

U.S. Environmental Protection Agency Proposal to Designate POFA/PFOS as CERCLA Hazardous Substances: American Farm Bureau Comments



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The American Farm Bureau (“AFB”) submitted comments to the United States Environmental Protection Agency (“EPA”) addressing its proposal to designate two of the per- and polyfluoroalkyl substances (“PFAS”) as Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) hazardous substances. See EPA-HQ-OLEM-2019-0341; FRL-7204-02-OLEM.

EPA is proposing to designate Perfluorooctanoic Acid (“PFOA”) and Perfluorooctanesulfonic Acid (“PFOS”) (including their salts and structural isomers) as hazardous substances.

AFB describes itself as the Voice of Agriculture and states it includes:

... farm and ranch families working together to build a sustainable future of safe and abundant food, fiber and renewable fuel for our nation and the world.

PFAS are a group of man-made chemicals that have been used in various industrial applications and consumer products for a number of years. Properties of these chemicals include resistance to heat, water, and oil. They have been described as persistent in the environment and resist degradation. Potential human exposure to PFAS includes pathways through drinking water, air, or food.

A focus of AFB’s comments is concern that the proposed designation of PFOA and PFOS as CERCLA hazardous substances:

... overlooks the consequences on farmers and ranchers as the owners of contaminated property.

As a result, AFB requests that EPA withdraw the proposed rule and instead:

... continue to expand as appropriate the use of its existing CERCLA removal and Safe Drinking Water Act authorities to address acute circumstances of PFOA and PFOS contamination in soil and groundwater.

AFB also requests that EPA “be clear” in its continued support of farmers and ranchers using biosolids beneficially on their lands.

Arguments/points put forth by the AFB comments include:

- Supports the protection and restoration of land and groundwater
- PFOA and PFOS have come onto agricultural land through no knowledge or fault of farmers or ranchers

- EPA’s proposal to use its CERCLA remedial authority is the wrong tool proposed to be used at the wrong time
- Designating PFOA and PFOS as hazardous substances creates liability risk for farmers and ranchers, does not compensate them for their economic losses, and threatens the long-used application of biosolids
- CERCLA has no ability to compensate or protect loss of agricultural land value because it does not provide a claim for economic damage recovery
- EPA Cannot Offer Protection from CERCLA Remedial Liability to Farmers and Ranchers as Landowners
- Biosolids are a valuable low-cost fertilizer and there is not a good alternative to land application
- EPA’s proposal to use its CERCLA remedial authority does not include a careful analysis of how it compares with other existing authorities to address PFOA and PFOS contamination
- The proposal fails to consider the additional costs and burdens due to the existing technical challenges
- The lack of a complete approved suite of analytical methods hampers the ability to understand the potential extent of liability and conduct an effective cleanup
- The lack of approved treatment and disposal methods limits the ability to plan, conduct and complete remediation
- EPA’s current draft drinking water health advisory limit and its uncertain status further complicate implementation of cleanup
- Other Technical Failings of the Proposed Rule
- The proposal cannot support its claim that it will hold PFOA/PFOS manufacturer’s liable
- The proposal does not address the profound challenges and unintended consequences of applying CERCLA remedial authority to a contaminant that is found everywhere
- EPA simply asserts cleanups will be faster but does not provide support as to why using remedial authority will be faster than continuing to use its CERCLA removal authority and other authorities
- Cost recovery has not been demonstrated to be a significant need
- Required release reporting’s value has been overstated as it is unlikely EPA will receive many PFOA or PFOS release reports
- The proposal provides no support for its claim that CERCLA will encourage better management of PFOA and PFOS
- The proposal does not explain the limitations of EPA’s enforcement discretion
- The proposal does not explain the real value of the federal property disclosure requirement of CERCLA 120(h)
- The proposal identifies 5 broad categories of parties impacted, but neglects to identify the owners of property impacted by PFOA/PFOS
- The proposal merely cites “meaningful” public health benefits without identifying what those benefits are and how they would be facilitated by the CERCLA designation
- EPA claims designation will have only limited direct economic impacts
- The proposal incorrectly claims that cleanup costs and liability management are indirect effects
- The Proposals Rationale Certifies that the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA) do not apply

A copy of the AFB comments can be downloaded [here](#).