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EPN Comments on EPA's Proposed Designation of PFOA and PFOS as CERCLA Hazardous Substances

Docket No.: EPA-HQ-OLEM-2019-0341

November 7, 2022

Founded in 2017, the Environmental Protection Network (EPN) harnesses the expertise of more than 550 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

EPN commends EPA for proposing to designate perfluorooctonoic acid (PFOA) and perfluorooctane sulfonate (PFOS) as hazardous substances under CERCLA section 102(a). 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 costs. This designation 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. We provide comments below on each of the key issues in the proposed rule.

Definition of PFOA and PFOS

We commend EPA for including the salts of PFOA and PFOS as well as their linear and branched structural isomers in the hazardous waste designation. This inclusive definition is necessary to ensure the substances currently produced by U.S. companies for certain uses and by international companies exporting treated products to the U.S., the substances formed by precursor compounds, and the substances remaining from legacy production in the U.S. are covered by this designation.

Evidence of Substantial Danger

We agree with EPA's conclusion that the totality of the evidence demonstrates that PFOA and PFOS can pose substantial danger to public health or welfare or the environment and far exceeds the minimum information to designate a substance as hazardous under CERCLA section 102(a). We recommend that EPA add to the final rule a citation to the July 28, 2022, consensus report from the National Academy of Science, Engineering, and Medicine that concludes there is sufficient evidence for an association between exposure to PFOA, PFOS, and five other PFAS chemicals and increased risk of lowered antibody response in adults and children, decreased infant and fetal growth, and kidney cancer in adults.[1] This consensus report, entitled *Guidance on PFAS Exposure, Testing, and Clinical Follow-Up*, recommends that clinicians nationwide screen people who have blood serum PFAS concentrations as low as 2 parts per billion for various health conditions. This new report adds to the overwhelming evidence that PFOA and PFOS pose a substantial danger to the American people.

Acceleration of Cleanup

We agree that designation of PFOA and PFOS as hazardous substances will speed cleanup of contaminated sites even though CERCLA already authorizes cleanup of these substances as a pollutant or contaminant. Before initiating cleanup of a pollutant or contaminant that is not designated as hazardous at a site, EPA

[1] https://nap.nationalacademies.org/catalog/26156/guidance-on-pfas-exposure-testing-and-clinical-follow-up

must take the time to document that the substance poses an imminent and substantial danger to public health or welfare. EPA can initiate cleanup immediately for a substance designated as hazardous since this documentation of danger has already been completed. Designation also speeds cleanup by making private funding available in place of limited federal funding. While EPA cannot require a private party to pay for or conduct the cleanup of a pollutant or a contaminant, the designation of PFOA and PFOS as hazardous substances gives 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 also gives EPA the authority to recover its cleanup costs when it performs the work itself and provides responsible parties who are cleaning up PFOA and PFOS authority to collect contributions from other responsible parties.

We recommend that EPA add to the final rule a citation to a previous determination by EPA and the U.S. Department of Justice (DOJ) 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 waste.[2] Use of this cross-media enforcement authority can further speed cleanup at a site by eliminating the need to pursue multiple enforcement actions under separate statutes.

Notification of Reportable Quantity Releases

EPN recommends that in the preamble of the final rule EPA clarify how the notification requirements of CERCLA section 111(g) will be implemented should PFOA and PFOS be designated as hazardous substances. This section requires the owner/operator of a facility which has released a hazardous substance to provide reasonable notice to potential injured persons by publication in local newspapers serving the affected area. The preamble of the proposed rule mentions notifications under CERCLA section 103 and Emergency Planning and Community Right-to-Know Act section 304 but does not mention the community notification requirement under CERCLA section 111(g).

Interpretation of "May Present" Statutory Language

CERCLA section 102(a) states that "[t]he 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…" We agree with EPA's proposed interpretation that the "may present" statutory language indicates Congress did not require certainty that the substance presents a substantial danger or require proof of actual harm. 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, and CERCLA section 102(a) should be interpreted similarly.

[2] https://www.epa.gov/sites/default/files/2013-10/documents/ise-crossmedia.pdf

Information for Determining Substantial Danger
We agree with EPA's list of the information they will consider in determining whether a substance poses substantial danger. The list includes the potential harm to humans or the environment from exposure to the substance; how the substance moves and degrades when in the environment; and the frequency, nature, and geographic scope of releases.

Section 102(a) Consideration of Costs
We agree with EPA's interpretation that section 102(a) precludes consideration of cost for the designation of a substance as hazardous for the following reasons: 1) in section 102(a), Congress did not list cost as a required or permissible factor for designation of hazardous substances and required only that the substance pose a substantial danger to public health or welfare or the environment; and 2) in section 9601(14), Congress did not make CERCLA use of hazardous substance designations under other statutes contingent on the resulting cost for cleanup.

We agree with EPA's assertion that CERCLA section 102(a) is similar to Clean Air Act (CAA) section 109(b)(1), which governs EPA's setting of national ambient air quality standards. The case law on this section of the CAA established that where the CAA expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act should not be read as implicitly allowing the agency to consider cost. The role of hazardous substance designation in the overall structure of CERCLA is much closer to the role of a national ambient air quality standard (NAAQS) in the overall structure of the NAAQS program than it is to the role of the appropriate and necessary finding in regulating air toxic emissions from power plants. Under CERCLA, the only automatic private party obligation that flows from hazardous substance designation is the obligation to report releases. There is no automatic response action required from reporting a release. If a response is eventually required under CERCLA, that response is subject to cost considerations.

We further agree with EPA's statement that designation of PFOA and PFOS as hazardous substances does not generally create new costs but allows costs to be shifted from the taxpayer to responsible private parties and that a private party's ability to pay is taken into account. Once a site is on the National Priorities List (NPL), EPA can and does include both hazardous substances, pollutants, and 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 hazardous substances, pollutants, or contaminants.

Focus on Direct Costs vs. Indirect Costs
We agree that EPA's economic assessment for this rule should focus on the potential direct costs associated with this designation. Those direct costs are limited to reporting any release of PFOA and PFOS at or above the reportable quantity of 1 pound or more in a 24-hour period, providing notice and clean up for federally-owned property being sold or transferred, and DOT listing and regulating these chemicals under the Hazardous Materials Transportation Act.

We agree with EPA's assertion that it is impractical to quantitatively assess the indirect costs for response actions associated with this designation. Any estimated costs would be meaningless because they are so highly speculative. We are aware that the U.S. Chamber of Commerce has prepared a report that estimates private party compliance costs pool 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 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 the Chamber of Commerce assumptions and 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 the 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. As described above, EPA already considers these pollutants in its CERCLA cleanups and in its five-year review process. It is particularly difficult to predict the resulting costs of the five-year reviews because EPA does not reopen all NPL 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. In addition, reopening sites with PFOA and PFOS contamination may not be necessary because the remedy for the previously identified pollutants may prevent exposure to these chemicals, obviating the need for new remedial actions.

EPN also disputes the Chamber of Commerce assertion that this designation would add 20 sites to the NPL annually for the next 10 years. The only statutory requirement for adding sites to the NPL is the requirement that updates occur once a year. According to EPA's annual accomplishments reporting, the agency has been averaging over 800 remedial site assessment completions per year for potential addition to the NPL, but has placed on average only about 10 sites on the NPL each year over the past decade 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.

EPN also disputes the extremely high costs that the 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 decades-long experience of our EPA alumni in the Superfund program. EPN further notes that the unrealistically high costs estimated by the Chamber of Commerce are dwarfed by a recent estimate of the benefits of cleaning up PFOA, PFOS, and other PFAS chemicals. The New York University Grossman School of Medicine recently published a study identifying 13 medical conditions that may result from PFAS exposure.[3] Those diseases generated medical bills and reduced worker productivity across a lifetime to create costs ranging from $5.5B to $63B per year, far exceeding the Chamber of Commerce exaggerated estimates of private party compliance costs ranging from $700M to $800M per year.

[3] Obsekov, V., Kahn, L.G. & Trasande, L. Leveraging Systematic Reviews to Explore Disease Burden and Costs of Per- and Polyfluoroalkyl Substance Exposures in the United States. *Expo Health* (2022). https://doi.org/10.1007/s12403-022-00496-y

Impacts on Wastewater and Drinking Water Utilities

Wastewater and drinking water utilities have raised concerns about the implementation of this rule. The 16,000 wastewater treatment works in the country assert that this designation will prevent the beneficial uses of their biosolids, and the 50,000 community water systems assert that this will raise the costs of disposing of PFOA and PFOS removed during treatment. These facilities have asked EPA to exempt them from the hazardous substance designation, but EPA does not have the authority to waive the applicability of the rule for certain classes of facilities. To respond to these concerns, EPA has said the agency will use enforcement discretion in taking any federal CERCLA actions involving wastewater and drinking water facilities. EPA has a successful record of using enforcement discretion to address similar concerns associated with hazardous substances in the past, and EPN supports the use of enforcement discretion when appropriate to avoid unfair impacts of the designation on these facilities.

With regard to previous uses of biosolids as a fertilizer, we note that CERCLA Section 101 (22) exempts the "normal application of fertilizer" from the definition of "release." Because applying biosolids to the land in the past in a manner consistent with applicable regulations constituted the normal application of fertilizer, it would not be considered a release of a hazardous substance. With regard to future uses of biosolids after this hazardous substance designation, EPA has two major actions underway that can mitigate the impact on biosolids. First, in states where EPA is the permitting authority, EPA is requiring source controls and best management practices to reduce or eliminate PFAS discharges to publicly-owned wastewater treatment works (POTWs). EPA should promote these pretreatment requirements as a model for the states, urging their adoption as quickly as possible to reduce PFAS in both wastewater and biosolids. We suggest EPA increase technical assistance to state permitting authorities to ensure they identify potential PFAS dischargers to their POTWs and implement strong pretreatment requirements. At the present time, Michigan is the only state that has required POTWs to identify PFAS contributors to their plants. EPA should also promote adoption of PFAS limits in the National Pollutant Discharge Elimination System (NPDES) permits of wastewater treatment plants to mitigate potential future liability. CERCLA Section 107(j) limits liability from federally permitted releases, including releases subject to NPDES permits under the CWA. Second, EPA is developing a risk assessment for PFOA and PFOS in biosolids which is expected by the winter of 2024 to identify the safe concentrations of these chemicals for beneficial uses. EPA should accelerate the completion of this risk assessment so that the results can inform other actions related to the implementation of the final rule designating PFOA and PFOS as hazardous substances to assure safe beneficial use.

This CERCLA hazardous substance designation does not confer a hazardous waste designation under RCRA, so utilities will not be required to dispose of their PFOA/PFOS treatment wastes following RCRA hazardous waste requirements once this rule is finalized. However, EPA is developing a RCRA rule to designate PFOA, PFOS, GenX, and PFBS as hazardous wastes. The RCRA rulemaking may not be complete before EPA finalizes the PFOA and PFOS drinking water standard in 2024, but it will eventually require treatment waste disposal following hazardous waste requirements. In anticipation of both the new SDWA and RCRA rules, EPA should provide technical assistance now to publicly owned treatment works and community drinking water systems on how to dispose of these wastes in a safe, cost-effective manner.

Conclusion

We are certain this long-awaited rule will accelerate cleanups nationwide and urge EPA to finalize this rule as soon as possible. We look forward to the agency extending this hazardous waste designation to other PFAS chemicals in order to better protect the American people and the environment.