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August 9, 2023

Michelle Schutz and Linda Strauss
Office of Superfund Remediation and Technology Innovation
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Submitted via the Federal eRulemaking Portal:

<https://www.regulations.gov/>

Re: National Association of Clean Water Agencies Comments on the U.S. Environmental Protection Agency's Advanced Notice of Proposed Rulemaking, Addressing PFAS in the Environment (Docket ID EPA-HQ-OLEM-2022-0922)

Dear Ms. Schutz and Ms. Strauss:

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) Advanced Notice of Proposed Rulemaking (ANPRM), *Addressing PFAS in the Environment*.

NACWA represents the interests of over 350 publicly owned wastewater and stormwater agencies of all sizes across the country. NACWA's members protect public health and the environment by managing and treating billions of gallons of wastewater and stormwater generated daily in communities throughout the country. As such, public clean water agencies are on the front lines of addressing per- and polyfluoroalkyl substances (PFAS) in the environment every day.

NACWA's members have never, and do not, manufacture or profit from PFAS. Rather, PFAS enter public sewer and stormwater systems through industrial releases and, critically, from commercial and domestic sources including common household goods and uses. Because of this, NACWA's members often have no control over the amount of these substances they must handle.

As explained in detail in [NACWA's comments](#) on EPA's proposed hazardous substance designations for perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the collection, management, treatment, and sustainable reuse activities undertaken by municipal wastewater and stormwater agencies provide untold benefits for our modern civilization. Yet, because these activities, which are designed by their nature to protect human health and the environment, often fall within CERCLA's broad categorizations of "disposal"

and “releases,” their performance can also lead to those same agencies being incongruously labeled as CERCLA “potentially responsible parties,” and thereby subject to CERCLA’s strict joint and several liability framework. As such, NACWA’s members have the potential to be negatively impacted should EPA finalize any designations of PFAS as CERCLA hazardous substances absent additional actions on the part of both the Agency and Congress.

Blanket Designations of PFAS as CERCLA Hazardous Substances – Particularly PFAS Still in Widespread Use – Will Subject Public Clean Water Utilities to Unacceptable Legal Risks

NACWA’s membership stands firm in its commitment to work as partners with EPA and state environmental agencies to protect communities from harm caused by PFAS contamination. NACWA has been encouraged by the Agency’s recent outreach efforts concerning its potential use of enforcement discretion under CERCLA to help limit the legal exposure utilities face in the context of PFAS response actions.

But in spite of the best intentions on the part of both EPA and the public clean water community, a simple fact remains: absent Congressional intervention, designations of PFAS as CERCLA hazardous substances, such as those previously proposed by the Agency and now being considered in the ANPRM, will subject public utilities and the communities they serve to unprecedented amounts of liability under CERCLA for PFAS cleanups.

The seven PFAS EPA is now considering designating as CERCLA hazardous substances have not been the focus of phase-out efforts which have decreased the use of PFOA and PFOS in recent years. Instead, these chemicals are continually released into wastewater and stormwater systems every day from an unknown number of industrial, commercial, and domestic sources.

In proposing to utilize its authority under CERCLA to begin cleanups of such substances that are continually being placed into the environment, EPA is putting the proverbial cart before the horse, and embarking on a haphazard pathway to address a serious environmental threat that is destined to fail. This is very troubling for NACWA member agencies across the country. EPA must undertake efforts to limit the constant introduction and reintroduction of PFAS into the environment before meaningful nationwide cleanup efforts can occur. Absent such prerequisite source control efforts, utilities will be forced to expend significant public funds trying to address PFAS at the back end of the problem without sufficient means to limit the environmental harms, or their own legal exposure, caused by PFAS being constantly released into their systems.

Placing the very members of the public – water and sewer bill ratepayers – who have already been exposed to PFAS pollution in the position of having to fund PFAS cleanups is untenable. Equally untenable are any actions that would threaten the sustainable and well-regulated land application of biosolids, which currently accounts for the management of over 60% of biosolids generated in the U.S. each day. EPA must take steps to protect this from happening prior to continuing with the designation of any PFAS as hazardous substances under CERCLA.

As NACWA has outlined in multiple other contexts, these steps include: (1) utilizing the Agency’s authority under the Toxic Substances Control Act and other statutes to implement source control efforts designed to reduce the continuous introduction of PFAS into the environment; (2) issuing regulations clarifying that the scope of existing CERCLA exclusions includes wastewater, stormwater, and biosolids management and treatment activities; (3) finalizing a CERCLA enforcement discretion

policy to help shield utilities from unwarranted PFAS-related CERCLA liability to the maximum extent possible; (4) undertaking a comprehensive accounting of the potential costs of PFAS CERCLA hazardous substance designations, including cleanup costs; (5) working with the clean water community and other stakeholders to advance scientific understanding, destruction technologies, and regulatory strategies surrounding PFAS pollution; and (6) supporting Congressional efforts to provide much needed statutory relief to clean water utilities in the context of PFAS cleanups.

Absent these steps, the actions contemplated by the ANPRM threaten to harm communities across the country, undermine utility affordability efforts, have significant negative ramifications on biosolids management and water recycling efforts nationwide, and disproportionately burden disadvantaged communities that can least afford to pay for PFAS cleanups.

Efforts to combat PFAS pollution must be undertaken in a sequence that makes practical sense and protects the public. Stemming the constant flow of PFAS into the environment through source control mechanisms and shielding clean water utilities from unwarranted liability are critical precursors to the triggering of nationwide cleanup efforts under CERCLA.

NACWA also offers the following specific comments concerning the questions posed by EPA in the ANPRM.

[EPA's Position That It Is Statutorily Precluded from Considering Costs Is Flawed; the Agency Must Consider the Costs of Any Proposed PFAS Designations](#)

EPA once again states in the ANPRM that "CERCLA section 102(a) precludes EPA from taking cost into account in the designation of a hazardous substance." This is incorrect as a matter of law. Prior to finalizing any hazardous substance designations under CERCLA section 102(a), EPA in fact *must* consider the costs of such designations to the public.

Section 706(2)(A) of the Administrative Procedure Act (APA) instructs courts reviewing regulations, including those promulgated by EPA, to invalidate actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Failure to consider the costs and associated impacts to the public of designating as "hazardous" substances which are ubiquitous throughout the American landscape – including in our own homes and workplaces – is undeniably arbitrary and capricious.

If a federal regulatory action threatens to subject every individual cooking with a nonstick pan or washing a waterproof jacket to joint and several liability for PFAS cleanups, topple land values throughout the U.S. where PFAS might be present, and subject low-income communities to spikes in water, sewer, and stormwater bills, the costs of such an action must be considered. Likewise, ignoring the lack of validated methods for PFAS destruction and scientific determinations concerning safe levels of PFAS in water, air, and soils is not just bad policy, it is unlawful. Removal and remediation plans lie at the heart of CERCLA; EPA cannot deem their costs and feasibility irrelevant.

Contrary to previous EPA assertions, relevant Supreme Court caselaw underscores the need for EPA to consider the costs of any potential PFAS CERCLA hazardous substance designations. EPA has likened CERCLA Section 102(a) to Clean Air Act Section 109(b)(1), which governs EPA's setting of national ambient air quality standards (NAAQS). In *Whitman v. American Trucking*, the U.S. Supreme Court held that costs could not be considered where the statute instructs EPA to base

NAAQS on health effects articulated in certain technical documents, “allowing an adequate margin of safety,” and ensuring that the standards are “requisite to protect the public health.”

By contrast, the Agency has argued that the Supreme Court’s decision in *Michigan v. EPA*, which required the Agency to consider costs when determining whether to regulate air toxic emissions from power plants where the statute mandates such regulation if EPA finds it is “appropriate and necessary,” is *not* applicable to CERCLA 102(a)’s language. As EPA has stated, in *Michigan v. EPA*, “the Supreme Court explained that ‘appropriate’ is a broad term that ‘includes consideration of all the relevant factors’ and when read in the context of CAA section 112(n)(1)(A) requires ‘at least some attention to costs.’”

A closer inspection of the relevant text of CERCLA 102(a) reveals that the provision is, in fact, much more akin to that considered by the Court in *Michigan v. EPA*, where consideration of costs was deemed mandatory, rather than the one at issue in *Whitman v. American Trucking*.

In relevant part, CERCLA Section 102(a) states that EPA “shall promulgate and revise as may be appropriate regulations designating as hazardous...substances which, when released into the environment may present substantial danger to the public health or welfare or the environment...” (emphasis added). Just as the air toxics provision determined by the Court in *Michigan v. EPA* to require a consideration of costs, CERCLA Section 102(a) expressly instructs EPA to promulgate regulations where it finds doing so “appropriate.” The broader statutory context of ensuring that responsible parties pay for environmental damages and Section 102(a)’s general reference to protecting “public welfare” likewise support consideration of costs.

Additionally, as EPA itself has noted, substances designated under certain provisions of the primary federal air, water, waste, and toxics laws are automatically designated as hazardous under CERCLA, which itself is a statute dedicated to funding cleanups based primarily on standards set by other environmental statutes. EPA’s potential designations of PFAS as “hazardous” under CERCLA 102(a) mark the first time that substances which are not CWA hazardous substances or toxic pollutants, Clean Air Act hazardous air pollutants, Resource Conservation and Recovery Act hazardous wastes, or TSCA imminently hazardous substances would be deemed “hazardous” pursuant to CERCLA. Congress’ instruction to EPA to utilize CERCLA to make a substantive determination concerning the hazardous nature of a substance when it has not seen fit to do so under any of the other environmental statutes it implements *only* where it deems it “appropriate” to do so should, like the provision in *Michigan*, be read to entail consideration of all relevant factors, including costs.

Also importantly, as in *Michigan v. EPA*, the question posed to the Agency in CERCLA Section 102(a) is one of whether to regulate at all. By contrast, in *Whitman v. American Trucking*, the Court was not addressing a provision from Congress leaving discretion to the Agency on whether to regulate; rather, the provision at issue presumed Agency action and instead spoke to the “how” of setting NAAQS. Costs are inherently relevant to the question of the appropriateness of a regulation, even where they may not be to the issue of which requirements should be included in that regulation.

EPA must fully consider the ramifications – including costs – of designating PFAS as CERCLA hazardous substances on all stakeholders. It is incumbent upon EPA from a legal, policy, and public health standpoint to fully analyze and consider what such listings will mean for the clean water community, and to utilize its full statutory authority to mitigate any potential negative impacts to the provision of safe, affordable clean water for communities across the country.

EPA Should Not Designate Precursors to PFAS as CERCLA Hazardous Substances

The peer-reviewed information on the seven chemicals listed in the ANPRM is growing and becoming more understood by the scientific community. However, there is relatively little information on whether these PFAS and their precursors warrant the full weight of a hazardous substance designation under CERCLA at this time, especially as presence, concentration, and toxicity data are not well understood, yet these chemicals and their precursors continue to be manufactured, imported, and used in the U.S.

While clean water utilities are striving to identify potential concentrated sources of PFAS coming into their systems that could be reduced through industrial pretreatment programs, many of the PFAS listed in the ANPRM are commonplace in consumer products, and thus enter public wastewater and stormwater systems through sources that cannot be regulated through pretreatment. Nor are the environmental conditions that drive PFAS chemical structures to remain stable, as opposed to degrading or oxidizing into an entirely new PFAS chemical, known at this time.

Even more concerning, there is very little scientific information on precursors, including their occurrence in environmental media, their concentrations, and at what levels they could pose a risk to public health or the environment. These questions are integral to EPA regulation and should be a priority for further research.

Additionally, while not yet well understood, it has been documented that certain long-chain PFAS break down to some degree in the wastewater treatment process itself. Wastewater treatment plants were not designed to address or have this indirect effect on certain PFAS chemicals, but the possibility for these reactions to occur could expose utilities to even more CERCLA liability should EPA move forward with hazardous substance designations of PFAS precursors. Without further development of our scientific understanding of precursor impacts to public health and the environment,¹ EPA must refrain from designating them as hazardous substances under CERCLA.

EPA must also finalize an approved analytical method for precursors before finalizing any such CERCLA hazardous substance designations. Many commercial products contain a wide variety of potential PFAS precursors, but there is not yet a means to reliably detect and measure them with an adequate degree of confidence. Targeted mass spectrometry methods capture many of the known PFAS chemicals, but it remains challenging to detect most precursors, and the analytical standards to do so are not commercially available. And even if the presence of a given PFAS precursor is found and confirmed, it is nearly impossible to assign its origin to a specific PFAS chemical. While the total oxidizable precursor assay can estimate the concentration of precursors in a given sample, it remains non-specific and produces a range of possibilities of PFAS manufacturing origins.

EPA is still working to finalize its draft analytical Method 1633 for measuring 40 PFAS chemicals in aqueous, solid, biosolids, and tissue samples, which is a prerequisite to the method being approved for use under the Clean Water Act. And while EPA has recommended the use of its draft Adsorbable Organic Fluorine Method 1621 to capture other PFAS beyond those detectable by Method 1633, that

¹ See, e.g., Ateia, et. al. *Total Oxidizable Precursor (TOP) Assay – Best Practices, Capabilities, and Limitations for PFAS Site Investigation and Remediation*, 10 *Environmental Science & Technology Letters* 292-301 (2023) (“the current understanding of precursors of PFAS, including molecular structures, physical and chemical properties, bioaccessibility, degradation rates, and environmental prevalence among the scientific community is limited. Gaps exist in publicly available information pertaining to proprietary composition and production methods, abiotic and biotic degradation pathways, and the presence and quantities of PFAS precursors in the environment.”).

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method only captures the concentrations of total organofluorine and non-PFAS fluorinated compounds in a sample, it does not quantify or qualify precursors.

EPA must not designate precursors as CERCLA hazardous substances until these significant gaps in information concerning their risk to public health and the environment, as well as their origin and concentrations, are filled.

Conclusion

NACWA continues to urge EPA to develop a comprehensive approach to PFAS regulation that does not threaten the provision of affordable, reliable clean water services. Such an approach necessarily entails further study of PFAS risks and development of regulations protecting public clean water agencies from unwarranted liability for PFAS cleanups. Please contact NACWA's General Counsel, [Amanda Aspatore](#) or Senior Director of Regulatory Affairs, [Emily Rimmel](#) with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Krantz', with a large, sweeping underline.

Adam Krantz
Chief Executive Officer
NACWA

cc:

Radhika Fox, Assistant Administrator, Office of Water, U.S. EPA
Kenneth Patterson, Director, Office of Site Remediation Enforcement (OSRE), U.S. EPA
Andrew Sawyers, Director, Office of Wastewater Management (OWM), U.S. EPA