EARTHJUSTICE

RIN 2070-AK97

MEMORANDUM IN RESPONSE TO SLIDES SUBMITTED BY CHEMOURS TO OFFICE OF MANAGEMENT AND BUDGET IN CONNECTION WITH SEPTEMBER 7, 2023 MEETING

Submitted by Earthjustice on behalf of National PFAS Contamination Coalition, Sierra Club, and Union of Concerned Scientists

A. Chemours' Concerns About the Burdens of Eliminating the De Minimis Concentration Exemption Are Legally Irrelevant Because It Was Not Legal for EPA to Subject TRI Reporting of PFAS to This Exemption in the First Place

Chemours asks for modifications to *Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notifications for Chemicals of Special Concern; Community Right-to-Know Toxic Chemical Release Reporting*, 87 Fed. Reg. 74,379 (proposed Dec. 5, 2022) ("Proposed Rule"), asserting it will impose undue burdens on the regulated industries. However, the de minimis exemption is illegal so it must be eliminated in its entirety, and any burden on industry is one that Congress intended to impose. *See* Earthjustice Comments on the Proposed Rule, submitted herewith, at pages 12–14. And as EPA explained in detail in its economic analysis for the Proposed Rule, there are significant unquantified benefits associated with the rulemaking. *See* Earthjustice Comments at 28–29. The final rule should indicate that EPA is taking this action because the exemption is not legally permissible for PFAS so that another administration cannot just change it back. *See* Earthjustice Comments at 14.

The TRI program requires reporting releases of chemicals that are byproducts or impurities just like any other chemical release, and Chemours should need no "incentive" to comply with legal mandates. Compliance with TRI reporting duties—including reporting on release of substances in the form of byproducts and impurities—is standard business practice for chemical manufacturers. Since manufacturers use very precise formulations and processes, and know precisely what is in the products they make (often to the molecular level), including how much goes to the product, to waste, or to releases to air or water, there is at most a limited burden in compiling threshold and release data for TRI reporting.

If Chemours finds TRI reporting of releases too onerous, the simple solution is for it to stop releasing PFAS into the environment.

B. Chemours' Concerns About EPA's Adding PFAS to the "Chemicals of Special Concern" List Is Based on Misstatements of the Applicable Law

Chemours raises legal arguments for why PFAS should not be added to the "chemicals of special concern" ("COSC") list, but these arguments misstate the applicable law. Its presentation

presupposes that 1) only chemicals that are persistent, bioaccumulative and toxic ("PBTs") can be listed on the COSC list, and 2) there are strict criteria, including quotas, for listing PBTs on the TRI. Neither is correct.

The COSC list—which is effectively a list of chemicals with reporting thresholds lower than the standard reporting threshold—is not mentioned in the Emergency Planning and Community Right-to-Know Act ("EPCRA"). Rather, EPA created the COSC list through regulations that were adopted in 1999 pursuant to 42 U.S.C. § 11023(f)(2), which authorizes "[t]he Administrator [to] establish a threshold amount for a toxic chemical different from the [default] amount." The only limitation on this discretion is that the "revised threshold shall obtain reporting on a substantial majority of total releases of the chemical at all facilities subject to the requirements of this section." *Id*.; *see also* Earthjustice Comments at 21–22.

Though EPA initially included only PBTs on the COSC list, there is nothing in the statutory text of EPCRA that limits the list to PBT chemicals, and nothing in EPA's regulations related to the COSC list that limits it to PBTs. Chemicals can present dangers at low levels of exposure regardless of whether they are also persistent and bioaccumulative, and it is appropriate—and legally permissible—for EPA to use its EPCRA authority to require lower TRI reporting thresholds for these toxic-at-low-level chemicals regardless of whether they are also persistent and bioaccumulative.

In its presentation to OMB, Chemours wrongly contends that "[t]he list of PBT chemicals can be no more than 25% of the total number of chemicals on the TRI list." This statement is based on a misreading of 42 U.S.C. § 11023(d)(2)(C), which sets limits on the percentage of chemicals that are added to the TRI due to significant adverse effects *on the environment*. However, this limitation does not apply to any of the PFAS that are already on the TRI because those were not added to the TRI under section 11023(d)(2)(C), rather they were directly added to the TRI by Congress pursuant to 15 U.S.C. § 8921. Moreover, it is unlikely this limitation will apply to any PFAS added to the TRI in the future because we expect that future additions of PFAS to the TRI will be based on human health effects—and there is no limit to how many chemicals can be listed on the TRI based on human health effects. 42 U.S.C. § 11023(d)(2)(B). Thus, Chemours' arguments against adding PFAS to the COSC list fail on all counts.

C. Chemours' Concerns About Removing the De Minimis Concentration Exemption from the Supplier Notification Rule Are Misguided

Chemours expresses a variety of concerns related to eliminating the de minimis concentration exemption for the supplier notification rule ("SNR"), but none of them justify making any changes to the Proposed Rule. The SNR requires facilities that manufacture, process, sell, or distribute a mixture or trade name product to notify each person to whom the mixture or trade name product is sold about the presence of any TRI-listed toxic chemical in the mixture or product. Because TRI reporting requirements attach only if listed chemicals are "known to be present" at covered facilities, 42 U.S.C. § 11023(g)(1)(C), supplier notifications are crucial to ensure that covered facilities are properly accounting for all known toxic chemicals present at

facilities—including those contained in mixtures and trade name products when reporting to the TRI. *See* Earthjustice Comments at 23–24. However, under current regulations, the SNR does not apply if the TRI-listed chemical is in the mixture or trade name product below the concentration that is deemed de minimis. Closing this loophole is important to ensuring the accuracy of the information on the TRI and ensuring downstream users are aware of the presence of PFAS in the products they have purchased so they can take appropriate measures to safeguard employees and eliminate environmental releases.

Chemours' concerns about reporting small levels to downstream users and whether that may raise alarms or somehow be misleading is not well-founded. PFAS are toxic at extremely low levels, and everyone has an interest in knowing about the presence of PFAS in products and mixtures, even if the levels are quite low. The point of the TRI is to provide information about toxic chemical use and releases, and eliminating the de minimis concentration exemption from the SRN for chemicals that are toxic at low levels will further that goal. Any additional burdens to industry are justified by the benefits of this information. And industry has been on notice of this proposal for nearly a year, which is more than enough time to prepare to comply with it.

We agree with Chemours that the fact that foreign manufacturers do not have to comply with the SNR is unfortunate, but this is not a reason to undermine accurate reporting by domestic manufacturers.

D. Chemours' Concerns About Lack of Analytical Methods Is a Problem of Its Own Making and Cannot Justify Weakening the Proposed Rule

Chemours' presentation complains about the supposed burdens arising from the limited availability of analytical test methods for measuring PFAS releases that are reported to the TRI. But these arguments provide no basis for weakening the Proposed Rule. First, EPCRA allows reporting based on reasonable estimates, so manufacturers do not have to precisely measure environmental releases. 42 U.S.C. § 11023(g)(2). Moreover, if PFAS manufacturers wanted analytical methods so that they could precisely measure their releases so there is no possibility of over-estimation, they are in the best position to create those methods. Their failure to do so cannot be used as an excuse for not reporting their pollution.