

Testimony of Jane C. Luxton

Protecting Americans at Risk of PFAS Contamination & Exposure

Before the House Subcommittee on the Environment and Climate Change

May 15, 2019

I. Introduction

Chairman Tonko, Ranking Member Shimkus, Chairman Pallone, and Ranking Member Walden, thank you for inviting me to testify today on legislation that has been introduced to address PFAS contamination. My name is Jane Luxton. I am a partner in the Washington, DC, office of the law firm, Lewis Brisbois, and co-chair of the firm's Environmental and Administrative Law Practice.

I have practiced in the fields of environmental and administrative law for more than thirty years, in both the public and private sectors. My government service includes appointments as a trial attorney and senior trial attorney at the U.S. Department of Justice and as General Counsel of the National Oceanic and Atmospheric Administration, where I was responsible for implementing and enforcing numerous environmental and natural resource laws. My work as a private practitioner has covered a broad spectrum of federal environmental statutes. For my service at NOAA and the Department of Justice, I received the highest awards of the Commerce Department (Gold Medal Award, twice) and the Justice Department (Attorney General's Award). My curriculum vitae lists other professional recognition I have received during my career. I am a graduate of Harvard University, with honors, and Cornell Law School.

I am testifying today on my own behalf, as an environmental and administrative law practitioner who has a strong interest in science policy issues, which has led me to follow developments relating to PFAS compounds. My colleagues and I at Lewis Brisbois have written numerous articles on PFAS science regulatory issues, which are noted in my CV. I am not representing any client on PFAS issues or legislation before the Committee.

Today I would like to speak to the broader issue of the challenges surrounding the regulation of PFAS chemicals and then I will address a few of the specific bills the Committee is considering.

II. Introduction to PFAS

Per- and poly-fluorinated substances, commonly known as "PFAS," are a large family of chemicals consisting of 3,000 to 5,000 individual chemical compounds, of which perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonate ("PFOS") are two of the most widely-known. PFAS have historically been used for a variety of purposes, including in the manufacture of goods such as textiles, paper, packaging materials, cleaning solutions, firefighting foam, and products using water or grease resistant coatings such as pots and pans.

III. While there has been a significant amount of initial research done on PFAS, much of this research remains incomplete and more needs to be done to adequately understand the potential health effects of PFAS chemicals

PFAS compounds have been manufactured since the 1940s and, because of their properties, have been widely used in product manufacturing and subsequently dispersed in the environment. These chemicals are persistent in the environment, as they do not readily degrade. Some research has raised concerns over health effects caused by PFAS exposure. Scientific studies of PFAS compounds have primarily concentrated on PFOA and PFOS, but much less is known about the thousands of other PFAS chemicals. PFAS compounds vary in terms of specific chemical structure, chain length, and composition, and these differences appear to matter significantly in terms of fate and degradation in the environment, as well as toxicity, uptake, and retention in humans, plants, and animals. Dr. Linda Birnbaum, Director of the National Institute of Environmental Health Sciences and the National Toxicology Program, testified before the Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Federal Spending Oversight and Emergency Management last fall that “we do not have strong data on which to base conclusions for the great majority of thousands of PFAS and we have only limited findings that support [particular] adverse health effects.”¹ A great deal of academic and governmental research is currently underway to determine the extent of causal links between exposure to PFOA, PFOS, and the many other PFAS compounds and specific health effects in humans. There appears to be a consensus that more research is needed.

IV. State Responses to PFAS Contamination

Several states have implemented comprehensive sampling programs testing for PFAS contamination in drinking and groundwater. As sampling programs continue to yield positive results for PFOA- or PFOS-contaminated drinking or groundwater, states and communities have begun to take regulation of these chemicals into their own hands. Examples of state approaches include:

- Several states trigger remedial action based on the sum of the concentration of PFOA and PFOS exceeding a 70 part per trillion (“ppt”) concentration limit (i.e., the current EPA drinking water advisory).
- Connecticut, Massachusetts, and Vermont are setting limits for the sum of five different PFAS, not just PFOA and PFOS.
- New Jersey and New York use a lower concentration ceiling than EPA and other states (a 10 ppt limit for PFOA and PFOS). New Jersey has issued a statewide Directive seeking

¹ Hearing on “The Federal Role in the Toxic PFAS Chemical Crisis,” Testimony before the Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Federal Spending Oversight and Emergency Management, Linda S. Birnbaum, Ph.D., D.A.B.T., A.T.S., Director, National Institute of Environmental Health Sciences and National Toxicology Program National Institutes of Health (September 26, 2018).

information, remediation, and reimbursement of past costs and payment of future costs from PFAS manufacturers.

- Vermont triggers action based on the sum of five PFAS exceeding 20 ppt.

V. Federal Response to PFAS Contamination

As states and communities continue to implement their own regulations, risks increase that the result will be a patchwork of differing requirements around the country.

One way to avoid this outcome is to adopt workable, scientifically-based federal regulations to manage these chemicals. The federal government has several statutory mechanisms it can use to regulate PFAS chemicals, but it must proceed carefully to ensure new regulations are effective in addressing the problem.

A. When the government regulates, it must rely on up-to-date, credible scientific research and legally sound procedures to avoid negative, unintended consequences

As stated above, as many as 5,000 individual chemical compounds make up the PFAS family. Of these, the three best known are PFOA, PFOS, and GenX. These are the compounds that are most commonly found in drinking water and on which most research has been done. However, even the research on these three chemicals remains largely incomplete.

Imposing blanket regulations on thousands of PFAS chemicals – as some of the proposed legislation seeks to do – when scientists agree we have at best limited information on most, risks losing focus on the highest priority concerns. As the Centers for Disease Control stated in its most recent report, “[f]inding a measurable amount of [PFAS] in blood does not imply that the levels . . . cause an adverse health effect,” and “small amounts [of PFAS] may be of no health consequence.”² An across-the-board approach would impose extraordinary burden and cost on federal agencies, states, and local governments, requiring funds that today’s federal and state regulatory agencies simply do not have, while diluting resources that should be on targeted on the highest risk chemicals.

Even chemicals of demonstrably significant concern, such as dioxin, PCBS, and PAHs, have been found, on examination, to differ significantly in terms of potency among individual congeners. In a similar vein, one of the most promising approaches for addressing the large number of PFAS compounds appears to be grouping them into categories with similar properties, as a workable way to assess relative toxicity. The alternative of attempting to impose a one-size-fits-all approach to regulating PFAS chemicals poses a very real risk of doing more harm than good.

² Centers for Disease Control, Biomonitoring Summary. Perfluorochemicals (2018), *available at* https://www.cdc.gov/biomonitoring/PFAS_BiomonitoringSummary.html.

In addition, bills that direct agencies to issue specific federal regulations can present other challenges. For example, in promulgating regulations, agencies must adhere to the requirements of the Administrative Procedure Act (“APA”). The APA requires agencies to follow a series of steps, providing for transparency in decisionmaking, a defensible administrative record, analyses of the benefits and costs of the regulatory action and the feasibility of alternatives, and due process in the form of a public notice and comment period, if a regulation is to withstand review by the courts. As recently as the 2016 amendments of the Toxic Substances Control Act, Congress reinforced the need to adhere to these kinds of requirements in order to ensure the adoption of scientifically and legally sound rules.

B. Existing statutes provide authority to regulate PFAS chemicals

EPA’s February 2019 PFAS Action Plan³ includes directed action under both the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA, and the Safe Drinking Water Act. CERCLA provides the authority for EPA’s Superfund program and allows EPA to use federal funds to clean up contaminated sites. EPA has initiated the regulatory process to designate PFOA and PFOS as CERCLA hazardous substances, and formal listing would give EPA additional power to require responsible parties to undertake and/or pay for remediation. But expanding this approach to all PFAS compounds, as H.R. 535, the PFAS Action Act of 2019, seeks to do, could lead to wholesale reopening of remediated sites, potentially overwhelming the program and undermining progress on the highest-risk targets.

The Safe Drinking Water Act is another mechanism that EPA may use to regulate PFAS chemicals. EPA has authority under the Safe Drinking Water Act to set standards for drinking water quality and implement federal programs to ensure drinking water safety. Specifically, EPA may set a Maximum Contaminant Level (“MCL”) that is the threshold limit on the amount of any one substance permitted to be found in public drinking water. The MCL process takes time and, understandably, many concerned communities are impatient to see action, but EPA’s Action Plan anticipates releasing a proposed MCL for PFOA and PFOS this year. It makes sense to see EPA’s recommendation and decide at that point if further legislation is needed.

VI. Additional Comments on Other Bills

H.R. 2577 would amend the Emergency Planning and Community Right-To-Know Act of 1986 to require reporting on releases of per- and polyfluoroalkyl substances through the Toxics Release Inventory. The PFAS of greatest concern are no longer being manufactured, and so releases of these compounds from manufacturing are extremely unlikely. Requiring reporting on thousands of other compounds, the toxicity of which is not established, is of uncertain value. This proposed legislation would greatly expand reporting requirements in a way that is

³ EPA, EPA’s Per- and Polyfluoroalkyl Substances (PFAS) Action Plan, EPA 823R18004 (Feb. 2019), *available at* https://www.epa.gov/sites/production/files/2019-02/documents/pfas_action_plan_021319_508compliant_1.pdf.

significantly more burdensome for U.S. businesses, including U.S. small businesses that often have limited resources to comply with complex and costly regulations.

VII. Conclusion

While the bills being debated are motivated by good intentions, the reality is that much more research needs to be done on PFAS chemicals in order to generate and act on accurate and reliable information. It is difficult to deregulate once regulations are put in place, even when those regulations may prove to be based on inadequate science. Perhaps the most effective focus for Congressional support at this point is providing additional funding for research and regulatory efforts that target priority concerns.