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Lawrence Starfield, Acting Assistant Administrator  
Office of Enforcement and Compliance Assurance

Rosemarie Kelley, Director  
Office of Civil Enforcement

Cyndy Mackey, Director  
Office of Site Remediation Enforcement

Kenneth Patterson, Director  
Regional Support Division

Mary McCullough, Communications Specialist  
Office of Enforcement and Compliance Assurance

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

Submitted Via: [CERCLAEnforcement-PFAS@epa.gov](mailto:CERCLAEnforcement-PFAS@epa.gov)

**Re: Proposed CERCLA PFAS Enforcement Discretion and Settlement Policy**

Dear Acting Assistant Administrator Starfield, Director Kelley, and Director Mackey:

The American Fuel & Petrochemical Manufacturers (“AFPM”) and the American Petroleum Institute (“API”) (together, “the Associations”) respectfully submit these comments in response to the U.S. Environmental Protection Agency’s (“EPA” or “Agency”) proposal to establish a CERCLA PFAS Enforcement Discretion and Settlement Policy (“Policy”). The Agency is reportedly in the early stages of developing this Policy, and has requested stakeholder comments and the submission of written input in connection with two Public Listening Sessions on the Policy.<sup>1</sup> For the reasons

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<sup>1</sup> U.S. Environmental Protection Agency, <https://www.epa.gov/enforcement/forms/contact-us-about-cercla-pfas-enforcement-listening-sessions>. EPA indicates this policy would address releases of per- and polyfluoroalkyl substances (“PFAS”), including perfluorooctanoic acid (“PFOA”) and perfluorooctanesulfonic acid (“PFOS”).

explained below, the Associations request that any Policy ultimately adopted by EPA clearly establish that the Agency will not seek to impose CERCLA liability against any owners and operators of facilities where aqueous film-forming foams (“AFFF”) containing any PFAS have been or are used in response to a fire or emergency incident.

The Associations previously submitted comments on, and requested withdrawal of, EPA’s proposed rulemaking designating PFOA and PFOS as CERCLA hazardous substances, due to numerous legal and equitable deficiencies in the proposed rulemaking that were documented throughout these comments.<sup>2</sup> Among other concerns, the Associations expressed serious objections to EPA’s stated intent to rely on enforcement discretion to mitigate ramifications of the proposed listing for PFOA and PFOS on some potentially responsible parties, and they restate these objections today.<sup>3</sup>

In announcing its listening sessions on a proposed Policy, EPA states that this Policy will “take into account various factors, such as EPA’s intention to focus enforcement efforts on PFAS manufacturers and other industries, whose actions result in the release of significant amounts of PFAS into the environment, and EPA’s intention not to focus on pursuing entities where factors do not support taking an enforcement action.”<sup>4</sup> The Agency further states this Policy will “address[] stakeholder concerns and reduc[e] uncertainties by clarifying when EPA intends to use its CERCLA enforcement authorities or its CERCLA enforcement discretion.”<sup>5</sup>

EPA’s proposed Policy raises several concerns for our members. Any such Policy will fall short of EPA’s goals and cause confusion, as such a Policy will affect only federal enforcement efforts under CERCLA. It will not alter actions by States, Tribes and citizens’ groups to enforce the statute and impose CERCLA liability against any facility owner or operator implicated with PFOA/PFOS contamination. Similarly, an EPA Policy would not deter or otherwise affect private party actions seeking cost recovery or contribution under CERCLA.

Moreover, the exercise of EPA enforcement discretion to disclaim CERCLA enforcement for certain categories of landowners, facility operators or industry sectors cannot alter these entities’ statutory liability, unless they are covered by an available statutory exemption. Indeed, in its 2020 decision in *Atlantic Richfield Co. v. Christian*, the U.S. Supreme Court stated “EPA’s nonenforcement policy does not alter the

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<sup>2</sup> American Petroleum Institute, American Fuel & Petrochemical Manufacturers, et al., Comments on Designation of PFOA and PFOS as CERCLA Hazardous Substances (Nov. 7, 2022) <https://www.regulations.gov/comment/EPA-HQ-OLEM-2019-0341-0419> (Association Comments).

<sup>3</sup> *Id.* at 27-28.

<sup>4</sup> See <https://www.epa.gov/enforcement/forms/contact-us-about-cercla-pfas-enforcement-listening-sessions>.

<sup>5</sup> *Id.*

landowners' status as potentially responsible parties. Section 107(a) unambiguously defines potentially responsible parties and EPA does not have authority to alter that definition."<sup>6</sup> This is why the Associations have encouraged EPA to invoke the liability exemption under CERCLA 107(d)(1),<sup>7</sup> should the Agency move forward with its listing for PFOA/PFOS notwithstanding significant comments opposed to this action. By enacting Section 107(d)(1), Congress directed that CERCLA liability should not be imposed on persons that render care or assistance in response to incidents – such as fires – that endanger public health, welfare or the environment.

Finally, and most importantly, EPA reliance on enforcement discretion is wholly inadequate to remedy the adverse consequences of designating PFOA and PFOS (or any other PFAS) as hazardous substances. As explained in the Associations' Comments, final CERCLA listing for PFOA/PFOS will automatically establish strict, joint and several CERCLA cleanup liability for all current landowners where these substances have come to be located. For our members, this listing could immediately and adversely impact the important emergency use of firefighting foams at refineries, terminals, and other facilities, and impose an inflexible CERCLA liability scheme for past emergency uses of PFOA/PFOS contained in AFFF, despite such foams' necessary and authorized use for protecting human health and the environment.

During its stakeholder listening sessions, EPA did not address Section 107(d)(1) (or other statutory exemptions), but stated its intent to decline CERCLA enforcement against only a select group of entities – primarily governmental entities, tribes and farmers whose operations may have involved PFOA, PFOS or other PFAS-containing materials. Notably, the Agency indicated it would apply enforcement discretion to decline CERCLA actions for AFFF use solely by State, local, and tribal airports, and tribal or local fire departments; industrial users of AFFF would remain subject to CERCLA enforcement.

EPA's intent to distinguish between public and private entities is an arbitrarily false distinction without any rational basis because AFFF use by both entity groups has occurred in emergency situations to reduce escalation and protect against endangering

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<sup>6</sup> 140 S.Ct. 1335, 1354 (2020). This case involved certain questions about a 1991 CERCLA enforcement policy under which EPA stated its intent not to seek recovery of CERCLA costs from residential landowners who are not responsible for contamination at their properties and do not interfere with the Agency's remedy. U.S. EPA, Policy Towards Owners of Residential Property at Superfund Sites (July 3, 1991) (<https://www.epa.gov/sites/default/files/documents/policy-owner-rpt.pdf>).

<sup>7</sup> CERCLA §107(d)(1), 42 U.S.C. § 9607(d)(1), provides in pertinent part as follows:

no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an on-scene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

citizens, workers and nearby communities. Under “mutual aid” arrangements and similar coordination among local responders and within Local Emergency Planning Committees (and similar coordination under Risk Management and Spill Prevention, Control and Countermeasure Plans), local fire departments and industry facilities/organizations regularly conduct joint fire and emergency response training, and provide combined responses to actual emergency incidents using PFAS-containing AFFF. Typically there is no difference between AFFF training and response actions taken by governmental responders, airport facilities, and private entities, but rather they are frequently joint and/or substantively identical activities. Furthermore, AFFF use by both publicly-owned and private facilities provides the same, identical benefits for protecting human health against fire and personal injuries. EPA’s proposal to provide enforcement discretion solely to governmental or tribal fire departments, or airport operators, is therefore wholly unreasonable and inappropriate. CERCLA enforcement discretion should be similarly extended to training and response actions by industrial facilities and private organizations involving PFAS-containing AFFF.

Contrary to EPA’s preliminary statements, and consistent with the statutory exemption under section 107(d)(1) and other equitable factors, CERCLA liability – and any EPA enforcement under this law – should not apply to past, present, and future uses of PFAS in AFFF by any public or private organization in response to a fire or emergency incident or related training activities. Thus, any CERCLA PFAS Enforcement Discretion and Settlement Policy ultimately adopted by EPA should clearly establish that the Agency will not seek to impose CERCLA liability against any owners and operators of facilities where PFAS-containing AFFF has been or is used in such situations.


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We appreciate the opportunity to submit these comments. Please feel free to contact either Keith Petka at [petkak@api.org](mailto:petkak@api.org) or 302-463-7992 or Jeff Gunnulfsen at [jgunnulfesen@afpm.org](mailto:jgunnulfesen@afpm.org) or 202-457-0480, if you have any questions or would like to discuss this matter.

Sincerely,



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American Petroleum Institute



Jeff Gunnulfsen  
Senior Director  
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