



THE UNITED STATES
CONFERENCE OF MAYORS



November 7, 2022

Mr. Barry Breen
Acting Assistant Administrator
Office of Land and Emergency Management
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OLEM-2019-0341

Dear Acting Assistant Administrator Breen:

On behalf of the nation's mayors, cities, and counties, we appreciate the opportunity to provide comments on the U.S. Environmental Protection Agency's (EPA) Proposed Rule - *Comprehensive Environmental Response, Compensation, and Liability Act Hazardous Substances: Designation of Perfluorooctanoic Acid and Perfluorooctanesulfonic Acid*. **Although the rule has been deemed economically significant by the Office of Management and Budget (OMB), sufficient analysis has not been performed by EPA. Due to this lack of analysis, which we strongly believe would have triggered the Federalism Consultation requirements of Executive Order 13132: Federalism, we urge the Agency to withdraw the Proposed Rule until such analysis has been conducted.**

Our organizations represent the nation's 3,069 counties, 19,000 cities and the mayors of the 1,400 largest cities throughout the United States. The health, well-being and safety of residents and communities are of utmost importance to local leaders. For the past several years, all levels of government, including the counties and cities we represent, have become increasingly concerned about drinking water contamination from Per- and Polyfluoroalkyl Substances (PFAS). Private industry created these chemicals for use in a variety of industries and applications around the globe, which have made their way into drinking water systems across the country, particularly in communities near military installations or industrial sites. The presence of these human-made chemicals has spurred action by state and local governments across the country.

Local leaders have a substantial interest in this rulemaking. First, local governments serve as co-regulators in implementing and enforcing many federal laws with states, including Safe Drinking Water Act and Clean Water Act programs. Second, local governments manage solid waste facilities and landfills, airports, and other public service activities that will likely be impacted through unfunded mandates, additional cost burdens and legal liabilities due to the Proposed Rule.

The Proposed Rule will have severe economic impacts and require significant modifications of public works operations in every community in America to implement and comply, and yet the Agency has not accounted for the cascading regulatory burdens the Proposed Rule will trigger.

Our concerns with both the regulatory process and the potential impacts to municipal services are detailed below. We urge EPA to address these concerns before proceeding with this rulemaking.

Overarching Concerns with Regulatory Process

While we share the concern about these chemicals in our water systems, we are concerned that EPA has not examined the impacts around implementation and compliance of the Proposed Rule. Given the far-reaching impacts the rulemaking will have on many municipal operations, coupled with the lack of meaningful consultation, we believe the Agency is moving too fast and without firm knowledge of the consequences for local governments, communities and residents.

1. Lack of Economic and Regulatory Impact Analysis

EPA failed to consider the economic impacts of the proposed rule that OMB designated as a rule of economic significance. The lack of consideration of and reporting on the direct and indirect costs and benefits, and the resulting lack of public review and comment indicates that EPA is rushing the process when more consultation is needed with the regulated and co-regulating communities.

Given the scope and magnitude of impacts that will occur when local governments are required to administer, implement and comply with a final version of this Proposed Rule, and the likelihood of additional legal implications for local governments, we respectfully request that EPA withdraw the Proposed Rule and conduct a complete cost-benefit and public health analysis. The analysis should consider the impact the Proposed Rule will have on local government administration, operations and budgets for drinking water, wastewater, airport firefighting and landfill facilities, and the new financial burdens that will be imposed on households and communities. Only after completing and transparently reporting this analysis should the Agency move forward with developing a rule based on those findings. Further, the Agency should also follow the proper procedures as outlined in the Administrative Procedure Act, including the Federalism Consultation process, which would have included a briefing and the opportunity to provide comments before the rule is proposed.

2. Lack of Federalism Consultation Process

Under Executive Order 13132: Federalism, federal agencies must consult with state and local government officials early (even before a rule is proposed) and often in the rulemaking process when it will directly impact these entities. Due to the complicated nature of this rulemaking and the responsibilities and burdens that will fall to local governments in its implementation, our organizations asked for a transparent and straightforward rulemaking process, including a meaningful and engaging Federalism Consultation process, to help ensure that any final regulation is effective, implementable, practicable and cost-efficient. As co-regulators and intergovernmental partners, it is essential that state and local governments clearly understand the broad and substantial impacts the Proposed Rule will have on local communities, residents and resources.

The lack of an economic and regulatory analysis is even more concerning given EPA's failure to conduct a Federalism Consultation, despite the clear economic significance of the rule and its implications for state and local governments. The absence of an economic impact analysis and the lack of a Federalism Consultation process are fatal flaws that leave the Proposed Rule deficient in adhering to requirements the EPA must satisfy to meet a legal threshold of

acceptability. We urge EPA to adhere to the Executive Order, as well as the Agency's own implementing guidance.

Potential Impacts of the Proposed Rule to Municipal Operations

Designating Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as a hazardous waste triggers a number of new responsibilities on local governments to manage the substance in different media, as well as potentially opening local governments up to legal liability. These broad impacts have not been examined by EPA, but we offer a few examples below.

1. Drinking Water

Drinking water treatment plants, wastewater treatment facilities and solid waste landfills and composting facilities neither manufacture nor use PFAS; instead, they are passive receivers of media containing PFAS—compounds that are ubiquitous in the stream of commerce and environment. The Proposed Rule subjects these facilities to possible third-party lawsuits and future liability under CERCLA.

Moreover, once a drinking water facility detects PFOS or PFOA in their system, it will face additional expenses necessary to purchase and install energy-intensive technology (i.e., Granulated Activated Carbon, Reverse Osmosis, or Ionization) to remove the substances. Most local governments do not have available resources to retrofit facilities or take on additional treatment costs. As such, this expense will ultimately be borne by ratepayers in the community, in turn exacerbating the financial burden that fixed- and low-income households bear regarding the percentage of their income paid toward their water bills.

2. Wastewater Treatment

Wastewater treatment plants, like drinking water facilities, are passive receivers of PFAS and do not cause or contribute to contamination. Nevertheless, if PFOS or PFOA are detected at a wastewater treatment plant, there are few options available to these plants for treatment or disposal. Instead, wastewater treatment plants will have to modify or curtail their operation. For example, designating PFOS or PFOA as a hazardous substance will have a chilling effect on beneficial reuse, a policy approach that EPA has embraced in the past, but might no longer be feasible for a wastewater treatment plant under this Proposed Rule. EPA should consider how limits on biosolids land application will curtail the overall reuse and recycle preferences for responsible end of life management.

The current management options available for wastewater treatment plants include using sewage sludge to create energy, sludge treatment to form biosolids and for land application, disposing in landfills, and incineration. Each of these options are currently supported by regulatory and guidance policy that takes into account the cost and health/environment risks.

- A. Treated biosolids are land applied as a natural fertilizer and to amend soils. Many homeowners and rental unit managers purchase compost that is mixed with treated biosolids for home use on lawns and gardens. If PFOS or PFOA is found in the compost or biosolids fertilizers, landowners and other users would risk becoming subject to CERCLA's liability or clean up requirements. If the more than 8 million tons of sludge that is treated to biosolids specification is no longer allowed to be used, or the legal risk of using such beneficial reuse materials is too great, where will the materials be sent, at what cost, over what roads to what facility? EPA has not considered if there is enough "permitted" capacity to receive the sludge or biosolids.

- B. Sewage sludge that is not treated to biosolids specifications is normally disposed of in Subtitle D landfills. If EPA designates PFOS and PFOA as a hazardous substance, municipal and private landfill operators will reconsider if accepting this sludge remains a viable option when faced with future liability concerns. The reluctance of municipal solid waste landfill operators to accept sludge with PFOS and PFOA will force communities to seek hazardous waste Subtitle C landfills. Such actions would require expensive long-haul sludge transport to costly Subtitle C landfills.

EPA has not considered the availability of Subtitle C landfill capacity that can accommodate the 8 million tons of “hazardous” (by virtue of PFOS and PFOA being detected) sludge. Further, EPA has not considered how this impact will contradict other national policies to reduce greenhouse gas emissions released from the transport of sludge.

In putting forth this Proposed Rule, EPA appears to not consider or suggest how communities can manage PFOS- and PFOA-contaminated waste streams that would normally be handled by recycling and reuse.

3. Landfills and Solid Waste Facilities

Similar to drinking water and wastewater treatment facilities, landfills are passive receivers of PFAS. The role of landfills is twofold - as receivers of sewage sludge from wastewater treatment plants, as described above, and through the solid waste stream.

Although sales of products containing PFOA and PFOS have been discontinued in the U.S. market for more than a decade, many products containing PFAS remain in circulation and end up in landfills when they are thrown away by residential and commercial consumers. Once PFAS-containing items, such as carpeting, cookware and water-resistant clothing, are in landfills, PFAS accumulates in landfill leachate and is difficult to remove. The Proposed Rule would subject landfills to liability concerns and, as a result, change the calculation for landfills in terms of deciding which products to accept. Any costs associated handling or treating PFAS in leachate would be passed along to communities and its residents and businesses. We urge EPA to consider the full and complex nature of this Proposed Rule and the unintended consequences it would have on local government and these interdependent municipal services.

4. Airport Firefighting Operations

Only until recently, PFAS chemicals were required in firefighting foams used at airports to meet federal performance standards for extinguishing agents. While the Federal Aviation Administration is updating its standards to allow for a non-fluorinated option for airports, runoff from these facilities have contaminated drinking water and soils, and further opens local governments up to legal liabilities when PFAS is detected, particularly from municipal airports.

Communities with or located near military installations are similarly at risk for legal liability under this Proposed Rule, as these same firefighting foams have been used for training exercises at military bases. While the U.S. Department of Defense (DOD) is phasing out its use of the foam in training exercises and is investing in research and development of a PFAS-free firefighting foams, communities may be found liable to address contamination originating from DOD facilities.

While we applaud the federal effort to develop new firefighting foam, EPA has failed to consider the cost burdens on local governments in the interim, including the costs and available technology for cleaning up these sites, as well as the costs of having to purchase new equipment.

Additional Considerations

1. Enforcement

EPA has indicated that it intends to use enforcement discretion to minimize the unintended consequences of the proposed designation, but has not provided information on what those consequences would be nor has it clearly stated its policy to avoid them. Without this information, local governments cannot assess the potential impacts on their operations or budgets. Additionally, with all that is at stake for local governments with this rulemaking, local leaders should not be asked to simply trust that EPA will not take enforcement actions against local governments without seeing the Agency's commitment in writing. Furthermore, any Agency policy could change with each new Administration.

Moreover, EPA's use of its enforcement discretion cannot shield parties from private litigation under CERCLA. Regardless of EPA's use of enforcement discretion in initiating remedial actions, CERCLA designation would result in third-party contribution and cost recovery claims, likely leading to substantial litigation costs for public service providers and the communities they serve.

2. Local governments fund the majority of water infrastructure investments

Local governments fund 98 percent of all capital, operations and maintenance investment in drinking water and wastewater infrastructure in the United States, primarily through user fees and bonds. Many American households currently face a significant and widespread financial burden when it comes to water bills. This burden falls disproportionately on fixed- and low-income households who pay a significant portion of their income toward water. With the Administration's focus on environmental justice, water rate affordability must be a part of consideration of this Proposed Rule.

The most recent U.S. Census data shows that local governments spent over \$144 billion on water and wastewater in 2020 alone, and, from 1993-2019, spent over \$2.38 trillion, not adjusted for inflation. Even with this significant investment by and commitment from local governments, many communities struggle to upgrade their drinking water and wastewater systems.

During this same time period, the federal government only appropriated approximately \$2 billion annually for both the Clean Water and Drinking Water State Revolving Loan Fund (SRF) programs. The SRF programs provide grants to states which, in turn, provide local governments with loans that must be repaid.

We are pleased that the bipartisan Infrastructure Investment and Jobs Act (IIJA) provided record-high levels of funding for our nation's water infrastructure, including \$10 billion over five years for grants to address PFAS and other emerging contaminants in drinking water. Yet, we all know this level of funding will not be sufficient for local governments to meet the requirements of this Proposed Rule and/or other PFAS-related rules that the Agency is considering.

At a minimum, it must be acknowledged that the timelines for the availability of funding under IIJA, which is through FY26, and the likely compliance dates for this rulemaking do not align. Therefore, it is uncertain if local governments will be able to use IIJA funding specifically for compliance with this forthcoming rule, as well as future rulemakings pertaining to PFAS.

Conclusion

In conclusion, as intergovernmental partners, local leaders are dedicated to addressing concerns related to PFAS exposure and protecting the health and well-being of residents. We urge the EPA to work with our organizations and our members to determine the best way to address PFAS in the environment.

We urge EPA and other federal agencies to continue making progress on a comprehensive, nationwide action plan for addressing PFAS contamination, including identifying both short-term solutions for addressing these chemicals and long-term strategies that will help local governments provide clean and safe drinking water to residents.

EPA has stated that as a subsequent step to finalizing this rulemaking, the Agency will begin a new rulemaking process to designate other PFAS chemicals as CERCLA hazardous substances. **It is incumbent on EPA to follow the proper rulemaking process for this Proposed Rule and future rulemakings, including a meaningful and transparent stakeholder engagement through the Federalism Consultation process.**


Considering the unprecedented nature of the Proposed Rule, as well as the significant ramifications for local governments, the Agency should have prioritized the completion of economic and regulatory impact analyses, a comprehensive and science-based evaluation, and meaningful stakeholder outreach. Instead, EPA has done the opposite. **We urge EPA to withdraw the Proposed Rule and to conduct the appropriate and required analysis and to consult with our organizations.**

On behalf of the nation's mayors, cities, and counties, we thank you for considering these requests and we look forward to working with the agency to ensure any final rule is practical, implementable and cost-effective at the local level as we continue to strive to provide clean water to our residents. If you have any questions, please contact our staff: Judy Sheahan (USCM) at 202-861-6775 or jsheahan@usmayors.org; Carolyn Berndt (NLC) at 202-626-3101 or Berndt@nlc.org; or Sarah Gimont (NACo) at 202-942-4254 or sgimont@naco.org.

Sincerely,



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