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Environmental Protection Agency
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Washington, DC 20460

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RE: DOCKET ID NO. EPA-HQ-OLEM-2019-0341

To Whom It May Concern:

The interests of biosolids and residual management in the United States is of significant concern to many parties. The major associations which provide research, education and guidance on safe practices and solutions are: Northwest Biosolids Association (NWB), Mid-Atlantic Biosolids Association (MABA), Midwest Biosolids Association (MBA) and Northeast Biosolids and Residuals Association (NEBRA). These four groups represent 26 states and over 152,000,000 citizens in the US. Our combined experience in the related fields of biosolids solutions and beneficial use exceeds 75 years of practice. Our primary mission is to provide reliable information and advocacy on behalf of our members and the public, and to be a leader in sustainability and utilization of renewable resources.

We collectively appreciate the opportunity to provide comments in response to the U.S. Environmental Protection Agency's request for public comments on the proposed rule to designate perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) as hazardous substances under the Comprehensive Emergency Response and Compensation Act (CERCLA), published in the Federal Register on September 6, 2022.

We believe that the USEPA's proposal to designate PFOA/PFOS as hazardous substances, will place undue burdens and unintended penalties on clean water agencies. The most significant concern is that the proposal need to clarify existing essential exemptions for clean water agencies. Both the RCRA domestic sewage exclusion and the CERCLA federally permitted release provision recognize that entities whose discharge is regulated under the CWA should not be penalized for that activity under CERCLA or RCRA. In addition, the cost impacts to wastewater agencies need to be considered.

Exemption for Federally Permitted Releases

Congress exempted “federally permitted releases” as defined in CERCLA section 101(10) from the notification requirements in CERCLA section 103 and EPCRA section 304. The definition of federally permitted release in CERCLA section 101(10) specifically identifies releases that are regulated under other environmental programs, such as the National Pollutant Discharge Elimination System of the Clean Water Act.

Releases that are federally permitted are exempt from CERCLA section 103 and EPCRA section 304 notification requirements, CERCLA liability. Designation of PFOA and PFOS as hazardous chemicals under CERCLA, as pointed out in the Federal Register, has the immediate effect of triggering reporting requirements. This is not particularly onerous at the default levels of 1 pound in 24 hours. Our concern in this vein is the prospect that CERCLA designation would immediately trigger CERCLA’s retroactive, joint and several, and strict liability regime. The rulemaking introduces this most significant potential effect, particularly for clean water agencies, which is the threat of being drawn into significant third-party litigation or enforcement actions based on de minimis contributions of PFAS to a particular site. This single decision would potentially impose huge costs to the public in the form of litigation expenses, where a potentially responsible party might attempt to capture any party (including public agencies) that has “touched” PFAS tainted wastewater, and lands (via biosolids application).

Our associations and members recognize the importance of addressing threats from PFOA/PFOS to public health and the environment. However, clean water agencies are passive receivers of these constituents. We do not manufacture nor use these chemical nor do we have effective means of treating them. PFOA/PFOS, have been widely used for decades, the sources of which are broadly distributed across our systems, including low level but persistent residential and commercial sources. The most effective way of protecting the public and the environment from these chemicals is through product stewardship and source control. EPA’s road map for dealing with PFAS chemicals must include tools for preventing the manufacture and use of these chemicals and tools for local agencies to calculate and implement local limits.

CERCLA was designed as a polluter pays model such that the general public would not be responsible for contamination caused by entities that produce various contaminants. Without explicit exemption for properly conducted biosolids land application as federally permitted releases, rate payers may be made to subsidize the cleanup of sites that are actually created by actions of manufacturers and users of PFOA and PFOS chemicals.

We believe that the agency’s proposal to designate PFOA/PFOS as hazardous substances, without clarifying essential exclusions, will result in clean water agencies diverting resources away from source control thus delaying reductions in PFAS contamination. Without explicit clarifying exemptions for clean water agencies, and consideration of the significant potential costs for those entities, designating PFOA/PFOS as hazardous substances, the “Polluter Pays” model would be undermined resulting in the public and local ratepayers being held responsible for costs that should be borne by the entities that manufacture and use PFOA/PFOS.

Exemption for Routine Agricultural Use Under EPCRA

While the request for public comment was specific to Agency actions related to CERCLA, we believe it is important to note that biosolids land application activities are exempt under EPCRA as well as CERCLA. The importance of dovetailing federal regulations so they neither conflict nor confuse has been recognized by EPA in the past. Under Section 311(e)(5), any substance - when used in routine agricultural operations - is exempt from reporting under Section 311 and 312. This exemption is designed to eliminate the reporting of fertilizers, when stored, applied, or otherwise used at a farm facility as part of routine agricultural activities. Land application of biosolids has been recognized as a routine agricultural activity.

We believe acknowledging land application of biosolids as a federally permitted release under CERCLA will maintain the consistency of regulation with the recognition of biosolids land application as a routine agricultural practice and concomitant exemption from reporting under EPCRA.

Impacts to Water and Wastewater Agencies Should be Included in Cost Considerations

We understand that USEPA is proposing to interpret CERCLA section 102(a) as excluding consideration of cost in a designation decision. We believe it is important to consider the true (perhaps considered “indirect”) costs of the proposed designation.

In terms of direct costs, the reporting requirements for land application of biosolids does not seem to pose a significant impact. Specifically, the proposed reportable quantity is one pound per day for PFOA and PFOS. This is a mass which is unlikely to be reached in any conceivable land application scenario.

However, indirect costs associated with the proposed rule are an issue with the use of CERCLA to regulate PFOA and PFOS (as opposed to regulation through other statutes, such as RCRA). Of note, OMB has designated the proposed rule as “economically significant,” which means it is expected to have more than \$100 million in economic impacts. This may have significant financial implications for local governments. Communities could be faced with significant legal fees, and potentially the cost of corrective action if PFOA and PFOS are listed as hazardous substances under CERCLA. As such, there must be a robust and extensive economic analysis of these impacts included as part of this designation.

Conclusions

Significant progress has been made in identifying the potential hazards posed by PFOA/PFOS. Since 2002, production and use of PFOS and PFOA in the United States has declined. This has resulted in a significant decline in blood levels of these chemicals. From 1999-2000 to 2017-2018, blood PFOS levels declined by more than 85% and blood levels of PFOA have declined more than 70%. Preventing the manufacture and use of these chemicals is having a profound effect on their prevalence in the environment and on their appearance in the blood of people. Product stewardship preventing the further use of these chemicals and source control

preventing the release of these chemicals from industrial facilities is, and will continue to be, the most effective methods of preventing harm to humans and the environment. Without significant attention to source control and pretreatment, designation of PFOA and PFOS as hazardous chemicals has the potential for unnecessary significant adverse consequences to the clean water community and our ratepayers. We suggest that EPA provide an explicit clarification that clean water utilities that are land applying biosolids in compliance with federal regulations are exempt from both reporting and liability under CERCLA under the federally permitted releases exemption.

Thank you for the opportunity to comment on the proposed rulemaking. If you have any questions or concerns, please feel free to contact the association contacts below:

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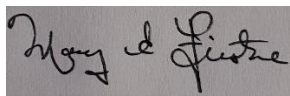
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