

May 11, 2021

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Regulatory Process for Designating Substances as “Hazardous” under CERCLA

Dear Administrator Regan:

The undersigned organizations support your recent decision to form the EPA Council on PFAS to develop a comprehensive agency approach to addressing per- and polyfluoroalkyl substances (PFAS). We look forward to working with you and the Council on decisions that protect human health and the environment using high-quality scientific data, methods, and principles. Inherent in EPA’s application of high-quality science is that the agency recognizes the vast differences in physical, chemical, and biological properties within this broad class of chemistries.

As the new Council begins its important work, we thought it important to provide input with respect to EPA’s possible actions on two PFAS chemistries, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS). We support the decisions to move ahead with establishing national standards for PFOA and PFOS under the Safe Drinking Water Act (SDWA) and to better understand releases to water from industries that manufacture and/or use PFAS under the Clean Water Act. This action, including monitoring and regulating these chemistries in drinking water under consistent federal regulation, will help further reduce potential exposure to people and the environment.

We are concerned, however, about calls to designate PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This action could undercut our mutual goal of addressing PFAS releases promptly and effectively to protect human health and the environment. Before deciding on any action under CERCLA, EPA should first consider using its existing authorities under other laws to more effectively address releases of PFOA and PFOS. EPA should also consult with stakeholders potentially affected by a CERCLA designation, collect data on the impact on current CERCLA remediation activity, and evaluate the nature and extent of those impacts. We welcome the opportunity to engage you and your team to discuss our concerns with an overly broad CERCLA approach and our strong interest in finding pragmatic and effective solutions to PFAS challenges (e.g., accelerating treatment and cleanup).

EPA and other federal agencies are currently using their existing authority to address PFOA and PFOS contamination at hundreds of locations across the U.S. Pursuant to section 1431(a) of the SDWA, EPA has responded on multiple occasions when it determined that the

presence of PFOA and PFOS in a public water system may endanger public health. EPA could continue to apply this authority to address PFAS releases as necessary. Federal agencies are fulfilling their responsibility under CERCLA to respond to sites where PFOS and PFOA have been released. The Department of Defense (DoD), for example, has provided alternative drinking water supply to military base personnel and residents of affected communities and now is identifying PFAS contamination at hundreds of its facilities under CERCLA. Additionally, EPA is providing technical assistance and federal grants to support state PFOA and PFOS cleanup activities under state authorities.

We urge EPA to evaluate how it can use the agency's existing authorities and resources in a more comprehensive and coordinated fashion to respond to releases of these two PFAS. EPA can take these actions now without delay and without undertaking additional rulemakings. Before deciding on regulatory action under CERCLA, we recommend EPA use its existing authorities first and then conduct a gap analysis to show which, if any, PFOA and PFOS release sites cannot be addressed within existing federal authority and resources. This path, in our view, is the most expedient way to address these sites, accelerate cleanups, and support local communities.

In contrast, designating PFOA and PFOS as hazardous substances, either directly through CERCLA section 102(a) or by reference from listing under another statute under section 101(14), will have significant adverse implications throughout society and the economy without commensurate benefit in reducing human and environmental exposure to these chemistries. The scope of liability under CERCLA sweeps in multiple, disparate companies, local governments, family businesses, and other organizations potentially liable for a single site. It is then left to lengthy and complicated litigation to sort out responsibilities; this often takes decades.

Owners and operators, including local governments and authorities that operate wastewater treatment plants, landfills, fire departments, as well as family farms could become potentially liable as a result of their past or present handling of materials containing PFOA and PFOS. Further, under CERCLA, states must contribute to remediation and remedy operating costs for certain sites.

Specifically, CERCLA designation could—

- Delay ongoing cleanups of PFOA and PFOS under state authority. Only EPA can approve CERCLA cleanups. States would either have to transfer oversight to EPA or negotiate a process where the state can act as co-regulator. If a site is listed on the National Priorities List (NPL) due to listing of PFOS or PFOA, potentially responsible parties (PRPs) could not receive approval to advance their cleanup activities.
- Delay the redevelopment of sites with suspected or known PFOA and PFOS releases. With the current list of hazardous substances, EPA estimates that there are over 450,000 “brownfield” sites with potential releases of hazardous substances. If PFOA and PFOS are added to CERCLA jurisdiction, many more sites could become brownfields, and relocation of soils containing CERCLA hazardous substances could be viewed as

creating future CERCLA liability. Protecting human health and the environment must remain our top priority and sometimes sites need additional attention. But “painting with too broad a brush” and pausing construction can put these jobs at risk and will harm our economy’s pandemic recovery.

- Reopen redeveloped brownfield sites. A hazardous substance designation for PFOA and PFOS would lead to reopening of Superfund sites for which cleanup has been completed, including brownfield sites that have received a release of liability and undergone redevelopment. As a result of the substantially lower target cleanup levels and the potential for inclusion of additional responsible parties, site reopening could become extremely complicated disruptive and resource intensive. Indeed, the added level of uncertainty associated with these chemicals could in many cases halt redevelopment activities altogether.
- Increase of drinking water and wastewater PFAS treatment costs. Handling treatment residuals containing PFAS would require hazardous waste disposal; companies that are not permitted as hazardous waste treatment facilities may refuse to regenerate spent carbon, for example. Biosolid disposal would become more expensive and restricted, also leading to increased costs.
- Incur costs to states. Under CERCLA, states must pay for ten percent of remedy costs and 100 percent of operating and maintenance costs at certain sites.

Proceeding down the CERCLA designation pathway will not advance our shared objective for addressing the environmental challenges facing communities across our country. Such an EPA action will disrupt ongoing PFAS and other cleanups, divert scarce funds to litigation, and harm our economy as we emerge from the COVID pandemic.

Therefore, we recommend EPA conduct a gap analysis and seek the views of states, local governments, businesses, and other stakeholders. The gap analysis could help the agency examine—

- activities it could take to address PFOA and PFOS contamination under existing regulation,
- additional entities potentially affected by designation as hazardous substances,
- the ability to limit the impacts of a hazardous substance designation by using other statutory authority,
- potential impacts of the interim recommended cleanup level of 70 ppt and screening level of 40 ppt established in 2020,
- implications of a hazardous substance designation on the available commercial capacity to manage the newly listed waste streams and sites, and
- the broader, nationwide cost implications of such a designation, including DoD’s current work on its sites already under CERCLA authority.

Consultation with small businesses, states, and localities on the potential impact of CERCLA listing on their programs, economic development, and financial assurance approaches

The Honorable Michael S. Regan

May 11, 2021

Page 4

would also be helpful. It would alert potentially affected parties that may not be aware of the potential impacts to collect additional information on the nature and extent of those impacts and their associated financial assurance responsibilities, and allow EPA to incorporate the most current science and data from active cleanup projects being undertaken across the country.

Finally, effective remediation calls for a risk-based, adaptive approach that not only promotes faster and more cost-effective cleanups but provides more immediate protections for human health and the environment. Cleanup should, therefore, focus on the exposure pathways at issue, specifically in drinking water. Adaptive management should be clearly and uniformly defined to offer more scientifically sound, targeted, and cost-effective remedies for addressing PFOA and PFOS.

Again, we look forward to working with you and the PFAS Council. We appreciate the opportunity to share our thoughts on CERCLA consideration for PFOA and PFOS and look forward to discussing these issues with you and your staff. Please do not hesitate to contact us if you have any questions.

Sincerely,

Aerospace Industries Association
Airlines for America
American Chemistry Council
American Farm Bureau Federation
American Feed Industry Association
American Forest and Paper Association
American Fuel and Petrochemical
Manufacturers
American Petroleum Institute
Council of Industrial Boiler Owners
Flexible Packaging Association
National Association of Chemical
Distributors
National Association of Manufacturers

National Association of Printing Ink
Manufacturers
National Association for Surface Finishing
National Cattlemen's Beef Association
National Oilseed Processors Association
National Milk Producers Federation
National Mining Association
National Pork Producers Council
National Turkey Federation
Plastics Industry Association
U.S. Chamber of Commerce
U.S. Poultry & Egg Association

cc: Radhika Fox, Acting Assistant Administrator, Office of Water
Deborah Szaro, Acting Regional Administrator, Region 1