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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

RICHARD M. RUSSELL, *MAJORITY STAFF DIRECTOR*
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April 17, 2020

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue N.W.
Washington D.C. 20004

Dear Administrator Wheeler:

I write with concern about the apparent efforts of Dr. Nancy Beck, nominee to chair the Consumer Product Safety Commission (CPSC), to weaken EPA's proposed Significant New Use Rule (SNUR) that is designed to restrict the use of certain long-chain PFAS chemicals (including PFOA and PFOS) in products. Documents and other information obtained by my office indicate that in Dr. Beck's previous role as EPA's Deputy Assistant Administrator for the Office of Chemical Safety and Pollution Prevention, as well as in her current role at the White House National Economic Council, Dr. Beck has sought to make it more difficult for EPA to use its authority under the Toxic Substances Control Act (TSCA) to protect Americans from these harmful substances. I urge you to resist these efforts and ensure the final rule is as protective as was originally envisioned.

In January, 2015, EPA first proposed what amounted to a de facto ban on certain long-chain PFAS (including but not limited to PFOA and PFOS) for which there were no ongoing uses, as well as a de facto ban on the resumption of all abandoned uses of certain long-chain PFAS substances that had previously been allowed. Additionally, the rule proposed to remove the exemption in TSCA that allowed entities to import these chemicals as part of articles (such as surface coatings or other consumer products). Following the 2016 re-authorization of TSCA, EPA concluded that a supplemental proposed rule would be needed in order to consider and reflect the changes Congress made. In February 2020, EPA issued that supplemental proposed rule. A review of hundreds of pages of inter-agency documents, agency calendars, red-lined drafts of this rule and other information obtained by my office indicate that:

- While at EPA, Dr. Beck sought to weaken the supplemental proposed rule by urging for the adoption of a complicated and time-consuming analytic barrier to justify the finding mandated in the 2016 TSCA provisions that the "reasonable potential for exposure" to a chemical from an article (i.e. a product) must exist before applying the law's requirements to those articles. She did this even though EPA had told Congress at the time the 2016 TSCA revisions were being negotiated that EPA did not believe the new provisions would alter its ability to finalize this rule.
- After Dr. Beck left the EPA for the White House, she directed the reversal of the White House's repeated conclusions that this proposed rule did not require White House or

inter-agency review, presumably in order to assure her continued ability to direct the development of the supplemental proposed rule.

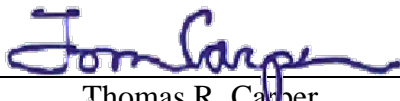
- Through months of inter-agency negotiations, involvement of political officials and extensive editing, and despite the apparent resistance of EPA, Dr. Beck succeeded in originating or directing the inclusion of provisions in the supplemental proposed rule that could, if finalized, result in violators of the rule being granted 'safe harbor' from enforcement, the exemption of some PFAS-containing products from being subject to the rule, and the exclusion of data that describe the risk of exposure.

The appended timeline and underlying documents more specifically describe these concerning developments. I request that you place all of them into the public docket associated with this proposed rule.

In the FY 2020 National Defense Authorization Act, Congress included provisions that mandated the finalization of this rule by June 22, 2020. As the Agency moves to meet this deadline, I urge you to support the legal and scientific views of the EPA experts who have sought to promulgate these important protections for years, and resist the involvement of Dr. Beck or other political officials who seek to weaken them.

Thank you very much for your consideration of this important matter. If you have any questions or concerns, please have your staff contact Dr. Michal Freedhoff of the Environment and Public Works Committee staff (michal_freedhoff@epw.senate.gov).

Sincerely,


Thomas R. Carper
Ranking Member

Timeline Showing Nancy Beck's Involvement with the PFAS Significant New Use Rule

January 21, 2015: EPA proposed¹ a Significant New Use Rule (SNUR) for PFAS under the Toxic Substances Control Act (TSCA). The SNUR proposed what amounted to a de facto ban on certain long-chain PFAS (including but not limited to PFOA and PFOS) for which there were no ongoing uses, as well as a de facto ban on the resumption of all abandoned uses of certain long-chain PFAS substances that had previously been allowed. Additionally, the SNUR proposed to remove the exemption in TSCA that allowed entities to import these chemicals as part of articles (such as surface coatings or other consumer products).

March-April, 2016: Senate negotiators working on TSCA re-authorization asked EPA [Attachment A] whether language under consideration that would have required EPA to find a “reasonable potential for exposure” to a chemical included in an article² would create a barrier for EPA in its efforts to finalize the 2015 PFAS SNUR. EPA's response was “no.”

June 21, 2016: Re-authorization of TSCA was enacted into law, necessitating a supplemental proposal of the 2015 SNUR to reflect its new provisions. According to the Fall 2017 White House Office of Management and Budget (OMB) docket,³ the supplemental proposed rule was expected to be published in January, 2018 with a final rule expected by April, 2019. The supplemental proposed rule was also classified as non-significant,⁴ meaning that it would not require interagency or White House Office of Information and Regulatory Affairs (OIRA) review.

April 30, 2017: Nancy Beck joined the Trump Administration EPA as Deputy Assistant Administrator for the Office of Chemical Safety and Pollution Prevention.

September 18, 2017: Nancy Beck was briefed on the PFAS SNUR and the “ski wax” issue [Attachment B]. PFAS-containing ski wax has been known for some time to rub off of skis and release PFAS into the environment.^{5,6}

2017-2018: In the January, 2015 proposed SNUR, EPA proposed to remove the exemption in TSCA that allowed entities to import covered chemicals as part of all articles. However, while at EPA, Dr. Beck urged the Agency to adopt a high analytic barrier as it sought to justify the finding mandated in the 2016 TSCA provisions that require EPA to find that the “reasonable potential for exposure” to a chemical from an article must exist before applying the law's

¹ <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2013-0225-0001>
<https://archive.epa.gov/epa/newsreleases/epas-actions-restrict-pfoa-and-similar-chemicals-yield-significant-human-health-and.html>

² See <https://www.law.cornell.edu/cfr/text/40/704.3> Under TSCA, ‘article’ means a “manufactured item (1) which is formed to a specific shape or design during manufacture, (2) which has end use function(s) dependent in whole or in part upon its shape or design during end use, and (3) which has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article, and that result from a chemical reaction that occurs upon end use of other chemical substances, mixtures, or articles; except that fluids and particles are not considered articles regardless of shape or design.”

³ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=2070-AJ99>

⁴ <https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp>

⁵ <https://www.scientificamerican.com/article/ski-wax-chemicals-buildup-blood/>

⁶ <https://www.sciencedaily.com/releases/2019/11/191106085449.htm>

requirements to articles.

February, 2018: According to information provided to Senator Carper's office, EPA briefed OIRA on the PFAS SNUR and re-confirmed that it would continue to be classified as non-significant.

January 2, 2019: Alexandra Dunn was confirmed to be the Assistant Administrator of EPA's Office of Chemical Safety and Pollution Prevention.

June, 2019: Nancy Beck left EPA to join the White House National Economic Council.

July 11, 2019: According to information provided to Senator Carper's office, EPA Assistant Administrator for the Office of Chemical Safety and Pollution Prevention Alexandra Dunn received a staff briefing on the PFAS SNUR.

July 19, 2019: According to documents obtained by Senator Carper's office [Attachment C], OMB informed EPA that it had changed its mind about the significance of the supplemental proposed rule and was re-classifying it as 'significant', meaning that White House and interagency review would be required. The document stated that "this request was not sent to OMB by OP [EPA's Office of Policy] through the normal process."

October 3, 2019: According to documents obtained by Senator Carper's office [Attachment D], OMB requested a summary of all comments received by EPA on the 2015 proposed SNUR.

November 6, 2019: According to documents obtained by Senator Carper's office [Attachment E], OMB submitted 79 comments and questions on the supplemental proposed rule and 12 comments on the proposed Environmental Assessment to EPA. These comments included some minor clarifying edits, but also included some significant suggested revisions which are understood to have been largely originated by or included at the request of Nancy Beck. On **November 27, 2019**, EPA responded to OMB:

1. *Safe Harbor*⁷: The White House suggested that EPA modify the rule to add a 'safe harbor' for importers of PFAS included as part of an article in case an importer was unaware of the rule. *EPA Response:* EPA stated that it did not believe a 'safe harbor' for importers of PFAS included as part of an article was needed, saying that importers had been aware of EPA's efforts since the 2015 proposed rule and that a 'safe harbor' would dis-incentivize importers from learning about or disclosing the existence of PFAS-containing articles during the comment period on the supplemental PFAS SNUR in order to subsequently claim they were unaware of the rule.
2. *Exposure Potential*⁸: The White House questioned whether it was known that PFAS used as part of a surface coating could be released into the environment. *EPA Response:* EPA stated that PFAS could be released into the environment as the surface coating degraded.

⁷ Comment 1 of Attachment E

⁸ Comment 44 of Attachment E

3. *New Analysis*⁹: The White House suggested that EPA create a separate technical document or exposure analysis demonstrating the “reasonable potential for exposure” to PFAS from surface coatings. *EPA Response*: EPA said that it had issued SNURs for other chemical substances without a separate technical document justifying its view that a “reasonable potential for exposure” to the chemical substance existed, did not wish to create a new precedent not specified in law, but would cite all scientific sources used to reach the conclusion in the final rule.
4. *Non-stick cookware*¹⁰: The White House sought to argue that the coating for non-stick cookware does not include anything but ‘negligible levels’ of the PFAS covered by this SNUR and that the chance of any PFAS from these coatings migrating into food is also negligible. *EPA Response*: While EPA noted that food-contact uses of chemicals are not regulated by EPA, residual PFOA (which is covered by the SNUR) is not removed to “negligible levels” during the fabrication process of non-stick cookware coating, and thus EPA chose to retain non-stick cookware as an example of a PFAS-containing coating that could be analogous to uses that are regulated by EPA under TSCA.
5. *Justifying the Use of Studies*¹¹: The White House sought to remove certain studies from being used to justify the SNUR. *EPA Response*: EPA disagreed, saying the studies did show a “reasonable potential from exposure” from PFAS in articles.
6. *Limiting Applicability of the Rule*¹²: The White House questioned whether a numeric limit for how much PFAS could be released from the article should be set to trigger applicability of the rule. *EPA Response*: EPA disagreed, citing the plain language of TSCA.
7. *Costs*¹³: The White House asked EPA why it believed that the importers that would be subject to the rule would incur costs that were at the lower end of the range presented in the regulatory analysis as well as for the basis for some of EPA’s cost estimates. *EPA Response*: EPA explained its assumptions and data sources, added some additional cost information, and agreed to add language requesting public comment on whether its assumptions were accurate.

December 9, 2019: According to documents obtained by Senator Carper’s office [Attachment F], the White House Office of Management and Budget (OMB) submitted numerous follow-up suggestions and reactions to EPA’s earlier (November 27, 2019) responses to OMB on the supplemental proposed rule and one comment on the proposed Environmental Assessment to EPA. The more significant comments are understood to have been largely originated by or included at the request of_ Nancy Beck. On **December 18, 2019**, EPA responded to OMB:

1. *Safe Harbor*¹⁴: The White House questioned EPA’s November response that a safe harbor for importers of PFAS-containing articles would dis-incentivize importers from

⁹ Comment 45 of Attachment E

¹⁰ Comments 49 and 53 of Attachment E

¹¹ Comments 50 and 55 of Attachment E

¹² Comments 51 and 52 of Attachment E

¹³ Comments 72, 76 and EA Comment 9 of Attachment E

¹⁴ Comment 1 of Attachment F

learning about or disclosing the existence of PFAS-containing articles during the comment period on the supplemental PFAS SNUR in order to subsequently claim they were unaware of the rule, and strongly urged EPA to add such a provision. *EPA Response:* EPA continued to disagree with the White House.

2. *Exposure Potential*¹⁵: The White House continued to question whether it was known that PFAS used as part of a surface coating could be released into the environment. *EPA Response:* EPA continued to state that PFAS could be released into the environment as the surface coating degraded.
3. *New Analysis*¹⁶: The White House continued to request that EPA create a separate technical document or exposure analysis demonstrating the “reasonable potential for exposure” to PFAS from surface coatings and disagreed with EPA’s earlier response, calling it insufficient. *EPA Response:* EPA reiterated and explained its earlier response, and proposed to list and briefly describe the scientific sources used to reach the conclusion in the final rule.
4. *Non-stick cookware*¹⁷: The White House proposed to remove all references to non-stick cookware from the supplemental proposed rule since the PFAS-coatings in food contact substances are not subject to TSCA, saying that EPA’s earlier response did not address its concern. *EPA Response:* EPA agreed to remove the references.
5. *Justifying the Use of Studies*¹⁸: The White House continued to argue that certain studies should not be used to justify the rule. *EPA Response:* EPA disagreed, saying the studies did show a reasonable potential from exposure from PFAS in articles.
6. *Limiting Applicability of the Rule*¹⁹: The White House continued to question whether a numeric limit for how much PFAS could be released should be set to trigger applicability of the rule. *EPA Response:* EPA disagreed, citing the plain language of TSCA.
7. *Costs*²⁰: The White House disagreed with EPA’s explanation of why it believed that the importers that would be subject to the rule would incur costs that were at the lower end of the range presented in the regulatory analysis, and continued to ask for more information about some of EPA’s cost estimates. *EPA Response:* EPA agreed to add some clarifying text saying that for some importers, costs could be higher, and further explained its assumptions and data sources.

December 19, 2019: EPA (including Assistant Administrator Dunn) and OMB had a phone call about the supplemental proposed rule. On **January 15, 2020**, EPA responded to the comments it received on that call [Attachment G]:

1. *Safe Harbor*²¹: The White House continued to request that EPA modify the rule to add a ‘safe harbor’ for importers of PFAS included as part of an article in case an importer was

¹⁵ Comments 39, 41, 42 and 46 of Attachment F

¹⁶ Comments 44 and 45 of Attachment F

¹⁷ Comments 49, 53 56 of Attachment F

¹⁸ Comment 50 of Attachment F

¹⁹ Comments 51 and 52 of Attachment F

²⁰ Comments 72 and 76 of Attachment F

²¹ EPA Change 2 of Attachment G

unaware of the rule. *EPA Response:* EPA agreed to request comment on whether a safe harbor should be included in the final rule.

2. *Limiting Applicability of the Rule*²²: The White House continued to question whether a numeric limit for how much PFAS could be released should be set to trigger applicability of the rule was needed. *EPA Response:* EPA agreed to request comment on the question of whether such a limit should be developed.
3. *Costs*²³: The White House suggested text that referenced a 2006 study that found higher costs than those cited by EPA and asked EPA to add text stating that EPA could not conclude whether any small businesses would experience a significant impact as a result of the rule. *EPA Response:* EPA agreed to add the text.

December 20, 2019: The National Defense Authorization Act was enacted, mandating finalization of the PFAS SNUR by June 22, 2020.

January 27, 2020: OMB sent a redlined version of the supplemental proposed rule to EPA with new, significant redlined text [Attachment H]. The new text is understood to have largely originated by or included at the request of Nancy Beck. The language added new explanations for why EPA should consider establishing a numeric limit for how much PFAS could be released to trigger applicability of the rule. It also added to the previously agreed-upon request for comment on whether to include a ‘safe harbor’ provision by noting that some importers might not be aware that their products include PFAS.²⁴

January 30, 2020: EPA sent back a modified redlined version of the supplemental proposed rule [Attachment I] that made clear that nothing in TSCA required EPA to set a numeric limit for how much PFAS would be needed to trigger the rule, but that EPA could do so if appropriate. EPA also suggested removing the language the White House added to the ‘safe harbor’ portion of the January 27 version that noted that some importers might not be aware that their products include PFAS.²⁵

January 31, 2020: OMB sent questions to EPA [Attachment J] and, according to information received by Senator Carper’s office, requested elevation to political officials. The first question asked EPA to justify the deletion of the text previously added by the White House. The second question related to whether the proposed rule should apply to processors of the covered PFAS as well as to manufacturers. On **February 10, 2020** EPA responded to the January 31, 2020 questions and noted that its explanation for the deletions was in a **February 7, 2020** redlined version of the supplemental proposed rule it had sent to OMB.²⁶ EPA’s explanation for deleting the text was that it believed the request by the White House for EPA to request comment on specific ways in which EPA could set a numeric limit for how much PFAS could be released to trigger applicability of the rule, without actually proposing such a limit and allowing public comment on it, would make the rule vulnerable to legal challenge. EPA also noted that even absent that legal vulnerability, it would not easily be able to evaluate comments on, analyze

²² EPA Change 2 of Attachment G

²³ Comments 75, 76 and EA Comment 1 of Attachment G

²⁴ See especially the additions beginning on page 12 of Attachment H

²⁵ See especially the edits to the text beginning on page 12 of Attachment I

²⁶ See comment A50R48 of Attachment K.

potential methodologies for, set such a limit and finalize the rule before the June 22, 2020 statutory deadline.

February 11, 2020: According to a final copy of a redlined version of the supplemental proposed rule [Attachment K], principals, including Assistant Administrator Dunn spoke and agreed to add language further weakening the supplemental proposed rule:

1. *Proposing to exempt processors*²⁷: Language was added stating that because EPA did not believe processing uses of the covered PFAS was ongoing, processors would be excluded from the rule and requested comment on that. However, since one of the purposes of the proposed rule is to prevent abandoned uses from being resumed in the future, this proposed exemption for processors of PFAS on the basis that there are no known ongoing uses would seem to be unwarranted.
2. *Justifying the Use of Certain Studies*²⁸: Language was added requesting comment on whether the studies that EPA had previously refused to exclude could be used.

February 14, 2020: OMB concluded review of the supplemental proposed rule, and it was published.

²⁷ See language associated with comments A28 and A64 of Attachment K.

²⁸ See the language associated with comment A63 of Attachment K.