State of Oregon Department of Environmental Quality

Post Rulemaking Advisory Committee Meeting 1 Feedback

PFAS 2025 Rulemaking

Introduction

The following summarizes feedback received from the rulemaking advisory committee (RAC) members following the first RAC meeting on Nov. 19, 2024 via email and discussions as well as two comment letters included as attachments. A summary of the discussion that took place during the RAC meeting is available in the Meeting Minutes, available on the rulemaking website.

Comments in response to discussion topic: disproportionately impacted populations and communities

- Minorities and disadvantaged communities experience daily unfairness, including access to environmentally safe drinking water, food, and living conditions, with indigenous Tribal communities in particular being disproportionately impacted.
- Tribal populations are many times more likely to experience disease and chronic illness, terminal and non-terminal, compared to the larger population. Environmental conditions contribute to these discrepancies.
- Despite Treaty rights for access to clean and healthy fish and game for federally recognized Tribes, Tribes are still significantly more likely to experience impacts by contaminated food and water compared to the larger population.
- Pacific Northwest Tribes consume tens or hundreds of times more fish compared to the larger population, making them more vulnerable to contaminants that bioaccumulate in fish, especially children and pregnant or nursing parents.

Comments in response to discussion topic: enforcement, exemptions, and liability

- Excluding closed sites or sites with No Further Action determinations from this rulemaking would do little to nothing to address legacy contamination that already exists and affects Tribes and other populations disproportionately. For example, this approach would not address PFAS contamination in water and fish.
- Excluding closed sites or sites with NFAs from this rulemaking would result in many sites with no regulatory means for remediation.
- In many cases, new releases will likely be relatively insignificant compared to existing and historical releases. As a result, responsible parties would not be held accountable, and Oregonians and the environment would not be protected.
- Reopening all sites with NFAs would be excessive, but prioritizing and reevaluating these sites on a case-by-case basis would be warranted. For example, higher priority

sites could include facilities such as airports, fire training areas, and metal plating facilities, while lower priority sites could include facilities such as small paint shops.
- In some cases, an initial assessment of a site's current and historical activities may negate the need for further investigation and actions.

Comments regarding the discussion topic: rule scope

- How will potential additional PFAS added as hazardous substances at a later date be handled in existing investigations and cleanups?
- Adding PFOA and PFOS as hazardous substances now and potentially adding additional PFAS compounds later may result in lengthy delays or high costs at sites with ongoing or completed investigations, evaluations of cleanup alternatives, or cleanup actions.
- A total PFAS approach should be considered to avoid duplicative efforts, though addressing PFOA and PFOS at sites may also address other PFAS compounds.

Points of clarification requested

- Clarify whether other legacy contaminants have exemptions for certain industries.
    - DEQ notes that some limited exemptions for certain parties exist for Oregon hazardous substances rules, as described in OAR 340-122-0030.
- Clarify the scope of the Cleanup Program and rulemaking.
- Clarify why additional PFAS compounds aren't proposed.
- Clarify when the Cleanup Program may become involved at sites.
- Clarify rulemaking impact to wastewater.
- Clarify what input DEQ is seeking from the RAC.

Links to scientific studies provided for reference

- Nonlethal detection of PFAS bioaccumulation and biomagnification within fishes in an urban- and wastewater-dominant Great Lakes watershed - PubMed
- Is the fresh water fish consumption a significant determinant of the internal exposure to perfluoroalkylated substances (PFAS)? - ScienceDirect
- Perfluoroalkyl substances and fish consumption - ScienceDirect
- Fish consumption benefits and PFAS risks: Epidemiology and public health recommendations - ScienceDirect

Non-discrimination statement

DEQ does not discriminate on the basis of race, color, national origin, disability, age, sex, religion, sexual orientation, gender identity, or marital status in the administration of its programs and activities. Visit DEQ's Civil Rights and Environmental Justice page.

From: Johnny Leavy, Water Reclamation Division Manager, City of Medford; Vice Chair, Oregon Association of Clean Water Agencies
To: (DEQ staff team)
Re: Rules Advisory Committee Member Input on the PFAS 2025 Rule Concept

Thank you for the opportunity to provide input on this very important rulemaking process related to adding PFOS and PFOA to the state CERCLA list of hazardous substances. It is important to ensure that efficient and effective regulation, source reduction, and cleanup of PFAS substances is implemented across DEQ regulatory programs without creating unnecessary, inefficient, and confusing regulatory duplication and potential liabilities for critical publicly-owned infrastructure facilities such as publicly owned treatment works (POTWs). To that end, please consider the following information as the proposed rules are drafted.

ACWA supports DEQ's rulemaking proposal and agrees that PFOS and PFOA **should** be added to DEQ's list of "hazardous substances." This will make the state's list consistent with EPA's list. ACWA has been a strong proponent of tracking sources of PFOS and PFOA with an aim to reduce or eliminate their production and use since at least 2019. However, additional modifications should be made to the rule to clarify that effluent discharges, the application of recycled water, and biosolids from POTWs should not be defined as a "confirmed release" subject to 340-122-… due to the fact that these "releases" are permitted releases regulated by DEQ under the Clean Water Act (CWA) NPDES permitting program and the state's WPCF permitting program (see OAR 340-122-0073 (2)(c)).

The DEQ Water Quality Division implements the federal CWA and state water quality programs for the very purpose of regulating wastewater discharges and byproducts to protect public health and the environment. POTWs cannot lawfully discharge any effluents or distribute recycled water or biosolids without obtaining NPDES or WPCF permits from DEQ's Water Quality Division. These permits authorize releases that are strictly regulated based on the human and aquatic health criteria established by the EPA and water quality standards and permit requirements established to meet these criteria.

The CWA provides a rigorous framework for DEQ's Water Quality Division to regulate and reduce/eliminate PFAS chemicals through NPDES permits. With respect to PFOS and PFOA, EPA has established maximum contaminant levels (MCLs) for drinking water, adopted aquatic life, and has developed human health criteria, which will soon be finalized. EPA is currently completing the risk assessment for biosolids and is developing effluent limitation guidelines (ELGs) for key industries. The results of all these actions include or will include regulatory permitting requirements implemented by EPA and delegated states (such as DEQ).
Based on EPA's guidance to the states, regulation of PFOA and PFOS will include, at a minimum, Industrial Pretreatment Program and source reduction requirements and sampling/monitoring requirements for NPDES permit holders. Implementation of drinking water system requirements by the Oregon Health Authority, based on the EPA established MCLs, is already underway.

With a comprehensive permitting and regulatory framework already in place that would address PFAS chemicals in POTW effluents and beneficially reused byproducts, not clarifying the definition of "confirmed release" would leave POTWs open to conflicting regulation and third-party liabilities under CERCLA, which would be an unnecessary, wasteful, inequitable, and a misapplied use of the hazardous substance regulatory framework for the following reasons:

1. POTWs are critical public infrastructure services that cannot be disrupted or shut down, they are not sites or facilities that are intentionally or incidentally using, using, creating, or releasing hazardous substances, and they should be exempt from the definition of "confirmed release" under the CERCLA regulatory framework. Rather, they must be operated for continuous service in protection of public health and the environment, they are carefully regulated and closely monitored by DEQ under the tools provided by the CWA to ensure that strict water quality standards and residuals requirements are met.
2. Permit limits and pollutant reduction measures required for POTWs will be based on aquatic and human health criteria established by EPA based on human health risk assessments, and not by a comparison to background levels as stipulated in the CERCLA rules (see OAR 340-122-0073(1)(a)(C). EPA's process to determine risk and establish water quality criteria and compliance standards for NPDES permits is the science-based process that should be applied to the regulation of PFAS chemicals.
3. CERCLA is based on a bedrock principle of "polluter pays," which is intended to hold polluters financially responsible for the cleanup of contaminated sites they create. POTWs do not create or use PFAS chemicals in their treatment processes or facilities. Rather, they are receiving PFAS chemicals from ubiquitous community use of PFAS-containing products, industrial discharges, and commercial businesses. If POTWs were to be regulated under CERCLA as cleanup sites, public wastewater utilities and their ratepayers would face a "community pays" outcome that would unfairly shift the liability and cleanup costs away from the producers of PFAS chemicals onto the public, which already faces affordability challenges for water and wastewater services and assets.
4. POTWs are not designed to treat PFAS and there are no currently available effective or cost-effective treatment technologies that can be employed at the scale of domestic wastewater facilities; EPA recognizes, in its PFAS Strategic Roadmap (October 18, 2021), and in its guidance letter to the states (December 5, 2022), that the approach to regulating PFAS chemical discharges from POTWs should focus on monitoring and source reduction through federally-mandated pretreatment programs. The established regulatory vehicle for these requirements is the NPDES wastewater discharge permit.

When acting in accordance with all applicable laws, permitted POTW wastewater discharges and application of recycled water and biosolids should be excluded from "Confirmation of Release" (OAR 340-122-0073), by application of OAR 340-122-0073 (2) "A release shall not be defined as a "Confirmed Release" if the Director determines the release meets any of the following criteria" and OAR 340-122-0073 (2)(c) "The release is a permitted or authorized release…" The following revision to this section of OAR 340-122 would make it clear that releases from facilities operating under a DEQ approved NPDES or WPCF discharge permit are an excluded release: ADD--340-122-0073(2)(a) "The release is from a facility operating under a DEQ-approved NPDES or WPCF discharge permit."

Making this exclusion clear is important to shield POTWs from the risks, costs, and liabilities associated with third party lawsuits—costs that would be directly passed through to the public ratepayers. Although DEQ may use enforcement discretion, that does not provide any protection from third party lawsuits. Given that POTWs are publicly-funded critical infrastructure, leaving them vulnerable to costly lawsuits would divert finite resources away from more effective source reduction and elimination efforts.

At the federal level, EPA staff have made clear their intention to reasonably shield public wastewater agencies and ratepayers from cleanup liabilities through the agency's expressed intent (PFAS Enforcement Discretion and Settlement Policy Under CERCLA, April 19, 2024) to use "enforcement discretion" and has offered to prepare and promote enforcement tools and policies to lessen impacts to public service entities. However, in the highly litigious world of CERCLA actions, the reference to "any potentially responsible party" (PRP) can—and does—bring utilities into actions to try to reduce their own portion of the overall cleanup costs, even in the presence of EPA enforcement tools. Therefore, federal legislation has been introduced that would specifically exempt public utility service providers such as POTWs that are passive receivers of PFAS from federal CERCLA liabilities.

Conclusion

ACWA supports efforts to address PFOA and PFOS at the state and federal level through source control, product stewardship, and pretreatment. ACWA members stand ready to advocate and support these efforts. However, the designation of PFOA and PFOS as CERCLA hazardous substances without the stated clarifications and exemptions articulated in this letter will have significant adverse consequences to the clean water community and the public ratepayers. DEQ should consider rule language, similar to or as suggested above, that would reduce the risks, the liabilities, and the shifting of cleanup costs from the producers and distributors of PFAS chemicals and PFAS containing products to the public, which the fundamental principles behind CERCLA are intended to avoid.

OREGON BUSINESS & INDUSTRY | OBI

January 10, 2025

VIA EMAIL

Dan Hafley
Sarah Van Glubt
Department of Environmental Quality
700 NE Multnomah Street
Suite 600
Portland OR 97232

Re: PFAS 2025 Rulemaking

Dear Mr. Hafley and Ms. Van Glubt:

Please accept the attached comments on the Department of Environmental Quality's (DEQ) PFAS 2025 rulemaking. Oregon Business & Industry's (OBI) appreciates the opportunity to participate on the Rulemaking Advisory Committee and to submit these initial comments on the proposed rulemaking.

OBI is a statewide association representing businesses from a wide variety of industries and from each of Oregon's 36 counties. Our 1,600 member companies, more than 80% of which are small businesses, employ more than 250,000 Oregonians. Oregon's private sector businesses help drive a healthy, prosperous economy for the benefit of everyone.

OBI recognizes that DEQ's Hazardous Substance Remedial Action Rules incorporate into the definition of "hazardous substance" any substance designated as a hazardous substance pursuant to Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., as amended. OBI also recognizes that EPA recently designated two per- and polyfluoroalkyl substances (PFAS): perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers, as hazardous substances under CERCLA. 89 Fed. Reg. 39,124 (May 8, 2024). As DEQ should be aware, this is the first time in the 44 year history of CERCLA that EPA has attempted to use its authority under Section 102 of CERCLA to designate a hazardous substance under CERCLA.

OBI understands that DEQ is concerned that its existing regulation (OAR 340-122-115(30)) may not automatically include new hazardous substances designated by EPA. OBI further understands that DEQ is not proposing any changes to its definition "hazardous substance" under OAR 340-122-115(30). Rather, DEQ would change the effective date of the rule thus incorporating the "current list of CERCLA hazardous substances."

OBI generally agrees that DEQ's definition of hazardous substances under its regulations should be consistent with the list of hazardous substances under CERCLA. DEQ should not in this rulemaking, as some other members of the Rulemaking Advisory Committee suggested, identify other PFAS compounds as hazardous substances.

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However, while DEQ's definition of "hazardous substances" should be consistent with the federal definition under CERCLA, DEQ should postpone this rulemaking for several compelling reasons. First. EPA's designation of the two PFAS compounds as hazardous substances under CERCLA is currently being challenged in the D.C. Circuit Court of Appeals. *Chamber of Commerce of the U.S. v. EPA*, No. 24-1193 (D.C. Cir. 2024). In addition, the incoming federal Administration may decide to withdraw or reconsider the designation of these substances as hazardous substances under CERCLA. Until these pending issues are resolved, a short delay of DEQ's rulemaking is appropriate and is not going to result in any substantial harm to the public health or the environment.

If DEQ is going to continue with this rulemaking, the rule update should clarify that the current list of hazardous substances under CERCLA is not tied to a specific date, but rather be tied to the federal CERCLA list of "hazardous substances" as amended, modified or vacated in the future. Under this approach, for example, a future DEQ rulemaking should not be required if the D.C. Court of Appeals invalidates EPA's regulation or EPA withdraws the regulation. Here, DEQ's rulemaking is based solely on EPA's regulation and should likewise be subject to any Court ruling or subsequent action by EPA. Likewise, if EPA adds additional hazardous substances to CERCLA, the DEQ rules will automatically be current with such changes. The approach OBI proposes would both keep DEQ's rules current and avoid expending substantial time, effort and agency resources necessary for any rulemaking. Attached is a proposed edit to OAR 340-122-0115(30) which captures this concept.

DEQ also needs to take into consideration the potential retroactive application of including two new substances as hazardous substances under DEQ's Hazardous Substance Remedial Action Rules. As described in DEQ's presentation during the Rulemaking Advisory Committee #1, it is not DEQ's intent to automatically impose investigation or remediation requirements by updating the definition to include the two additional PFAS compounds. Yet as soon as these substances are designated as hazardous substances under DEQ's rules, there is substantial concern that DEQ could impose additional investigation, treatment, or remediation requirements on active as well as closed sites.

If DEQ proceeds with this rulemaking as currently proposed, DEQ should amend its rules to clarify that any new designation of substances as hazardous substances will only apply to ***new releases*** and DEQ cannot, absent specific evidence of a substantial, on-going endangerment to public health, safety, or welfare or the environment, require sites with historical releases of hazardous substances to conduct additional investigation or remediation for these two PFAS compounds.

DEQ should also consider the effect of the proposed rule on passive receivers–publicly owned treatment works, landfills, or land application sites–and entities that were required under federal law to use aqueous film forming foam (AFFF) containing PFAS compounds for firefighting and fire training purposes and sites were AFFF containing PFAS may have been used for firefighting purposes. Permitted discharges and releases from these facilities, even if the released contained the two PFAS compounds, should not trigger remedial action under OAR 340-122 or give DEQ the authority to require investigation.

The above approach is consistent with DEQ's existing regulations which exempt certain releases from the remedial action rules. Thus, DEQ should include additional exemptions to address discharges and releases of PFAS compounds from passive receivers. Attached are proposed edits to OAR 340-122-0030(1) and (3) that OBI requests DEQ to adopt if it moves forward with this rulemaking which captures this important clarification.

Including a few additional exemptions is not going to result in any substantial harm to the public health or the environment or significantly impact DEQ's authority. As DEQ mentioned during the Rulemaking Advisory Committee #1, there are only a handful of sites where PFAS contamination is known to be present, and the owners/operators of those sites are generally working cooperatively with DEQ to investigate potential PFAS impacts. The agency should reassure the regulated public that this rulemaking will not result in a dramatic re-opening of closed release sites without first demonstrating a compelling need to do so.

OBI appreciates your consideration of these comments. Please call Jeff Hunter at (503) 727-2265 if you have any questions regarding these comments or the attachment.

Sincerely,

Sharla Moffett

Sharla Moffett
Senior Policy Director

Proposed Amendments to OAR 340-122-0030

(1) Exempted Releases. These rules shall not apply to:

(a) releases exempted pursuant to ORS 465.200(22)(a), (b), (c), and (d)**; and**

(b) the following discharges or releases of any per- or polyfluoroalkyl substance designated as a hazardous substance under OAR 340-122-0115(30) unless the Director determines, based on substantial evidence, the application of these rules are necessary to abate a substantial documented threat to public health, safety, or welfare or the environment:

(A) the disposal, discharge, release or threatened release from facilities which occurred or may occur in a manner consistent with all applicable federal or state laws governing such disposal or release at the time the activity is or was carried out including, without limitation, regulated airports, governmental facilities and other facilities or sites that were or are required under law to use or train with aqueous film forming foam containing per- or polyfluoroalkyl substances;

(B) a discharge, release or threatened release, including stormwater discharges, from a disposal site, landfill, landfill disposal site, or regional disposal site (as defined in ORS 459.005), a publicly owned or operated treatment works (treatment works) (as defined in ORS 454.010) or a municipality or community water system, pursuant to a permit issued under ORS 468B.050 or the federal Clean Water Act, regardless of whether the permit contains limitations on per- or polyfluoroalkyl substances;

(C) a discharge, release or threatened release from a disposal site, landfill, landfill disposal site, or regional disposal site (as defined in ORS 459.005) or other industrial facility, pursuant to the pre-treatment standards of Section 307(b) and (c) of the Federal Water Pollution Control Act (33 U.S.C. 1317(b) and (c)), regardless of whether the pretreatment standard or the applicable enforceable requirement contains limitations on per- or polyfluoroalkyl substances;

(D) a discharge, release or threatened release from any site where the disposal of biosolids was authorized by federal or state law, regardless of whether the permit or other applicable law contains limitations on per- or polyfluoroalkyl substances; or

(E) a discharge, release or threatened release from public water systems including the disposal or release of water treatment residuals or any other byproduct of drinking water or wastewater treatment activities, regardless of whether the permit or other applicable law contains limitations on per- or polyfluoroalkyl substances.

…

(3) Relationship to Other Cleanup Actions:

(a) Except as provided under subsection (3)(b) of this rule, these rules do not apply to releases where one of the following actions has been completed:

…

(E) Where prior to the designation of any new hazardous substance under OAR 340-122-0115(30), the Director issued a No Further Action determination for a release or threatened release of a hazardous substance.

OAR 340-122-0115(30)

"Hazardous substance" means:

…

(b) Any substance defined as a hazardous substance pursuant to section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act, P.L. 96-510, as amended, and P.L. 99-499, ***as such laws and related regulations may be amended, modified, or vacated in the future;***