

UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

*DESIGNATION OF PERFLUOROOCCTANOIC ACID (PFOA) AND
PERFLUOROCTANESULFONIC ACID (PFOS) AS CERCLA HAZARDOUS SUBSTANCES
(ACTION: PROPOSED RULE)*

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

**COMMENTS AND REQUEST OF THE
ELECTRIC POWER SUPPLY ASSOCIATION**

November 7, 2022

These comments are presented by the Electric Power Supply Association (“EPSA”)¹ in response to the August 26, 2022 Notice of Proposed Rulemaking (“NOPR”) issued by the U.S. Environmental Protection Agency (“EPA”).² Herein EPSA addresses the agency’s proposal to designate two of the most widely used per- and polyfluoroalkyl substances (PFAS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund. The proposal applies to perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers.

The operational/generating processes of power suppliers do not typically use or create PFOA or PFOS. However, our members maintain firefighting equipment, some of which includes firefighting aqueous film forming foam (AFFF) solutions, to respond to fire emergencies. PFOA and PFOS are often present in AFFF, whether as an intended ingredient or a side product in manufacturing AFFF. Fire protection and prevention programs are not

¹ EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

² Environmental Protection Agency, *Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances*, Notice of Proposed Rule, Docket EPA-HQ-OLEM-2019-0341. Federal Register Publication September 6, 2022, establishing 60-day public comment period ending November 7, 2022; Vo. 87, No. 171, pp 54415-54442,

only best management practices, they are required by the Occupational Safety and Health Administration (OSHA) and other parties, including the equipment manufacturer, local fire departments, and often by a local permitting agency.

In addition to using AFFF in a firefighting emergency, where applicable, our members must, as required by OSHA and as a best management practice, train their employees and test their equipment, including AFFF, to ensure proper functioning in the event of a fire emergency. Releases of PFOA and/or PFOS in reportable quantities may be a by-product of the proper application of AFFF, whether in the event of a fire or training/testing. Proper application of AFFF should not trigger release reporting and remediation obligations. Very few products have been so essential to life safety by across the nation.

EPSA members are not indifferent to the potential for contaminants to leach to groundwater and for the potential for groundwater ultimately to be used as a drinking water resource. While municipal water supplies have detected PFOA and PFOS, evidence suggests that these substances are ubiquitous due to, among other things, their common household every day uses. Municipal water supplies receive treatment to reduce these and other contaminants to acceptable concentrations. Treatment of municipal water supplies is a cost paid by the taxpayers as part of water usage fees, which is appropriate given that millions of Americans use products containing PFOA and PFOS for daily activities.

Despite the fact that power suppliers' only meaningful link to PFOA and PFAS is AFFF for life preservation and safety, power suppliers may be drawn into protracted litigation over PFOA and PFOS based solely on the use of AFFF in compliance with OSHA and other regulations or mandates. Additionally, power suppliers could be required to pay for expensive and resource intensive remediation projects that never see a finish line because of the extraordinarily low action levels for PFOA and PFOS. As a strict liability statutory scheme,

CERCLA does not distinguish that an entity was using AFFF for the salutary purpose of protecting life safety.

But CERCLA should differentiate this type of use. Facilities that deploy AFFF are doing so to protect life safety in limited circumstances. Occupational safety measures in the workplace separate working conditions in the United States from working conditions in numerous other countries. Regulatory management of PFOA and PFOS should thus be risk-based rather than strict liability. Penalizing those who use AFFF by applying a strict liability remedial scheme is unjust and contradicts our nation's commitment to workplace safety.

Our Request

EPSA proposes that releases associated with the proper application of AFFF, whether as a result of actual firefighting or emergency preparedness/testing/training, be exempt from CERCLA's release reporting and cleanup requirements. We believe that USEPA can and should exempt PFOA and PFOS releases resulting from properly applied AFFF from its designation. This should be incorporated into the designation or declared a permitted release (perhaps with a companion permit by rule). It is completely reasonable for the public to continue to fund removing unacceptable concentrations of contaminants in drinking water (which we, the public, already do), given the benefits of AFFF. Thank you for your consideration.

Respectfully submitted,

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