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1200 Pennsylvania Avenue NW,  
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**Re: Docket ID No. EPA-HQ-OLEM -2019-0341**  
**Designation of Perfluorooctanoic (PFOA and Perfluorooctanesulfonic Acid (PFOS ) as CERCLA Hazardous Substances, Proposed Rule, 87 Fed. Reg. 54,415 (Sept. 6, 2022)**

The American Farm Bureau Federation appreciates the opportunity to submit these comments to the U.S. Environmental Protection Agency (“EPA”) in response to its proposed rule to designate Perfluorooctanoic (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA “hazardous substances.” *See* 87 Fed. Reg. 54,415 (Sept. 6, 2022).

The American Farm Bureau Federation is the Voice of Agriculture®. We are 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. The livelihood of farmers and ranchers depends on healthy soil and groundwater. We support EPA’s underlying goal of addressing widespread contamination of the environment caused by historic use of PFOA and PFOS. Unfortunately, EPA’s proposed designation of PFOA and PFOS as CERCLA hazardous substances overlooks the consequences on farmers and ranchers as the owners of contaminated property.

EPA should withdraw this proposed rule as urged by AFBF and many other organizations in a letter dated October 19, 2022 for the reasons explained in detail in that letter and in these comments. Instead of listing PFOA and PFOS as a “hazardous substance,” EPA should 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. EPA retains complete authority and enforcement discretion in the use of these existing authorities. EPA should also be clear in its continued support of farmers and ranchers using biosolids beneficially on their lands. Further, EPA should continue to conduct its own research, and support research conducted by others to develop and enhance treatment and destruction technologies as well as reliable analytical methods as outlined in EPA’s PFAS Roadmap<sup>1</sup>.

**AFBF supports the protection and restoration of land and groundwater**

Farmers and ranchers support the protection and restoration of land and groundwater and the efforts that EPA is making in the PFAS Roadmap to address the impacts of the historic use of PFAS chemicals. The livelihood of farmers and ranchers depends on healthy soil and

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<sup>1</sup> PFAS Strategic Roadmap: EPA’s Commitment to Action 2021- 2024, October 2021 (PFAS Roadmap).

groundwater. American's families and the rest of the world rely on food, fuel and fiber produced by American farmers and ranchers. Farmers and ranchers have not knowingly used PFOA and PFOS in their operations. Farmers and ranchers are in no position technically, economically or practically to address the impact of the presence of PFAS chemicals and especially PFOA and PFOS which continue to be found in virtually any place where soil, surface and groundwater has been tested.<sup>2</sup>

EPA's proposed rulemaking and administrative record fails to fully consider the appropriateness of using CERCLA remedial authority to address the apparent ubiquitous presence of PFAS contamination and how the application of CERCLA's remedial authority imposing strict liability on the largest landowning segment of the economy—farmers and ranchers. PFOA and PFOS poses more technical challenges than two other widely found contaminants that have been designated as a CERCLA "hazardous material," PCBs and dioxin. PFAS chemicals pose a greater challenge because these chemicals are more mobile so in addition to contaminating soil, PFAS chemicals contaminate surface and groundwater to much greater degree than PCBs or dioxin.

### **PFOA and PFOS have come onto agricultural land through no knowledge or fault of farmers or ranchers**

PFOA and PFOS are believed to come onto agricultural land through a few different mechanisms. First, these chemicals can be found in high quantities in firefighting foam that is used in and around airports and Department of Defense (DoD) training facilities. These chemicals have been known to travel naturally through the environment—most notably through ground and surface waters—and can eventually be deposited onto farm fields. Proximity to one of these areas can lead to elevated levels of PFAS.

Another way PFAS chemicals are delivered to farms is through the use of biosolids. Biosolids are commonly applied to farm fields as an alternative to fertilizer. A farmer accepts biosolids from a wastewater treatment facility to land apply onto their property. Biosolids are regulated at the federal, state, and local level to ensure protection of public health and the environment. For decades, the EPA has encouraged and supported farmer's beneficial use of biosolids. Unfortunately, more recently, we have learned that biosolids are contributing to the spread of PFAS on agricultural lands. This is a major concern for our members and these comments will elaborate on it further.

Pesticide holding containers have also been identified as a potential source of PFAS on farms. Recent EPA data indicates that plastic containers made of fluorinated high-density polyethylene (HDPE) are likely to leach PFAS into pesticides and other liquid products that are stored in them. EPA's review also suggests that the amount of PFAS that migrates into liquid products increases with storage time.

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<sup>2</sup>See e.g., 87 Fed. Reg. 54415, September 6, 2022 (Proposed Rule preamble) at 55,426 – 55,428. See also, study cited in footnote 39.

Regardless of how PFAS ultimately arrives onto a farm field, it is undeniable that the fault does not fall on our nation's farmers and ranchers. It is worth acknowledging, yet again, that farmers do not use PFAS chemicals in any part of their operations and are innocent receivers.

**EPA's proposal to use its CERCLA remedial authority is the wrong tool proposed to be used at the wrong time**

EPA's proposal to exercise its never before used CERCLA remedial authority to designate PFOA and PFOS as CERCLA hazardous substances to address the ubiquitous contamination of the environment, including agricultural lands, is the wrong tool to deploy at this time.

**A. 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**

**i. CERCLA has no ability to compensate or protect loss of agricultural land value because it does not provide a claim for economic damage recovery**

CERCLA is not a tool that addresses the potential loss of use and value to farm and ranchland from PFAS contamination. Instead, CERCLA causes of action only provide for clean-up costs incurred in compliance with the National Contingency Plan. However, farms and ranches are unlikely to ever receive the benefit of a clean-up, meaning a CERCLA designation will reduce agricultural land value and use potential without providing any corresponding relief. Ironically, a listing may hinder regulators and legislators from actually addressing the issue of contamination because of a common misunderstanding of how CERCLA operates.

Farmers and ranchers have not knowingly contributed to the presence of PFOA or PFOS chemicals on their lands. Yet, the threat of contamination can diminish or even destroy the value of the agricultural land and production. There are an increasing number of reports illustrating how the contamination of the soil and groundwater on farms with PFOA and PFOS has devastated farming operations. These reports highlight the commonly understood notion that farmer's livelihoods are completely reliant on the health of their land.

As the largest landowning sector of the economy, farmers and ranchers have experienced more potential damage to their livelihood than any other sector of the economy and unlike other sectors are not in a position to pass along higher costs. As explained below, CERCLA's strict liability scheme can impose potential liability on farmers or ranchers as the owners of contaminated property, but it does not provide a way for farmers and ranchers to recover the value of their economic losses created by the contamination that they did not "cause."

One devastating example of the impact that PFAS contamination can have on farmers is from the Grostic Cattle Company in Brighton, Michigan. The company, operated by Jason Grostic and his family, is a 300-acre beef farm approximately 50 miles northwest of Detroit. The Grostic family sold beef from their 120-head herd primarily at farmers markets, private purchases of freezer

beef, and to local businesses and schools.<sup>3</sup> Because the farm was operated using minimal inputs, Jason did not purchase conventional fertilizer for his pastures, hay, or silage, but instead fertilized with manure from his own cattle and from treated biosolids from a local wastewater treatment facility, regulated and tested by the State of Michigan through its biosolids rules.<sup>4</sup>

The Wixom Wastewater Treatment Plant, the wastewater facility supplying Grostic Cattle Company's biosolids, tested its biosolids at Michigan PFAS Action Response Team's (MPART) direction and found that the biosolids contained PFOS concentrations as high as 2,150 parts per billion, likely from a chrome plating operation in the city. The Wixom facility was instructed to halt land application of biosolids. However, because of the high PFAS sampling results, the MPART team began testing the sites that had accepted biosolids from Wixom, including the Grostic Cattle Company's land.<sup>5</sup>

With the voluntary cooperation of the Grostic family, MPART contractors sampled surface water, tile drain outlets, nested groundwater monitoring wells, as well as soil, forage, haylage, and silage from Jason's farm. They additionally tested four nearby residential wells. The drinking water samples tested were non-detect for any PFAS compounds. Two of the shallow groundwater monitoring wells contained detectable levels of PFAS, but the concentration was below Michigan's drinking water criteria.<sup>6</sup> 12 of the 13 surface water sites, consisting of standing water from Grostic Cattle Company's fields along with four small ponds on the property, had PFOS levels above surface water criteria, the highest result with a PFOS concentration of 533 parts per trillion (ppt).<sup>7</sup>

MPART advised Jason that because crop and soil samples had elevated levels of PFAS above comparable background levels, they should have the cattle tested. Samples were sent to the USDA laboratory in St. Louis, MO. PFOS concentrations in the meat samples, sirloin steaks, chuck and English roasts contained PFOS at concentrations between 0.98 and 2.48 ppb.

The MPART team and the Governor's office issued a seizure order for all cattle and products from the farm.<sup>8</sup> The family could not move them or sell any of the products. The State of Michigan issued a press release and contacted Grostic Cattle Company customers directly,

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<sup>3</sup> 2022. Grostic Cattle Company. Retrieved from: <https://www.facebook.com/pages/category/Agriculture/Grostic-Cattle-Company-917482395307701/>. See also

<https://www.dtnpf.com/agriculture/web/ag/livestock/article/2022/05/06/michigan-farm-cautionary-tale-pfas>

<sup>4</sup> 2022. Michigan Administrative Rules. Part 24: Land Application of Biosolids. R 323.2401 to R 323.2418. Retrieved from:

<https://ars.apps.lara.state.mi.us/AdminCode/DownloadAdminCodeFile?FileName=R%20323.2401%20to%20R%20323.2418.pdf&ReturnHTML=True>.

<sup>5</sup> 2022. Michigan PFAS Action Response Team. Wixom WWTP Biosolids Fields Area of Interest (Wixom, Livingston County). Retrieved from: <https://www.michigan.gov/pfasresponse/investigations/sites-aoi/livingston-county/wixom-wwtp-biosolids-fields-area-of-interest>.

<sup>6</sup> 2020. Michigan PFAS Action Response Team. Maximum Contaminant Levels. Retrieved from: <https://www.michigan.gov/pfasresponse/drinking-water/mcl>.

<sup>7</sup> 2021. Michigan Department of Environment, Great Lakes, and Energy. Statewide Wastewater Treatment Plant and Biosolids PFAS Study. Retrieved from: <https://www.michigan.gov/-/media/Project/Websites/egle/Documents/Programs/WRD/Biosolids/PFAS-Biosolids-Field-Reports-Summary-WRD.pdf?rev=46ca463cf970481dbc86162c002cac12>.

<sup>8</sup> Personal communication with Jason Grostic, January 27, 2022.

advising them they could return the beef for a refund, and instructing the public that although there is no state or federal standard for PFAS in food, an increased exposure to PFAS compounds could cause health impacts.<sup>9</sup>

Jason Grostic and his family were devastated. Jason spoke with his state and national Representatives, but for months after the seizure he and his family were trapped in limbo. Cattle and beef couldn't be sold and the forage and crops on the farm appeared to be one of the sources of the cattle's PFAS exposure, so the Grostic family was instructed to try not to feed the cattle from their own stored hay, grazing, and silage. This meant the farm began bleeding money as they had no revenue and skyrocketing feed costs, while their lender who held the notes on additional land and equipment the Grostic family had recently purchased to expand the farm began pressuring the Grostics to come up with some guarantee of their ability to repay those loans. Legislators were unable to bring appropriations bills to the floor that might have provided the farm with financial assistance during this time.

Jason provided an estimate of the total costs of losing access to his land for grazing and capacity to grow feed for his herd, building manure storage, disposing of the contaminated feed, and an estimate for laying concrete to convert the farm to a feed lot and purchase feed and hay for them. The total ran to more than \$10 million<sup>10</sup> and the State of Michigan had no authorization to provide him additional financial assistance, nor does the State have statutes providing for indemnification of the loss of livestock or farmland due to chemical contamination. Michigan State University also sought funding to study the situation on the Grostic Farm but was unable to secure enough research funding to provide the Grostics any assistance. By June Jason was forced to sell his farming equipment to keep his family and the cattle supported.<sup>11</sup>

## **ii. EPA Cannot Offer Protection from CERCLA Remedial Liability to Farmers and Ranchers as Landowners**

Under CERCLA's remedial authority, EPA is unable to limit the focus of cleanup obligations from historic PFOA and PFOS use on particular parties. The designation of PFOA and PFOS as CERCLA "hazardous substances" will automatically trigger the imposition of CERCLA liability on four broad classes of parties. Especially relevant to farmers and ranchers who have unknowingly and unintentionally allowed PFOA and PFOS contaminated materials to be deposited on their properties is that CERCLA imposes liability on current and previous owners of contaminated property. This may mean that current farmers and ranchers who own agricultural lands contaminated with PFOA and PFOS as well as retired farmers and ranchers who sold contaminated land may be potential liable parties under CERCLA to subsequent

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<sup>9</sup> 2022. Michigan Department of Agriculture and Rural Development. Consumption Advisory: Grostic Cattle Company of Livingston County Beef Sold Directly to Consumers May Contain PFOS. Retrieved from: <https://www.michigan.gov/mdard/about/media/pressreleases/2022/01/28/grostic-cattle-company-of-livingston-county-beef-sold-directly-to-consumers-may-contain-pfos>. 2022. Michigan PFAS Action Response Team. MPART investigation yields new data on PFAS. Retrieved from: <https://www.michigan.gov/pfasresponse/about/news/2022/01/28/mpart-investigation-yields-new-data-on-pfas>.

<sup>10</sup> Personal communication with Jason Grostic, February 15, 2022.

<sup>11</sup> Personal communication with Jason Grostic, June 2022.

owners and developers of agricultural property who incur cleanup costs.<sup>12</sup> This is yet another example of why this rulemaking is an inappropriate place to start in addressing PFAS concerns.

A landowner with CERCLA hazardous substances on the property is strictly liable under CERCLA by operation of law and not by virtue of an EPA administrative act. Knowledge of the presence of CERCLA hazardous substances is not a defense, and EPA has no ability to shield any parties that come within CERCLA's statutory definition of responsible parties from potential CERCLA remedial liability. The past 40 years of the Superfund program have demonstrated that EPA's intention to use its enforcement discretion is not binding on EPA nor is it a restraint on CERCLA cost recovery litigation brought by third parties that will be enabled immediately by this rulemaking. CERCLA provides few effective defenses to remedial liability.

EPA currently has CERCLA removal authority to address PFOA and PFOS contamination which can be used in a more targeted manner that does not rely on these chemicals being designated as "hazardous substances." Specifically, EPA can use its CERCLA removal authority to respond to contamination based on PFOA and PFOS being "pollutants and contaminants."<sup>13</sup> EPA has complete discretion on the use of this component of CERCLA authority because it is limited to EPA and other designated federal agencies. To do this, EPA has to make a finding that the presence of the pollutants or contaminants is an "imminent and substantial" threat.<sup>14</sup> Based on CERCLA's 40 year history, this is not a high threshold to meet and has not inhibited EPA's ability to take prompt action.<sup>15</sup> Importantly, in contrast to CERCLA remedial authority and its automatic imposition of liability, EPA does have to make a finding to use this removal authority.

### **iii. Biosolids are a valuable low-cost fertilizer and there is not a good alternative to land application**

EPA must first consider and resolve how a listing decision will impact the use of biosolids on agricultural land. EPA has long encouraged and supported the application of biosolids to agricultural property as a valuable low-cost means of managing biosolids. While beneficially used on farm fields, it also prevents these substances from taking up landfill space or requiring expensive and energy-intensive treatment and disposal. EPA's proposed rule ignores the impact that the CERCLA designation will have on this long-term and widespread practice and the absence of practical available alternatives. The placement of a CERCLA hazardous substance on property automatically creates potential remedial liability for the parties involved in the transportation and placement of the hazardous substances on the land, as well as the landowner.

The PFAS Roadmap proposes developing a biosolids risk assessment, which could be the basis for a future biosolids regulatory standard, as one of its last proposed actions (Winter 2024). A biosolids disposal standard might provide a CERCLA defense to the biosolids liability going

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<sup>12</sup> Under CERCLA Section 107(a) the following parties are liable "(1) the owner and operator of a vessel or a facility

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of...." 42 USC 9607(a).

<sup>13</sup> 42 USC 9604 (1)(B).

<sup>14</sup> *Ibid.*

<sup>15</sup> Superfund Removal Guidance for Preparing Action Memorandum, SEMS Doc ID 190041September, 2009. <https://semspub.epa.gov/work/HQ/190041.pdf>

forward, but would not provide liability relief retrospectively. The administrative record for this rule fails to consider the implication on the management of biosolids retrospectively and prospectively.<sup>16</sup> We hope that biosolids can continue to be available as a viable fertilizer option. However, designating these chemicals as a “hazardous material” before setting a regulatory standard for biosolids is very concerning. It is important for farmers to feel safe and confident in taking biosolids for beneficial use, and, therefore, EPA must address these concerns imminently.

**B. 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**

EPA’s proposed designation of PFOA and PFOS does not include a careful analysis of how its other existing authorities have been and can continue to be used to address widespread contamination of PFOA and PFOS in comparison with the implementation of CERCLA remedial authority. In particular, the preamble does not address how three existing authorities are already well suited to accomplish EPA’s goals: (1) existing CERCLA removal authority; (2) Safe Drinking Water Act orders; and (3) RCRA corrective actions.<sup>17</sup> For example, EPA did not explain what significant limitations it has encountered with respect to using these existing authorities to address PFOA and PFOS contamination. In fact, CERCLA removal authority has allowed EPA to conduct PFOA and PFOS cleanups. Safe Drinking Water Act orders to responsible parties have compelled action to address contaminated drinking water. RCRA corrective action is another authority that EPA and authorized states have to address PFOA and PFOS contamination from industrial and waste management sources. EPA has proposed to further clarify RCRA corrective action authority by adding PFOA, PFOS and potentially other PFAS chemicals to the RCRA Appendix VIII.<sup>18</sup>

A careful analysis by EPA would have provided a detailed description of the existing authorities and their strengths, benefits, and limitations in comparison to the designation of PFOA and PFOS as CERCLA hazardous substances. While EPA does identify its use of CERCLA removal authority in the preamble, it fails to compare and contrast its exercise of that authority against the additional authority that would be gained by the PFOA and PFOS CERCLA designation in any meaningful or practical manner. For example, EPA in recent years has more frequently relied upon its removal authority to address lead contamination, even though lead is a CERCLA hazardous substance, to most rapidly and effectively address acute residential human exposure to lead. EPA has also used its removal action authority as the basis for entering consent orders with parties to conduct cleanups while also requiring those parties to reimburse EPA for its costs. In such cases, EPA can recover its costs without exercising its remedial authority.

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<sup>16</sup> EPA Assistant Administrator for the Office of Water Radhika Fox’s statements on biosolids. “I will certainly say the issue of biosolids and PFAS is an absolute frontier issue,” Fox said Oct. 11 during WEFTEC 2022, the annual conference of the Water Environment Federation (WEF). Her remarks were livestreamed from New Orleans, LA. Reported in *Inside EPA*, October 11, 2022.

<sup>17</sup> Proposed Preamble at 54436.

<sup>18</sup> *See*, Letter from EPA Administrator Michael Regan to Governor Lujan Grisham of New Mexico, dated October 26, 2021, announcing intention to initiate the rulemaking to add POFA, PFOS, PFBS and GenX as RCRA Hazardous Constituents to 40 CFR Part 261 Appendix VIII and a rulemaking to clarify that RCRA Corrective Action provides the authority to require the investigation and cleanup of wastes that meet the statutory definition of hazardous waste under RCRA Section 1004(5).

EPA could have compared how addressing PFOA and PFAS contamination under CERCLA compares with addressing it under RCRA. This comparison would have been an evaluation of reasonable alternatives to the proposed CERCLA designation rule as well as being relevant to EPA's response to pending RCRA petitions before the Agency. EPA has a pending petition from the State of New Mexico as well as at least two environmental NGOs, seeking to have PFOA, PFOS and other PFAS chemicals regulated under RCRA.<sup>19</sup> EPA has not responded to New Mexico within the 90-day statutory timeline for responding to a state's RCRA regulatory request to decide whether it will or will not precede to conduct a RCRA rulemaking.

Under RCRA, which unlike CERCLA is a regulatory statute, EPA could carefully craft the regulation of PFOA, PFOS, and other PFAS chemicals and not have it apply simply to the presence of chemicals at any concentration from any source. For example, EPA could focus the regulation of PFOA and PFOS from certain sources (e.g. manufacturers) as well as from certain sources (e.g. the use of AFFF) and only regulate the chemicals that are above a certain concentration threshold. In addition, under RCRA, EPA has the authority it does not have under CERCLA to provide exemptions from regulations. RCRA regulation of PFOA and PFOS would achieve the same goals as this rulemaking and do much more. For example, chemicals regulated under RCRA automatically become CERCLA hazardous substances. More importantly, RCRA could do much to address the remediation of PFOA and PFOS and the management of PFOA and PFOS contaminated materials. RCRA provides for a comprehensive national management scheme for RCRA hazardous wastes. CERCLA does not regulate the management of CERCLA hazardous substances. EPA has experience with RCRA rulemaking designating particular wastes as RCRA hazardous waste, but it has never designated a chemical directly as a CERCLA hazardous substance. EPA has announced its intention to conduct the first step in the RCRA regulation of PFOA and PFOS, which is to add those chemicals to Appendix VIII of RCRA<sup>20</sup>, but has not made a time commitment, even in the face of a statutory deadline to respond to New Mexico, to further pursue RCRA regulation.

EPA has announced that it plans to regulate PFOA and PFOS under both the Safe Drinking Water Act (SDWA) and the under the National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act. Both of these authorities are regulatory authorities that will establish regulatory limits and will need to consider treatment technologies as part of the rulemaking process. The SDWA regulation will address PFOA and PFOS contamination in drinking water and drinking water sources. The NPDES regulations will address PFOA and PFOS contamination in some manner yet to be announced by EPA in water discharges that are subject to Clean Water Act jurisdiction. EPA has considerable experience in regulating chemicals under both of these regulatory schemes. EPA could have analyzed how these regulatory actions once implemented would impact the need for the CERCLA designation of PFOA and PFOS as CERCLA hazardous substances. In addition, EPA could have analyzed the impact of CERCLA designation of PFOA and PFOS on these Clean Water Act regulations as the liability associated with the handling and disposal of CERCLA hazardous substances will

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<sup>19</sup> The New Mexico petition was dated June 23, 2021 and so 90 days was September 21, 2021. The petition was submitted pursuant to 42 U.S.C. Section 6921(c).

<sup>20</sup> See, footnote 9.

complicate and increase the costs of handling residues of treating drinking water, stormwater and wastewater.

### **C. The proposal fails to consider the additional costs and burdens due to the existing technical challenges**

All parties potentially facing CERCLA liability under this proposal will face technical challenges understanding their potential liability. It is difficult to know how they might seek to address and resolve that potential liability because of the current lack of a full suite of approved analytical methods and approved destruction, disposal, and cleanup standards and technologies.

#### **i. 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**

There are many reasons that the timing of this rulemaking is problematic and, at least in the near term will raise questions that cannot at present be answered. In particular, there are gaps in the current suite of analytical methods that preclude a proper investigation and remediation of PFOA and PFOS contamination and likewise prevent potentially responsible parties from assessing their potential liability. While EPA's PFAS Roadmap does address the eventual development of analytical techniques,<sup>21</sup> the proposal does not acknowledge the reality that we do not currently have the necessary technology. For example, current approved analytical techniques allow for the measurement of PFOA and PFOS concentration in groundwater, although not down to the level of EPA's current Safe Drinking Water Act health advisory limit. Similarly, there are no EPA approved analytical methods for accurate measurement of concentrations in soil as well as EPA soil concentration limits necessary for the protection of groundwater. The lack of a discussion in the preamble about the relevance of these analytical standards and reference values is concerning since these are essential components to a CERCLA cleanup. EPA fails to explain why it is necessary or advantageous to impose CERCLA liability now on parties in advance of those parties being able to understand, estimate their liability and conduct an effective soil and other environmental media cleanup.

#### **ii. The lack of approved treatment and disposal methods limits the ability to plan, conduct and complete remediation**

In addition to technical gaps preventing the accurate detection and quantification of PFOA and PFOS, there are no approved treatment and disposal methods for PFOA and PFOS contaminated soil, surface, and groundwater. EPA is required by law to issue and update guidance on PFAS destruction and disposal technology. In response to this Congressional statutory mandate, EPA issued the first Destruction and Disposal guidance document on December 18, 2020.<sup>22</sup> The

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<sup>21</sup>The PFAS Roadmap states that during the Fall of 2022 "EPA and DoD are continuing this collaboration to complete a multi-laboratory validation of the method. EPA expects to publish the multi-lab validated method online by Fall 2022. Following the publication of the method, EPA will initiate a rulemaking to propose the promulgation of this method under the Clean Water Act (CWA). "PFAS Roadmap, page 15. EPA also says it will release analytical techniques for monitoring drinking water in the Fall of 2024. *Ibid.*

<sup>22</sup> Interim Guidance on the Destruction and Disposal of Perfluoroalkyl and Polyfluoroalkyl Substances and Materials Containing Perfluoroalkyl and Polyfluoroalkyl Substances, December 18, 2020

document did not provide guidance in the sense of recommending treatment methods and treatment limits; rather, it summarized the current state of different technologies.<sup>23</sup> Work continues on the development of destruction and disposal technologies, but all EPA has committed to is issuing the second edition of the destruction and disposal guidance in December 2023, which is the statutory deadline. However, this is merely guidance and will not have the same impact as issuing generally applicable regulatory management standards, which would happen if EPA regulated PFOA and PFOS waste under its RCRA authority.

### **iii. EPA’s current draft drinking water health advisory limit and its uncertain status further complicate implementation of cleanup**

In EPA’s December 9, 2019, guidance memorandum, *Interim Recommendations to Address Groundwater Contaminated with Perfluorooctanoic Acid and Perfluorooctanesulfonate*, EPA provides guidance addressing groundwater used as a drinking water source at sites being cleaned up under federal authority. This guidance incorporated the former health advisory limit (HAL) from EPA’s drinking water program as the de facto cleanup standard. Further, EPA explained that in the event EPA were to adopt a Maximum Contaminant Level (MCL) for PFOA and PFOS under the Safe Drinking Water Act, the MCL would in effect replace the HAL. The PFAS Roadmap states EPA intends to propose a MCL in the Fall of 2022 and finalize it in the Fall of 2023.<sup>24</sup> EPA has sent proposed MCLs and MCLGs to OMB for interagency review.

EPA has not revised the December 2019 groundwater memorandum, but EPA issued a revised HALs in June 2022 of .004 ppt (PFOS) and .02 ppt (PFOA) that is more than 17,500 and 3,500 times less than the prior HAL of 70 ppt that applied to both PFOS and PFOA individually and to a combination of those two PFAS chemicals. The new HAL is well below the value that laboratory methods can accurately quantify. Stated differently, drinking water analyzed at present time as not having detectable concentrations of PFOA and PFOS may in fact have concentrations well above the current HAL.

The World Health Organization (WHO) recently proposed drinking water standards of 100 ppt. This would be comparable to the prior 2016 HAL of 70 ppt and may be more in line with what EPA may propose for drinking water limits. It is also worth noting that a number of states<sup>25</sup> and

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[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) (Destruction and Disposal Guidance).

<sup>23</sup> Destruction and Disposal Guidance, page 3.

<sup>24</sup> PFAS Roadmap, page 12.

<sup>25</sup> See e.g. the following state information as examples:

1. PFAS Testing of Minnesota Community Water Systems, Minnesota Department of Health: <https://mdh.maps.arcgis.com/apps/MapSeries/index.html?appid=63515695237f425ea7120d1aac1fd09a>;
2. State of Michigan’s Statewide PFAS Survey of Public Water Supplies: <https://www.michigan.gov/pfasresponse/drinking-water/statewide-survey>;
3. Illinois Environmental Protection Agency’s PFAS Statewide Investigation Network: Community Water Supply Sampling: <https://www2.illinois.gov/epa/topics/water-quality/pfas/Pages/pfas-statewide-investigation-network.aspx>; and
4. South Carolina Department of Health and Environmental Control, “PFAS Sampling Results”: <https://scdhec.gov/BOW/pfas-sampling-results>.

the Department of Defense<sup>26</sup> have conducted a considerable number of evaluations of drinking water sources. This data provides strong evidence that at the prior HAL of 70 ppt there are a finite number of groundwater sources used for drinking water to address.

The inability to determine whether drinking water meets the current HAL or the soon to be proposed MCL creates additional unnecessary uncertainty about the potential impact of costs associated with the proposed CERCLA PFOA and PFOS designation. If EPA delayed this proposal until there was a final MCL, it would be possible to make some projections not possible at present about the costs and time needed to address drinking water contamination under CERCLA's remedial authority.

#### **D. Other Technical Failings of the Proposed Rule**

The proposal ignores the 40-year history of CERCLA implementation in its analysis of the rule's impacts, benefits, and costs.

##### **i. The proposal cannot support its claim that it will hold PFOA/PFOS manufacturer's liable**

The preamble talks about holding liable those parties who manufactured and released significant amounts of PFOA and PFOS. But CERCLA liability is not limited to addressing manufacturers. In fact, CERCLA provides no direct cause of action against a manufacturer of PFOA and PFOS who sold those chemicals to others for use and incorporation into other products.<sup>27</sup> EPA makes the assertion that the CERCLA designation will hold manufacturers responsible without acknowledging the fact that there were very few manufacturers and manufacturing sites that produced PFOA and PFOS. EPA does not consider RCRA corrective action authority as an alternative tool to use with respect to manufacturers. Further, 40 years of CERCLA case law has established that when those manufacturers sold a useful product to a third party, those manufacturers are not liable for the CERCLA cleanup obligation of the downstream users.<sup>28</sup> CERCLA imposes liability without regard to manufacturing, control or knowledge of the presence of PFOA and PFOS. The CERCLA designation of PFOA and PFOS of hazardous substances has the potential to impose CERCLA liability on parties who own land where those chemicals have come to rest after circulating in the environment for decades and even though those landowners had no hand in the manufacture or intentional use of these chemicals.

##### **ii. The proposal does not address the profound challenges and unintended consequences of applying CERCLA remedial authority to a contaminant that is found everywhere**

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<sup>26</sup> Memorandum for Assistant Secretary of the Army (Installations, Energy and Environment) from the Deputy Assistant Secretary of Defense for Construction, "Public Disclosure of Department of Defense Testing Results of Per-and-Polyfluoroalkyl Substances in Drinking Water Within a Covered Area," April 26, 2022, available at: <https://media.defense.gov/2022/Apr/27/2002985404/-1/-1/0/MEMO-PUBLIC-DISCLOSURE-POLICY-SECN-345-OF-FY22-NDAA.PDF>

<sup>27</sup> *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009).

<sup>28</sup> *Ibid.*

While EPA's proposed designation references the widespread finding of PFOA and PFOS not only across the United States, but globally, it does not address how this impacts the use of CERCLA. Analyzed in the CERCLA context highlights the inadequacy and poor fit CERCLA remedial authority is for addressing the problem. For example, if all land is contaminated with PFOA and PFOS, where does "clean" soil come from to replace "contaminated" soil?

The proposal fails to address how CERCLA remedial authority and attendant liability is supposed to work in the context of contaminants that can and have been found virtually any and everywhere where they have been sampled.<sup>29</sup> This is not like the finding of chemicals in particular places resulting from the improper management of chemical wastes from manufacturing, waste treatment, and other particular sources. CERCLA was adopted because RCRA, which was adopted four years earlier, had not yet gone into effect, and had not been able to regulate the storage, treatment, and disposal of hazardous wastes. That is, CERCLA was intended to address the legacy of inappropriately managed hazardous wastes at particular sites primarily caused by historic waste management practices that existed in the absence of modern, nationally applicable pollution prevention requirements enforced by EPA and the states.

The original core environmental statutes such as the Clean Air Act, Clean Water Act, RCRA, and the Toxic Substances Control Act (TSCA) were adopted by Congress to address most broadly contamination in the air, water, and on land by the way of imposing pollution controls. The regulation of what products could be sold and distributed to avoid widespread contamination and unsafe human and environmental exposure is the core of TSCA. These core environmental statutes were designed in part to reduce or eliminate the background concentrations of harmful contaminants. CERCLA was designed to address releases that created the need for immediate action to address particular sites with high level of contaminants. Once again, this only further supports the notion that CERCLA is the wrong tool to be using and there are other, more appropriate environmental statutes that need to be deployed first.

**iii. 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**

EPA identifies the designation of PFOA and PFOS as a means to designate an area as a site on the National Priorities List (NPL) and that somehow, the placement of a site on the NPL will lead to faster cleanups. EPA simply asserts cleanups will be faster but provides no authority or support for the proposition. EPA side steps the fact that it can, does, and has implemented its CERCLA removal authority much faster than CERCLA's multi-year remedial process, which includes the administrative rulemaking required to add a site to the NPL. The CERCLA remedial process has proven to be a slow multi-step process that takes years if not decades to complete.<sup>30</sup> Further, EPA's position is that it can designate sites for inclusion on the NPL based on the

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<sup>29</sup>See e.g. Proposed Preamble at 55,426 – 55,426. See also, study cited in footnote 39.

<sup>30</sup> See e.g. the media report about the possibility EPA might seek to list a site in Ann Arbor, Michigan that the state has been working on for decades and which could take EPA two years of time to go through the administrative process to list the site on the NPL and then 7 years to conduct a remedial investigation and feasibility study. <https://www.mlive.com/news/ann-arbor/2019/05/ann-arbor-at-pivotal-point-with-gelman-dioxane-plume.html>

presence of “pollutants and contaminants” and not just because of the presence of designated hazardous substances.<sup>31</sup>

**iv. Cost recovery has not been demonstrated to be a significant need**

EPA touts the ability to conduct cost recovery against responsible parties as a benefit of CERCLA designation without providing any analysis of whether the lack of such authority has hindered its current ability to address PFOA and PFOS contamination in a meaningful way. In fact, EPA would not have such authority and does not need it against the Department of Defense (DoD). If EPA had included an analysis of the work it has accomplished to date without a PFOA and PFOS hazardous substance designation, it would show that the EPA has successfully forced known sources of contamination, such as DoD facilities, airports, and many manufacturers to address groundwater as a drinking water source contamination. State environmental agencies, state laws and regulations,<sup>32</sup> as well as private party litigation are also imposing PFAS cleanup requirements. Further, EPA does not address the reality of 40 years of the implementation of Superfund, which shows that cost recovery from potentially responsible parties leads extensive litigation and transaction costs at Superfund sites.

**v. Required release reporting’s value has been overstated as it is unlikely EPA will receive many PFOA or PFOS release reports**

EPA identifies the regulatory requirement to report a release of one pound of PFOA or PFOS, if those chemicals become CERCLA hazardous substances, as a particular benefit of the proposed rulemaking. As EPA knows from 40 years of CERCLA implementation, most CERCLA release reports do not require an immediate response. When a release of a CERCLA designated chemical occurs and merits an immediate response, EPA has the authority to respond using its CERCLA removal authority. It appears to be unlikely that EPA would ever receive many release reports of releases of one pound of PFOA or PFOS, as when those chemicals are present in the parts per trillion level (or even the part per billion level) the quantity of material that would have to be released to exceed the one pound threshold in a 24-hour period would be enormous. It is certainly possible that the intentional use or unintentional release of older AFFF containing PFOA or PFOS could trigger a release report as those chemicals could be present as a percentage of the firefighting foam.<sup>33</sup> Unfortunately, EPA does not provide any information on the number of old AFFF systems still in place at DoD facilities, airports, and fire departments. Further, as the risk of release of PFOA and PFOS associated with the use of AFFF has become better understood, there are new procedures in place for management of discharged AFFF that previously did not exist. These procedures mitigate the impact of AFFF discharges on the environment. EPA could consider, for example, how many release reports it has received for dioxin, which shares a one-pound RQ and is frequently present in parts per trillion levels, to

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<sup>31</sup> See e.g. the Saint-Gobain Performance Plastic Village of Hoosick Falls, New York Superfund site that is on the NPL and a driver of the listing of the site was the presence of PFAS chemicals. <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0202702>.

<sup>32</sup> The Interstate Technology Research Council (ITRC) PFAS website collects and updates various state water and soil standards. <https://pfas-1.itrcweb.org/fact-sheets/>.

<sup>33</sup> 10 billion parts per trillion is 1% of something translated into parts per billion.

assess the likelihood of receiving many, if any, release reports exceeding the one-pound reportable quantity.

**vi. The proposal provides no support for its claim that CERCLA will encourage better management of PFOA and PFOS**

The proposal makes the unsupported assertion that the CERCLA designation of PFOA and PFOS will encourage better management of these chemicals. But not only does the proposal fail to explain how this better management will happen, it fails to comprehensively address how PFOA and PFOS contaminated materials should be managed and disposed. The proposal further fails to explain how the CERCLA designation will work with the ever-growing patchwork of state requirements that address the management of PFOA and PFOS contaminated materials.

**vii. The proposal does not explain the limitations of EPA's enforcement discretion**

The proposal identifies EPA's enforcement discretion not to pursue cost recovery litigation and seek to focus its cleanup efforts on certain parties, but does not explain that EPA is not itself bound or constricted by these policies. Furthermore, third parties are not bound by EPA's proposed intention to limit which parties are held responsible for PFOA and PFOS related remedial response costs. Upon the designation of PFOA and PFOS as CERCLA hazardous substances, cost recovery litigation becomes available to any qualifying responsible party. EPA's enforcement discretion is no solution to the statute's strict and automatic application of liability, which frequently causes foreseeable litigation chain reactions. For example, EPA routinely has sought to compel particular parties to be responsible for CERCLA response costs and to perform remedial work, which triggers those parties to sue other parties not targeted by EPA, but who the targeted parties think contributed to the contamination and associated remedial costs. This sequence of events is particularly likely because there can be so many potential sources of PFOA and PFOS contamination in the vicinity of suspected sources of the contamination. Unfortunately, the use of EPA's enforcement discretion would only provide cold comfort for our nation's farmers and ranchers because it does not guarantee any protections.

**viii. The proposal does not explain the real value of the federal property disclosure requirement of CERCLA 120(h)**

The proposal does not explain whether there is any real value to the CERCLA federal property disclosure provision in CERCLA Section 120(h) that would be triggered by the designation of PFOA and PFOS as CERCLA hazardous substances. This kind of disclosure in the context of a sale of federal property and further cleanup commitment could be implemented by Executive Order directed to all federal agencies and by adoption of individual agency policies.

**ix. The proposal identifies 5 broad categories of parties impacted, but neglects to identify the owners of property impacted by PFOA/PFOS**

The proposal indicates five broad categories of parties impacted by the proposed regulation, but in a fundamental flaw fails to identify the largest group—property owners—for a contaminant that may be present everywhere in the United States. EPA cannot avoid considering the impact

of the proposed designation of PFOA and PFOS as CERCLA hazardous substances on the basis that EPA has no current plans to seek cost recovery against landowners. As explained above, the designation of PFOA and PFOS as CERCLA hazardous substances will automatically impose potential liability on current owners of property contaminated with PFOA and PFOS as well as those who owned property at the time PFOA and PFOS contaminated the property.

**x. The proposal merely cites “meaningful” public health benefits without identifying what those benefits are and how they would be facilitated by the CERCLA designation**

The proposal claims that the CERCLA designation will produce “meaningful” public health benefits but does not explain what those benefits would be or how CERCLA designation would create those benefits. While the proposal references significant progress in reducing PFOA and PFOS concentrations in blood levels of the general public<sup>34</sup> (which has corresponded with the ceasing of the manufacture and distribution of PFOA and PFOS), it does not explain how CERCLA designation will contribute to further reduction in blood levels. In fact, this proposal may cut against its intended goal in unexpected ways. For example, treating wastewater and drinking water to reduce or eliminate PFAS seems to be one of the approaches most likely to reduce background levels of PFAS contamination in the environment, providing the PFAS extracted from wastewater and drinking water can either be destroyed or managed in a permanent way. If the CERCLA designation of PFOA and PFOS makes it more expensive to treat wastewater and drinking water, it will ultimately slow down the treatment of water and the rate of removal of the background levels of PFAS. Unfortunately, this will require considerable resources and could equate to an additional tax on water. EPA’s existing CERCLA removal authorities allows EPA to immediately address drinking water sources and reduce the acute risk of increased PFOA and PFOS exposure for the people using those sources of drinking water. Importantly, EPA has not articulated how CERCLA designation of PFOA and PFOS will compare or integrate with using other EPA authorities, such as the Clean Water Act and the Safe Drinking Water, to reduce background levels of exposure to PFOA and PFOS.

**xi. EPA claims designation will have only limited direct economic impacts**

On June 8, 2022, the U.S. Chamber of Commerce provided EPA with a detailed expert assessment of the potential costs of CERCLA hazardous substance designation.<sup>35</sup> This report provided considerable detail on the estimated costs to address PFOA and PFOS at existing non-federal national priority sites, which the report estimated could exceed \$17 billion and have annual costs of between \$700 million and \$900 million.<sup>36</sup> Dr. Linda Birnbaum, recently retired but formerly a long time government scientist, recently published a study in *Environmental*

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<sup>34</sup> See e.g. Proposed Preamble pages 54,417 and 54,427.

<sup>35</sup> See, the analysis prepared for US Chamber of Commerce, which is available at: <https://www.uschamber.com/environment/pfos-and-pfoa-private-cleanup-costs-at-non-federal-superfund-sites>. This analysis shows a mean estimate for existing NPL sites alone are present value \$17.4 billion (90% prediction interval equaling \$10 billion to \$27.2 billion) using a 3% discount rate and \$9.8 billion (90% prediction interval equaling \$5.9 billion to \$15 billion) using a 7% discount rate.

<sup>36</sup> *Ibid*

*Science and Technology*<sup>37</sup> that claims that there are over 57,000 presumptive contamination sites in the U.S. based on modeling conducted on “500 known sites.”

EPA’s initial claim that the CERCLA designation will have only limited direct economic impact was a position that OMB ultimately did not agree with as demonstrated by the change in the designation of the economic significance of the rule as it progressed through the interagency review process. Presumably this change of designation by OMB came about as OMB considered the information and evidence provided by various parties inside and outside of the government based on the 40 years of implementation of CERCLA. The change in designation towards the end of the inter-agency process may explain, in part, why EPA’s evaluation of costs is so limited as it did not conduct a thorough cost analysis of the proposed rule prior to submitting it to OMB.

**xii. The proposal incorrectly claims that cleanup costs and liability management are indirect effects**

EPA’s unwillingness to consider the reasonably expected range of costs does not mean the costs are indirect and not capable of assessment. The proposal does not analyze the DoD cost estimates based on DoD’s considerable experience with PFOA and PFOS cleanups and overall CERCLA experience.<sup>38</sup> The clear intent of the rulemaking is to direct cleanups beyond what EPA thinks it can do with its existing authorities, which begs the question of why the costs of those cleanups is not considered a direct consequence of the rulemaking.

**xiii. The Proposals Rationale Certifies that the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA) do not apply**

The proposal’s handling of costs and the associated economic analysis fails to meet the statutory requirements, EPA’s own economic guidance, Small Business Administration’s (SBA) analysis of issues, and EPA’s administration of CERCLA. The proposal fundamentally fails to adequately evaluate the costs notwithstanding having 40 years of CERCLA implementation experience and fails to assess the benefits for its proposal in comparison to the costs and benefits of not taking the proposed action.

As has been explained, the CERCLA designation of PFOA and PFOS as hazardous substances will have an impact on all landowners with PFOA and PFOS contamination, including farmers and ranchers, many of whom are small business owners. EPA cannot avoid the procedural requirements of these statutes by ignoring the impacts on farms, ranches, and many other small businesses. The SBA should conclude that the EPA’s certification is improper and require EPA to conduct more evaluation of the cost impact of the proposed rule on small businesses. This could include: requiring EPA to conduct an Initial Regulatory Flexibility Analysis (IRFA) and

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<sup>37</sup>Presumptive Contamination: A New Approach to PFAS Contamination Based on Likely Sources, *Environ. Sci. Technol. Lett.* 2022, Publication Date: October 12, 2022.

<sup>38</sup> See, e.g. *Report on Per- and Polyfluoroalkyl Substances Active Sites Cleanup Costs*, Office of the Under Secretary of Defense for Acquisition and Sustainment, June 2022.

take public comment on the analysis; convening panels of small entities to consider alternatives; and preparing an economic analysis consistent with Circular A- 4.

A closer look at the impact that EPA's proposal would have on small businesses would likely have demonstrated a significant potential adverse impact on farmers and ranchers. As discussed, these economic impacts are associated with CERCLA liability as landowners, added complications and additional costs associated with real estate transactions, and increased operational costs associated with limitations on the use of biosolids.

### **Farm Bureau Implores You to Consider Unintended Impacts on Agriculture**

We appreciate the opportunity to bring light to the unintended consequences of this proposed rulemaking. Farmers all over the country could face devastating impacts simply for owning land and creating an agricultural product. PFAS contamination is a very serious issue, and we must work together to find solutions. However, families here at home and abroad are increasingly turning to America's farmers to provide for global food security. It is frightening to imagine a world where farmers are unable to produce the food, fuel and fiber that our country, and the world, relies on. For all of the reasons outlined in these comments, EPA must strongly consider these implications and should reevaluate moving forward with this proposal.