

August 18, 2022

Mr. Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D. C. 20460

Mr. Barry Breen
Acting Assistant Administrator
Office of Land and Emergency Management
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Re: Hazardous substance designation for PFOA and PFOS under CERCLA

Dear Administrator Regan & Acting Assistant Administrator Breen,

As the Executive Director of the Environmental Protection Network (EPN), an organization of 550 U.S. EPA alumni volunteering their time to protect the integrity of EPA and its mission, I am writing to urge you to move quickly to designate PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Pollution from decades of unregulated releases of these toxic chemicals threatens communities, including low-income and communities of color, who are experiencing serious health effects and incurring cleanup costs. The designation of PFOA and PFOS as hazardous substances under CERCLA is an important step in shifting the burden of cleanup from the American people to the polluters, encouraging more responsible stewardship, and accelerating efforts to clean up contaminated sites.

The designation of PFOA and PFOS as hazardous substances would give EPA the authority to compel cleanup by the polluters and, where such parties refuse to take such action, the authority to enforce such actions. The designation would also give EPA the authority to recover its cleanup costs when it takes on the work and provides responsible parties who are cleaning up PFOA and PFOS authority to collect contributions from other responsible parties. In fact, EPA and the U.S. Department of Justice (DOJ) have previously determined that CERCLA Section 106 enforcement authority for hazardous substances can be used to address cross-media contamination in lieu of using separate authorities for air, water, and waste¹. In addition, the requirement to report releases of PFOA and PFOS that exceed the reportable quantity within a 24-hour period will provide federal, state, and local government as well as downwind, downstream communities with valuable data on exposures and potential risks.

We are aware that EPA has received letters from the U.S. Chamber of Commerce, National Association of Manufacturers, and the CERCLA Coalition asserting that this rulemaking is a significant regulatory action

¹ <https://www.epa.gov/sites/default/files/2013-10/documents/ise-crossmedia.pdf>

under Executive Order 12866 because: 1) private party compliance costs would exceed the \$100M threshold for a major rule; and 2) novel legal or policy issues would be raised because EPA has never previously designated hazardous substances directly using CERCLA authority. If EPA were to agree that this rulemaking is a significant action, the agency would need to spend significant time and resources developing a comprehensive Regulatory Impact Analysis and complying with the Small Business Regulatory Enforcement Act, Unfunded Mandates Reform Act, and Executive Order 13132 on Federalism. EPN disputes the assertions that this rulemaking is a significant regulatory action and explains why in the following sections.

Private Party Compliance Costs

The U.S. Chamber of Commerce asserts that the new rule would exceed the \$100M threshold for a significant rulemaking based on their economic analysis claiming that private party compliance costs will range from \$11B to \$22B, with annualized costs from \$700M to \$800M. These costs are based on a number of unrealistic assumptions: 1) all existing non-federal National Priorities List (NPL) sites would be required to monitor for PFOA and PFOS; 2) PFOA and PFOS contamination would add 20 sites to the NPL annually for the next 10 years; and 3) all new and existing PFOA/PFOS contaminated sites would require very costly cleanup with high legal and consultant transaction costs.

EPN disputes those assumptions and their costs for the following reasons. First, CERCLA response authorities are triggered by a release or substantial threat of a release of either a hazardous substance or a pollutant or contaminant into the environment that poses or may pose an imminent or substantial threat to public health, welfare, or the environment. PFOA and PFOS are already considered pollutants and are already subject to most CERCLA authorities. Designation of PFOA and PFOS as hazardous substances should not generate any new requirements for the cleanup process at sites already on the NPL. Once a site is on the NPL, EPA can and does include both hazardous substances and pollutants or contaminants in its remedial investigations, decision-making, remedy design, and remedy construction processes. Likewise, when conducting statutorily required five-year reviews of NPL sites, EPA already looks at whether remedies remain protective for both hazardous substances, pollutants, or contaminants. EPA does not reopen all Superfund sites every time a new contaminant is identified but instead takes a targeted approach, focusing on those types of sites most likely to be contaminated with the chemical. Even at sites where PFOA and PFOS are suspected, the remedy for the previously identified pollutants may prevent exposure to these chemicals and obviate the need for additional remedial actions.

Second, the only statutory requirement for adding sites to the NPL is the requirement that updates occur once a year. Over the past decade, EPA has been evaluating approximately 500 sites or releases a year for potential addition to the NPL but has only placed on average about 10 sites on the NPL each year because of resource constraints and other considerations. While the hazardous substance designation will enable EPA to score hazard ranking system exposure pathways for PFOA and PFOS, not every site eligible for the NPL is proposed to be added or made final, as sites can be deferred to other authorities or to the states. EPA historically has viewed CERCLA as the statute of “last resort.” EPA first looks to other federal authorities such as the Clean Water Act (CWA), the Safe Drinking Water Act (SDWA), and the Resource Conservation and Recovery Act (RCRA) as preferred avenues for treatment or cleanup. EPA also works with states to evaluate their capabilities for taking action under delegated federal regulatory programs or under state programs. In many instances, states will take the lead on sites, and EPA will look to state and local authorities to take appropriate actions.

Third, EPN disputes the extremely high costs that the U.S. Chamber of Commerce estimates for every step of the cleanup process and for the expected transaction costs of legal and consultant services. These are unrealistic costs that cannot be justified based on the experience of our EPA alumni who have decades of experience in the Superfund program..

Novel Legal or Policy Issues

CERCLA defines “hazardous substances” as those designated by four other statutes (CWA, SDWA, RCRA, and Toxic Substance Control Act (TSCA)) and by CERCLA Section 102(a)², which authorizes EPA to designate additional hazardous substances not listed in those statutes. There are currently about 800 CERCLA hazardous substances, so this action is novel only insofar as this is the first time EPA has used its Section 102(a) authority.

EPN disputes the statement that use of this CERCLA authority poses novel legal or policy issues. CERCLA Section 102(a) states that “The Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances in addition to those referred to in Section 9601(14) of this title, such element(s), compound(s), mixture(s), solution(s) or substance(s) which when released into the environment *may present* substantial danger to the public health or welfare or the environment, and shall promulgate regulations establishing that quantity of hazardous substance the release of which should be reported pursuant to Section 9603 of this title.”² (Emphasis added.) As EPA explained in its January 2021 Advance Notice of Proposed Rulemaking³, the language “may present” in Section 102(a) does not represent a dramatic departure from other statutory requirements using that same language. Those statutory requirements include CERCLA Section 104, which authorizes a federal response action “whenever there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare,” and CERCLA Section 106, which allows the federal government to seek judicial enforcement when “there may be an imminent and substantial endangerment to public health or welfare or to the environment because of an actual or threatened release of a hazardous substance from a facility.” These sections have never required certainty that a substance presents a substantial danger or proof of harm, and neither should CERCLA Section 102(a). More importantly, because PFOA and PFOS are the most widely-studied PFAS chemicals in the world, hundreds of epidemiology and toxicology studies are available demonstrating their detrimental health effects, as EPA documented in the June 2022 interim drinking water health advisories for these chemicals⁴. A July 28, 2022 National Academy of Science, Engineering, and Medicine consensus report⁵ further underscores the serious risks of PFOA, PFOS, and five other PFAS chemicals, concluding that sufficient evidence exists for an association between exposure to these chemicals and increased risk of lowered antibody response in adults and children, decreased infant and fetal growth, and kidney cancer in adults. *Guidance on PFAS Exposure, Testing, and Clinical Follow-Up*⁵ recommends that clinicians nationwide screen people with blood serum PFAS concentrations as low as 2 parts per billion for various health conditions. There is **no** uncertainty about whether PFOA and PFOS pose “a substantial danger to the public health or welfare or the environment.”

² <https://www.law.cornell.edu/uscode/text/42/9602>

³ https://www.epa.gov/sites/default/files/2021-01/documents/fri-10019-13-olem_addressing_pfoa_pfos_anprm_20210113_admin-508.pdf

⁴ <https://www.epa.gov/sdwa/drinking-water-health-advisories-pfoa-and-pfos>

⁵ <https://nap.nationalacademies.org/catalog/26156/guidance-on-pfas-exposure-testing-and-clinical-follow-up>

While we dispute the claims of industry regarding the significance of this rulemaking and its impact on private parties, we are very concerned about the impact of this rule on wastewater and drinking water utilities. The 16,000 wastewater treatment works in the country assert that this designation would prevent the beneficial uses of their biosolids, and 50,000 community water systems assert that this designation would raise the costs of disposing of PFOA and PFOS removed during treatment. We have recommendations on how EPA can mitigate the impacts on these utilities.

First, we recommend that EPA clarify that designation of a hazardous substance under CERCLA Section 102(a) does not confer a hazardous substance designation under the other four statutes (CWA, CAA, RCRA, and TSCA). Therefore, utilities will not have to dispose of their PFOA/PFOS treatment wastes following RCRA hazardous waste requirements. We recommend that EPA provide guidance on how these wastes should be disposed of in a safe manner and explain that a new rulemaking would be required if EPA eventually decides that a RCRA hazardous waste designation is needed. We further recommend that EPA consider using a variance or some other means to delay the effective date of applying the hazardous waste designation to biosolids until after EPA promulgates a CWA Section 503 rule identifying safe levels of PFOA and PFOS in biosolids for various beneficial uses. This delay would provide a much needed grace period for wastewater utilities to monitor their biosolids and evaluate their reuse/disposal options.

We welcome an opportunity to discuss these issues and thank you for your consideration.

Respectfully,

Michelle Roos
Executive Director
Environmental Protection Network

cc:

Janet McCabe, EPA Deputy Administrator
Radhika Fox, Assistant Administrator, EPA Office of Water
Lawrence Starfield, Acting Assistant Administrator, EPA Office of Enforcement and Compliance Assurance