



November 7, 2022

Honorable Michael S. Regan
U.S. Environmental Protection Agency
EPA Docket Center
OLEM Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

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

Re: Comments for the proposed Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as Hazardous Substances

Dear Administrator Regan:

Thank you for the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) proposed Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as Hazardous Substances under the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), published in the *Federal Register* on Tuesday, September 6, 2022 at 87 FR 54415. The Pennsylvania Department of Environmental Protection (DEP) offers the following comments on the proposed rule.

DEP supports EPA's proposed designation of PFOA and PFOS as CERCLA hazardous substances. Although PFOA and PFOS are no longer produced in the United States, these chemicals continue to be manufactured internationally and imported into the United States. While EPA's designation would not ban the use of PFOA or PFOS, the designation would represent an important step toward regulating the estimated 9,000 substances in the Per- and Polyfluoroalkyl Substances (PFAS) family. Upon finalization, this EPA action will strengthen DEP's ability to address PFAS contamination across the Commonwealth of Pennsylvania.

Pennsylvania's Hazardous Sites Cleanup Act (HSCA), Act 108 of 1988, defines a hazardous substance to include any element, compound, or material which is designated as a hazardous substance under CERCLA 35 P.S. §§ 6020.103. Following an EPA final action on this proposed rule, PFOA and PFOS would automatically become hazardous substances under HSCA by direct reference to CERCLA.

The authority granted in HSCA applies to both "contaminants" and "hazardous substances" and DEP maintains the authority to respond to, or order a response to, PFOA or PFOS contamination under Chapter 5 of HSCA. Cost recovery remains a persistent concern under HSCA section 507 for contaminants, as the liability provisions in HSCA section 701 only reference hazardous

Secretary

Rachel Carson State Office Building | P.O. Box 2063 | Harrisburg, PA 17105-2063 | 717.787.2814 | www.dep.pa.gov

substances. A hazardous substance designation under CERCLA for PFOS and PFOA will simplify the HSCA cost recovery process in Pennsylvania.

In HSCA Chapter 7, liability and additional settlement provisions only apply to hazardous substances. These provisions include: additional classes of responsible persons (generators, transporters, property owners) whether they directly caused the release or not; exemptions for “innocent landowners”; the ability of a person to file contribution actions against a responsible party; and the ability of responsible person to settle their proportionate liability with DEP. EPA’s designation of PFOA and PFOS as hazardous substances under CERCLA will broaden DEP’s ability to name responsible persons when there is a release and allow for a wider range of settlement options.

HSCA Chapter 11 addresses enforcement and remedies, but has some limitations when the contaminants are not designated as hazardous substances. For example, HSCA section 1115 provides the authority for citizens suits, including local governments, for those who have been injured in some manner from a release of a hazardous substance, but it does not provide the same authority for a release of contaminants. EPA’s designation would simplify the HSCA enforcement process and provide additional authorities.

Additionally, Pennsylvania’s Land Recycling and Environmental Remediation Standards Act, Act 2 of 1995 (Act 2), applies to “regulated substances” which includes both contaminants and hazardous substances as defined in HSCA. Thus, following EPA’s finalization of this proposed rule, there would not be a difference to how cleanup standards or the voluntary cleanup program work under Act 2.

The American Society for Testing and Materials (ASTM) standard for property assessments applies to hazardous substances, so – following finalization of this proposed rule by EPA – initial environmental assessments (Phase I and Phase II) by potential buyers of commercial and industrial property would have to assess the potential for PFOA and PFOS releases. DEP has no regulatory requirements to conduct property assessments; however, federal “superfund” law requires an “All Appropriate Inquiry” to become exempt from CERCLA liability for past releases of hazardous substances. This federal exemption drives the ASTM standard and best professional practices. Responsible parties can protect themselves from CERCLA liability by addressing contamination through the voluntary cleanup process. Finalization of this rule by EPA may lead to a significant increase in the number of properties with known PFOA and/or PFOS contamination.

Pennsylvania’s Storage Tank and Spill Prevention Act (STSPA), Act 32 of 1989, regulates aboveground and underground storage tanks that contain hazardous substances. If EPA finalizes this rule, storage tanks that contain PFOS and PFOA compounds would become regulated in Pennsylvania under the STSPA. Based on current and historical storage of hazardous substances at regulated storage tank facilities, any storage tank that would be regulated due to designation of PFOA and PFOS as hazardous substances would most likely be stored in an aboveground storage tank.

As detailed in EPA's August 2022 [presentation about the notice of proposed rulemaking](#) and [press release](#), DEP agrees with EPA's proposed approach on addressing concerns about liability for minor parties such as biosolids producers and users, fire departments, and utilities.

DEP also supports EPA's proposed method of focusing on large environmental releases from manufacturers when identifying responsible parties. EPA does not have clear authority to exempt certain entities from Superfund liability beyond exclusions provided by Congress. However, EPA does maintain enforcement discretion and can exercise other approaches like policy documents, "de minimis" and/or "ability to pay" settlement agreements (under CERCLA Section 122(g)), and delayed payments or payment schedules when addressing minor parties and equity concerns. An EPA settlement produces a contribution shield protecting the party from additional CERCLA liability. This means that other potentially responsible parties at a site cannot seek financial contribution from parties that have already settled with EPA.

As detailed in EPA's August 2022 [presentation about the notice of proposed rulemaking](#) and [press release](#), DEP agrees with EPA's proposed plan on conducting further outreach, devoting resources, and engaging with affected communities, utilities, businesses, farmers, entities using biosolids, municipal airports, local firehouses, and other parties during the consideration of the proposed rule.

DEP offers the following comments and recommendations to EPA to clarify and strengthen the rule.

Section II. Does this action apply to me?

- *Paragraph 1:* DEP requests clarification on how the release reporting limit of one pound or more in a 24-hour period is to be interpreted and applied by wastewater or a waste disposal facility (landfill). If less than one pound per day disposed in daily trash of a business or home is combined with other collected trash, a landfill leachate from collected trash producing an unacceptable result may occur. Also, please clarify any reporting issue requirement associated with storm sewer overflows which may occur during extreme weather events.
- *Paragraph 2, (4):* Please clarify the definition of "users of PFOA and/or PFOS products." "Users" as applied in this context is overly broad and may be interpreted to include any party, such as residential homeowners or renters.
- *Paragraph 2, (5):* Please explain the rationale to include waste management and wastewater treatment facilities as entities potentially affected by this proposed action. Specifically, are these entities included because they use PFOA and/or PFOS, or because they receive wastes containing those substances? Additionally, if a spill occurred while transporting the untreated waste to a treatment and/or disposal, would the spill be considered a release or potential release of a hazardous substance from a known or unspecified source?

Section III. General Information

- *A. Executive Summary:* Regarding the statement “The Federal government is already authorized to cleanup PFOA/PFOS contamination under some circumstances, including when it finds that a release may present an imminent and substantial danger to public health or welfare,” please clarify what constitutes an imminent and substantial danger to public health or welfare in this instance.
- *B. What are PFOA and PFOS, and how have they been used?:*
 - EPA’s Chemical Data Reporting (CDR) rule under the Toxic Substance Control Act (TSCA) requires manufacturers (including importers) to report certain data about chemicals in commerce in the United States, including information on PFOA and PFOS (subject to a 2,500 pound threshold at a single site). A 2,500-pound reporting threshold at a single site appears overly permissive considering EPA’s proposed reporting thresholds for those compounds.
 - Pursuant to Toxics Release Inventory (TRI) reporting requirements, facilities in regulated industry sectors must report annually on releases and other waste management of certain listed toxic chemicals that they manufacture, process, or otherwise use above certain threshold quantities (e.g., 100 pounds for PFOA and PFOS). Similarly, as with the CDR reporting thresholds under TSCA, a 100-pound reporting threshold for PFOA and PFOS appears overly permissive.

Section IV. Legal Authority

- *A. Background:* EPA’s final rule should explicitly address the applicability of CERCLA liability for the closed National Priorities List (NPL) sites and the NPL sites nearing closure. For instance, for NPL sites that have already been closed without investigation and remediation of PFOA and PFOS, does the designation of such substances as hazardous substances under CERCLA require those sites to be reopened for additional remedial efforts? Likewise, if a Superfund site is nearing closure, would the new PFOA/PFOS hazardous substances designation under CERCLA require a new site assessment to address PFOS and PFOA?

Section VI. Effect of Designation

- *B. Direct Effects of a Hazardous Substance Designation, 1. Reporting and Notification Requirements for CERCLA Hazardous Substances:* Please clarify if historic releases of PFOA/PFAS which may result in an impact to wastewater treatment plants and/or landfills, and possible discharges to the environment, will be subject to this provision.

Section VII. Regulatory and Advisory Status at EPA, Other Federal, State and International Agencies

- *A. EPA Actions:* In EPA's [Interim Recommendations to Address Groundwater Contaminated with PFOA and PFOS](#), tap water screening levels are stated as follows:

If both PFOS and PFOA are detected in tap water, PFOS regional screening level (RSL) = 6 parts per trillion (ppt). If they are the *only* contaminant detected in tap water, PFOA RSL = 60 ppt and PFOS RSL = 40 ppt.

Please explain why varying screening levels for PFOA and PFOS are recommended in tap water dependent on other contaminants present. Also, given EPA's recently published Interim Lifetime Health Advisories for PFOS and PFOA in drinking water, how will EPA's interim health advisories for PFOA/PFOS be used at NPL sites?

Thank you for your consideration of DEP's comments on this important proposed rule. Should you have any questions or need additional information on this matter, please contact Troy Conrad, Director of DEP's Bureau of Environmental Cleanup and Brownfields, at tconrad@pa.gov or 717.783.9480.

Respectfully,



Ramez Ziadeh, P.E.
Acting Secretary