ISRI is the voice of the recycling industry, promoting safe, economically sustainable and environmentally responsible recycling through networking, advocacy and education.

Via electronic delivery at www.regulations.gov

November 7, 2022

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

Re: Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances; EPA–HQ–OLEM–2019–0341

Dear Ms. Schutz:

The Institute of Scrap Recycling Industries, Inc. (ISRI) is pleased to submit the following comments for consideration by EPA's Office of Land and Emergency Management in response to its proposed rule, "Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances" (the Proposed Rule).[1]

ISRI is the *Voice of the Recycling Industry*®. With headquarters in Washington, DC and 18 chapters nationwide, ISRI represents more than 1,500 companies that process, broker, and consume recyclable materials, including metals, paper, plastics, glass, rubber, electronics, and textiles. ISRI provides education, advocacy, and safety and compliance training, and promotes public awareness of the essential role that recycling plays in the U.S. economy, global trade, the environment, and sustainable development. Generating nearly $117 billion annually in U.S. economic activity, the recycled materials industry supports more than 500,000 Americans with good jobs.

As detailed below in ISRI's comments on the Proposed Rule, EPA's emphasis on certain direct effects of the Proposed Rule downplays likely immediate significant other effects, including a substantial amount of litigation with significant attendant costs. The Proposed Rule significantly expands the universe of potentially responsible parties (PRPs) beyond those who produced or intentionally used PFOA or PFOS to almost anyone who owns land. Designation of PFOA and PFOS as CERCLA hazardous substances means that persons having nothing to do with producing or intentionally using PFOA or PFOS, including ISRI members, can be held liable for the cleanup of PFOA and PFOS contamination. Due to the foreseeable resulting litigation, the designations proposed by EPA will likely economically harm ISRI members and other persons not involved in the production or intentional use of PFOA or PFOS. EPA

[1] 87 Fed. Reg. 54415-54442, September 6, 2022.

must address this potential economic harm when considering a final rule. Finally, the Proposed Rule is an "economically significant action" and a "major rule" because it will have an annual effect on the economy of $100 million or more. As a "major rule" under the Congressional Review Act, the Proposed Rule, if finalized, would be subject to the Act's Congressional disapproval procedure.

I. Background

ISRI takes great interest in the Proposed Rule because of its foreseeable consequences. As EPA noted, PFOA and PFOS have been used in many industrial, commercial and consumer products for decades. At end of life, some of these products may be received by recycling facilities as recyclable materials (input of recycling process) for processing into recycled materials (output of recycling process). From a recycling perspective, PFOA and PFOS are incidental to any recyclable material and do not provide any value to recycling processes, recyclable material, and recycled materials; that is, there is no intention to recycle PFOA or PFOS. The recycled materials industry does not intentionally use PFOA or PFOS in its recycling processes. This situation is the same as that of wastewater treatment plants (WWTPs), in that WWTPs incidentally receive PFOA and PFOS as part of WWTP influent from households, commercial establishments, and other wastewater dischargers. Nonetheless, the possibility exists that PFOA or PFOS is present at recycling facilities, whether from certain recyclable materials received over time, any firefighting activities using aqueous film-forming foam including on-site firefighting training offered to local fire departments, or off-site environmental sources such as precipitation.[2] This possibility makes the Proposed Rule relevant to the recycled materials industry.

As EPA notes, "CERCLA was enacted to promote the timely cleanup of contaminated sites and to ensure that parties responsible for the contamination bear the costs of such cleanups".[3] However, the historical context of CERCLA generally concerned a contaminated site with a finite extent of contamination (even if large in area, multi-contaminant, and multimedia) involving a finite set of PRPs (even if numerous). PFOA and PFOS challenge the assumptions of CERCLA because "PFOA and PFOS are common contaminants in the environment because of their release into the environment since the 1940s and their resistance to degradation".[4] Given their nationwide presence in the environment, if PFOA and PFOS become CERCLA hazardous substances, the scope of PRP expands well beyond parties who produced or intentionally used PFOA or PFOS to include anyone who unintentionally handles PFOA or PFOS with some of it becoming "located" at the "facility".[5] EPA does not acknowledge this expanded scope of PRP and its foreseeable consequences in the Proposed Rule.

[2] Pike, K.A.; Edmiston, P.L.; Morrison, J.J.; and Faust, J.A. Correlation analysis of perfluoroalkyl substances in regional U.S. precipitation events. *Water Res.* **2021**, *190*, 116685. https://doi.org/10.1016/j.watres.2020.116685.
[3] Proposed Rule 54420.
[4] Id. 54426.
[5] See CERCLA Section 101(9).

II. Comments

From ISRI's perspective, EPA takes a limited view of the consequences of designating PFOA and PFOS as CERCLA hazardous substances under CERCLA Section 102(a). EPA emphasizes the "direct" effects of the Proposed Rule and effectively discounts its other immediate, if not direct, effects. As a result, EPA significantly downplays the foreseeable consequences and costs of the Proposed Rule.

A. EPA's Emphasis on Certain Direct Effects of the Proposed Rule Downplays Likely Immediate Significant Other Effects, Including Substantial Amounts of Litigation.

EPA's emphasis on certain direct effects of the Proposed Rule downplays likely immediate significant other effects. In the preamble of the Proposed Rule, EPA identifies only three direct effects of the proposed designation, besides the default setting of their reportable quantity (RQ) at 1 pound each under Section 102(b): (1) reporting and notification obligations for releases pursuant to Section 103; (2) notification by Federal agencies when selling or transferring any Federally-owned real property pursuant to Section 120(h); and (3) listing and regulation as hazardous materials by DOT pursuant to Section 306(a). In the case of (1), reporting and notification for a release of a RQ or more of a CERCLA hazardous substance from a facility to off-site within a 24-hour period (with some exceptions) are required separately by CERCLA regulation at 40 CFR §302.6 to the National Response Center and by Emergency Planning and Community Right-to-Know Act (EPCRA) regulation at 40 CFR §355.30 to the State (or Tribal) Emergency Response Commission and Local (or Tribal) Emergency Planning Committee (or 911/operator during transport).

In ISRI's view, designation of PFOA and PFOS as CERCLA hazardous substances has much broader immediate (if not direct) effects than just EPA's three cited direct effects. These broader direct effects arise from several definitions and Sections 107 and 113 under CERCLA. The relevant CERCLA definitions in Section 101 are "facility", "onshore facility", "owner or operator", and "person" (in pertinent part):

> *(9) The term "facility" means…(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located….*
>
> *(18) The term "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land or nonnavigable waters within the United States.*
>
> *(20)*
> *(A) The term "owner or operator" means…(ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility,…*
>
> *(21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.*

With respect to "person", any individual (human being) is a CERCLA "person".

With respect to "facility", the information provided by EPA in the preamble of the Proposed Rule suggests that PFOA and PFOS are present throughout the U.S. in outdoor air, surface water, drinking water, and surface and subsurface soils.[6] In fact, EPA specifically states that "this information illustrates the prevalence of PFOA and PFOS in water, soil, air, plants, and animals worldwide due to its transportability and persistence." New research provides additional evidence of the nationwide presence of PFAS generally, if not PFOA and PFOS specifically, including presumptively (and conservatively) at more than 57,000 U.S. facilities.[7] The significance of this likely nationwide presence of PFOA and PFOS is that every square foot of U.S land is arguably part of a CERCLA "facility" and a CERCLA "onshore facility" because PFOA or PFOS "has…otherwise come to be located" there, if not "deposited, stored, disposed of, or placed" there.

With respect to "owner or operator", any individual that owns property (i.e., an onshore facility), where arguably PFOA or PFOS "has…otherwise come to be located"—if not "deposited, stored, disposed of, or placed" there—is a CERCLA "owner or operator".

Section 107(a) states that "(1) the owner…of…a facility" is a covered person who "(4)…shall be liable for–":

> *(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;*
>
> *(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;*
>
> *(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and*
>
> *(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.*

Section 113(f)(1) states:

> *Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title.*

---

[6] Proposed Rule 54426-54429.

[7] Salvatore, D.; Mok, K.; Garrett, K.K.; Poudrier, G.; Brown, P.; Birnbaum, L.S.; Goldenman, G.; Miller, M.F.; Patton, S.; Poehlein, M.; Varshavsky, J.; and Cordner, A. Presumptive Contamination: A New Approach to PFAS Contamination Based on Likely Sources. *Environ. Sci. Technol. Lett.* **2022**, XXXX, XXX, XXX-XXX. www.doi.org/10.1021/acs.estlett.2c00502.

When the above CERCLA definitions and provisions are taken together in the context of PFOA and PFOS, the Proposed Rule has the direct effect of making just about any owner of property, whether of industrial facilities or residential homes, a "covered person" with potential or actual CERCLA liability.

While these direct effects may also be true for any CERCLA hazardous substance (to the extent that only one molecule or atom of it is required), PFOA and PFOS are significantly different than current CERCLA hazardous substances because of their broad historical use and their hazard profiles. These differences matter. In a recent *Federal* Register notice,[8] EPA released interim lifetime drinking water health advisories of 0.004 parts per trillion (ppt) for PFOA and 0.02 ppt for PFOS and noted their carcinogenic potentials. These interim health advisories were "based on data and draft analyses that indicate that the levels at which negative health effects could occur are much lower than previously understood when the agency issued its 2016 health advisories for PFOA and PFOS (70 parts per trillion or ppt)".[9] They are below the analytical detection limits for PFOA and PFOS, respectively, in drinking water,[10] also noted by EPA.[11] These health advisories suggest that there is no safe non-zero concentration of PFOA and PFOS. Given the expected presence of PFOA and PFOS everywhere, there arguably is no place in the U.S. "safe" from PFOA and PFOS. While EPA notes that "[the health advisories] are not regulations and should not be construed as legally enforceable Federal standards,"[12] they do shape public perception and almost certainly influence people's (including organizations') behavior.

Based on the above, an expected immediate (if not direct) effect of the Proposed Rule is substantial amounts of litigation by private parties under Sections 107 and 113 with significant attendant costs. While "[CERCLA] confers considerable discretion upon the EPA in its exercise of [its response authorities]",[13] discretion by EPA is not controlling. EPA notes that "designating PFOA and PFOS as hazardous substances will…allow the government **and private parties** to seek to recover cleanup costs from potentially responsible parties assuming relevant statutory criteria are met" (emphasis added).[14] Litigation by private parties that invoke Sections 107 and 113 has happened in connection with other CERCLA hazardous substances without any action by EPA.[15] There is no reason to expect different behavior in the aftermath of these CERCLA designations under the Proposed Rule.

To the extent that designation of a substance as a CERCLA hazardous substance is intended to "signal to the market that there is value in the prevention of releases due to the burden in

[8] 87 Fed. Reg. 36848-49, June 21, 2022.
[9] Id. 36849.
[10] 0.53 ppt PFOA and 1.1 ppt PFOS in Table 5 of Method 537.1 (EPA Document #: EPA/600/R-20/006).
[11] Proposed Rule 54430.
[12] 87 Fed. Reg. 36848.
[13] Proposed Rule 54420.
[14] Ibid.
[15] See *Garrison Southfield Park LLC v. Closed Loop Refining and Recovery, Inc.*, 2019 BL 436160, S.D. Ohio, No. 17-cv-783, 11/13/19.

reporting",[16] as well as the burden of future cleanup costs, the Proposed Rule would not have that effect. PFOA and PFOS are already present nationwide at concentrations already deemed not "safe". The Proposed Rule does not seem likely to offer much prevention. However, the Proposed Rule does significantly expand the universe of PRPs beyond those who produced or intentionally used PFOA or PFOS to almost anyone who owns land. Designation of PFOA and PFOS as CERCLA hazardous substances means that persons having nothing to do with producing or intentionally using PFOA or PFOS, including ISRI members, can be held liable for the cleanup of PFOA and PFOS contamination. Due to the foreseeable resulting litigation, the designations proposed by EPA will likely economically harm ISRI members and other persons not involved in the production or intentional use of PFOA or PFOS. EPA must address this potential economic harm when considering a final rule.

B. The Proposed Rule is an "Economically Significant Action" and a "Major Rule" Because It Will Have an Annual Effect on the Economy of $100 Million or More.

In ISRI's view, the Proposed Rule is an "economically significant action" and a "major rule". The Proposed Rule would have an annual effect on the economy of $100 million or more. While EPA considers the Proposed Rule to be a "significant regulatory action", EPA should have found that it would also have a significant monetary impact on the economy.

EPA states:[17]

> *This action is a significant regulatory action that was submitted to the OMB for review. While EPA is not considering costs in its hazardous substance designation decisions in this proposed rule, and despite that there is still significant uncertainty and lack of data as discussed in the economic analysis (EA), OMB designated this proposed rulemaking as an economically significant action.*

In its assessment of costs and other impacts of the Proposed Rule, EPA classifies the Proposed Rule as a "significant regulatory action" because the "action may raise novel legal or policy issues arising out of legal mandates, the Presidents' priorities, or the principles set forth in the [Executive Order (EO) 12866]."[18] This is the fourth of four alternative criteria for a "significant regulatory action" in EO 12866. EPA does not base this classification on the first criterion:[19]

> *Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;*

[16] "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" (EPA-HQ-OLEM-2019-0341-0034) 4.
[17] Proposed Rule 54439.
[18] "Economic Assessment" (Footnote 16) 52.
[19] Executive Order 12866 of September 30, 1993 (58 Fed. Reg. 51735).

EPA opts for "novel legal or policy issues" over "annual effect on the economy of $100 million or more" because it did not consider costs in its designation of PFOA and PFOS as CERCLA hazardous substances and considered assessing "indirect" response costs to be "impractical" due to "uncertainty".[20] In invoking impracticality and uncertainty, EPA effectively assigns a value of $0 to "indirect" response costs arising from the Proposed Rule. A value of $0 is certainly incorrect. An Office of Management and Budget (OMB) document provides an understanding of the $100 million threshold in the first criterion (emphasis original):[21]

> *The $100 million threshold applies to the impact of the proposed or final regulation in* any one year*, and it includes* benefits, costs, or transfers*. (The word "or" is important: $100 million in annual benefits, or costs, or transfers is sufficient; $50 million in benefits and $49 million in costs, for example, is not.)*

Given the evidence of the nationwide presence of PFOA and PFOS and their hazard profiles, it is not difficult to imagine that designation of PFOA and PFOS as CERCLA hazardous substances would result in $100 million in "benefits, costs, **or** transfers" in any future year (even the first year) due to litigation and other actions. New research estimates conservatively that more 57,000 sites in the U.S. have presumptive PFAS contamination.[22] Assuming that this conservative (i.e., low) count is equally offset by the possibility that not all of these sites necessarily have PFOA or PFOS contamination, assigning an annual cost of $2,000 to each facility as a consequence of the proposed designations would put the annual cost above $100 million. This makes the Proposed Rule an "economically significant rule". This scenario does not even envision the costs of likely substantial litigation under the Proposed Rule, so an annual amount may be much greater.

As an "economically significant rule" based on the $100 million threshold, the Proposed Rule also qualifies as a "major rule" under the Congressional Review Act (CRA) for having "an annual effect on the economy of $100,000,000 or more".[23] As a "major rule" under the CRA, the Proposed Rule, if finalized, would be subject to the Congressional disapproval procedure of the CRA.[24]

---

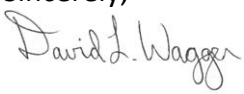
[20] Proposed Rule 54423.
[21] Regulatory Impact Analysis: Frequently Asked Questions (FAQs), February 7, 2011 (OMB Circular A-4 FAQ) (EPA-HQ-OLEM-2019-0341-0203).
[22] Salvatore, D.; Mok, K.; Garrett, K.K.; Poudrier, G.; Brown, P.; Birnbaum, L.S.; Goldenman, G.; Miller, M.F.; Patton, S.; Poehlein, M.; Varshavsky, J.; and Cordner, A. Presumptive Contamination: A New Approach to PFAS Contamination Based on Likely Sources. *Environ. Sci. Technol. Lett.* **2022**, XXXX, XXX, XXX-XXX. www.doi.org/10.1021/acs.estlett.2c00502.
[23] 5 U.S.C. §804(2)(A).
[24] 5 U.S.C. §802.

III. Summary

ISRI finds that EPA's emphasis on certain direct effects of the Proposed Rule downplays likely immediate significant other effects, including a substantial amount of foreseeable litigation with significant attendant costs. The Proposed Rule significantly expands the universe of PRPs beyond those who produced or intentionally used PFOA or PFOS to almost anyone who owns land. Designation of PFOA and PFOS as CERCLA hazardous substances means that persons having nothing to do with producing or intentionally using PFOA or PFOS, including ISRI members, can be held liable for the cleanup of PFOA and PFOS contamination. Due to the foreseeable resulting litigation, the designations proposed by EPA will likely economically harm ISRI members and other persons not involved in the production or intentional use of PFOA or PFOS. EPA must address this potential economic harm when considering a final rule. Finally, the Proposed Rule is an "economically significant action" and a "major rule" because it will have an annual effect on the economy of $100 million or more. As a "major rule" under the CRA, the Proposed Rule, if finalized, would be subject to the Congressional disapproval procedure of the CRA.

In closing, ISRI appreciates this opportunity to provide comment on the proposed rule, "Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances", and EPA's consideration of these comments. If you have any questions, you can reach me at DWagger@isri.org or 202-662-8533.

Sincerely,



David L. Wagger, Ph.D.
Chief Scientist / Director of Environmental Management
Institute of Scrap Recycling Industries, Inc.