April 8, 2024

Docket ID No. EPA-HQ-OLEM-2023-0278
Submitted via www.regulations.gov

Mr. Narendra Chaudhari
Office of Resource Conservation and Recovery
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on EPA's Proposed Rule | Listing of Specific PFAS as Hazardous Waste (EPA-HQ-OLEM-2023-0278) (Feb. 8, 2024)

Ms. Chaudhari:

The National Asphalt Pavement Association (NAPA) and their state association partners are nonprofit trade organizations representing thousands of companies across the nation associated with the production, application, and maintenance of asphalt pavements. Since recycling existing pavement is germane to the industry, and asphalt pavements are one of the top recycled materials in the nation, we are concerned with the U.S. Environmental Protection Agency's (EPA's) efforts to designate PFAS as either RCRA or CERCLA hazardous constituents or substances because of the potential that airport pavements may be contaminated with PFAS from firefighting foam. On June 9, 2023, NAPA submitted comments on Docket ID No, EPA-HQ-OLEM-2022-922, EPA's ANPRM on Addressing PFAS in the Environment, identifying, among other facts, the asphalt pavement industry does not use, manufacture, or purposefully add PFAS into asphalt pavements.

However, due to stringent FAA requirements, on-site recycling of such airfield pavements is prohibited, and contractual obligations almost always require the removal and repurposing of such pavements by the contractor involved. Because it is unwise to prolong critical airfield pavement maintenance and given the uncertainty that either RCRA or CERCLA PFAS designations will have on such airfield pavement maintenance, we encourage EPA to step-back from such rulemaking to better understand and document the toxicity and environmental fate of PFAS constituents, before rushing to regulate.

While NAPA does have a strong public track-record of promoting environmental protection, leading in construction material decarbonization, and even closely partnering with EPA on other programs, we believe the agency is acting prematurely, not following prior precedent, and acting without statutory authority with regards to classifying PFAS as a RCRA 'hazardous constituent'.

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Even EPA's prior rulemaking effort to designate PFAS chemicals as CERCLA 'hazardous substances' similarly lacks precedent – in fact, such a chemical designation is unheard of under CERCLA. While NAPA provided extensive comments on EPA's PFAS CERCLA rulemaking, the agency has not informed the public nor key industry stakeholders on the outcome or status of that rulemaking.

Regarding EPA's effort to classify PFAS as RCRA hazardous constituents, the agency is mistaken that peer-reviewed and published PFAS toxicity and health effects/impacts data reach or exceed the statutory-identified level of toxicity for a RCRA hazardous substance, specifically articulated in 40 CFR 261.11(2). Such PFAS materials simply do not meet that toxicological threshold. For example, according to the U.S. Agency for Toxic Substances and Disease Registry's (ATSDR's) Toxicological Profile for Perfluoroalkyls <https://www.atsdr.cdc.gov/ToxProfiles/tp200-c2.pdf> (May 2021), the lowest single-dose oral LD50 value in rats for representative PFAS (in this case, PFOS) was estimated to be greater than 200 mg/kg, not meeting the threshold criteria for 'hazardous waste' specified in 40 CFR 261.11(2).

Given the pervasiveness of PFAS and substantial unintended consequences of either a RCRA or CERCLA PFAS designation, EPA must wait for clear Congressional intent, through legislation, to regulate PFAS under either RCRA or CERCLA; otherwise, we are concerned EPA will exceed its statutory authority. Recognizing the ongoing need for better environmental protection, EPA must also understand potential impacts of such rulemaking on the nation's critical material supply chains, product procurement, and overall economic growth.

Lastly, as NAPA identified in its CERCLA comments, we are willing to work with Congress and the agency to better understand how recycling PFAS-contaminated pavements, not dissimilar to EPA's 2007 rule on Chat waste, can be repurposed safely "when its particles are encapsulated in asphalt or concrete." (see Criteria for the Safe and Environmentally Protective Use of Granular Mine Tailings Known as "Chat" | 72 Fed Reg 39331).

Regards,

Howard Marks
Vice President – Environment, Health & Safey
National Asphalt Pavement Association