March 26, 2024

Ms. Barbara Foster
Program Information and Implementation Division
Office of Resource Conservation and Recovery (5303T)
United States Environmental Protection Agency
1200 Pennsylvania Avenue, Northwest
Washington, DC 20460

Re: Definition of Hazardous Waste Applicable to Corrective Action for Releases From Solid Waste Management Units; Docket ID No. EPA-HQ—OLEM—2023-0085

Dear Ms. Foster:

The American Petroleum Institute (API) and the American Fuel & Petrochemical Manufacturers (AFPM) respectfully submit these comments in response to the U.S. Environmental Protection Agency (EPA) proposed rulemaking amending the definition of hazardous waste applicable to corrective action for releases from solid waste management units (89 Federal Register 8598, February 8, 2024). API member companies are leaders of a technology-driven industry that supplies most of America's energy, supports more than 10.3 million jobs and nearly 8 percent of the U.S. economy, and since 2000, has invested more than $3 trillion in U.S. capital projects. API's members are involved in all major points of the chemical supply chain — from natural gas and crude oil production — to refinery production of fuels and other products, to service companies using chemicals. AFPM represents America's petrochemical refining and manufacturers, facilities across the United States that produce gasoline, diesel, jet fuel, and other products that keep America running. AFPM members support more than three million quality jobs, contribute to our economic and national security, and enable the production of thousands of vital products used by families and businesses throughout the United States.

Our members have a strong interest in this rulemaking. API and AFPM members are subject to regulation under the Resource Conservation and Recovery Act (RCRA), including provisions related to corrective action. Many of our members have undertaken and completed investigations and cleanups under the RCRA corrective action program. Our member companies are committed to responsibly working with the public, the government, and others to develop and use natural resources in an environmentally sound manner while protecting the health and safety of our employees and the public.

Summary of Comments

API/AFPM's comments cover the following five topics, presented at a high level here and in more detail in the following section.

1. EPA's proposed amendments are inconsistent with Congressional intent as evidenced by the clear meaning of the statute and the legislative history.

2. EPA's expansion of RCRA corrective action beyond substances established by regulation as hazardous wastes or listed as hazardous constituents is contrary to EPA's long-standing policies and contrary to EPA's decades-long implementation of the corrective action program.

3. EPA's assertion that estimating the potential impact of these amendments is "not relevant" and that the rule would not result in any impacts is incorrect, conflicts with Executive Order 12866, and is not supported by the necessary analysis.

4. Applying the vague statutory definition of hazardous waste for purposes of corrective action fails to provide fair notice to the regulated community.

5. Expanding RCRA corrective action to cover substances not defined in regulation as hazardous waste or hazardous constituents is unnecessary and could inadvertently signal and expose weaknesses in existing state implementation efforts.

Detailed Comments

1. EPA's proposed amendments are inconsistent with Congressional intent as evidenced by the clear meaning of the statute and the legislative history.

In the preamble to the rule, EPA states that its amendments "reflect what EPA believes was Congress' intent as to the scope of RCRA sections 3004(u) and (v) and section 3008(h)."[1] Yet EPA has not supported this position with any legislative history indicating Congress intended corrective action under these sections of the statute to apply to substances not defined as either hazardous wastes or hazardous constituents. In fact, nowhere in the legislative history does Congress indicate that wastes or constituents beyond those identified by EPA as hazardous under the regulations are to be addressed by sections 3004(u), 3004(v), or 3008(h).[2]

EPA's sole basis for believing this was Congress' intent is that sections 3004(u) and (v) and section 3008(h) use the term "hazardous waste" while other sections of the statute use the term "hazardous waste listed and identified." EPA has pointed to this difference to make the leap that Congress intended corrective action authority to extend to any substance that meets the statutory definition of a hazardous waste not just those defined under EPA's regulations.

This reading is contradicted by legislative history. Section 3004(u) states that corrective action is applicable to releases of "hazardous waste or constituents" from any "solid waste

[1] 89 Federal Register 8598, 8603 (February 8, 2024)

[2] 89 Federal Register 8598, 8599 (February 8, 2024)

management unit." Nothing in the legislative history suggests Congress intended the phrase "hazardous waste" here to mean anything other than wastes defined as hazardous by EPA. More significantly, the addition of the phrase "or constituents" makes it clear that Congress did intend corrective action to extend beyond hazardous waste as defined by EPA to include hazardous constituents as well. Here, Congress made it clear that constituents for purpose of corrective action is limited to those designated as hazardous constituents under EPA's regulations:

> "Section 7 amends Section 3004's treatment, storage, and disposal facility standards, to require that all treatment, storage and disposal facilities which apply for a final permit and which release hazardous constituents (as defined in EPA regulations) into the environment from any of the solid waste management units at the facility." [Emphasis added][3]

It is illogical to believe that Congress would so clearly specify the term "constituents" in the phrase "hazardous waste and constituents" to be those defined in EPA's regulations but then intend the term "waste" to mean any substance that meets the broad statutory definition of a hazardous waste. Instead, it is quite evident that Congress intended this authority to apply to both hazardous wastes and hazardous constituents as defined by EPA in its regulations.

Congress reiterated this in the legislative history when describing the term "solid waste management unit" as it applies to corrective action under section 3004(u).

> "Use of the term "solid waste management unit" is used to reaffirm the Administrator's responsibility to examine all units at the facility from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid and/or hazardous wastes. This section is not limited to hazardous wastes listed or identified under Section 3001 of the Act because it may be impossible to determine if hazardous constituents come from hazardous wastes as currently defined by the Administrator. The term "hazardous constituent" as used in this provision is intended to mean those constituents listed in Appendix VIII of the RCRA regulations."[4] [Emphasis added]

Here, Congress acknowledges that corrective action authority extends beyond hazardous wastes listed and identified by EPA, but that it extends only to hazardous constituents under Appendix VIII. Certainly, if Congress intended corrective action to extend to substances that were not defined by EPA as hazardous wastes or not listed in Appendix VIII, it would have made that clear here.

[3] H.R. Rep. No. 198, 98th Cong., 1st Sess., Part 1, p. 60 (1983).

[4] H.R. Rep. No. 198, 98th Cong., 1st Sess., Part 1, p. 60 (1983).

Both sections 3004(v) and 3008(h) of the statute use the term "hazardous waste" instead of "hazardous waste and constituents." There is nothing in the legislative history that suggests Congress intended the scope of sections 3004(v) or 3008(h) to include any additional substances beyond those covered by 3004(u) and EPA has long interpreted the scope of these provisions to be the same. Therefore, it is reasonable to conclude that 3004(v) and 3008(h) are also limited to hazardous waste as defined by EPA or hazardous constituents listed in Appendix VIII.

2. EPA's expansion of RCRA corrective action beyond substances established by regulation as hazardous wastes or listed as hazardous constituents is contrary to EPA's long-standing policies and contrary to EPA's decades-long implementation of the corrective action program.

EPA asserts that its proposed amendments are "consistent with EPA's longstanding interpretation" of the statute.[5] This is not supported by the record. In fact, EPA's policies and the implementation of the corrective action program by both EPA and delegated states have consistently limited the scope of RCRA corrective action under sections 3004(u), 3004(v), and 3008(h) to hazardous waste as defined in the regulations or listed hazardous constituents.

a. The 1985 Codification Rule Does Not Mention the Statutory Definition.

EPA's primary interpretation of the corrective action provisions appear in the 1985 Codification Rule and preamble.[6] Following the passage of the HSWA amendments in 1984 establishing the new corrective action provisions under sections 3004(u), 3004(v) and 3008(h), EPA issued a Codification Rule to facilitate an "understanding of the new amendments to RCRA" and provide "an early, clear articulation of the regulated community's new responsibilities. . ."[7] It remains one of the few regulatory actions or interpretations EPA has taken with regard to corrective action that has been issued through formal notice and public comment.

Despite the fact that the Codification Rule was intended to provide EPA's interpretation of the key provisions in HSWA, it makes no mention of EPA's view that the new corrective action provisions are applicable to any substance meeting the statutory definition of a hazardous waste. EPA itself acknowledges that in the Codification Rule it "did not discuss the question of whether the regulatory definition of hazardous waste, generally applicable to 40 CFR part 264, should also apply to the new corrective action authority."[8]

[5] 89 Federal Register 8598, 8604 (February 8, 2024)

[6] 50 Federal Register 28701 (July 15, 1985).

[7] 50 Federal Register 28701, 28702, 28703 (July 15, 1985).

[8] 89 Federal Register 8598, 8599 (February 8, 2024)

In fact, the Codification Rule clearly defines the constituents covered under corrective action in section 3004(u) as those listed in Appendix VIII:

> "The Agency's authority under section 3004(u) encompasses "all releases of hazardous waste or constituents" from any solid waste management unit …EPA believes this language contemplates coverage of any release of hazardous constituents from a solid waste management unit. The term "hazardous constituent as used in this section is intended to mean those constituents listed in Appendix VIII to 40 CFR Part 261. . ."[9] [Emphasis added]

Similarly, in describing the "solid waste management units" which are covered under section 3004(u), EPA stated that they include any unit at a facility:

> "from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid and/or hazardous wastes."[10]

EPA makes no mention of this authority under section 3004(u) extending to any constituent that meets the broad statutory definition of a hazardous waste.

In fact, EPA notes in the rule that corrective action differs in scope than CERCLA in part because it is limited to hazardous constituents in Appendix VIII:

> "The Congress has, however, placed constraints on the scope of Section 3004(u) (i.e., "solid waste management unit" "hazardous constituents" discussed above that may result in cleanups at RCRA facilities that do not have the same breadth as CERCLA cleanups."[11]

As EPA's formal interpretation of its corrective action authority, the Codification Rule provided clear guidance to the regulated community that the corrective action provisions in section 3004(u) apply to Appendix VIII constituents and does not claim that any substance meeting the statutory definition could potentially be covered.

b. The 1985 3008(H) Guidance Memorandum Limits Covered Substances to Appendix VIII Constituents.

In 1985, shortly after the passage of HSWA, EPA issued a detailed guidance memorandum interpreting its new authority under section 3008(h), the corrective action

[9] 50 FR 28702, 28713 (July 15, 1985)

[10] 50 FR 28702, 28712 (July 15, 1985)

[11] 50 FR 28702, 28713 (July 15, 1985)

provision applicable to RCRA interim status facilities.[12] The memorandum, while not a formal rulemaking, has been widely relied upon by the regulated community in understanding its obligations under this provision. This memorandum does not mention the RCRA statutory definition of hazardous waste and never suggests that the statutory definition can be used for purposes of corrective action under 3008(h).
Unlike section 3004(u), section 3008(h) of the statute (as well as section 3008(v)) uses the term "hazardous waste" only and not "hazardous waste and constituents." EPA recognized that Congress likely intended the scope of corrective action in section 3008(h) to be the same as in section 3004(u). Therefore, in the 1985 memorandum EPA offered its interpretation that section 3008(h) "can be used to compel response measures for releases of hazardous constituents from hazardous or solid waste" and that "hazardous constituents are the substances listed in Appendix VIII to 40 CFR Part 261." Again, EPA never mentions that this authority could be applied to any substance meeting the statutory definition and EPA makes it clear that constituents are limited to those in Appendix VIII.

c. The 1990 Subpart S proposed rule and 1996 ANPR never resulted in final rules and while they mention the statutory definition of hazardous waste, both proposed rules are clear that Congress' intent was to address listed hazardous constituents.

EPA's primary basis for contending that the proposed amendments reflect the Agency's "longstanding interpretation" are statements made in the July 1, 1990 Subpart S proposed rule and the May 1, 1996 Advanced Notice of Proposed Rulemaking (ANPR). Both of these regulatory initiatives were never finalized. While EPA has issued memoranda supporting the use of these draft regulatory actions as guidance for the corrective action program, it has also made clear that they do not express legally binding requirements. For example, in a memorandum supporting the use of the 1996 ANPR as guidance, EPA stated:

> "This memorandum and the ANPR provide guidance to EPA personnel on how to best implement RCRA corrective action requirements. It is not a regulation, and it does not substitute for applicable statutes or regulations. Therefore, it cannot impose legally binding requirements on EPA, States, or the regulated community, and may not apply to a particular situation based on consideration of specific circumstances. EPA may change this guidance in the future."[13]

As importantly, while the July 1, 1990 Subpart S proposed rule and the May 1, 1996 ANPR do reference the statutory definition, these proposals both make it clear that the intent of Congress was to address "hazardous wastes or constituents" as defined under the RCRA regulations. The Subpart S proposed rule states:

[12] Memorandum from J. Winston Porter, Assistant Administrator, Office of Solid Waste and Emergency Response, Interpretation of Section 3008(h) of the Solid Waste Disposal Act (December 16, 1985).

[13] Memorandum from Elliot P. Laws, Assistant Administrator, Office of Solid Waste and Emergency Response, Use of Corrective Action Advance Notice of Proposed Rulemaking as Guidance (January 17, 1997).

> "However, EPA believes that use of the phrase "hazardous wastes or constituents" (emphasis added) indicates that Congress was particularly concerned that the Agency use the section 3004(u) authority to address a specific subset of this broad category, that is, hazardous constituents. The term "hazardous constituent" used in section 3004(u) means those constituents found in Appendix VIII to 40 CFR Part 261."[14]

The 1996 ANPR similarly states:

> "EPA also used the 1990 proposal to discuss use of the phrase ''or constituents'' in RCRA section 3004(u). EPA views this phrase as significant in two ways. First, it indicates that Congress was particularly concerned that, within the broad category of wastes that might be ''hazardous'' within the statutory definition, the corrective action authority should be used to address the specific subset of ''hazardous constituents.''"[15]

Both of these draft regulatory initiatives support the view that Congress intended these corrective action provisions to apply to substances listed in Appendix VIII. Neither establish a "longstanding policy" that corrective action can be applied to any substance that meets the general and vague definition of a hazardous waste.

d. EPA's other references supporting its position that its amendments represent a "longstanding interpretation" do not, in fact, support this position.

Besides the draft 1990 Subpart S proposed rule and 1996 ANPR, EPA also points to a few other statements to bolster its position that the proposed amendments reflect a "longstanding interpretation." The first is a statement in the preamble to the 1992 proposed decision not to list used oil as a hazardous waste.[16] In the preamble to this 1992 rulemaking, EPA merely states that used oil is subject to corrective action under sections 3004(u) and 3008(h) "which apply to solid waste management units."[17] The referenced statement and the preamble make no mention of the statutory definition of hazardous waste nor does it address the scope of constituents that are covered by corrective action. It is merely reiterating the fact that corrective action applies to solid waste management units which cover units that managed either hazardous waste or solid waste. Therefore, a solid waste management unit that managed used oil is

[14] 55 Federal Register, 30798, 30809 (July 27, 1990).

[15] 61 Federal Register 19432, 19443 (May 1, 1996).

[16] 57 Federal Register 21524 (May 20, 1992).

[17] 57 Federal Register 21524, 21529 (May 20, 1992)

covered by the corrective action provisions, even if the used oil is not hazardous waste. This says nothing about the scope of constituents covered by such an action.

EPA also points to the preamble of a 2002 rule excluding zinc fertilizer made from hazardous secondary materials from the definition of solid waste.[18] Again, that preamble makes no mention of relying on the statutory definition of hazardous waste to define the scope of constituents subject to correction action. It merely states EPA's authority to apply certain provisions of RCRA to zinc fertilizers while exempting it from others.

Finally, EPA points to a statement in the PFAS Action Plan that cited the potential use of sections 3004(u) and (v) and 3008(h) to address correction action. Again, this thin reference makes no mention of the statutory definition of hazardous waste and provides no support that the use of the statutory definition to define the scope of hazardous substances is a longstanding position.

e. For decades, the scope of corrective action has been limited to listed hazardous constituents for decades.

EPA itself acknowledges in the preamble of it proposed amendments that the RCRA program has consistently limited corrective action authority to regulated hazardous constituents, contradicting EPA's assertion that it is long-standing policy to apply the broad statutory definition of hazardous waste:

> "In the process of developing this proposed rule, the Corrective Action Program gathered permits that impose corrective action to address substances not listed or identified as hazardous waste or constituents and found very few."[19]

Therefore, despite issuing thousands of RCRA permits and corrective action orders, EPA and state authorities have almost never extended the authority beyond identified or listed hazardous wastes or constituents. In fact, the few examples to which EPA points, in which substances outside listed hazardous were included in corrective action permit provisions, are the exceptions that prove the rule.

3. EPA's assertion that estimating the potential impact of these amendments is "not relevant" and that the rule would not result in any impacts is incorrect, not in conformance with Executive Order 12866, and not supported by the necessary analysis.

EPA states in the preamble that "[t]he potential impacts of this rulemaking and the potential for associated benefits and costs do not form any part of the basis of EPA's decision to

[18] 67 Federal Register 48393 (July 24, 2002).

[19] 89 Federal Register 8598, 8603 (February 8, 2024)

propose the amendments in this notice."[20] EPA also states that the Agency's "estimate as to the potential impact of the amendments is not relevant either to what Congress intended in enacting these provisions or to whether EPA's regulations should accurately reflect that intent. This position entirely inconsistent with E.O. 12866.[21] In fact, E.O. 12866 demands that EPA evaluate both the costs and benefits of this action and to consider those costs and benefits in promulgating a rule.

E.O. 12866 requires that federal agencies:

> ". . . assess both the costs and benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[22]

It clearly defines a "regulation" to include actions that interpret Congressional intent:

> "Regulation or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret or prescribe law or policy or to describe the procedure or practice requirements of an agency."[23] [Emphasis added]

By EPA's own statements, this action is an interpretation of the law: "EPA believes that the regulations would, as a result of this rule, accurately reflect what the statute authorizes and requires, as interpreted by EPA."[24] [Emphasis added] The fact that others, including API and AFPM, disagree with EPA's reading of the statute, is further evidence that EPA's action is, in fact, an interpretation of the statute and subject to the requirements under E.O. 12866 which compel EPA to evaluate both costs and benefits and consider that evaluation in developing the regulation.

EPA also states in the preamble that "even if potential impacts were relevant" to the proposal it "does not expect that the rule would result in any impacts."[25] This position is reiterated in the January 2024 Economic Analysis that accompanied the rule which states: ". . . EPA predicts no change in practice under this rulemaking and therefore does not expect any costs or benefits, beyond benefits related to adding regulatory certainty, to

[20] 89 Federal Register 8598, 8603 (February 8, 2024). We note that this position articulated in the preamble appears inconsistent with statements in the January 2024 Economic Assessment which confirms that the proposed amendments are a "significant" regulatory action and "therefore subject to OMB review and the full requirements of the Executive Order." (U.S. EPA, Economic Assessment for the Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units (January 2024), p. 21.

[21] Executive Order 12866, Regulatory Planning and Review (September 30, 1993).

[22] E.O. 12866, Section 1(b)(3).

[23] E.O. 12866, Section 2(d).

[24] 89 Federal Register 8598, 8603 (February 8, 2024)

[25] 89 Federal Register 8598, 8603 (February 8, 2024)

result from the proposed rule."[26] The Agency has justified this position by asserting that this amendment is not actually a change and the authority to use corrective action to address any substance that meets the statutory definition of a hazardous waste has always existed. Additionally, EPA states the following in the Economic Analysis, but does not provide any the available data it relied on to reach this conclusion:

> "At present, the data available to EPA indicate that this proposed rule will not impact the corrective actin program or increase corrective action costs for the regulated community."[27]

As described in our comments above, these amendments do, in fact, represent a significant change in the way the corrective action program has been communicated and implemented.[28] EPA has made no effort to evaluate the extent to which this change will result in the consideration of new substances in the corrective action process and what the costs or benefits are of the consideration of these substances. Such an evaluation is required under Executive Order 12866 and necessary to support this rulemaking. An accurate assessment of the costs and benefits of these amendments should be completed and issued for public comment before a final rule is published.

4. Applying the vague statutory definition of hazardous waste for purposes of corrective action fails to provide fair notice to the regulated community.

The statutory definition of hazardous waste is very broad:

> "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when

[26] (U.S. EPA, Economic Assessment for the Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units (January 2024), p. 22.

[27] (U.S. EPA, Economic Assessment for the Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units (January 2024), p. 4.

[28] The Economic Analysis states the following, which demonstrates the inherent contradiction in this EPA proposal and the difficulty that permit writers would have in applying their corrective action authority to the statutory definition. "If the Appendix VIII rule is finalized as proposed, the 9 PFAS would be unlikely to be included in a permit as a statutory hazardous waste, since the burden on the regulator of addressing these substances as statutory hazardous waste would be greater than the burden of addressing them as hazardous constituents. The former would require the regulator to make a determination, including a site-specific administrative record, that the PFAS are statutory hazardous waste, whereas with the inclusion on Appendix VIII of the 9 PFAS, these substances would be considered in the corrective action process as would any other Appendix VIII hazardous constituent. Moreover, as discussed above, EPA has identified few corrective action permits that address statutory hazardous waste; the overwhelming majority address Appendix VIII constituents, consistent with the guidance in EPA's 1990 and 1996 preambles." (p. 14).

> improperly treated, stored, transported, or disposed of, or otherwise managed."[29]

The definition includes several undefined terms that by themselves and without interpretation provide little clear guidance on when a waste or substance meets the definition. These terms include "significantly contribute," "serious irreversible, or incapacitating reversible, illness," "substantial present or potential hazard," and others. As a consequence, the definition by itself fails to inform the regulated community what is and what is not covered under RCRA. This lack of specificity provided by the above broad and vague definition is why Congress directed EPA to "promulgate regulations identifying the characteristics of hazardous waste, and list particular hazardous waste (within the meaning of 6903(5) of this title), which shall be subject to the provisions of this subchapter [i.e., Subtitle C]."[30] The RCRA program has consistently been implemented with the understanding that EPA's regulations define what is and what is not a hazardous waste and what is and is not regulated under Subtitle C of the statute.

EPA itself has acknowledged that the statutory definition provides little guidance to the regulated community as to their obligations under the statute. When EPA issued its first regulations defining the criteria for identifying the characteristics of hazardous waste and for listing hazardous waste, it made it clear that the statutory definition was inadequate by itself:

> "Obviously, this definition cannot by itself provide clear guidance to waste producers as to whether their waste is hazardous. EPA is obligated by Section 3001 to flesh out the criteria for and characteristics of hazardous waste. [Emphasis added.]"[31]

Without an understanding of the specific wastes that fall under the statutory definition for purposes of corrective action (or the specific constituents), the regulated community has no fair notice of what is covered under one of the most important aspects of RCRA, the corrective action program.

Further, EPA has provided no guidance to either permit writers who would be incorporating corrective action provisions into permits or to the regulated community, on the process and criteria that would be employed to make a determination that an unlisted constituent could be defined as a hazardous waste for purposes of corrective action. As a result, the regulated community has no advance understanding as to which of the hundreds of thousands of chemical substances in commerce would be considered a hazardous waste under the statutory definition and therefore no way of understanding the applicability of the corrective action provisions to their operations. Further, without clear, specific definitions of terms such as "significantly contribute," "serious irreversible, or incapacitating reversible, illness," and "substantial present or potential hazard," it is highly likely that the statutory

[29] RCRA, §1004(5)

[30] RCRA, §3001(b)

[31] 43 FR 58950 (December 18, 1978).

definition of hazardous waste will be applied by regulatory authorities in an inconsistent and arbitrary and capricious manner.

To further these uncertainties, EPA has provided no indication of how wastes generated as a result of corrective action will be managed. Does remedial waste (e.g., excavated soils) remain hazardous waste under the statutory definition? If so, how is to be assigned a waste code or manifested and what facilities are permitted to receive these materials? What treatment will be required for these materials and will TSDFs or other facilities be required to be permitted to accept these materials? The rule is entirely silent on these important issues.

5. Expanding RCRA corrective action to cover substances not defined in regulation as hazardous waste or hazardous constituents is unnecessary and could inadvertently signal and expose weaknesses in existing state implementation efforts.

The amendments EPA is proposing are unnecessary. Both EPA, as well as states, have the authority to add substances to their lists of hazardous constituents, providing clarity to both regulatory authorities and the regulated community as to the substances subject to RCRA corrective action under sections 3004(u), 3004(v), and 3008(h). EPA has consistently amended the Appendix VIII list over time, adding new substances when necessary and, in conjunction with this proposal, is seeking to add nine new substances to the list.

To the extent it is necessary to take more immediate action on a substance, EPA has authority under RCRA section 7003 to address any substance that meets the statutory definition of a solid waste or a hazardous waste and that presents an "imminent and substantial endangerment." This broad authority to address this broader universe of wastes and substances under section 7003 was, in contrast to section 3004(u), established, and clarified by EPA in regulation, at the very beginning of the RCRA program. As EPA has stated in guidance, this authority can be used when existing authorities (i.e., other authorities under RCRA) "do not allow EPA to address the particular material present at the site or facility."[32] There are also decades of court rulings clarifying what constitutes an "imminent and substantial endangerment."[33] This authority is in addition to authority EPA has to take action under CERCLA and the authority states have under their state-specific cleanup laws.

Because state-specific cleanup laws (and budgets to service them) are already likely to address any perceived omissions that the RCRA redefinition is attempting to address, imposing the open-ended redefinition and leaving the burden of substance-specific determination to individual RCRA permit writers does not seem the best scientific or fiscal course of action, particularly as it will be opening the door further to unnecessary discrepancies in interstate implementation interpretation. Contrary to the claim made by EPA that there is no economic impact of this definition revision, if it were highlighted that states now need to ensure their permit writers are well-rounded scientists with an ability to

[32] U.S. Environmental Protection Authority, Guidance on the Use of Section 7003 or RCRA (October 1997).

[33] In addition, EPA has authority under CERCLA §104 removal authority to address a broad range "pollutants and contaminants" that are not listed as hazardous substances or constituents.

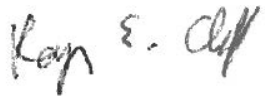
forecast new and not-yet-listed hazardous constituents and compel them for inclusion in a permit, additional funding mandates would result.

6. Conclusion

Congress clearly intended RCRA corrective action to address hazardous wastes and hazardous constituents as defined and listed by EPA and EPA has communicated and implemented the program in this manner since the passage of HSWA. These amendments violate the statute, represent a major change in the scope of the RCRA corrective action program, would create significant uncertainty in the regulated community, and would fail to provide the regulated community with proper notice of their obligations. In addition, EPA has failed to properly assess and consider the costs and benefits of the rulemaking as required by executive order. The amendments are also unnecessary, as there are other mechanisms to address substances not designated as hazardous constituents. EPA should not finalize the proposed amendments. Should EPA decide to move forward, these significant concerns should be addressed before publishing a final rule.

API and AFPM appreciate the opportunity to provide these comments and concerns regarding EPA's proposed definition of hazardous waste applicable to corrective action under RCRA. Should have have any questions concerning our comments, or wish to discuss the matter further, please contact Roger Claff, API, at (202) 682-8399, claff@api.org, or Jeff Gunnulfsen, AFPM, at (202) 457-0480, jgunnelfsen@afpm.org.

Sincerely,



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