challenge as it works to keep up with novel chemicals, such as those used by Chemours.

Chemours is an American chemical company that owns the Teflon brand, which sells products ranging from kitchenware to windshield wipers to clothing.⁶⁴ The company uses synthetic plastics to make Teflon products nonstick and water resistant.⁶⁵ To manufacture these plastics, Chemours uses hexafluoropropylene oxide dimer acid (HFPO-DA), commercially known as "GenX," and HFPO-DA's ammonium salts, collectively known as "GenX chemicals."⁶⁶ GenX and GenX chemicals are types of PFAS.⁶⁷

In 2018, the EPA started developing its GenX health advisory⁶⁸ and opened the draft toxicity assessment, the first element of the health advisory, to public comment for sixty days.⁶⁹ The EPA published the final toxicity assessment in 2021⁷⁰ and the full health advisory in June 2022.⁷¹ In the advisory, the EPA estimated that the average person would experience health impacts if exposed to three nanograms of GenX per kilogram of their body weight each day, and identified Chemours as a user of GenX chemicals.⁷² Chemours petitioned the Third Circuit for review shortly after.⁷³

63. See *Safe Drinking Water Act (SDWA)*, EPA <https://www.epa.gov/sdwa> (last visited Feb. 25, 2025).

64. See, e.g., *After More Than 75 Years, the Teflon™ Brand Has Once Again Been Reimagined*, CHEMOURS CO., <https://www.chemours.com/en/industries-applications/application-development/continuous-innovation> (last visited Feb. 25, 2025).

65. *Id.*

66. Advisory, *supra* note 10, at vii.

67. *2022 Final Health Advisories for GenX Chemicals and PFBS*, EPA, <https://www.epa.gov/sdwa/drinking-water-health-advisories-genx-chemicals-and-pfbs> (last updated Apr. 26, 2024).

68. *Chemours Co. v. EPA*, 109 F.4th 179, 183 (3d Cir. 2024). The *Chemours* court refers to the chemical in question as HFPO-DA, which is also known as GenX. See Advisory, *supra* note 10, at vii.

69. EPA OFF. OF WATER & OFF. OF SCI. & TECH., No. EPA 822R-21-008, EPA RESPONSE TO PUBLIC COMMENTS ON DRAFT HUMAN HEALTH TOXICITY VALUES FOR HEXAFLUOROPROPYLENE OXIDE (HFPO) DIMER ACID AND ITS AMMONIUM SALT (CASRN 13252-13-6 AND CASRN 62037-80-3) 1 (2021), https://www.epa.gov/system/files/documents/2021-10/final-genx-assessment-resp-to-public-comments_508.pdf [hereinafter EPA Response].

70. *Chemours*, 109 F.4th at 183.

71. *Id.*

72. Advisory, *supra* note 10, at viii, 4 ("Chemours Company uses GenX chemicals to produce four trademarked fluoropolymers: Teflon™ polytetrafluoroethylene (PTFE), Teflon™ perfluoroalkoxy (PFA), Teflon™ fluorinated ethylene propylene (FEP), and Teflon™ amorphous fluoropolymer (AF)").

73. *Chemours*, 109 F.4th at 183.

The Third Circuit ultimately dismissed Chemours' petition, explaining that its decision "begins and ends with jurisdiction."⁷⁴ The court noted that the EPA "cannot enforce the health advisory," does not establish "direct consequence for parties who choose to disregard [the] EPA's advice," and "characterizes the health advisory as a non-enforceable, non-regulatory informational document."⁷⁵ Since a "health advisory provides guidance, but it imposes no obligations, prohibitions, or restrictions," the court found that a health advisory did not meet one of the finality requirements of the *Bennett* test: it did not "alter any party's rights or obligations" or "give rise to any direct and appreciable legal consequences."⁷⁶

III. ANALYSIS

Since the Third Circuit decided *Chemours* on jurisdictional grounds, the merits of the case remain unsettled. The SDWA defines health advisories in two words: "not regulations."⁷⁷ Industry points to this limited statutory guidance to argue that the current process for creating and publishing health advisories is insufficient.⁷⁸ However, for a court to reach such a decision, litigants would need to meet two thresholds. The first Subpart of this analysis will revisit the jurisdiction question and evaluate two ways the Third Circuit could have found that a health advisory is a final action of the EPA, thus granting the court subject matter jurisdiction and the ability to move on to the merits. The second Subpart of this analysis will evaluate Chemours' substantive arguments about the legality of the health advisories under existing law.

A. Revisiting Subject Matter Jurisdiction

The SDWA only gave circuit courts the ability to hear petitions for review of a "final action."⁷⁹ As such, the threshold issue before the Third Circuit was whether a health advisory was a "*final action* of the Administrator."⁸⁰

1. *Bennett* Test

The *Bennett* two-prong test asks whether an agency action "mark[ed] the 'consummation' of the agency's decision making process" and whether "rights or obligations" or "direct and appreciable legal consequences" flow from the action.⁸¹ In *Chemours*, the court quickly disposed of the first element; the parties agreed that the publication of the health advisory marked the consummation of

74. *Id.*

75. *Id.* at 185 (internal quotation marks omitted).

76. *Id.* at 184 (internal quotation marks omitted).

77. 42 U.S.C. § 300g-1(b)(1)(F).

78. *See, e.g.*, Petitioner's Final Brief at 64, *Chemours v. EPA*, No. 22-2287 (3d Cir. 2022).

79. 42 U.S.C. § 300j-7(a)(2).

80. *Chemours*, 109 F.4th at 183.

81. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

“EPA’s decision to issue the advisory.”⁸² The remaining question was whether a health advisory determined rights or obligations or brought about “direct and appreciable legal consequences.”⁸³

When addressing whether direct and appreciable legal consequences flowed from the health advisory, the parties did not dispute that appreciable legal consequences can *result* from the health advisory.⁸⁴ Emergency powers triggered by a contaminant exceeding health advisory levels include the ability to bring a civil lawsuit, compel corrective actions, or impose thousands of dollars per day in penalties.⁸⁵ State UICs can integrate the standards set by health advisories in their permitting processes.⁸⁶ Once a state government incorporates the health advisory’s recommendations into its CERCLA enforcement, the law can impose significant cleanup liabilities upon responsible parties.⁸⁷

Knowledge can also create due diligence obligations for businesses, which must reevaluate their discharge and permits in anticipation of future regulations,⁸⁸ disclosures in transactional agreements,⁸⁹ or common law tort liability.⁹⁰ A defendant may even be negligent for failing to take reasonable precautions against a known or foreseeable harm,⁹¹ even if the risk was recently discovered⁹² or industry practice has not yet caught up.⁹³ In this context, a health advisory does not merely provide guidance; it explicitly informs companies about a potential harm they are inflicting on the public and warns them about the risk of being negligent.

Chemours argued that the health advisory could even determine the obligations of state-level programs.⁹⁴ Since states only have three to five years to comply with a formal SDWA regulation, state governments have an incentive

82. Respondents’ Motion to Dismiss at 10, *Chemours Co. v. EPA*, 109 F.4th 179 (3d Cir. 2024) (No. 22-2287); *see also* Concise Summary of the Case at 1, *Chemours Co. v. EPA*, 109 F.4th 179 (3d Cir. 2024) (No. 22-2287) (stating that the action for which Chemours sought review was the EPA’s publication of the health advisory).

83. *Chemours*, 109 F.4th at 184 (internal quotation marks omitted).

84. *Id.* at 186.

85. 42 U.S.C. § 300i(a)-(b).

86. *See, e.g.*, UTAH ADMIN. CODE r. 317-7-6.5(C)(4) (2013).

87. 42 U.S.C. § 9604(a).

88. *PFAS Update: State-By-State PFAS Drinking Water Standards - February 2023*, BRYAN CAVE LEIGHTON PAISNER (Feb. 21, 2023), <https://www.bclplaw.com/en-US/events-insights-news/pfas-update-state-by-state-pfas-drinking-water-standards-february-2023.html>.

89. Rick Shoyer, *PFAS & Environmental Due Diligence—The New Standard of Care*, MONTROSE ENV’T’L (May 20, 2024), <https://montrose-env.com/blog/pfas-due-diligence-the-new-standard-of-care>.

90. In *Riegel v. Medtronic, Inc.*, the Supreme Court observed that recognizing tort liability could impose additional requirements beyond those set by federal law, suggesting that tort liability operates as a source of direct legal consequences. *See* 552 U.S. 312, 321 (2008).

91. L. W. Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 79 U. PA. L. REV. 742, 758 (1931).

92. *See The T.J. Hooper*, 262 Conn. 116, 126 (2002).

93. *See Estate of Lepage v. Horne*, 60 F.2d 737, 740 (2d Cir. 1932).

94. Petitioner’s Final Brief, *supra* note 78, at 31-32.

to lessen their future compliance burden by taking steps to address water contamination as soon as the EPA releases a health advisory.⁹⁵ For example, after the EPA issued the PFOA and PFOS health advisories in 2016 and the updated health advisories in 2022,⁹⁶ the EPA did not issue a final regulation for PFAS until May 2024.⁹⁷ Still, just under half of states issued regulations for PFAS in drinking water by 2023.⁹⁸ By April 2024, thirty-four states had introduced “some level of restriction on PFAS.”⁹⁹

The key question for the *Bennett* test is whether these consequences are “direct.”¹⁰⁰ Given that a health advisory creates pathways to legal consequences that would not otherwise exist, the consequences are likely direct. Just as the BiOp in *Bennett* had no substantive impact unless the Bureau agreed to implement the BiOp’s recommendations, the health advisory here has no impact unless water agencies and state and local governments implement the health advisory’s recommended maximum GenX levels.¹⁰¹ Where *Bennett* and *Chemours* differ is in the legal consequences. In *Bennett*, the Bureau had a strong incentive to implement the BiOp because the recommendations would prevent (or provide protection from liability resulting from) damage to the habitat and population of an endangered species, a harm the agency would anyway be liable for under the ESA.¹⁰² In other words, if the EPA did not publish the BiOp, the Bureau would still face legal consequences under the ESA.¹⁰³ By contrast, in *Chemours*, if the EPA had not published the health advisory, state enforcement programs would not have a standard for regulating GenX unless they set their own maximum levels.¹⁰⁴ To a lesser extent, a health advisory can also create a pathway to legal consequences such as injunctions and civil penalties¹⁰⁵ by acting as a source of information the EPA Administrator can cite to invoke

95. See *PFAS: Per- and Polyfluoroalkyl Substances*, STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/pfas.html (last updated July 8, 2025).

96. *Historical PFOA and PFOS Health Effects Science Documents*, EPA, <https://www.epa.gov/sdwa/historical-pfoa-and-pfos-health-effects-science-documents> (last updated October 8, 2025).

97. See generally *Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances*, 89 Fed. Reg. 39124 (May 8, 2024) (to be codified at 40 C.F.R. pt. 302).

98. *PFAS Update*, *supra* note 88.

99. Kelsey Brown, *The Current State PFAS Regulations in the United States*, Z2DATA (Apr. 10, 2024), <https://www.z2data.com/insights/the-current-state-pfas-regulations-in-the-united-states>.

100. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

101. See *id.*; *Chemours Co. v. EPA*, 109 F.4th 179, 185 (3d Cir. 2024).

102. *Bennett*, 520 U.S. at 158-59.

103. See *id.*

104. See *Chemours*, 109 F.4th at 185.

105. 42 U.S.C. § 300h-1(a)-(b); *Chemours*, 109 F.4th at 186. Two main limitations of this argument are that (1) the EPA Administrator must affirmatively invoke emergency powers; the health advisory does not automatically apply, and (2) a health advisory is just one of many sources of information for invoking emergency powers. See 42 U.S.C. § 300h-1(a).

emergency powers.¹⁰⁶ As such, a health advisory likely leads to appreciable legal consequences even more directly and causally than a BiOp.

2. *Hawkes Rule*

Ultimately, the *Chemours* court did not find arguments under the *Bennett* test persuasive and declined to use another rule, stating that *Bennett* was “the general rule” and there was “no reason to depart” from it.¹⁰⁷ Yet, there might be another rule worth analyzing, one from a case that the Third Circuit even cited to clarify a prong of the *Bennett* test in *Chemours*.¹⁰⁸ While the *Bennett* test provides a useful structure for determining what constitutes a final agency action,¹⁰⁹ the Supreme Court’s more recent decision in *Hawkes* asserted that the Court has “long taken” a pragmatic approach in deciding what is final.¹¹⁰ The *Hawkes* rule overlaps with *Bennett*’s two-prong test but arguably broadens the scope of what may qualify as a final action, affording courts greater flexibility in determining subject matter jurisdiction for judicial review.¹¹¹

Under the *Hawkes* rule, the Court has broader subject matter jurisdiction because it can hear petitions for final actions that create rights, obligations, direct and appreciable legal consequences, or an immediate “risk of significant criminal and civil penalties.”¹¹² The concurrence in *Hawkes* summarized the effects in the latter category as those bringing about an “immediate and practical impact.”¹¹³ Here, similar to how an agency’s decision to classify a commodity as “agricultural” automatically affected the permitting requirements for a carrier in *Frozen Food*, the EPA’s decision to issue a health advisory automatically affects environmental permitting requirements for actors in certain states.¹¹⁴ Some states explicitly tie statutory standards for environmental contamination to EPA

106. See Memorandum from Rosemarie Kelley, *supra* note 37, at 7.

107. *Chemours*, 109 F.4th at 184 n.5.

108. *Id.* at 184, 184 n.5. The Third Circuit also acknowledged another legal standard for a final action: (1) whether the decision represents the agency’s definitive position on the question; (2) whether the decision has the status of law with the expectation of immediate compliance; (3) whether the decision has immediate impact on the day-to-day operations of the party seeking review; (4) whether the decision involves a pure question of law that does not require further factual development; and (5) whether immediate judicial review would speed enforcement of the relevant act. *Id.* at 184 n.6 (citing *Ocean Cnty. Landfill Corp. v. EPA*, 631 F.3d 652, 655 (3d Cir. 2011)). Despite the word “and,” the Court did not state that all five factors are required, but rather that it has “listed several factors relevant to the assessment.” *Univ. of Med. & Dentistry v. Corrigan*, 347 F.3d 57, 69 (3d Cir. 2003). While this apparently broader test may increase the chance of finding subject matter jurisdiction, like the Court’s opinion, this In Brief will not evaluate any legal standards that the parties did not argue were relevant.

109. See *Bennett v. Spear*, 520 U.S. 154, 178.

110. *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 599 (2016).

111. See *id.*

112. See *id.* at 597-600.

113. *Id.* at 604.

114. See *Frozen Food Express v. United States*, 351 U.S. 40, 43-44 (1956); UTAH ADMIN. CODE r. 317-7-6.5(C)(4) (2013) (stating that “EPA Adult Lifetime Health Advisories must be met at the point of injection while the permit application is under review”).

guidance, making advice that may not be enforceable by the EPA enforceable as a matter of state law.¹¹⁵

While intelligent minds could, and did, disagree on the subject matter jurisdiction question, the purpose of this In Brief is to examine the possibility and implications of a different holding in *Chemours*. As such, the next Subpart will assume that a hypothetical court has selected a broad test, found that the health advisory could at least have immediate or practical impacts on states and industries, and decided that it has subject matter jurisdiction over the case.

B. Substantive Arguments

In a scenario where the Court has found subject matter jurisdiction, the parties would have already agreed that the venue was correct, so the case would likely have proceeded.¹¹⁶ Chemours' briefs asserted that the health advisory violated the procedural and substantive requirements of the APA, as well as the nondelegation doctrine.¹¹⁷

1. Administrative Procedure Act

Chemours brought an APA challenge against the EPA, arguing in its brief: "Rather than follow the notice-and-comment rulemaking process required by the APA, the agency issued the Health Advisory without affording the public notice of its key assumptions or an adequate opportunity to correct the agency's errors."¹¹⁸

Challenging the health advisory under the APA's notice-and-comment requirements would not likely have succeeded because the specific part of the health advisory that creates obligations, legal consequences, and immediate impacts underwent a notice-and-comment process. The toxicity assessment, EPA's assertion for how much and how frequently a person can be exposed to GenX without experiencing adverse health effects,¹¹⁹ underwent a notice and 60-day public comment period.¹²⁰ Twenty-six authors commented, ranging from

115. See, e.g., IOWA ADMIN. CODE r. 567-137.5(4) (2025) (stating that "[i]f no enforceable MCL exists, the statewide standard for chemicals will be the lifetime health advisory level . . . by the EPA's Office of Water. . ."); ALA. ADMIN. CODE r. 335-6-15-.30(e) (2022) (stating that "the corrective action limit shall be set equal to the Maximum Contaminant Level (MCL) or Health Advisory Level (HAL) established by EPA"); UTAH ADMIN. CODE r. 317-7-6.5(C)(4) (2013) (stating that "EPA Adult Lifetime Health Advisories must be met at the point of injection while the permit application is under review").

116. See *Chemours Co. v. EPA*, 109 F.4th 179, 184 n.4 (3d Cir. 2024).

117. Petitioner's Proof Brief at 22, 62, *Chemours Co. v. EPA*, 109 F.4th 179 (3d Cir. 2024) (No. 22-2287).

118. Petitioner's Final Brief, *supra* note 78, at 1. Chemours made three other claims, asserting that EPA had considered more sources of GenX than the SDWA authorized, did not use the best available science, and failed to consider the cost of the regulation. *Id.* at 36, 51, 58. This In Brief acknowledges the uncertainty surrounding these substantive arguments in the Conclusion but primarily focuses on the two arguments that apply to EPA's *method* of creating a health advisory.

119. See *Human Health Toxicity Assessments for GenX Chemicals*, *supra* note 29.

120. EPA Response, *supra* note 69, at 1.

independent consultants to environmental groups to government departments.¹²¹ Chemours also cannot argue that it lacked a fair chance to participate, as one commenter was legal counsel to Chemours, two were consultants to Chemours, and one more received research funds from and submitted comments on behalf of Chemours.¹²²

2. *Nondelegation Doctrine*

Chemours made a second substantive argument, arguing that Congress gave the EPA “no guidance whatsoever” because it gave the agency discretion over whether to publish a health advisory and what to put in the health advisory.¹²³

However, Chemours’ claim likely fails under examination of the SDWA’s language. Under the SDWA, “[t]he Administrator may publish health advisories (which are not regulations) . . . for contaminants not subject to any national primary drinking water regulation.”¹²⁴ While brief, Congress wrote an upper boundary on the advisory power into the statute, stating that a health advisory cannot be a regulation.¹²⁵ In other parts of the SDWA, Congress also defined contaminants as “any physical, chemical, biological, or radiological substance or matter in water” and required “best available, peer-reviewed science,” providing two additional guidelines.¹²⁶

The Supreme Court’s recent case involving EPA’s authority under the nondelegation doctrine, *West Virginia v. EPA*, can provide insight here. In *West Virginia*, the Supreme Court imposed a narrow interpretation of the authority that Congress delegated to the EPA,¹²⁷ holding that the EPA has the authority to require the “best system of emissions reduction,” such as fuel switching or carbon capture,¹²⁸ and to establish “different standards of performance with respect to different pollutants.”¹²⁹ Congress did not provide guidance on how to create each standard, source classification, and emissions measurement.¹³⁰ Rather, the Court found that the legislature “intended a technology-based approach” such as decisions “based on . . . best adequately demonstrated control technology,”¹³¹ similar to the “best available, peer-reviewed science” language

121. *See id.* at 2-3.

122. *Id.* at 2-3, 7, 11, 36, 54.

123. Petitioner’s Final Brief, *supra* note 78, at 21.

124. 42 U.S.C. § 300g-1(b)(1)(F).

125. *See id.*

126. *Id.* §§ 300f(6), 300g-1(b)(3)(A)(i).

127. *West Virginia v. EPA*, 597 U.S. 667, 732 (2022) (“[T]he Government must—under the major questions doctrine—point to ‘clear congressional authorization’ to regulate in that manner.”).

128. *Id.* at 706, 727.

129. *Id.* at 709.

130. *See id.* at 724-25.

131. *See id.* at 726.

in the SDWA.¹³² Like the SDWA's broad definition of a water contaminant,¹³³ the act at issue in *West Virginia*¹³⁴ broadly defined a pollutant as "any air pollution agent . . . which is emitted into or otherwise enters the ambient air."¹³⁵ Based on the similarity of the language between the acts, requiring Congress to tell the EPA when to publish a health advisory and what to cover in a health advisory would extend to a level of granularity that courts have not yet imposed. Therefore, a court would likely find that the SDWA does provide sufficient guidance to the EPA about health advisories.

CONCLUSION

If health advisories have immediate, practical impacts,¹³⁶ but substantive arguments about the process the EPA uses would likely fail,¹³⁷ regulated parties may have concerns about the potential authority the EPA could exercise through advisories.¹³⁸ Given this apparent imbalance between impact and agency discretion, industry groups will likely continue to bring challenges to health advisories. As such, aside from the legal arguments addressed in this In Brief, a circuit court may want to allow a future petition for review to proceed to the merits for the benefits of clarifying this rapidly evolving area of law. Since January 2025, the Trump administration has ridiculed protections for endangered species in the face of water shortages,¹³⁹ withdrawn a PFAS wastewater regulation as a result of the regulatory freeze memorandum,¹⁴⁰ walked back Biden-era PFAS regulations in favor of previously existing less strict standards,¹⁴¹ cut Clean Water and Drinking Water State Revolving Funds,¹⁴² and

132. See 42 U.S.C. § 300g-1(b)(3)(A)(i).

133. See *id.* § 300f(6).

134. The act at issue in *West Virginia* was the Clean Air Act. *West Virginia*, 597 U.S. at 706.

135. 42 U.S.C. § 7602.

136. See *supra* Part III.A.

137. See *supra* Part III.B.

138. See, e.g., Petitioner's Final Brief, *supra* note 78, at 64 (alleging "EPA may issue health advisories whenever it wants, and . . . say essentially whatever it wants").

139. See *Putting People over Fish: Stopping Radical Environmentalism to Provide Water to Southern California*, THE WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/putting-people-over-fish-stopping-radical-environmentalism-to-provide-water-to-southern-california>.

140. Evey Weisblat, *EPA Drops PFAS Discharge Rule After Regulatory Freeze Issued by Trump Administration*, CITY VIEW (Jan. 27, 2025), <https://www.cityviewnc.com/stories/epa-drops-pfas-discharge-rule-after-regulatory-freeze-issued-by-trump-administration>.

141. *EPA Announces It Will Keep Maximum Contaminant Levels for PFOA, PFOS*, EPA (May 14, 2025), <https://www.epa.gov/newsreleases/epa-announces-it-will-keep-maximum-contaminant-levels-pfoa-pfos>.

142. Cathleen Kelly & Jasia Smith, *The Trump Administration's Cancellation of Funding for Environmental Protections Endangers Americans' Health While Draining Their Wallets*, CTR. FOR AM. PROGRESS (Apr. 2, 2025), <https://www.americanprogress.org/article/the-trump-administrations-cancellation-of-funding-for-environmental-protections-endangers-americans-health-while-draining-their-wallets>.

rolled back environmental regulations using a “ten out, one in” approach.¹⁴³ In a political climate where significant uncertainty surrounds environmental regulations, courts can offer some stability.

If a court reaches the substantive claims, a strong outcome for the EPA or environmental groups would be an affirmation of the EPA’s authority. For example, the court might find that statutory requirement to use the “best available, peer-reviewed science”¹⁴⁴ is flexible and intentionally low because advisories address emerging risks where perfect information is rarely available.¹⁴⁵ The court could also clarify that cost considerations are irrelevant where the statute is silent and that the EPA may evaluate contaminants whose exposure pathways extend beyond drinking water, so long as drinking water is among the relevant routes.

On the other hand, the court could remand the health advisory, ordering the EPA to conduct more notice and comment, use better science, or consider another factor. This is not necessarily a bad outcome. The core objective of the health advisory—to inform the public about health risks associated with exposure to newly researched contaminants¹⁴⁶—would continue with little to no delay. Once the EPA releases information, it enters the public domain and fulfills its role of public disclosure, even if it does not trigger substantive legal obligations. Meanwhile, the health advisory could benefit from further public comments that provide critiques on research methodology, data gaps, and policy considerations.¹⁴⁷ Additionally, public comment can facilitate inclusive civic engagement, encourage government responsiveness to the public, and inform agencies about public views.¹⁴⁸

Further, a delay in the health advisory does not block the government from acting to address a health threat. Even without a health advisory, section 1431 permits the Administrator to take necessary action upon receiving and confirming information indicating that there is a contaminant present in a public water system.¹⁴⁹ Instead of citing to a health advisory’s toxicity assessment, the EPA could rely on technical findings, sampling data, toxicology data, or the

143. *Fact Sheet: President Donald J. Trump Launches Massive 10-to-1 Deregulation Initiative*, THE WHITE HOUSE (Jan. 31, 2025), <https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-launches-massive-10-to-1-deregulation-initiative>.

144. 42 U.S.C. § 300g-1(b)(3)(A)(i).

145. See *Drinking Water Health Advisories (HAs)*, EPA, <https://www.epa.gov/sdwa/drinking-water-health-advisories-has> (last updated Apr. 29, 2024) (“HAs ... are subject to change as new information becomes available. The EPA can develop interim or provisional HA levels to provide information in response to an urgent or rapidly developing situation.”).

146. *Id.*

147. See Petitioner’s Proof Brief, *supra* note 117, at 1 (asserting that the public can “correct the agency’s errors”); see, e.g., EPA Response, *supra* note 69, at 1.

148. See Nina A. Mendelson, *Democracy, Rulemaking, and Outpourings of Comments*, THE REGUL. REV. (Dec. 20, 2021), <https://www.theregreview.org/2021/12/20/mendelson-democracy-rulemaking-and-comments>.

149. Memorandum from Rosemarie Kelley, *supra* note 37, at 7; 42 U.S.C. § 300i(a).

opinion of an expert.¹⁵⁰ Similarly, states do not have to wait for a health advisory and have the authority to decide they want more stringent regulations on their drinking water supplies at any point.¹⁵¹ Finally, the EPA can simply pass a final regulation,¹⁵² as it did with PFOS and PFOA.¹⁵³

It is worth acknowledging that a key limitation of this analysis lies outside the courts and the legislature. Although health advisories are a useful tool that can inform the public when other regulatory pathways stall in litigation, the system falls apart if the EPA does not take advantage of this authority. The current EPA Administrator shares many of the Trump administration's policies and industry values.¹⁵⁴ Even if the EPA issued a health advisory that the president did not support, the EPA Administrator is a political appointee who the president can remove at will.¹⁵⁵ This removal power is one that the Trump administration has already tried to use broadly.¹⁵⁶ Therefore, even though courts can preserve or clarify the health advisory power, voters also have a key role to play in electing government leaders who will use the health advisory power to support transparent, science-based policymaking.

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150. Memorandum from Rosemarie Kelley, *supra* note 37, at 19.

151. 40 C.F.R. § 131.4(a) (1994) (“As recognized by section 510 of the Clean Water Act, States may develop water quality standards more stringent than required by this regulation.”)

152. 42 U.S.C. § 300g-1(b)(1)(A).

153. Designation of Perfluorooctanoic Acid, *supra* note 97, at 39124.

154. See John Santucci et al., *Lee Zeldin Tapped to Lead Environmental Protection Agency under Trump*, ABC NEWS (Nov. 11, 2024), <https://abcnews.go.com/Politics/lee-zeldin-tapped-lead-environmental-protection-agency-trump/story?id=115748664> (describing Zeldin's alignment with Trump's environmental policies, such as a commitment to energy dominance and the elimination of regulations that impede business); *What They are Saying: EPA Administrator Lee Zeldin to Unleash American Greatness as Head of EPA*, EPA (Jan. 31, 2025), <https://www.epa.gov/newsreleases/what-they-are-saying-epa-administrator-lee-zeldin-unleash-american-greatness-head-epa> (highlighting the support of Republican politicians and industry groups for Zeldin's nomination).

155. See *Myers v. United States*, 272 U.S. 52, 125 (1926) (holding that the President has the sole power to remove appointed officers of executive agencies); *Memorandum for the Heads of Executive Departments and Agencies: Restoring Accountability for Career Senior Executives*, THE WHITE HOUSE (Jan. 20, 2025) (outlining the Trump administration's policy that uses the threat of removal to ensure officials “faithfully perform their duties”), <https://www.whitehouse.gov/presidential-actions/2025/01/restoring-accountability-for-career-senior-executives>.

156. See Gabriella Cantor & Hannah Sobran, *Tracking Trump's Unprecedented—Often Illegal—Firings of Political Appointees and Watchdogs*, CITIZENS FOR RESP. & ETHICS IN WASH., <https://www.citizensforethics.org/reports-investigations/crew-reports/tracking-trumps-unprecedented-often-illegal-firings-of-political-appointees-and-watchdogs> (last updated Nov. 26, 2025).

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