



June 8, 2022

The Honorable Shalanda Young
Director
Office of Management and Budget
Washington, DC 20503

Re: RIN: 2050-AH09 (Designating PFOA and PFOS as CERCLA Hazardous Substances)

Dear Director Young:

We are concerned about the potential high regulatory cost burden associated with the private party cleanup costs that would be incurred at Superfund sites if the Environmental Protection Agency (EPA) were to designate Perfluorooctanoic acid (PFOA) and Perfluorooctane sulfonic acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). We request that the Office of Management and Budget (OMB) indicate that EPA's proposed rule, "Designating PFOA and PFOS as CERCLA Hazardous Substances" is "economically significant" consistent with Executive Order (EO) 12866 and require EPA to perform the requisite regulatory impact analysis as outlined in OMB Circular A-4 before proceeding with any proposed rulemaking. We also request OMB to designate the rulemaking as a "major rule" under the Congressional Review Act (CRA) and confirm to Congress that the rule would impose unfunded mandates under the Unfunded Mandates Reform Act.

Attached to this letter is a report of the estimated private party cleanup costs for designating PFOA and PFOS as hazardous substances under CERCLA. The report offers the following key findings for your consideration:

- Private party compliance costs for this rulemaking are estimated to be between \$11 billion and \$22 billion.
- Corresponding annualized private party PFOS/ PFOA cleanup costs at non-federal sites are estimated to be between \$700 million to \$800 million.
- These annualized cost estimates greatly exceed the \$100 million threshold requiring EPA to prepare a full regulatory impact analysis consistent with EO 12866 and the fulfillment of additional statutory requirements under the Congressional Review Act and Unfunded Mandates Reform Act.
- The rulemaking cost estimates are expected to be much higher as private party costs at Superfund sites are just one element of the total costs borne by communities from a proposed hazardous substance designation.

Our analysis and findings—developed with the help of a consulting firm with deep expertise in economic and environmental modeling—were based on existing, publicly available

EPA and state sources. A significant and detailed effort was undertaken with publicly available information in a solid scientific framework to ensure a sound approach and reproducible results. This work centered on three assumptions: 1) the numbers of affected National Priorities List sites; 2) the typical full cost of each CERCLA cleanup phase; and 3) the incremental costs that each Potentially Responsible Party will incur to address PFOA and PFOS contamination at each cleanup phase.

EO 12866 calls for thorough and careful cost-benefit evaluations of proposed regulations should they “have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”¹ OMB also has the obligation under the CRA to designate as a “major rule” any agency rulemaking that would likely result in “an annual effect on the economy of \$100 million or more.” OMB should also report to Congress under the Unfunded Mandate Review Act that the rule would impose expenditures by the private sector of \$100 million or more. The intent of these statutory and Executive Order provisions is to ensure regulatory agencies fully consider and understand not only the direct benefits and costs of a regulation, but also its implications on American society, individual industries, innovation, investment, and the broader economy.

In addition, we respectfully note that the proposed action is a significant regulatory action under E.O. 12866 for a second reason: the proposed action would likely result in a rule that would “[r]aise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”² EPA has never directly designated a substance as hazardous under CERCLA section 102(a) (42 U.S.C. § 9602(a)) before. To do so, EPA must interpret and implement the first sentence of section 102(a), which provides: “The Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances, in addition to those referred to in section 9601(14) of this title, 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, and shall promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to section 9603 of this title.” The legal standard for direct designation that EPA chooses to set forth in its proposed rule would have implications for all other substances that could be deemed potential candidates for direct designation under CERCLA in the future. Moreover, should EPA select the wrong standard or otherwise fail to adequately justify and explain its action, EPA would face serious litigation risk that might frustrate or otherwise impede the achievement of the purposes of the proposed action. Also, of course, the policy issues arising from a proposed CERCLA designation would be novel and substantial.

The proposed action also warrants independent consideration under the Unfunded Mandates Reform Act (UMRA), given its likely significant impacts on local governments that would face new liabilities and burdens in the event of designation.

¹ <https://www.epa.gov/laws-regulations/summary-executive-order-12866-regulatory-planning-and-review>; <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

² See E.O. 12866 sec. 3(f)(4).

There are effective mechanisms available to EPA to accelerate cleanup on PFOA and PFOS. CERCLA is not one of them. We underscored our concerns in a separate [coalition letter to EPA dated May 11, 2021](#).

We urge you to designate the proposed rulemaking as “economically significant” to ensure EPA prepares and appropriately considers the costs of this proposal. We ask that the information contained in the report assist OMB in their determination as you further review EPA’s proposed CERCLA designation. We stand ready to assist you.

Sincerely,

A handwritten signature in black ink, appearing to read "Chuck Chaitovitz". The signature is written in a cursive style with a large, sweeping flourish at the end.

Chuck Chaitovitz
Vice President
Environmental Affairs and Sustainability
U.S. Chamber of Commerce

cc: Michael Regan, Carlton Waterhouse, Victoria Arroyo