



November 7, 2022

U.S. Environmental Protection Agency
EPA Docket Center
OLEM Docket EPA-HQ-OLEM-2019-0341
Mail Code 28221T
1200 Pennsylvania Avenue
Washington, D.C. 20460

Re: Comments by National Association of Water Companies (NAWC) on Designation of Perfluorooctanoic (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances – Docket ID No. EPA-HQ-OLEM-2019-0341; FRL-7204-02-OLEM.

Dear Administrator Regan,

The National Association of Water Companies (NAWC) and its members are pleased to offer this comment letter regarding the agency's proposal to designate PFOA and PFOS as CERCLA hazardous substances. NAWC members work on a daily basis to protect families and communities across the nation from the dangers posed by PFAS chemicals. While NAWC appreciates that EPA in this proposed rulemaking is seeking to protect public health and the environment from the risk of PFAS, the approach EPA has chosen in this proposal is of great concern to regulated water and wastewater companies. EPA's proposal to designate PFOA and PFOS as CERCLA hazardous substances creates costly liability for both municipal and private utilities that are currently working to protect the public from these chemicals and for which they bear no responsibility for the creation and distribution of these chemicals. NAWC urges EPA to choose another available path to protecting the public from these chemicals – one that puts the responsibility and costs of remediating and removing these chemicals from the environment on the companies that created, distributed and used these chemicals, rather than on the public and private utilities working to safeguard the public from these chemicals.

About NAWC

NAWC represents regulated water and wastewater companies, as well as those engaging in partnerships with municipal utilities. NAWC members provide 73 million Americans with safe and reliable water service and have an exceptional record of compliance with federal and state health and environmental regulations. Ensuring this high standard of quality requires extraordinary amounts of capital investment. NAWC estimates that its 10 largest members alone are collectively investing \$3.9 billion each year in their water and wastewater systems.

Providing affordable, safe, clean water to the customer is a high priority for NAWC's members. Toward that end, a 2018 study published in the Proceedings of the National Academy of Sciences confirmed that investor-owned water companies have a more consistent record of delivering high-quality water that meets or surpasses federal standards than their municipal counterparts.¹ NAWC is proud of that record and its members will continue to lead in delivering the highest attainable compliance results. NAWC worked with its members to adopt a public commitment beyond compliance to proactively protecting the public health of its members customers.

Comments

1. NAWC members played no part in creating the present PFAS crisis and should not be responsible for the obligation and costs associated with remediating PFAS contamination.

To properly and fairly create a regulatory scheme to address the problems caused by PFAS contamination, it is important at the outset to recognize how PFAS contamination began and how it has spread in order to place the responsibility for the contamination on the parties that created it and are responsible for the contamination. In the preamble to the proposal, EPA provides a brief description of the history of the production of "these human-made chemicals that have been used in industry and consumer products since the 1940's. (See 87 Fed. Reg. at 54418). EPA did not suggest, nor could it, that NAWC members or other public or private water or wastewater utilities have played any role in the production or distribution of these chemicals. NAWC members do not use PFAS chemical in the process of providing clean drinking water or in the wastewater treatment process. Rather, water, wastewater, and stormwater systems passively receive PFAS from these other sources. Water systems, and the public, have limited control over their contributions of PFAS to the environment given the overwhelming presence of this family of chemicals in the chain of commerce and in homes.

CERCLA is based on the principal that parties responsible for contamination should be responsible for and pay for its remediation. The producers, manufacturers and parties that used PFAS chemicals in their operations are all clearly responsible parties. CERCLA's broad liability scheme, however, place responsibility on parties that even unknowingly passed on these chemicals and disposed of them. CERCLA is the wrong tool for addressing PFAS contamination unless there is a legislative carve out for parties that have no responsibility for the contamination. Because EPA cannot provide that legislative fix, it should not use CERCLA to address the present PFAS crisis.

Further, any CERCLA liability incurred by NAWC members will ultimately be borne by consumers through higher rates, exacerbating efforts to address affordability issues.

¹ See article, February 12, 2018 (<https://www.pnas.org/doi/10.1073/pnas.1719805115>)

2. NAWC members and the clean water community should not face CERCLA liability for protecting water supplies and remediating PFAS contamination.

Numerous parties in the clean water community including NAWC have urged Congress and EPA to take a different approach to addressing the PFAS problem and have urged the agency to use other available legal authorities – rather than CERCLA – so that drinking water and wastewater providers would not be caught in the CERCLA liability net.² In promulgating this proposed rule, EPA refused to use other available legal options such as the Resource Conservation Recovery Act (“RCRA”) which is a more targeted approach to focusing liability and cleanups on the parties that are responsible for PFAS contamination. Instead, EPA has offered that the agency “does not intend” to focus on the water and wastewater sector. EPA knows full well that saying it does not intend to focus on the water and wastewater sectors does not prevent water and wastewater providers from being pulled into the CERCLA liability net.

The argument that an exemption may not be necessary for water systems because EPA would not seek to target local utilities as potentially responsible parties (PRPs) to bear liability provides only a false sense of protection. In the highly litigious world of CERCLA contribution actions, any PRP can—and do—bring utilities into actions to try to reduce their own portion of the overall cleanup bill. To date, at least 650 municipalities and counties have been pulled into CERCLA litigation by other PRPs.

EPA’s approach in this rulemaking violates the Administrative Procedure Act prohibition against arbitrary and capricious rulemaking. *See, Michigan v. EPA, 576 U.S. 743 (June 29, 2015)*. EPA’s use of its CERCLA authority arbitrarily makes numerous parties in various sectors liable under CERCLA for contamination they have no responsibility for. As set forth below, EPA’s failure to take cost into account in this action also violates the Administrative Procedure Act.

3. The proposal’s economic analysis is deficient and fails to take costs into account.

EPA’s proposed rule does not include an economic analysis of clean up action costs. The fact that there may be uncertainty or difficulty in determining costs does not absolve EPA of its statutory obligation to do so. Additionally, while EPA concluded that it was not required to take cost into consideration in determining whether a substance is hazardous or not, it should still have at least considered affordability and environmental justice impacts of its action prior to taking action. (87 Fed. Reg. 54421).

The CERCLA hazardous substance designation for PFOA and PFOS would lead to increased management costs for byproducts created during the normal water and wastewater treatment processes. Public and private utilities could face unwarranted liability and legal defense costs at Superfund sites—such as landfills or agricultural sites—and through our discharges, diverting vital resources from their primary

² See, https://www.nacwa.org/docs/default-source/resources---public/cercla-water-system-hill-letter-4-28-22.pdf?sfvrsn=4dfcc461_2

responsibilities of protecting public health and the environment. This is the case because under CERCLA any party who has contributed in any part to disposing of hazardous substances, even trace amounts, may be held liable for remediation.

A rulemaking must also consider the costs of agency action upon the public generally and specifically on environmental justice communities and disproportionately impacted communities. Many of the impacts on this rule will impose a burden on those who can least afford it. The proposed rule fails to conduct this essential analysis of costs.

Conclusion

NAWC and its members appreciate EPA's efforts to protect public health and the environment from harmful chemicals that pose a risk to many. We support EPA's efforts to better understand PFAS sources, take measured and practical approaches in gathering data, and assess the risks of PFAS to public health and the environment. Greater focus on eliminating PFAS in consumer products, source control, and destruction technology is truly necessary to achieve progress in mitigating PFAS risks and exposure. However, by proceeding under CERCLA with the designation of PFOA and PFOS as hazardous substances rather than acting under other available legal authorities, EPA's action will have far reaching implications and severe unintended consequences on water systems that have played no role in producing, using, or profiting from PFAS being placed into commerce.

We urge EPA to reconsider its action in this proposed rulemaking and choose another path that will hold those parties accountable for the contamination liable while recognizing that those parties that are also working to protect public health and the environment should not be forced to assume an unfair burden.

Please feel free to contact me at (267) 291-7765.

Sincerely,



Robert Powelson

cc: Radhika Fox

