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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; Docket: EPA-HQ-OLEM-2019-0341; FRL-7204-02-OLEM**

Dear Acting Assistant Administrator Breen:

The American Petroleum Institute (API), the American Fuel & Petrochemical Manufacturers (AFPM), the Alaska Oil and Gas Association (AOGA), the Louisiana Mid-Continent Oil and Gas Association (LMOGA), the New Mexico Oil and Gas Association (NMOGA), The Petroleum Alliance of Oklahoma (PAO), the Petroleum Association of Wyoming (PAW), and the Utah Petroleum Association (UPA) (collectively, “the Associations”) respectfully submit these comments in response to the U.S. Environmental Protection Agency (EPA or Agency) proposed rulemaking designating perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers, as CERCLA Hazardous Substances (87 Fed. Reg. 54415, September 6, 2022).<sup>1</sup>

Descriptions of the undersigned associations are included at Appendix A.

Our members are committed to sound stewardship of our natural resources and balanced, effective environmental protection. As established in API’s core Environmental Principles, API members are dedicated to continuous efforts to improve the compatibility of their operations with the environment while economically developing energy resources and supplying high quality products and services to consumers.

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<sup>1</sup> U.S. Environmental Protection Agency, *Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, Proposed Rule*, 87 Fed. Reg. 54415 (Sept. 6, 2022).

Similarly, AFPM members seek to preserve and protect land and water resources by implementing waste management programs and adhering to federal guidelines that govern effluent discharge, hazardous waste disposal and other priority areas, and continue to innovate to evolve our operations and products.

The Associations' members have a strong interest in this rulemaking. We recognize our responsibility to work with the public, the government, and others to develop and use natural resources in an environmentally sound manner while protecting the health and safety of our employees and the public. We support timely notifications of hazardous substance releases, and targeted, risk-based, and cost-effective cleanups for sites that pose legitimate threats to human health and the environment.

We also acknowledge the public policy challenges posed by the ubiquitous presence of PFOA, PFOS and other per- and polyfluoroalkyl substances (PFAS) in the environment, and support balanced remedial approaches for these substances that rely on sound science, appropriate considerations of risk, and efficient, proven technologies.

Unfortunately, however, efforts to complete orderly cleanups are sometimes hampered by the complicated liability structure of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). As more fully discussed below, EPA's designation of PFOA/PFOS as CERCLA hazardous substances would exacerbate this situation by subjecting a significant number of new areas of the country to CERCLA cleanup liability, delaying existing cleanups, creating waste stream management uncertainty, and potentially re-opening previously completed remediation projects.

CERCLA designation for PFOA/PFOS will have serious adverse ramifications for past, current, and future essential life-saving activities involving aqueous film-forming foams (AFFF). These foams are essential for effective firefighting and fire prevention activities. They are stored and used at oil and gas sites, petroleum refineries, terminals, and many other facilities where large volumes of flammable or combustible liquids are present. Older stockpiles of AFFF will contain PFAS and are still held onsite at some locations because AFFF made with PFAS are highly effective for fighting flammable liquid fires, including fires in large-diameter or deep-tank fires. Our members are significantly engaged in the process to develop, and support the use of, effective replacements for legacy long-chain PFOA/PFOS containing foams. However, as discussed in detail below, the transition to such replacements is underway and will require additional years to successfully complete.

Our comments offer key perspectives on the Agency’s proposal drawing on our industry’s long-standing experience with life-saving AFFF foams.<sup>2</sup>

Our comments will elaborate on the following points:

- I. Numerous legal and policy reasons should compel EPA to withdraw its proposed rule.**
- II. EPA’s proposed rule fails to consider the unintended consequences to the nation’s oil and gas industry associated with this rulemaking.**
- III. EPA has improperly, and arbitrarily and capriciously, interpreted its CERCLA §102(a) authority to designate additional hazardous substances.**
- IV. The one pound reportable quantity (RQ) lacks substantive supporting analysis.**
- V. Enforcement discretion is not a solution for this arbitrary and capricious designation.**
- VI. EPA’s proposed designation will result in the reopening of hundreds of federal and state led CERCLA site closures, without any assessment of exposure or risk.**
- VII. Responses to specific questions EPA poses in the preamble.**
- VIII. Conclusion.**

We are available to discuss our comments and to offer our members’ expertise to the Agency at its convenience.

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<sup>2</sup> The Associations support the comments submitted by the U.S. Chamber of Commerce (Chamber).

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

Sincerely,



Keith Petka  
Director  
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Jeff Gunnulfsen  
Senior Director  
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Manufacturers



Tamara Maddox  
Regulatory & Legal Affairs Manager  
Alaska Oil and Gas Association



Tommy Faucheux  
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Pete Obermueller  
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Rikki Hrenko-Browning  
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**I. Numerous legal and policy reasons should compel EPA to withdraw its proposed rule.**

**A. The proposed listing is both premature and arbitrary and capricious in that there are no accepted cleanup standards and no accepted disposal methods for PFOA and PFOS.**

EPA’s proposal could subject vast areas of the country to CERCLA liability and needlessly complicate the management of numerous waste streams. As EPA well knows, PFOA and PFOS are ubiquitous in the natural and human environment, often being detected in rainwater, surface water, soil, and ambient air.<sup>3</sup> Yet EPA has not proposed any lower threshold below which no CERCLA cleanup liability would attach to the owner or operator of property where PFOA or PFOS is detected. Thus, EPA’s proposed hazardous substance designations for PFOA/PFOS necessarily will cause essentially every industry sector, governmental agency, small business, and others that own real estate with detectable PFOA/PFOS to become subject to CERCLA liability.

EPA is also moving forward with its proposed rule despite the absence of any accepted disposal methods, cleanup standards, or management practices for PFOA or PFOS waste. EPA has ignored the current uncertainty around the proper treatment and disposal of PFAS waste and the impact the Agency’s proposed rule will have on waste management practices. Affected industries first need clear and timely direction from EPA, and identified Agency-approved PFAS waste management, storage, treatment, and disposal methods, before the Agency designates PFOA and PFOS as CERCLA hazardous substances. While EPA issued draft interim guidance for the disposal of PFAS waste in 2020,<sup>4</sup> that guidance has never been finalized and as drafted fails to conclusively designate acceptable disposal option(s). In fact, the draft interim guidance states that “interim storage may be an appropriate strategy until identified uncertainties are addressed and appropriate disposal and destruction technologies can be recommended.”<sup>5</sup> Stockpiling PFAS waste is a wholly ineffective long-term solution.

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<sup>3</sup> See, e.g., Buck R., et al., *Perfluoroalkyl and Polyfluoroalkyl Substances in the Environment: Terminology, Classification, and Origins*, Integrated Env’tl Assess. & Mgmt., Vol. 7, No. 4, pp. 513-541 (July 2011). The federal Agency for Toxic Substances and Disease Registry reports that “[m]ost people in the United States have one or more specific PFAS in their blood, especially PFOS and PFOA.” See <https://www.atsdr.cdc.gov/pfas/health-effects/blood-testing.html>.

<sup>4</sup> U.S. EPA, *Interim Guidance on the Destruction and Disposal of Perfluoroalkyl and Polyfluoroalkyl Substances and Materials Containing Perfluoroalkyl and Polyfluoroalkyl Substances*, Interim Guidance for Public Comment (Dec. 18, 2020). See [https://www.epa.gov/system/files/documents/2021-11/epa-hq-olem-2020-0527-0002\\_content.pdf](https://www.epa.gov/system/files/documents/2021-11/epa-hq-olem-2020-0527-0002_content.pdf).

<sup>5</sup> *Id.* at 3.

Further, according to EPA sources, the Agency may not revise or issue a final PFAS disposal guidance document until after this CERCLA listing is finalized. Our

members support all effective technologies for treating and disposing of PFAS-containing waste. Lacking clear, definitive guidance from EPA, some waste disposal facilities have refused to receive, manage, or treat PFAS-containing wastes, or imposed hazardous waste-type transport, treatment and disposal requirements for PFAS-containing wastes.

Additionally, EPA is arbitrarily proceeding with its proposed rule despite present and projected inadequate disposal capacity for PFOA/PFOS and other PFAS waste. Many industry sectors are already experiencing difficulty finding authorized facilities willing to receive any type of PFAS waste. This listing proposal will significantly increase the amount of PFAS waste that needs to be managed, as PFOA/PFOS contamination becomes more readily targeted by enforcement authorities. CERCLA §104(c)(9) mandates that EPA take steps to ensure adequate disposal capacity exists to handle CERCLA remediation wastes.<sup>6</sup> Under this provision, before EPA provides funding for any remedial action, a state must demonstrate the availability and adequate capacity of hazardous waste treatment or disposal facilities to manage wastes over the subsequent 20-year period. EPA is arbitrarily ignoring this statutory mandate by failing to evaluate the impact of its proposed rule on existing waste disposal capacity. In fact, the Agency has not addressed the issue of treatment and disposal in any meaningful way except to state in the economic impact analysis that it lacks “adequate data availability” about “developing treatment and disposal technologies.”<sup>7</sup>

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<sup>6</sup> Section 104(c)(9) provides, in pertinent part:

... the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which ... (A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed, [and] (B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority....” 42 U.S.C. § 9604(c)(9).

<sup>7</sup> U.S. EPA, *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* (Aug. 2022).

**B. The proposed rule fails to adequately characterize the benefits and costs associated with this rulemaking under key Executive Orders.**

The Agency also fails to adequately characterize the benefits and costs of its proposed action under Executive Order 12866, *Regulatory Planning and Review* (1993) and Executive Order 13563, *Improving Regulation and Regulatory Review* (2001). EPA asserts that key information is unavailable for even attempting to estimate the costs of the Agency’s proposal.<sup>8</sup> If this assertion were true, it would represent straightforward evidence that the rule is premature and should be withdrawn for failure to first consider its true costs and benefits. However, relevant data actually are available. EPA posted to the docket a 2019 study of remediation costs, which projects the number of waste sites within the U.S. (and other major international markets) requiring cleanup over the next 20 years.<sup>9</sup> EPA could have used information from this study to evaluate the incremental increased waste management and disposal costs, and necessary extra disposal capacity that will be required in response to the proposed rule. While only a subset of potential PFAS sites, this would have provided some additional cost data that is of central relevance to EPA’s rulemaking. However, the Agency arbitrarily elected not to undertake this specific and further necessary analysis.

Under Executive Order 12866, however, and contrary to EPA’s arbitrarily incomplete cost estimates, this rulemaking is a “significant regulatory action,” in that it will have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, and raises raise novel legal or policy issues.<sup>10</sup> A cost-benefit analysis is required for such “economically significant” regulations, which as detailed further below has not been completed in any meaningful fashion for EPA’s proposed rule.

Executive Order 13563 requires EPA to “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify.” It further requires that “[i]n applying these principles, each agency is directed to use the best available techniques to quantify anticipated

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<sup>8</sup> *E.g.*, “... EPA is not considering costs in its hazardous substance designation decisions in this proposed rule . . . there is still significant uncertainty and lack of data ...”. 87 Fed. Reg. at 54439.

<sup>9</sup> U.S. EPA, *2019 Remediation Market Study*, EPA: 542-R-19-002 (Jan. 15, 2020). See <https://www.regulations.gov/document/EPA-HQ-OLEM-2019-0341-0201>. (*Remediation Market Study*).

<sup>10</sup> Estimates by an independent expert prepared for the Chamber indicate the true cost of EPA’s proposal to be greater than \$700 million, substantially more than EPA’s estimated annual cost of only \$370,000. U.S. Chamber of Commerce, *PFOS and PFOA Private Cleanup Costs at Non-Federal Superfund Sites* (June 2022). See <https://www.uschamber.com/assets/documents/PFOS-and-PFOA-Private-Cleanup-Costs-at-Superfund-Sites-6.8.22.pdf>.

present and future benefits and costs as accurately as possible.” For this proposal, EPA has not made any attempt to quantify either the public health benefits or the actual costs of the action. As this is the first time EPA has used CERCLA §102(a) authority and the rulemaking has clearly significant implications, it is imperative that EPA adequately and thoroughly consider both the benefits and costs of the proposed rule. In particular, EPA must assess the costs of environmental response actions, such as hazardous substance investigations and removal and remedial activities, which are the core elements of the CERCLA program. Significantly, EPA has made no attempt to estimate the number of sites or releases that will be addressed as a result of this rulemaking, whether these sites would or could have otherwise been addressed under existing authorities, and the net benefit to public health and the environment from imposing this additional liability and response framework on PFOA/PFOS.

Additionally, EPA fails to consider the actual costs associated with this proposed rule, despite the Office of Management and Budget designating the rule as “economically significant” requiring the preparation of a Regulatory Impact Analysis. EPA makes an unjustified, false distinction between direct and indirect costs, and limits its estimate of costs to just the comparatively small direct costs (*i.e.*, the costs associated with (1) reporting releases above the reportable quantity, (2) the requirement for federal agencies to provide notice upon transfer of government property; and (3) the requirement for the Department of Transportation to list and regulate CERCLA hazardous substances under the Hazardous Materials Transportation Act). These “direct” costs are trivial compared to the equally “direct” costs of response actions which will be triggered by EPA’s proposed action. Yet EPA improperly designates such response costs as “indirect” costs.<sup>11</sup> Regardless of the label, the response costs would be a direct result of this rulemaking.

Furthermore, response actions are at the heart of the CERCLA program and the main purpose of the statute and the National Contingency Plan. As EPA states, CERCLA “provides a Federal ‘Superfund’ to clean up uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Through CERCLA, EPA was given power to seek out those parties responsible for any release and assure their cooperation in the cleanup.”<sup>12</sup> To disregard the core component of CERCLA, the response to releases of

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<sup>11</sup> Federal guidance authorizes no such distinctions between direct and indirect costs. See Office of Information and Regulatory Affairs, *Regulatory Impact Analysis: Frequently Asked Questions (FAQs)* (Feb. 7, 2011). See <https://www.regulations.gov/document/EPA-HQ-OLEM-2019-0341-0203>.

<sup>12</sup> See <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act>.



hazardous substances, and treat it as an “indirect” impact of designating a substance as a CERCLA hazardous substance, is illogical. The costs associated with conducting response activities, including the significant costs associated with complex litigation that frequently occurs under CERCLA, are a direct impact of designating substances as CERCLA hazardous substances.<sup>13</sup>

EPA's failure to estimate future CERCLA response costs for PFOA/PFOS cleanups is not cured by simply asserting it is too difficult.<sup>14</sup> Rather, EPA has an affirmative obligation under the Executive Orders cited above to estimate and take comments on the cost impacts of this sweeping proposed rule. The cost inputs that EPA views as “uncertain” are critical to understanding the true costs associated with implementing this proposed rule. Furthermore, if the information is, in fact, entirely insufficient to even attempt to estimate costs, then it is evidence that it is premature and unwarranted to take the unprecedented action of directly listing PFOA and PFOS as hazardous substances. This is evident in the long list of information requests included in EPA's economic analysis, including basic information about releases, potential contaminated sites, cleanup levels, and many other issues that are fundamental to evaluating this listing proposal.<sup>15</sup> These are the type of questions EPA should have asked and answered to the best of its ability before issuing a proposed rule. The Agency's apparent intent to evaluate important, directly relevant costs *after* the rule is already in force is contrary to fundamental principles of cost-benefit analysis under Executive Orders 12866 and 13563.

Even if the Agency's attempt to enumerate direct costs is taken at face value, EPA fails to include basic CERCLA requirements and reflects a misunderstanding of the burden on any entity already addressing a Superfund site. Specifically, the listing of PFOA and PFOS as CERCLA hazardous substances will now trigger very costly items, such as:

- Even for long-since remediated sites, any property past the Record of Decision (ROD) stage is subject to statutory Five-Year Review (FYR) requirements, which

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<sup>13</sup> Total investigation and remediation costs for existing CERCLA sites – without taking into account litigation and administrative costs – are estimated to be approximately \$35.1 million to \$48.3 million per site. *Remediation Market Study* at 3-46, Exhibit 3-9.

<sup>14</sup> For example, EPA asserts that “it is impractical, however, to quantitatively assess the indirect costs (for response actions) associated with a designation decision because of the uncertainty about such costs at this early stage in the process.” 87 Fed. Reg. at 54423.

<sup>15</sup> U.S. EPA, *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* at 19, 49-56 (Aug. 2022).

entails an assessment of any new contaminants of concern (COC),<sup>16</sup> and any newly applicable or relevant and appropriate requirements (ARARs) for the site, that were unknown at the time of the ROD. PFOA and PFOS will now be part of the FYR process if EPA’s rule is finalized, prompting new assessment and potentially remediation even though cleanup standards and accepted remedial alternatives are not identified.

- Every post-ROD National Priorities List (NPL) site with “possible” PFAS contamination will now have to sample for PFOA and PFOS before the next FYR.<sup>17</sup> When detected, “background” (upgradient, offsite, or other representative) PFOA and PFOS may (or may not) be required to be sampled as well, to determine if a “release” has occurred consistent with Hazard Ranking System scoring and to aid in interpretation of what is undeniably a widespread issue. Given the high cost of PFAS sampling and laboratory analyses and related disposal costs, sampling alone could result in over \$100,000 per site depending on the number of “suspected” media and the amount of investigation-derived waste that now would require separate handling and disposal due to the CERCLA designation.
- Ironically, if a “release” is now found at a site (even 5, 10, 15, 20 or 25 or more years past the ROD), the EPA-approved remedy at the site could potentially be found unprotective.
- All sites where a remedy was not designed for PFOA or PFOS removal, or where PFOA or PFOS presence was unknown, could be critiqued as “not protective” if concentrations exceed ARARs or EPA regional risk management levels, or if cumulative risks now trigger an “unprotective” mathematical determination. In many cases, the “cumulative risk” cannot be known without updating the remedial investigation-phase human health risk assessment (HHRA) and re-confirming compliance with the ROD limits. This could lead to

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<sup>16</sup> Adding PFOA and PFOS to the list of COCs at a site presents particular difficulties. The field of PFAS forensics is in its nascent stages, as researchers are still conducting studies to more fully understand the fate and transport of PFAS in the environment. In addition, PFOA and PFOS may be detected at low levels in samples from locations without any apparent or nearby sources. In those instances, site-specific anthropogenic ambient background concentrations can influence investigation findings, and may need to be assessed.

<sup>17</sup> According to EPA’s website, approximately 1,334 sites are currently listed on CERCLA’s NPL as of October 4, 2022, and about 75% of these have been on the NPL for more than 20 years and likely subject to FYRs. See <https://www.epa.gov/superfund/national-priorities-list-npl-sites-site-name>.

another \$100,000-\$150,000 per site due to the many changes in HHRA guidance in the last 30 years of CERCLA’s implementation.

- Ultimately, listing PFOA and PFOS under CERCLA could conceivably result at some sites in the obligation to perform costly new or expanded cleanups to address detection of these substances, even at extremely low concentrations. Remedy cost increases alone cannot yet be forecast, as EPA has not discussed how existing US hazardous waste facilities will handle the massive volume of trace PFOA and PFOS around the nation, other than the suggestion in the 2020 interim guidance to stockpile it. New removal actions and entirely new remedies like incineration, and their associated costs, are not viable for scenarios where a remedy has been considered protective for the last 5, 10, or even 25 or more years.

The above discussion does not even consider that listing PFOA and PFOS as hazardous substances could require “reopening” of completely “clean closed” and delisted NPL sites, as EPA has proposed no grandfathering or “effective date” to make the listing prospective only. EPA should instead clarify that its proposed listing will be applicable prospectively only – solely for any new releases or disposal of PFOA/PFOS. The U.S. Supreme Court has ruled that federal laws and regulations do not have retroactive effect unless there is a clear statement in the statute otherwise; Congress included no such statement in CERCLA §102(a).<sup>18</sup>

**C. EPA has adequate existing authorities to address PFOA and PFOS releases.**

Further, EPA has adequate existing authorities to address PFAS releases, including its CERCLA §104 removal authority for “pollutants and contaminants”; its Resource Conservation and Recovery Act (RCRA) §7003 imminent and substantial endangerment authority; Safe Drinking Water Act (SDWA) §1431 orders; and through Effluent Limitation Guidelines under the Clean Water Act (CWA). EPA by its own admission has strong, existing legal and regulatory mechanisms to address PFOA and PFOS in the environment, including mechanisms to clean up sites contaminated with PFOA and PFOS.<sup>19</sup> EPA also possesses authority under RCRA §3001 to designate PFOA/PFOS

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<sup>18</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

<sup>19</sup> 87 Fed. Reg. at 54418 (“The Federal government is already authorized to cleanup PFOA/PFOS contamination under some circumstances, including when it finds that a release may present an imminent and substantial danger to public health or welfare”).

wastes as hazardous based on a hazardous characteristic or waste listing following an appropriate rulemaking and proper consideration of relevant technical, economic and environmental factors. These authorities are in addition to EPA's other authorities under the SDWA and the CWA to address PFOA/PFOS, as well existing state authorities which have been and are being used to address sites contaminated with PFOA/PFOS across the United States.

Before EPA takes the unprecedented action to directly add PFOA/PFOS as a CERCLA hazardous substance—an action that EPA has not deemed necessary or appropriate for any other substance since the 1980 passage of CERCLA—the Agency should sufficiently explain how these actions would provide additional marginal environmental benefits over these existing authorities.

**II. EPA's proposed rule fails to consider the unintended consequences to the nation's oil and gas industry associated with this rulemaking.**

Our members have invested significantly in equipment, processes, and training related to incident prevention programs. As a part of this investment, our members are managing remaining stocks of legacy C8 foams, moving toward C6 foams, and supporting research and other processes to identify effective fluorine-free foams. The proposed rule will immediately and adversely impact the important emergency use of firefighting foams at refineries, terminals, and other facilities handling large volumes of flammable liquids, and would impose an inflexible CERCLA liability scheme at the same time facilities are confronting these important transition challenges.

Where used, oil and gas facilities have historically used PFOA/PFOS-containing AFFF foams meeting requirements of the National Fire Protection Association (NFPA) and complying with local fire codes. When confronted with fire emergencies, such facilities used the foams because they are proven effective at protecting life and critical infrastructure. The proposed rule fails to acknowledge how and why PFAS-containing AFFF foams are used in our industry, particularly that they are deployed at highly diluted concentrations in emergency firefighting situations. In the event of an emergency involving a hydrocarbon fire, firefighting foams that allow swift and definitive extinguishing power are required to protect the lives of first responders, workers, and the public, as well as the environment.

The proposed rule fails to acknowledge that firefighting capacity is critical to ensuring stable operation for the entire oil and gas industry, which as part of the energy sector, is designated critical infrastructure by the Cybersecurity and Infrastructure Security

Agency under Presidential Policy Directive 21.<sup>20</sup> Critical infrastructure are those “assets, systems, and networks, whether physical or virtual, ... considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.”<sup>21</sup>

While progress is being made, the transition to newer formulations of PFOS-free, PFOA-free, or fully fluorine-free foams cannot occur overnight. When European fire departments transitioned their foam delivery systems, such as at Copenhagen and Amsterdam airports, it took approximately 3 to 5 years. While testing in controlled situations has occurred, fluorine-free foams have yet to be employed during a significant large-scale tank fire at an industrial facility, creating skepticism about their efficacy in such situations. Yet, although not an outright ban on fluorosurfactant foams, the rule could effectively have the same impact as a ban, due to the stigma and potential cleanup liability risks associated with use of legacy long-chain (C8) foams. The energy industry’s transition to ethanol blended fuels requires a heightened degree of flammable liquids risk management (including firefighting foam) as the ethanol blending component is more hydrophilic (e.g., has different physical properties) than other kinds of fuels. To secure America’s future (including renewable biofuel production expansion), the energy industry must have effective firefighting capabilities to meet the elevated fire risk.

Our members are committed to developing alternatives to PFOA or PFOS-containing AFFF and have been providing financial and technical support to research being conducted by the National Fire Protection Association and the Large Atmospheric Storage Tank (LASTFIRE) consortium, focusing on verifying the effectiveness of synthetic fluorine-free foam. In addition, the industry has already moved away from long-chain C8 PFAS containing foams in training activities. Thus, while a transition to fluorine-free firefighting foams is expected in the future, EPA’s proposed rule and its associated CERCLA strict liability scheme does not allow for an adequate period of time for alternative technologies to develop and be tested and implemented. Until there is a

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<sup>20</sup> In 2015 the Department of Homeland Security stated: “The Energy Sector consists of widely-diverse and geographically-dispersed critical assets and systems that are often interdependent of one another. This critical infrastructure ... include[s] the production, refining, storage, and distribution of oil, gas, and electric power.... The Energy Sector supplies fuels to the transportation industry, electricity to households and businesses, and other sources of energy that are integral to growth and production across the Nation.” U.S. Dep’t of Homeland Sec., *Energy Sector-Specific Plan 2015*. See <https://www.cisa.gov/sites/default/files/publications/nipp-ssp-energy-2015-508.pdf>.

<sup>21</sup> See <https://www.cisa.gov/critical-infrastructure-sectors>.

viable fluorine-free foam, EPA should, at a minimum, declare AFFF used for emergency purposes exempt from potential CERCLA liability.

In this regard, EPA should note that oil and gas facilities are supported by local government firefighting and commercially retained firefighters, and that they are also impacted by transition needs. Our facilities may also have co-located airfields where foams have been and will continue to be used, consistent with local fire codes and/or aviation regulations requiring use of fluorinated foams to enable lifesaving rescue.

Depending on the facility, changing to fluorine-free foams can include several steps, each of which require time and some of which the facility cannot control. These include obtaining governmental approval to use reformulated foams and ensuring code compliance; ensuring existing systems work with new foam products given differences in viscosity and foam aspiration rates; proper training; and integrating new foams into mutual aid systems.

Should EPA move forward with the proposal, despite our request that it be withdrawn, the Agency must consider either appropriate exclusions for life-saving firefighting operations as discussed in Section III.B. below, or tailored modifications to the hazardous substance designation that delay the reporting obligations and liability related to the use of fluorine foams for an adequate transition period from the time an effective substitute is identified through transition time (*i.e.*, 3 to 5 years at a minimum).

**III. EPA has improperly, and arbitrarily and capriciously, interpreted its CERCLA §102(a) authority to designate additional hazardous substances.**

**A. The proposed rule fails to properly address statutory requirements for listing a hazardous substance under §102(a).**

It is uncontested that this proposed rule is EPA's first use of its Section 102(a) authority to "designate additional hazardous substances." The Agency historically has relied on CERCLA's §101(14) definition of "hazardous substance" and derived its listing or designation of hazardous substances from such designation under other environmental laws (CWA, RCRA, Clean Air Act, Toxic Substances Control Act). EPA's inaugural use of its §102(a) authority should be informed by past activity and agency practice.

EPA's proposal fails to address the statutory requirement for listing PFOA and PFOS as CERCLA hazardous substances. CERCLA §102(a) authorizes EPA to "*promulgate and revise as may be appropriate*" regulations designating as a hazardous substance:

“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...*” 42 U.S.C. § 9602(a) (emphasis added).

EPA proposes to interpret the phrase “may present” in the statute as an indication that Congress did not require certainty that the substance presents a substantial danger or require proof of actual harm.<sup>22</sup> Rather than articulating precise criteria for listing PFOA and PFOS under CERCLA §102(a), EPA proposes to consider a set of general information about the substances (*i.e.*, hazard, fate and transfer) and weigh this information to determine whether the substances when released may present a “substantial danger.”<sup>23</sup> EPA’s vague interpretation provides little guidance on when this general information rises to the level that a particular substance can be determined to present a substantial danger. Significantly, EPA has provided no specific criteria that would allow the Agency to make consistent and non-arbitrary decisions in its use of the CERCLA §102(a) authority going forward.

As defined in the preamble, EPA has interpreted its authority as to allow it to designate almost any substance without criteria or scientific support.

Notably, EPA’s interpretation of its §102(a) authority varies significantly from the interpretation articulated in its draft January 2021 Advance Notice of Proposed Rulemaking (ANPRM). In that document, although EPA acknowledged that CERCLA §102(a) does not require certainty, it stated the phrase “substantial danger” in this section requires EPA to:

. . . find that the substance, when released, may be significantly harmful in the degree of danger posed, regional or national in geographic scope, and more than fleeting in terms of time. To satisfy this standard, EPA’s current interpretation of CERCLA section 102(a) would require the Agency to have a significant level of evidence that when released into the environment, PFOA and PFOS may present a substantial danger to public

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<sup>22</sup> 87 Fed. Reg. at 54421.

<sup>23</sup> Specifically, EPA states the following in the preamble: “EPA proposes to consider information such as the following: the potential harm to humans or the environment from exposure to the substance (*i.e.*, hazard), and how the substance moves and degrades when in the environment (*i.e.*, environmental fate and transport). To further inform its decision about whether the statutory factors have been met, the Agency proposes to also consider other information that may be relevant when evaluating releases of the substance, such as the frequency, nature and geographic scope of releases of the substances. The Agency proposes to weigh this information to determine whether the substance, when released, may present a ‘substantial danger.’” *Id.*

health or welfare or the environment. Information that is best characterized as inconclusive, anecdotal or speculative would not be sufficient.<sup>24</sup>

EPA in the draft 2021 ANPRM also noted that a deep analysis was required to support a hazardous substance designation, stating that it “requires a *comprehensive assessment* of any candidate element, compound, mixture, solution, or substance based on, for example, *information from a wide range of sources that could include tribal, state, federal and international governments, as well as academia and the private sector.*”<sup>25</sup>

While the draft 2021 ANPRM did not include the necessary detailed criteria, it at least elaborated on the statutory language in a way that offered some guidance, and therefore consistency, in how EPA would make decisions under CERCLA §102(a). EPA’s interpretation and elaboration of its authority in the preamble to this proposed rule provides no such guidance, and will lead to inconsistent and unsupported use of this far-reaching authority. The Agency has failed to articulate the reasoning behind its significant change in direction from the ANPRM.

**B. EPA’s proposed listing is arbitrarily overbroad.**

EPA proposes to list all types and uses of PFOA and PFOS without any limitation, despite EPA having authority under CERCLA §102(a) to “*promulgate and revise as may be appropriate*” regulations designating hazardous substances and the ability to carry over other statutes’ regulatory exclusions or exemptions under CERCLA §101(14). Although we seek withdrawal of this proposed rule, we offer examples of reasonable exemptions or exclusions from the definition of “hazardous substance” for PFOA and PFOS that that are preferable to the Agency’s current proposal.

For example, EPA should limit the arbitrarily broad nature of this proposal by excluding PFOA and PFOS contained in AFFF used in response to a fire or other emergency from the definition of “hazardous substance.” Section 101(14) of CERCLA defines “hazardous substance” to include “(B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title....”<sup>26</sup> As noted above,

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<sup>24</sup> Draft Advance Notice of Proposed Rulemaking, *Addressing PFOA and PFOS in the Environment: Potential Future Regulation Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act* at 10 (Jan. 14, 2021). See [https://www.epa.gov/sites/default/files/2021-01/documents/frl-10019-13-olem\\_addressing\\_pfoa\\_pfos\\_anprm\\_20210113\\_admin-508.pdf](https://www.epa.gov/sites/default/files/2021-01/documents/frl-10019-13-olem_addressing_pfoa_pfos_anprm_20210113_admin-508.pdf).

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> 42 U.S.C. § 9601(14).



CERCLA §102(a) in turn grants EPA authority to promulgate and revise rules “as may be appropriate” to designate particular elements, compounds, mixtures, solutions, and substances as “hazardous substances.”<sup>27</sup> By vesting EPA with authority to make designation decisions “as may be appropriate,” Congress necessarily empowered the Agency to make appropriate distinctions between the facts and circumstances under which a particular “element, compound, mixture, solution, or substance” should be designated as a hazardous substance, and others where such a designation is unnecessary or inappropriate. In essence, when interpreted properly, CERCLA §102(a) and §101(14) authorize EPA to establish the proper scope of its hazardous substance designations, which includes the authority to identify appropriate exclusions from such designations.

A proposed exclusion for the use of PFOA and PFOS in response to a fire or similar emergency is consistent with CERCLA §107(d)(1), which 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 onscene 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.

Section 107(d)(1) embodies Congress’ directive that CERCLA liability should *not* be imposed on persons that render care or assistance in response to incidents – such as fires – that create a danger to public health, welfare or the environment. *Id.* Facility owners confronted with a significant fuel fire or similar emergency should be encouraged to take immediate action to minimize any danger to public health, welfare and the environment, even including through the use of AFFF potentially containing PFOA/PFOS, and not be subject to potential CERCLA cleanup liability due to such use.

As noted elsewhere in these comments, our industry is already embarked on a transition away from AFFF that contains PFOA or PFOS, but existing stocks of these legacy foams can remain at some locations – as well as at other facilities across the U.S. such as airports and local fire departments. When confronted with a major fuel fire incident, the remaining availability and use of such foams may represent one of few

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<sup>27</sup> 42 U.S.C. § 9602(a).

effective tools for controlling the fire and preventing serious threats to surrounding communities and avoiding potentially catastrophic outcomes. In such circumstances, we contend that the parties using such foams to abate these important threats to human health and welfare should not face onerous strict, joint and several liability under CERCLA, consistent with the plain language and intent of §107(d)(1).

Moreover, any release of a hazardous substance associated with the use of such foams would have occurred only in the course of a facility actually conducting emergency incident response. These circumstances are readily distinguished from the circumstances contemplated by CERCLA §107(d)(3),<sup>28</sup> which indicates that the liability bar of §107(d)(1) is inapplicable to persons who otherwise fall within one or more of the four categories of “liable persons” under §107(a).<sup>29</sup> Unlike the conduct that gives rise to liability under §107(a), facilities that use AFFF to put out fuel fires are doing so to abate threats to human health, welfare and the environment. It is therefore appropriate to apply §107(d)(1) to establish a regulatory exclusion that either: (1) excludes from the regulatory definition of “hazardous substance” under 40 C.F.R. § 302.4 (and Table 302.4) all AFFF containing PFOA or PFOS when used in response to a fire or emergency incident; or (2) clarifies that parties that use AFFF containing PFOA or PFOS in such circumstances shall be covered by CERCLA § 107(d)(1) and not subject to CERCLA liability under §107(a).<sup>30</sup> Such regulatory exclusions should apply to past, present, and future emergency uses of PFOA/PFOS containing AFFF.

**C. The inclusion of isomers in the definition of PFOA and PFOS is not justified.**

EPA has proposed listing not just PFOA and PFOS, but also “all salts and structural isomers of these chemical compounds.” The inclusion of isomers in the definition of PFOA and PFOS is not justified as EPA presented virtually no scientific information on

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<sup>28</sup> Section 107(d)(3) provides “[t]his subsection [§107(d)] shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of this section with respect to the release or threatened release concerned.” 42 U.S.C. § 9607(d)(3).

<sup>29</sup> These categories consist of: (1) the current owner or operator of a site with where hazardous substances have been released (§107(a)(1)); (2) the former owner or operator of a site who owned or operated the site at the time a hazardous substance was disposed there (§107(a)(2)); (3) any person who generated and arranged for the transport, treatment and/or disposal of any hazardous substance (§107(a)(3)); and (4) any person who transported a hazardous substance to a site for treatment or disposal from which there is a release or threatened release of such substance (§107(a)(4)). 42 U.S.C. § 9607(a).

<sup>30</sup> Another option available to EPA would be to withdraw its current proposal and instead apply its other existing regulatory authorities as discussed above to exclude the use of AFFF containing PFOA or PFOS from the imposition of cleanup liabilities.

these various isomers and their environmental and human health effects. This expanded listing is problematic for multiple reasons, including that EPA did not identify or list at the time of proposal what substances are included in “all salts and structural isomers.”<sup>31</sup>

As noted above, to meet the criteria for listing under CERCLA §102(a), EPA must demonstrate that each of these PFOA and PFOS isomers and salts “may present a substantial danger to the public health and welfare or the environment.” EPA did not present this information in its proposal. To include structural isomers and salts in the CERCLA listing is to presume these structural isomers and salts pose the same toxicity hazards as the linear perfluorinated isomer. This presumption is made in the proposed rule without information for even some of the simpler branched isomers let alone all other conceivable structural isomers, and therefore, to conclude that some (or any) of these branched isomers present a substantial danger to the public health and welfare or the environment is arbitrary without scientific basis.

EPA has cited the CAS registry number 335-67-1 as being applied to “perfluorooctanoic acid, and salts and structural isomers,” but this CAS registry number applies solely to PFOA (known more specifically as n-perfluorooctanoic acid). Similarly, EPA has cited CAS registry number 1763-23-1 as being applied to “perfluorooctanesulfonic acid and salts and isomers,” yet this CAS number only applies to PFOS (or n-perfluorooctanesulfonic acid). The structural isomers of these compounds are also entirely different substances than the perfluorinated linear chain compounds, each with entirely different physical and chemical properties. In addition, certain structural isomers of these compounds are not organic acids, nor must these structural isomers necessarily be perfluorinated.

Current analysis for PFAS by any US EPA method<sup>32</sup> does not require, or even mention, chromatographic resolution of the structural isomer peaks (e.g., linear vs. branched isomers). Quantitative reference standards are not available for most of the branched isomers. For those isomers that are available for identification, quantification is based solely on the relative response factor (RRF) of the linear isomer. Therefore, to include apparent branched isomer peaks quantified in this manner using the linear RRF represents a qualitative guess, at best. The RRF of each branched isomer varies potentially significantly, and as such, quantification of branched isomers using the linear

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<sup>31</sup> 87 Fed. Reg.at 54418.

<sup>32</sup> Not all of these methods have been formally approved. EPA’s limited approved methods for PFAS testing are listed here: <https://www.epa.gov/water-research/pfas-analytical-methods-development-and-sampling-research>.

RRF will not yield accurate or reliable data. Hence, mandating the quantitative inclusion of all branched isomers is not possible by current commercial laboratory application of Method 1633, or any other current US EPA method for PFAS.

EPA's inclusion of structural isomers and salts is further evidence of why this proposed rule is premature and not based on sound science, as neither the promulgated analytical methods, nor the requisite branched isomer reference standards, nor the environmental and human health toxicity data for branched isomers yet exist.

#### **IV. The one pound reportable quantity (RQ) lacks substantive supporting analysis.**

EPA's proposed rule uses the statutory default RQ of one pound for PFOA and PFOS, as provided under CERCLA §102(b). EPA states in the preamble that once it "has collected more data on the size of releases and the resulting risk to human health and the environment, the Agency may consider issuing a regulation adjusting the reportable quantities for these substances."<sup>33</sup> The fact that EPA admits it lacks sufficient risk information for PFOA and PFOS to set a chemical-specific RQ demonstrates that this rulemaking itself is premature. EPA should not use this unprecedented rulemaking as a means of collecting information in order to properly consider a more appropriate RQ.

#### **V. Enforcement discretion is not a solution for this arbitrary and capricious designation.**

EPA appears to acknowledge that its rulemaking creates significant concerns for stakeholders across industrial sectors. The Agency therefore indicates it plans to use a variety of enforcement tools, including issuing enforcement discretion policies and entering into settlement agreements that address potential liability issues on a site-specific basis.<sup>34</sup> EPA suggests that inequities associated with its proposed rule can be addressed through such enforcement discretion. However, EPA's assurances are completely inadequate given the strict, joint and several liability scheme imposed under CERCLA and the inevitable avalanche of CERCLA litigation by non-federal parties. It also is completely unclear how EPA can apply enforcement discretion to functionally create liability exemptions for entire industry sectors.

While EPA may choose not to bring an enforcement action, nothing would prevent other parties including states and affected parties from seeking cleanup contribution under

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<sup>33</sup> 87 Fed. Reg. at 54416.

<sup>34</sup> 87 Fed. Reg. at 54436-37.

this rule. Federal enforcement is only one part of the CERCLA enforcement equation, and is not binding on other entities. Further, defaulting to enforcement discretion further reveals that EPA is aware that its proposal would lead to inequitable results, and shows that the Agency is willing to sidestep the requisite policy and legal analyses outlined in these comments to develop a rule that arbitrarily satisfies political expediency over sound science and that cannot be implemented fairly and with regulatory certainty.

Even if reliance on enforcement discretion were an appropriate approach, which we question, the Agency would need to clearly articulate that the emergency use of AFFF is not subject to CERCLA enforcement. At a minimum, EPA should clarify it will not use CERCLA cleanup authorities against businesses, government organizations and others that used AFFF containing PFOA and/or PFOS in response to a fire or other emergency, including those acting through mutual aid or shared responses. This approach would be consistent with the text of CERCLA §107(d)(1), discussed above, which embodies Congress' directive that CERCLA liability should *not* be imposed on persons that render care or assistance in response to incidents – such as fires – that create a danger to public health, welfare or the environment.

**VI. EPA's proposed listing will result in the reopening of hundreds of federal and state led CERCLA site closures, without any assessment of exposure or risk.**

EPA's proposed rule would also have detrimental, costly impacts on existing site cleanups. If finalized, the rule will slow down cleanups as sites become mired in the complex CERCLA process and typical cost recovery litigation, especially given the ubiquitous nature of PFAS in the environment. For example, as noted above, existing CERCLA sites that are currently addressing PFOA and PFOS as supplemental contaminants, may have to revert back to the Remedial Investigation and Feasibility Study stage of the CERCLA cleanup process to address these contaminants once they are designated as CERCLA hazardous substances. EPA has not quantified or explained this likely impact. Further, EPA's proposed rule will delay and otherwise negatively impact real estate transactions at any site where even trace amounts of PFOA/PFOS are detected, especially given the lack of promulgated cleanup standards.<sup>35</sup>

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<sup>35</sup> The fact that PFAS have been detected in rainwater only adds to the complexity of assigning cleanup responsibility. See, e.g., Cousins et. al, *Outside the Safe Operating Space of a New Planetary Boundary for Per- and Polyfluoroalkyl Substances (PFAS)*, *Env't'l Sci. Tech.* 56, 16, 11172–11179 (Aug. 2, 2022) (the levels of PFOS in rainwater often exceed EPA's drinking water lifetime health advisory for PFOS, except for two studies conducted in Tibet and Antarctica).

Whether through enforcement action, re-opener remediation actions, or lawsuits for contribution, the costs for individual site cleanup could amount to tens of millions of dollars at each site, depending on the scope of pollution. In addition, companies that successfully saved lives and extinguished fires by using PFOA- and/or PFOS-containing AFFF in their operations and sent the PFOA/PFOS-containing waste to landfills or otherwise managed them will be at immediate risk for enforcement action and/or expanded liability in private party litigation. In contrast, the manufacturers of these products may bear no liability for the contamination caused by the deployment of their products consistent with instructions for use. Further exacerbating the challenge posed by EPA's proposed listing is the fact that in many cases, remediation technologies – such as for contaminated soils – have not been field tested.<sup>36</sup>

## **VII. Responses to specific questions posed in the preamble.**

We provide the following additional comments in response to the specific questions that EPA presents in the proposed rule preamble.

- **Does CERCLA §102(a) preclude, allow, or require consideration of cost in designation decisions?**

As described in the Chambers' comments, CERCLA §102(a) does not preclude the consideration of costs in making hazardous substance designation decisions. Under a long series of U.S. Supreme Court cases, most recently *Michigan v. EPA*, 576 U.S. 743 (2015), agencies should consider the costs and benefits of their actions absent statutory text directing otherwise. We reiterate our support for the U.S. Chamber's comments on this issue.

- **If so which costs and benefits of those discussed in the EA should be considered?**

EPA should consider all relevant direct and indirect costs and benefits in its EA as the consideration of these costs and benefits, including their quantification when feasible, is necessary to comply with Executive Orders 12866 and 13563. In particular, EPA must consider the costs associated with imposing CERCLA liability on PFOA/PFOS releases and the costs associated with nationwide investigation, response and removal actions, as cleaning up contaminated sites is the core mission of the CERCLA program. Numerous existing NPL sites are likely to have some PFOA/PFOS present due to their widespread occurrence in the natural environment. As a result, EPA's analysis fails to

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<sup>36</sup> See, e.g., *A Review of the Emerging Treatment Technologies for PFAS Contaminated Soils*, <https://pubmed.ncbi.nlm.nih.gov/32063301/>.

include the costs associated with completing hundreds of FYR submittals and related PFOA/PFOS sampling for these sites, once these substances become subject to new federal ARAR. Another set of costs to be considered include the costs to the U.S. Department of Defense to clean up sites impacted by PFOA/PFOS.<sup>37</sup> Also, EPA must consider and thoroughly evaluate the incremental benefits to human health and the environment of this proposed listing when compared to the baseline of existing authorities in place today to address PFOA and PFOS releases at the federal and state level.

- **Should additional benefits and costs not identified in the EA be considered?**

As described in our comments, the proposed listing will have a detrimental effect on the orderly transition to fluorine-free foams when they are available. EPA must consider and evaluate these impacts, including the potential cost in terms of property and human safety. In addition, EPA must consider the impacts of the listing on national waste management costs and disposal capacity as described above. EPA's assessment of national capacity for hazardous waste management and disposal indicates there is capacity through 2044. However, this estimate omits the substantial waste volumes that would be added by making PFOA and PFOS hazardous substances. Key federal partners, such as the DOD, have also expressed concern with the limited disposal options for PFOA and PFOS waste.<sup>38</sup>

- **If indirect benefits and costs are considered, how should they be assessed in light of the discretion and uncertainties described above?**

Any uncertainties in estimating this rule's costs and benefits does not relieve EPA of the responsibility to present its best quantification of this data to the public for comment. There are uncertainties associated with every economic model and risk assessment, including every economic impact analysis and risk evaluation EPA has conducted for previous rulemakings.

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<sup>37</sup> The U.S. Government Accountability Office (GAO) reports that the U.S. Department of Defense (DOD) estimates that its future PFAS investigation and cleanup costs will total more than \$2.1 billion beginning in Fiscal Year 2021, which is additional to the \$1.1 billion in actual PFAS costs incurred through Fiscal Year 2020. GAO-21-421 (June 2021). See [www.gao.gov/assets/gao-21-421.pdf](http://www.gao.gov/assets/gao-21-421.pdf).

<sup>38</sup> Transcript, Deputy Assistant Secretary of Defense for Environment and Energy Resilience Richard Kidd, Public Remarks, on PFAS, July 14, 2021. See <https://www.defense.gov/News/Transcripts/Transcript/Article/2699010/deputy-assistant-secretary-of-defense-for-environment-and-energy-resilience-ric/>.

- **How could benefits and costs be incorporated into the designation decision?**

The process for incorporating costs and benefits in EPA’s decision to designate PFOA and PFOS as hazardous substances is well outlined in relevant Executive Orders. The Agency has an entire set of Guidelines for Preparing Economic Analyses, with chapters dedicated to “Analyzing Benefits” and “Analyzing Costs.”<sup>39</sup> Under Executive Order 12866, EPA’s final decision to propose or finalize a regulation must be made “only upon a reasoned determination that the benefits of the intended regulation justify its costs.” The listing of PFOA/PFOS is a proposed regulatory action that must be demonstrated to meet this standard.

- **Would designation be justified if costs were to be considered in the Agency’s designation decision?**

We do not believe that designation is justified. First, the costs would dramatically outweigh any benefits – the Chamber, through a third-party expert, estimated these costs to conservatively be between \$800 million and \$1.1 billion (annualized over 30 years) at non-federal CERCLA sites.<sup>40</sup> This does not include other locations that may have PFAS contamination, such as DOD testing facilities, airports, and landfills not currently listed on the NPL. The Chamber’s analysis demonstrates both that it is possible to make such estimates in the face of the uncertainties EPA identifies, and that the likely cost impacts are massive and will outweigh the marginal benefits of this proposal. As shown throughout these comments, there are more efficient and effective ways to advance cleanup of PFOA and PFOS sites than this proposed rule.

## **VIII. Conclusion**

We respectfully request that EPA withdraw its proposed designation of PFOA/PFOS as CERCLA hazardous substances. In this proposal, EPA improperly interprets its CERCLA §102(a) authority, fails to consider its true costs and benefits, and wholly neglects appropriate consideration of its numerous detrimental consequences. Among other things, this proposal would subject significant new areas of the country to

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<sup>39</sup> <https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses>

<sup>40</sup> U.S. Chamber of Commerce, *PFOS and PFOA Private Cleanup Costs at Non-Federal Superfund Sites* (June 2022). See <https://www.uschamber.com/environment/pfos-and-pfoa-private-cleanup-costs-at-non-federal-superfund-sites#:~:text=Private%20sector%20cleanup%20costs%20at,the%20%24100%20million%20annual%20effect.>



CERCLA cleanup liability, delay existing cleanups, create waste stream management uncertainty, and potentially cause previously completed remediation projects to be reopened. We therefore urge EPA to reconsider this proposal and fully address the key issues presented in our foregoing comments.

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## **Appendix A**

### **Association Descriptions**

The American Petroleum Institute (API) is a nationwide, non-profit trade association that represents all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly eight percent of the U.S. economy. API's more than 600 member companies include large integrated companies, as well as exploration and production, refining, marketing, pipeline and marine businesses, and service and supply firms. API was formed in 1919 as a standards-setting organization, and API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability.

The American Fuel & Petrochemical Manufacturers (AFPM) is a trade association that represents most of the U.S. refiners and petrochemical manufacturers across the United States that produce gasoline, diesel, jet fuel, and other products that keep America running. AFPM members support more than three million quality jobs, contribute to our economic and national security, and enable the production of thousands of vital products used by families and businesses throughout the United States.

The Alaska Oil & Gas Association (AOGA) is a non-profit, professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefit of all Alaskans. AOGA's membership includes 14 companies representing the industry in Alaska that have state and federal interests, both onshore and offshore. AOGA's members have a well-established history of prudent and environmentally responsible oil and gas exploration, development, and production in Alaska.

The Louisiana Mid-Continent Oil & Gas Association (LMOGA), founded in 1923, is a trade association exclusively representing all sectors of the oil and gas industry operating in Louisiana and the Gulf of Mexico. LMOGA serves exploration and production, refining, transportation, marketing, and mid-stream companies as well as other firms in the fields of law, engineering, environment, financing, and government relations.

The New Mexico Oil and Gas Association (NMOGA) is dedicated to promoting the safe and responsible development of oil and gas resources in New Mexico through advocacy, collaboration and education.

The Petroleum Alliance of Oklahoma (PAO) represents more than 1,400 individuals and member companies and their tens of thousands of employees in the upstream, midstream, and downstream sectors and ventures ranging from small, family-owned

businesses to large, publicly traded corporations. Their members produce, transport, process and refine the bulk of Oklahoma's crude oil and natural gas.

The Petroleum Association of Wyoming (PAW) is Wyoming's largest and oldest oil and gas organization dedicated to the betterment of the state's oil and gas industry and public welfare. PAW members include companies representing every component of this industry and develop are responsible for producing a majority of these resources in the state.

The Utah Petroleum Association (UPA) is a statewide oil and gas trade association established in 1958 representing companies involved in all aspects of Utah's oil and gas industry. UPA members range from independent producers, to midstream and service providers, to major oil and natural gas companies widely recognized as industry leaders. UPA represents Utah's oil and gas workers, and celebrates their role in delivering safe, clean and local energy that drives Utahns and our way of life.