[ORAL ARGUMENT NOT YET SCHEDULED]

No. 24-1193
(consolidated with Nos. 24-1261, 24-1266, 24-1271, 24-1272)

In the United States Court of Appeals For the District of Columbia

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA et al.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents, and

CLEAN CAPE FEAR, et al.,
Respondent-Intervenors

On Petition for Review of Final Action by the United States Environmental Protection Agency – 89 Fed. Reg. 39,124 (May 8, 2024)

AMICUS BRIEF OF SUPERFUND SETTLEMENTS PROJECT IN SUPPORT OF PETITIONERS AND VACATUR

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The parties in this case are listed in the Opening Brief for Petitioners.

The Superfund Settlements Project ("SSP") is *amicus curiae* and is filing this brief in support of Petitioners and the requested vacatur of the final rule under review.

Reference to the final rule under review (the "Rule"), issued by the United States Environmental Protection Agency ("EPA"), is provided in the Opening Brief for Petitioners.

This case has not previously been before this Court or any other court, and counsel for *amicus curiae* is not aware of any related cases currently pending.

STATEMENT REGARDING CONSENT TO FILE, SEPARATE BRIEFING, AUTHORSHIP AND MONETARY CONTRIBUTIONS

Petitioners, Respondent, and Intervenors have all consented to SSP filing this brief. No party's counsel authored this brief in whole or in part. No party, party's counsel, or persons other than the members of SSP contributed money to fund the preparation or submittal of this brief. SSP submits a separate amicus brief because its unique perspective and broad-based membership make it impractical to join the brief of other amici.

DISCLOSURE STATEMENT

SSP is an unincorporated association of major companies from a broad cross-section of American industries, including mining, petroleum, chemicals, waste

management, and manufacturing, which is keenly interested in developments affecting EPA's regulatory program under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), also known as Superfund. SSP has no parent corporation, and no publicly held company has a 10% or greater ownership in SSP.

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GLOSSARY OF ABBREVIATIONS

CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
EA	Economic Assessment
HMTA	Hazardous Material Transportation Act
NPL	National Priorities List
PFAS	Per- and polyfluoroalkyl substances
PFOA	Perfluorooctanoic acid
PFOS	Perfluorooctanesulfonic acid
PRPs	Potentially Responsible Parties
RCRA	Resource Conservation and Recovery Act
RIA	Regulatory Impact Analysis

STATEMENT OF ISSUES

1. The Rule fails to articulate a clear standard for designating new substances as "hazardous substances" under CERCLA, rendering the designation of PFOA and PFOS arbitrary and capricious and establishing dangerous precedent for the designation of future hazardous substances.

2. By its own admission, EPA failed to consider the true cost of designating PFOA and PFOS as hazardous substances in violation of its duty to do so.

3. The Rule will not meaningfully advance EPA's stated goal of protecting human health and the environment.

INTEREST OF AMICUS

SSP was organized in 1986 to help improve the effectiveness of the Superfund program by encouraging settlements and processes that would result in the Superfund program operating efficiently and rationally, achieving site closures with a minimum of expense and delay. Since its formation, SSP has provided constructive input to the United States Environmental Protection Agency ("EPA") and other regulatory agencies on critical policy issues affecting the cleanup of contaminated sites; SSP representatives also have testified before Congress on many of these issues.

Consistent with its mission to provide constructive input on critical issues affecting the Superfund program and because its members expect to be directly affected by the Rule, SSP submitted comments in November 2022 on EPA's proposed designation of perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS")[1] as hazardous substances under Section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). SSP submits this brief, as a friend of the Court, to share its members' perspective on the issues presented by the Rule.

[1] EPA's designation includes the salts and structural isomers of PFOA and PFOS. Consistent with the final rule, references to PFOA and PFOS are meant to include the salts and structural isomers.

SUMMARY OF THE ARGUMENT

CERCLA establishes a unique and draconian liability regime for the cleanup of hazardous substances released into the environment. 42 U.S.C. § 9601 et seq. It imposes liability on, among others, any person that currently owns or operates a facility; that previously owned or operated a facility at the time of a release of hazardous substances; or that arranged for disposal of hazardous substances. 42 U.S.C. § 9607(a). The liability it imposes is strict: it attaches regardless of a party's fault or even knowledge of the presence of hazardous substances released into the environment. *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608–09 (2009). The liability it imposes is joint and several; each liable party is liable for the entire cleanup cost, irrespective of its "fair share" the cleanup costs. *Id.* at 613. And the liability it imposes is retroactive; it attaches even if a party's conduct contributing to a release was lawful at the time and even if the substances released into the environment were not "hazardous substances" when released. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1350–51 (Fed. Cir. 2001).

The Rule seeks to employ this liability scheme, developed more than forty years ago in response to the discovery of toxic wastes buried at Love Canal, to address emerging contaminants that are, by EPA's own account, ubiquitous in the environment. EPA's desire to address the potential risks PFOA and PFOS may

present is understandable, but CERCLA is ill-suited to the task. In its rush to find a solution in CERCLA, EPA promulgated a Rule that fails to articulate a clear standard to support its designation of PFOA and PFOS as "hazardous substances" under CERCLA, rendering the designation arbitrary and capricious and establishing an unbounded standard that EPA has made clear it intends to employ in the designation of other emerging contaminants as "hazardous substances." EPA also initially did so without conducting the cost-benefit analysis it was required to undertake, choosing to ignore available cost information that would have made clear that the costs far outweigh any identified benefits. Only in response to public comment on its proposed Rule did EPA undertake, as an "alternative," a Regulatory Impact Analysis, incorporating that analysis in its final Rule without providing an opportunity for notice and comment. And the Regulatory Impact Analysis EPA published with the final Rule fails to acknowledge not only that the Rule is unlikely to provide significant benefits to human health or the environment, but also that the Rule will substantially delay cleanup at Superfund sites, and impose undue costs and delays at sites where PFOA and PFOS are found simply by virtue of the fact that PFOA and PFOS are pervasive in the environment. For all these reasons, the additional reasons discussed below, and the reasons stated by Petitioners, the Rule should be vacated.

ARGUMENT

I. EPA failed to articulate a clear standard for designating a substance as a CERCLA "hazardous substance."

CERCLA Section 102(a) 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.

42 U.S.C. § 9602(a).

While CERCLA was promulgated over 40 years ago, this rulemaking represents EPA's first foray into listing a substance as a "hazardous substance" pursuant to the agency's authority under Section 102(a) of CERCLA. As such, it was incumbent on EPA to articulate a clear, well-defined standard for designation of new substances as hazardous substances under that statute, and specifically, what constitutes "when released into the environment may present substantial danger to the public health or welfare or the environment." Such a standard, moreover, should have been promulgated through a formal rulemaking subject to notice and comment. Separately, promulgating a standard is appropriate on policy grounds as well as consistent with the goal of administrative law to ensure treatment in accordance with the law, providing all stakeholders a reasonable opportunity to

comment on the standard before it is muddled with a particular application. Unfortunately, EPA failed not only to follow such a process, but ultimately engaged in what can only be termed a conclusory review propped up by a novel "totality of the circumstances" approach. Neither its conclusory determination nor its post-hoc rationalization comports with the authority Congress delegated EPA in Section 102(a), and thus, EPA's action was inherently arbitrary and capricious.

What is more, both proposed approaches are so subjective that they are impossible to apply as precedent going forward. As to EPA's conclusions as to what constitutes a "substantial danger," EPA fails to identify any discernible standard at all. EPA simply states it reached its conclusion that PFOA and PFOS present a "substantial danger" based on consideration of "the available scientific and technical information," 89 Fed. Reg. 39,124, 39,125 (May 8, 2024), that EPA baldly pronounces shows "that PFOA and PFOS are persistent and mobile in the environment and that exposure to such substances **may** lead to adverse health effects," 89 Fed. Reg. at 39,139 (emphasis added). Not only is this approach vague, but it is also subject to abuse. In fact, in this rulemaking, EPA focused only on scientific and technical information that would support a decision to designate PFOA and PFOS as hazardous substances, ignoring other available information.

Recognizing its analysis was flawed, EPA deemed it necessary to conduct an additional, discretionary "totality of the circumstances" analysis (not prescribed in Section 102(a)) to support its decision. *See* 89 Fed. Reg. at 39,124, 39,126-31. For that analysis, EPA exercised boundless discretion, identifying and weighing "advantages and disadvantages" that EPA apparently deemed relevant, to support its decision. 89 Fed. Reg. at 39,126-31. EPA explains that "as part of its decision-making process [it] went **beyond** considering whether PFOA and PFOS 'may present a substantial danger to public health welfare or the environment' within the meaning of section 102(a), and also performed an **additional** analysis that weighed the advantages and disadvantages of designation, including quantitative and qualitative benefits and costs." *Id.* at 39,125 (emphasis added). In doing so, EPA strayed remarkably far from the standard set by Congress, *i.e.*, whether PFOA and PFAS "may present substantial danger to the public health or welfare or the environment," considering factors such as "designation may allow for incidental cleanup of co-contaminants," *i.e.,* **contaminants other than PFOA and PFOS** that happen to be co-located with PFOA and PFOS.[2] *Id.* at 39,127. EPA applies this "additional" totality of the circumstances analysis to rationalize its conclusions

[2] The Agency's "additional" analysis also is not constrained to a formal cost-benefit analysis. As EPA states, it "identified and weighed the advantages and disadvantages of designation relative to CERCLA's purpose **alongside** the formal benefit-cost analysis." *Id.* at 39,126 (emphasis added).

where it is unable to actually determine certain required information, such as indirect costs of the Rule. This "additional" analysis "beyond" the authority Congress delegated in Section 102(a) does not support designation, but confirms that EPA failed to act "within" the authority delegated to it. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) ("when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it").

Under both approaches, it also is unclear what technical information is weighed or how, what factors should ultimately be considered overall, or how EPA might deal with conflicting information or data gaps in its new methods. As such, neither approach meets EPA's obligation to put forth a clearly defined standard to meet the statutory requirement. *See Loper Bright Enterprises*, 144 S. Ct. at 2263 (an agency must engage in "reasoned decisionmaking" within fixed boundaries). Without a clear standard, EPA's subjective designations are necessarily arbitrary and capricious, and must be vacated.

II. EPA failed to appropriately consider the costs of the Rule, which are considerable and not outweighed by the Rule's benefits.

A. EPA failed to properly consider the costs of the Rule.

It is a fundamental principle of administrative law that "Federal administrative agencies are required to engage in 'reasoned decisionmaking.'" *Michigan v. EPA*, 576 U.S. 743, 750 (2015). As a general rule, the cost of an agency's action is an

important aspect that the agency must consider before deciding to act. *Id.* at 753. Absent a clear directive to disregard costs, an agency must consider the costs and benefits of its proposed action and reasonably decide and explain whether the benefits outweigh the costs. *Id.* at 752-53. Here, 42 U.S.C. § 9602(a) only authorizes EPA to "promulgate and revise as may be appropriate" regulations listing hazardous substances that may present a substantial danger to the public health or welfare or the environment if released. This falls well short of a clear directive to ignore costs. Yet, in 2022, EPA took the position that it could issue the proposed rule without considering any costs associated with response actions at Superfund sites even though those costs are reasonably anticipated by the Rule; indeed, as EPA subsequently acknowledged, it anticipates that the Rule will increase response activities driving cost increases. *See* 89 Fed. Reg. at 39,127-29, 39,143. Notice and comment proceeded without this critical analysis, despite proposing to push billions of dollars of impacts onto broadly regulated parties.

1. EPA did not allow notice and comment on the Regulatory Impact Analysis or any cost-benefit evaluation.

Stakeholder pushback on the lack of cost-benefit analysis for the proposed rule was considerable. This should not be surprising, as a Regulatory Impact Analysis ("RIA") is required of all economically significant rulemakings and EPA initially failed to perform this analysis. The purpose of an RIA is to inform the public and other parts of the government of the effects of alternative actions, inform

agency decisions before significant regulatory actions are taken, and ensure that the agency has considered likely consequences before taking action. OMB, "Circular A-4," Sept. 17, 2003, at 1-2, available at https://www.whitehouse.gov/wp-content/uploads/ legacy_drupal_files/omb/circulars/A4/a-4.pdf; OIRA, "Regulatory Impact Analysis: A Primer," Aug. 15, 2011, at 3, available at https://www.reginfo.gov/public/jsp/ Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf. Additionally, RIAs are a "central part of open government" in that they promote agency accountability and transparency surrounding major rulemakings. OIRA, "Regulatory Impact Analysis: A Primer," Aug. 15, 2011, at 2. In order to achieve its purpose, an RIA should be conducted before a major rulemaking is finalized – not after – and, to be true to its "open government" purpose, be subject to public comment. "The purpose of the RIA is to inform agency decisions in advance of regulatory actions and to ensure that regulatory choices are made after appropriate consideration of the likely consequences." *Id.* (emphasis added).

In response to public pushback, and merely as an alternative analysis to its original position that such an evaluation was unnecessary, EPA published a post-hoc rationalization of the economic impacts of its proposal in its April 2024 Regulatory Impact Analysis of the Final Rulemaking. Not surprisingly, the RIA identifies billions of dollars' worth of direct and indirect impacts from the Final Rulemaking, including billions of dollars in liability transfers to newly designated CERCLA

PRPs. However, although EPA eventually provided a cost-benefit analysis to the public, EPA failed to provide notice and comment on its RIA for the Rule. The same stakeholders that identified the flaw in EPA's positions through a public comment process were thus denied the opportunity to meaningfully assess and comment on the underlying economic impacts of designating PFOA and PFOS as hazardous substances. The public was entitled to review the billions of dollars in proposed economic fallout from EPA's designations, but was only given timely access to the minimal costs associated with spill reporting. This alone is a sufficient basis to vacate the Rule.[3]

EPA's recently released analysis also falls short of its obligation to address costs with "reasonable certainty." Maintaining that it is unable to quantify costs as required, EPA falls back on nebulous qualitative analyses to conclude, based on the "totality of the circumstances," regulation is warranted. 89 Fed. Reg. at 39,131. EPA, however, routinely conducts cost estimates where there is significant uncertainty; for this proposal, the United States Chamber of Commerce was able to conduct a Monte Carlo analysis to estimate the cost of the Rule. U.S. Chamber of Commerce, "PFOS and PFOA Private Cleanup Costs at Non-Federal Superfund

[3] EPA's reliance on the RIA to support its designation of PFOA and PFAS renders it judicially reviewable. *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (holding that "when an agency decides to rely on a cost-benefit analysis as a part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable").

Sites," June 2022, at 3 (the "USCC Report"), available at https://www.uschamber.com//environment/pfos-and-pfoa-private-cleanup-costs-at-non-federal-superfund-sites. EPA simply failed to do the requisite work. This, too, warrants vacatur of the Rule.

2. The ubiquitous nature of PFOA and PFOS and CERCLA's liability scheme exacerbates EPA's failure to adequately assess and to provide notice and comment on the costs associated with the Rule.

CERCLA's strict liability scheme is particularly unsuited to PFOS and PFOA because of their widespread presence. PFOA and PFOS are "ubiquitous" in the environment. *E.g.,* PFAS Molecules: A Major Concern for Human Health and the Environment, 10 Toxics 44 (2022), at 7-22. Such ubiquity is unusual among CERCLA-designated hazardous substances, and, accordingly, the proposed rule indiscriminately transforms any location where PFOA and PFOS have come to be located into regulated CERCLA facilities. CERCLA defines a facility, in part, as "any site or area where hazardous substances have been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9)(B).

Because PFAS are so common in the environment, they can be expected to be detected at sites where neither PFOA nor PFOS were used or disposed of, triggering remediation and the associated expenses to PRPs or the federal government where liability rests simply on having some other, non-PFAS related association with the site. Indeed, EPA cites numerous studies showing worldwide detections of PFOA

and PFOS in urban and rural areas, including areas far from any industrial activities. *See, e.g.,* 89 Fed. Reg. at 39,140; *Id.* at 39,148.

Under CERCLA, a PRP is jointly and severally liable for the presence of a hazardous substance on its site, even if it did not release those substances. The designation of PFOA and PFOS as "hazardous substances" under this liability structure will result in protracted cleanups and new and increased costs for PRPs – indirect costs that EPA admittedly could not quantify and therefore failed to properly consider. By requiring PRPs to remediate PFOA and PFOS at Superfund sites to projected cleanup criteria, EPA will essentially be asking PRPs to clean up to background levels below current limits of detection while nearby areas may exhibit similar levels at ambient conditions.

In addition, the Rule will generate protracted litigation (and the associated costs) as PRPs tagged with liability for the cleanup of PFOA and PFOS seek contribution from other PRPs. As one commentator explained:

> The process of allocating financial responsibility among PRPs can take a long time; at expensive multi-party sites, it can take years. As PRPs are unlikely to sign a settlement agreement without knowing their financial exposure, delays in figuring out the allocation of financial responsibility among PRPs can delay the negotiation of a settlement agreement, and thus cleanup. The difference between being held responsible for 1%, 10%, or 25% of a $1 billion cleanup is potentially huge.

Katherine N. Probst, "Superfund at 40: Unfulfilled Expectations," in Looking Back to Move Forward: Resolving Health & Environmental Crises, State Energy & Environmental Impact Center, New York University School of Law (2020), at 232.

Furthermore, even while the existence of PFOA and PFOS at a site may be unrelated to site activity and essentially background, because of the extraordinarily low cleanup criteria imposed by the CERCLA regime, enormous costs will result from addressing these two substances. The USCC Report cited above concludes the costs associated with listing PFOS/PFOA as a CERCLA hazardous substance will be "over $17.4 billion for existing non-federal national priority sites alone."

EPA attempts to defuse such concerns by assuring the regulated public that the Agency "expects that designation should not change CERCLA's liability framework and that CERCLA will continue to operate as it has for decades to resolve who should pay for the cleanup and how much." 89 Fed. Reg. at 39,160. But this is precisely what potential PRPs are so concerned about – that CERCLA, continuing to operate as it has for decades, will require PRPs to collectively spend billions of dollars to remediate PFOA and PFOS at their sites, regardless of how they got there. These billions of dollars were not appropriately estimated or considered by EPA in finalizing the Rule.

III. The Rule will not produce significant benefits to health and safety or lead to more timely cleanups.

Both PFOA and PFOS have been largely phased out from manufacture and use so that future releases are not expected. Where PFOA and PFOS are present at a National Priorities List ("NPL") site but where they have no relation to the site operations and/or where there are no actual exposures, throwing PFOA and PFOS into consideration will slow down addressing other contamination at that site. For sites where there is exposure or where the substances were manufactured, used or released to the environment, other authorities can be, and have successfully been, used to address and abate impacts. Presence alone does not indicate exposure or risk, and dealing with low levels of PFOA and PFOS at individual Superfund sites generally will yield negligible environmental benefit.

A. The Rule will not advance any new broad health or safety benefits.

EPA claims that the Rule will have broad health benefits. 89 Fed. Reg. at 39,154. Domestic production and import of PFOA and PFOS, however, have already been largely phased out through voluntary means such as the 2010/2015 PFOA Stewardship Program.[4] EPA itself reports that the current use of PFOA and

[4] Fact Sheet: 2010/2015 PFOA Stewardship Program (https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/fact-sheet-20102015-pfoa-stewardship-program#meet). The participating companies successfully met the program goals – a 95% reduction by 2010 in global facility emissions and product content and 100% reduction of production of PFOA (and other substances) by 2015. EPA's Non-CBI Summary Tables for 2015 Company Progress Reports (Final Progress Reports) (USEPA 2017) (https://www.epa.gov/sites/default/files/2017-02/documents/2016_pfoa_stewardship_summary_table_0.pdf).

PFOS in the United States is "relatively low." Consequently, PFOA and PFOS levels have "sharply declined" in human serum samples since the phase out. Agency for Toxic Substances and Disease Registry ("ATSDR"), Toxicological Profile for Perfluoroalkyls, Released May 2021, at 3 (https://www.atsdr.cdc.gov/toxprofiles/tp200.pdf); *see also* 87 Fed. Reg. 54,415, 54,417 (Sept. 6, 2022); ATSDR, PFAS in the US Population (https://www.atsdr.cdc.gov/pfas/health-effects/us-population.html). Levels of PFAS in surface water have also declined following the phase out. 87 Fed. Reg. at 54,427-28. These reductions occurred even without regulating these substances in drinking water, which regulation now has been finalized. *See* 89 Fed. Reg. 32,532 (Apr. 26, 2024), codified at 40 C.F.R. Parts 141 and 142, as amended, April 26, 2024.

It is not clear that the same health benefits would come from remediation on the back end. EPA will be dealing with two types of sites: (1) where PFOA and PFOS are site-related and (2) where they are not. Where PFOA and PFOS are site-related, EPA already has the authority to address the environmental risk. Where PFOA and PFOS are not site-related, the Rule will result in significant slowing of response actions due to CERCLA's aggressive strict, joint and several, and retroactive liability scheme. Given the broad historical use of PFOA and PFOS in commercial products and ubiquity of PFOA and PFOS in the environment, it is

reasonable to believe that PFOA and PFOS have the potential to be present at an NPL site but completely unrelated to site operations or releases.

By drawing these sites and concerns into the Superfund process more formally by designating PFOA and PFOS as hazardous substances, other, potentially more serious, environmental risks will not be addressed or will be significantly delayed. The Superfund program already is painfully slow. Beyond the rigid lengthy process, EPA is overwhelmed and, even with willing and ready PRPs, progress at many sites is stalled. As EPA acknowledges, only about 3% of 53,400 assessed sites have been placed on the NPL. 89 Fed. Reg. at 39,138. Even at that rate, EPA is having difficulty keeping up with the volume – approximately 75% of the NPL sites were listed more than 20 years ago, some much longer ago than that. Proposed Rule Docket: 232 – National Priorities List (NPL) Sites – by Listing Date (https://www.regulations.gov/document/EPA-HQ-OLEM-2019-0341-0213). As just one example, a fairly simple and small site was listed on the NPL in the early 1980s. The RI was completed about ten years later, but EPA did not select a remedy for soil until over 20 years after that. The PRP did not receive a draft consent decree to implement that remedy for seven years and it took almost two-and-one-half years to finalize that decree. Further, no remedy has yet been selected for groundwater.

Tacking PFOA and PFOS on to NPL sites where they might otherwise have no connection is contrary to the spirit and letter of CERCLA.[5]

B. EPA already has the authority to address PFOA and PFOS.

EPA already has the authority under existing environment statutes to address PFOA and PFOS, including alternate CERCLA authority. Indeed, it has already begun to use these authorities.

EPA can address PFOA and PFOS at NPL sites as a "pollutant or contaminant" using CERCLA Section 104(a). 42 U.S.C. § 9604(a). CERCLA Section 104(a) is well-suited to deal with these types of sites because, by requiring EPA to make an endangerment finding, it will ensure that remediation of PFOA and PFOS at the site warrants the diversion of resources. *See id.* at § 9601(a)(1) (authorizing remedial action whenever "there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare"). If EPA would not be able to justify addressing PFOA or PFOS at a site as a pollutant or contaminant under CERCLA Section 104(a)(1), one has to question the need to designate PFOA and PFOS and to address them at all NPL sites. CERCLA Section 104(a)(1) also

[5] The Rule would require PRPs to address PFOS/PFOA regardless of the origin of those chemicals. And, as discussed above, it is reasonable to anticipate that any PFOA and PFOS detection will require remediation. This is in direct opposition to CERCLA's "polluter pays" principle, which mandates that the contamination being addressed have a connection to the site and PRP.

does not require that only EPA conduct response actions. "When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title." *Id.*

PRPs conduct the large majority of response actions at NPL sites after having reached settlement with the United States, and CERCLA 104(a) expressly allows those settlements with regard to pollutants and contaminants. *See, e.g.,* www.epa.gov/superfund/superfund-remedial-annual-accomplishments-metrics. Furthermore, where PFOA or PFOS are commingled with hazardous substances, which one can reasonably assume would be the case at most if not all NPL sites, EPA asserts it may require the responsible party to address such releases. EPA, "Economic Assessment of the Potential Costs and Other Impacts of the Proposed Rulemaking to Designate Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as Hazardous Substances," Aug. 2022 ("EA") at 49.

EPA also has used its authority under Section 1431 of the Safe Drinking Water Act (SDWA) to issue an order to control threats to public health from PFAS contamination in public water systems or underground sources of drinking water. 42 U.S.C. §§ 300i, 300f; *see, e.g.,* 3M Agrees to EPA Order to Sample and Provide

Treatment for PFAS Contamination in Drinking Water near Cordova, IL Facility, November 3, 2022, https://www.epa.gov/newsreleases/3m-agrees-epa-order-sample-and-provide-treatment-pfas-contamination-drinking-water. Indeed, less than two weeks before EPA finalized its CERCLA designation for PFOA and PFOS, it issued a precedential final rule under the SDWA to limit levels of six different PFAS, including PFOA and PFOS, in drinking water. *See* 89 Fed. Reg. 32,532-32,757 (April 26, 2024).

EPA additionally has two avenues to address PFAS at sites using its authority under the Resource Conservation and Recovery Act ("RCRA"). First, EPA has the authority to address substances that qualify as solid waste – even if those substances have not been designated as hazardous – if the substance presents a substantial endangerment to health or the environment. 42 U.S.C. § 6973(a). EPA has also proposed two rules pursuant to RCRA that would allow EPA to require parties to address PFOA and PFOS at RCRA corrective action sites. 89 Fed. Reg. 8,606 (Feb. 8, 2024); 89 Fed. Reg. 8,598 (Feb. 8, 2024). The rules, if finalized as proposed, would add nine PFAS (including PFOA and PFOS), their salts, and their structural isomers to the RCRA hazardous constituents list and amend the regulatory definition of "hazardous waste" to require corrective action for substances meeting the statutory definition of "hazardous waste," with the likely effect of increasing the scope of corrective action at existing and new sites.

EPA may also use its authority under the Clean Water Act (CWA) to regulate PFOA and PFOS. *See generally* Laura Gatz, "Regulating PFAS Under the Clean Water Act," CRS In Focus 12148, March 12, 2024, https://crsreports.congress.gov/product/pdf/IF/IF12148. In EPA's 2021 PFAS Strategic Roadmap, it laid out timelines for using CWA authorities to regulate PFAS. The CWA requires that EPA establish Effluent Limitation Guidelines (ELGs) which are limits for industrial dischargers. And even where EPA has not established an ELG, EPA may still impose discharge limits on a case-by-case basis. *Id.* EPA has also developed water quality criteria it can incorporate into the National Pollutant Discharge and Elimination System permits to control discharges of PFOA and PFOS. *E.g.,* Final Recommended Aquatic Life Criteria and Benchmarks for Select PFAS, 89 Fed. Reg. 81,077 (Oct. 7, 2024).

When considering CERCLA's unforgiving liability scheme and the importance of addressing other risks to the environment at NPL sites, EPA would be well served to rely on existing authority to address PFOA and PFOS at sites where their presence is related to site operations or releases and/or where PFOA and PFOS are present at levels well above background and present an imminent hazard. See 87 Fed. Reg. at 54,418. Indeed, EPA and the states are already addressing PFOA and PFOS at numerous Superfund and other sites. *See, e.g.,*

www.uschamber.com/assets/documents/230406_CERCLAAlternatives_Analysis.pdf.

C. "Direct" effects of the Rule are minor or redundant.

EPA identifies the direct effects of the Rule to be requiring: (1) any person in charge of a vessel or facility to report releases of PFOA or PFOS of one pound or more within a 24-hour period; (2) Federal agencies to meet property transfer requirements of CERCLA Section 120(h) when selling or transferring property; and (3) the Department of Transportation to list and regulate PFOA and PFOS as hazardous materials under the Hazardous Material Transportation Act ("HMTA"). 89 Fed. Reg. at 39,160. EPA admits that costs associated with these direct effects will be small. *Id*. In fact, with regard to regulation under the HMTA, "EPA estimates these incremental costs as zero or negligible. It is unlikely that regulated entities would ship PFOA or PFOS in quantities equal to or above the RQ [Reportable Quantity] because use and production of these chemicals are understood to have been largely phased out of production and use beginning in 2000." EA at 43; 87 Fed. Reg. at 54,430; *see also* 89 Fed. Reg. at 39,160.

These requirements would simply replicate information also obtained under existing regulatory requirements. The Rule cannot be justified by these illusory other "benefits" when response action costs will be enormous and corresponding remediation benefits small.

IV. Conclusion

For the foregoing reasons, the Court should vacate the Rule.

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Respectfully submitted,

/s/ Douglas A. Hastings

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations set out for amicus briefs in Federal Rule of Appellate Procedure 29(d). The brief, excluding the portions specified in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), contains 4,753 words, as calculated by Microsoft Word's word-count function.

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief was prepared in a proportionally spaced typeface using Microsoft Word with 14-point Times New Roman font.

November 12, 2024

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CERTIFICATE OF SERVICE

I hereby certify that, on November 12, 2024, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

November 12, 2024

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