

November 7, 2022

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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW, Washington, DC 20460

Submitted via Regulations.gov

RE: “Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances,” Docket ID No. EPA-HQ-OLEM-2019-0341

Ms. Schutz:

We appreciate this opportunity to provide comments¹ to the Environmental Protection Agency (EPA) on the proposed rule entitled “Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances.”²

The EPA’s decision to utilize its authority under CERCLA Section 102(a) for the first time in the law’s 42-year history presents many novel questions. Our comment addresses some of these questions and identifies serious process-related concerns with the proposed rule.

A 60-Day Comment Period is Insufficient

Numerous parties rightfully requested an extension of the comment period. The agency has never used CERCLA in the proposed fashion, and this, by itself, warrants a longer comment period than the short 60-day comments afforded the public. Yet, the EPA has indicated that it will not provide the public additional time to submit comments.³

Given the many questions on which the EPA seeks comment, including on critical and foundational issues such as whether to consider costs, the short comment period is unreasonable. It does a disservice to both the public and the agency to rush the process, in large part because it will lead to fewer comments and less robust feedback on the proposed rule. Sixty days does not give sufficient time to analyze the agency’s interpretation of the statute, to assess the complex issues concerning the designation of PFOA and PFOS as hazardous substances, to evaluate costs and benefits of the proposal, or to suggest meaningful, less costly alternatives.

CERCLA Section 102(a) Requires Consideration of Cost

The “EPA proposes to interpret the language of CERCLA section 102(a) as precluding the Agency from taking cost into account in designating hazardous substances.” The agency not

¹ The views we have expressed in this comment are our own and should not be construed as representing any official position of The Heritage Foundation.

² *Federal Register*, Vol. 87, No. 717 (September 6, 2022), pp. 54415—54442, <https://www.govinfo.gov/content/pkg/FR-2022-09-06/pdf/2022-18657.pdf> (accessed November 7, 2022).

³ *Ibid*

only should consider costs but based on the language in Section 102(a) and Supreme Court precedent, the agency *must* consider costs.

The following is the relevant language from the statute:

The 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 elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment, and shall promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to section 9603 of this title. [Emphasis added].⁴

The EPA’s Unreasonable Argument. The EPA argues that this language is comparable to Clean Air Act Section 109(b)(1)⁵ and cites to *Whitman v American Trucking Associations*⁶ for support. This is incorrect and unreasonable as a matter of statutory interpretation and based on the case law. Section 109(b)(1) expressly directs the EPA to set standards that are “requisite to protect the public health” with an “adequate margin of safety.”⁷

The Supreme Court in *Michigan v. EPA*,⁸ addressing another regulation in which the EPA did not think it should consider costs, explained, “*American Trucking* thus establishes the modest principle that where the Clean Air Act expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the Agency to consider cost anyway.”⁹

The Clean Air Act, unlike CERCLA Section 102(a), tells the EPA exactly how to set the standards using as the Court calls it: “discrete criterion.” Section 102(a) has no comparable non-cost language. To overcome this obstacle, the EPA in the proposed rule comes up with a statutory interpretation that ignores the language of the statute itself.

Specifically, the agency argues that CERCLA section 102(a) establishes a standard for designation that is tied exclusively to whether the release of a substance “may present substantial danger to the public health or welfare or the environment.” This is not the standard. The standard listed in Section 102(a), similar to the Section 112 Clean Air Act language “appropriate and necessary” addressed in *Michigan v. EPA*, is “as may be appropriate.”

The Administrator’s decision whether to promulgate regulations designating hazardous substances must meet this “as may be appropriate” standard. The “may present substantial danger to the public...” language explains what types of elements, compounds, etc. may be designated, but does not establish the standard by which the EPA shall go about figuring out

⁴ 42 U.S. Code § 9602(a).

⁵ 42 U.S. Code § 7409(b)(1).

⁶ *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001).

⁷ 42 U.S. Code §7409(b)(1).

⁸ *Michigan v. EPA*, 576 U.S. 743 (2015).

⁹ *Ibid.*

when such designations are warranted. When determining whether a regulation is “appropriate,” the Administrator would certainly need to evaluate whether an element “may present substantial danger,” but this is just one factor under the broad “as may be appropriate” standard.¹⁰

The EPA’s interpretation reads out of the statute the “as may be appropriate” language and renders it superfluous. If the standard were the “may present” language, then “as may be appropriate” would serve no purpose under section 102(a). This is contrary to proper statutory interpretation. The Supreme Court has explained, “a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...”¹¹

The EPA in the proposed rule gets even more unreasonable in its interpretation when it finally acknowledges the “appropriate” language in section 102(a), arguing:

CERCLA section 102(a) does use the word “appropriate” (the Administrator shall “promulgate and revise as may be appropriate” regulations designating hazardous substances), but significantly, the word “appropriate” is not used in the context of what EPA should consider when assessing whether a substance is hazardous.¹²

This makes no sense. “Appropriate” is directly and expressly connected to the *regulations* that designate hazardous substances. In order for the EPA to designate hazardous substances, it must do so through *regulations*.

The EPA is Making the Same Mistake as in the Past. The agency’s proposal to ignore costs is a repeat of the agency’s flawed MATS rule at issue in *Michigan v. EPA*. The Supreme Court made it clear that cost must be considered when looking at the “appropriate and necessary” language at issue in the case, explaining, “One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”¹³

Similarly, “as may be appropriate” under CERCLA 102(a) requires the same cost consideration, and not to do so would be “irrational” and unreasonable. As the Supreme Court pointed out:

Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation

¹⁰ As the EPA properly explains regarding the Supreme Court’s view of “appropriate,” as discussed in *Michigan v. EPA*, “The Supreme Court explained that ‘appropriate’ is a broad term that ‘includes consideration of all the relevant factors.’” *Federal Register*, Vol. 87, No. 717 (September 6, 2022), pp. 54415—54442.; and *Michigan v. EPA*, 576 U.S. 743 (2015).

¹¹ *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) <https://www.law.cornell.edu/supct/html/02-1809.ZO.html> (accessed November 7, 2022); See also “Statutory Interpretation: General Principles and Recent Trends,” Congressional Research Service *Report for Congress*, September 14, 2014, https://www.everycrsreport.com/files/20140924_97-589_3222be21f7f00c8569c461b506639be98c482e2c.pdf (accessed November 7, 2022).

¹² *Federal Register*, Vol. 87, No. 717 (September 6, 2022), pp. 54415—54442, <https://www.govinfo.gov/content/pkg/FR-2022-09-06/pdf/2022-18657.pdf> (accessed November 7, 2022).

¹³ *Michigan v. EPA*, 576 U.S. 743 (2015).

ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.¹⁴

A failure to ignore the centrally relevant factor of cost when it comes to CERCLA 102(a) would suffer the same legal fate as the MATS rule.

The EPA Must Conduct a Proper Regulatory Analysis

Despite the EPA's claims that costs should not be considered, the Office of Management and Budget properly designated the proposed rule as economically significant. This means that the agency should have conducted rigorous cost-benefit analysis as required by the economically significant designation. This includes having conducted a proper regulatory impact analysis (RIA). The EPA has not done an RIA and its "Economic Assessment"¹⁵ does not meet the requirements of an RIA.¹⁶ The economic assessment does not even meet some of the most basic elements of an RIA, such as identifying regulatory alternatives.¹⁷

This problem is not something that can be rectified without withdrawing the proposed rule, or possibly, at a minimum, publishing a supplemental notice of proposed rulemaking that properly utilizes an RIA to clearly justify the proposed rule. Even in that instance, a supplemental notice may be insufficient because the RIA will simply look like (and might be) conducted to "check the boxes" as opposed to using it to properly justify the rulemaking.

An RIA is not some inconvenient obstacle for agencies that exists for show. As explained by the Office of Information and Regulatory Affairs in a primer for agencies on RIAs:

The purpose of the RIA is to inform agency decisions in advance of regulatory actions and to ensure that regulatory choices are made after appropriate consideration of the likely consequences.¹⁸

Quite simply, the EPA should have conducted a proper RIA before it even decided to propose the rule. At this point, the EPA has proposed the rule without an RIA, which fails to "ensure that regulatory choices are made after appropriate consideration of the likely consequences." This makes the rule unreasonable and unjustified because the agency has not even properly thought through its consequences.

¹⁴ Ibid.

¹⁵ Office of Management and Budget, "Economic Assessment of the Potential Costs and Other Impacts of the Proposed Rulemaking to Designate Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as Hazardous Substances," <https://www.regulations.gov/document/EPA-HQ-OLEM-2019-0341-0035>, (accessed November 7, 2022).

¹⁶ See e.g. OMB Circular A-4 and Executive Order 12866.

¹⁷ See e.g. U.S. Office of Information and Regulatory Affairs, "Regulatory Impact Analysis: A Primer," pp. 5–8, https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf (accessed November 7, 2022).

¹⁸ Ibid., p. 2.

Cost Estimates. The EPA claims that it is difficult to quantify the costs of the rule due to the extent of the unknowns, such as the number of sites affected.¹⁹ Despite any difficulty, there are reasonable ways to determine who will be affected from designating PFOA and PFOS as hazardous substances, and the cost impact of such designations. As the U.S. Chamber of Commerce pointed out in a recent study:

However, this complexity does not prevent a reasonable economic analysis now with the information available, as there are known economic impacts that will flow as a foreseeable consequence of a PFOS/PFOA listing.²⁰

In fact, the U.S. Chamber of Commerce conducted such an economic analysis, in which it found that private sector cleanup costs alone could be as much as \$800 million a year.²¹ There is no reason why the EPA, a federal agency, is incapable of conducting a similar analysis. This is especially true for determining the costs arising from the obvious consequences of the designations. Finally, regardless of whatever challenges the EPA claims exist, difficulty is not an excuse to avoid the necessary regulatory analysis that must be conducted.

CERCLA Section 102(a) Requires “Appropriate” Scientific Support

The EPA’s misinterpretation of Section 102(a) ignoring the “as may be appropriate” language is also reflected in its consideration of the science. As the agency argues in the proposed rule, “EPA proposes to interpret ‘may present’ in the statutory language as indicating that Congress did not require certainty that the substance presents a substantial danger or require proof of actual harm.”²²

In determining whether to promulgate regulations designating PFOA and PFOS as hazardous substances, the Administrator shall promulgate regulations “as may be appropriate.” In *Michigan v. EPA*, the Supreme Court explained, “No regulation is ‘appropriate’ if it does significantly more harm than good.”²³

This is why properly assessing costs is critical. It is also why having a proper scientific foundation for regulatory decisions is a prerequisite. If the EPA does not know whether a substance causes actual harm, then the Administrator would not be able to reasonably conclude that the regulation is “appropriate.” Further, the EPA does not instill confidence regarding the scientific basis for the rule. For example, to support its proposed designations, the agency points

¹⁹ Office of Management and Budget, “Economic Assessment of the Potential Costs and Other Impacts of the Proposed Rulemaking to Designate Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as Hazardous Substances,” p. 10, <https://www.regulations.gov/document/EPA-HQ-OLEM-2019-0341-0035>, (accessed November 7, 2022).

²⁰ U.S. Chamber of Commerce, “PFOS and PFOA Private Cleanup Costs at Non-Federal Superfund Sites,” June 2022, p. 3, <https://www.uschamber.com/assets/documents/PFOS-and-PFOA-Private-Cleanup-Costs-at-Superfund-Sites-6.8.22.pdf> (accessed November 7, 2022).

²¹ *Ibid.*

²² *Federal Register*, Vol. 87, No. 717 (September 6, 2022), pp. 54415—54442, <https://www.govinfo.gov/content/pkg/FR-2022-09-06/pdf/2022-18657.pdf> (accessed November 7, 2022).

²³ *Michigan v. EPA*, 576 U.S. 743 (2015).

to the EPA's Science Advisory Board's *preliminary* data that the agency then states it did not even use for the proposed rule.

Conclusion

The EPA has proposed this CERCLA rule improperly claiming it does not have to consider costs, failing to conduct a regulatory impact analysis that is required for economically significant rules, deciding to not include the foreseeable costs of the designations, and having a questionable scientific basis for promulgating the rule in the first place. These factors, along with others, like the short comment period, demonstrate that the rule is both unreasonable and unlikely to pass legal muster.

The proposed rule, and whether it is "appropriate," should also be examined in light of the many ways that the federal government and states can already address PFOA and PFOS.²⁴ The EPA in the proposed rule discusses these many enforcement options. These options make the proposed rule, with all of its problems, even less appropriate, as does the potential scope and costs of the rule and the unpredictability and increased liability it would create across the economy. From purely the perspective of seeking to clean up sites, the rule's effect would likely be so sweeping that it would likely "crowd out" better targeted and more effective approaches.

We strongly urge the EPA to withdraw the proposed rule given its many flaws. There are many ways to address potential concerns over PFOA and PFOS. Any approach should be carefully considered, targeted, and supported by science. The proposed rule and using CERCLA Section 102(a) to designate PFOA and PFOS as hazardous substances is simply the wrong approach.

Sincerely,

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²⁴ See e.g. "The potential dangers posed by PFOA and PFOS specifically, and more generally by PFAS, have been recognized by numerous Federal, state, and international governmental entities that have taken a wide variety of actions to address these dangers to public health and welfare and the environment." *Federal Register*, Vol. 87, No. 717 (September 6, 2022), pp. 54415–54442, <https://www.govinfo.gov/content/pkg/FR-2022-09-06/pdf/2022-18657.pdf> (accessed November 7, 2022).