





Bund für









16 of August 2022

To:

Peter van der Zandt, Director of ECHA

Subject: Restrictions of PFHxA and PFAS in firefighting foams

Dear Mr. Van Der Zandt,

Thank you very much for your detailed reaction dated 27th June as a reply to our earlier letter. The publication of the final opinion PFHxA following our letter has reassured us that the process is moving forward, and that the REACH Art. 73(1) clock has now started ticking. Nevertheless, our overall concern regarding weakening of the measures proposed in the final opinion of the PFHxA restriction remains unaddressed.

In the following, we would like to raise a few points to complement statements in your letter or to react to these. We would very much appreciate receiving clarification from you on the points and questions below (see Appendix I).

Yours faithfully,

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Appendix I: Queries to be addressed by ECHA regarding the PFHxA and PFAS in firefighting foams restrictions:

1. Regarding ECHA's overall approach to these overlapping restrictions:

- 1.1. You write that the "intention of [the foams] proposal is not to weaken any existing legislation on PFAS for firefighting foams". We welcome updating of the Background Document to the ECHA proposal¹ to clarify this. However, our main worry was the weakening of proposed legislation, i.e. of the opinions of the scientific committees (on PFHxA), which are supposed to serve as the default basis for the Commission's decision according to Art. 73.
- 1.2. Your statement that "it is not appropriate, at this time, to assume that the PFHxA proposal will become part of the legislative baseline" surprised and concerned us.
 - 1.2.1. The Annex XV dossier and the scientific opinions are the default basis for the actual decision²; we are wondering on what grounds ECHA pulls into question this logic, which is, additionally, clearly within the remit of the Commission's decision making.
 - 1.2.2. Your claim that the PFHxA restriction might never be adopted is also of great concern to us. It would delay the phasing out of the use of certain PFAS in many sectors, such as textiles and food packaging, by relying on an presently unknown outcome of the universal restriction. Every year of delay in restricting PFAS means an increasing PFAS pollution burden due to their extreme persistence.
- 1.3. We are also worried that references to other legislators' faster and more far-reaching regulation demonstrating both political will and technical feasibility are often ignored, including by your letter.

2. Technical elements:

- 2.1. In your letter, you write that "there is evidence that PFASs beyond C6 are already being used in firefighting foams". Neither the PFHxA restriction documents nor ECHA's Annex XV dossier (including its Annex and Appendix) contain such evidence. Could you please share this evidence with us?
- 2.2. These potential substitutes are indeed the ones for which we suggested regulation in our letter.
- 2.3. Regarding the "Seveso derogation":
 - 2.3.1. Your letter states that "[the Seveso derogation] is based on an assessment that is a more fit-for-purpose approach [than for the large tanks derogation]". Could you share the arguments on which this opinion is based? We regret that such a comparison is not made in the documents of ECHA's proposal, and that the latter appear to ignore the work done, knowledge gathered, and recommendations made in the process of the PFHxA restriction. In the EEB's contribution of 24th May 2022 to the consultation on ECHA's proposal, section 5, this lack of justification has already been explained. One concrete example of this lack of justification: as compared to the PFHxA restriction proposal, ECHA's proposal allows use of AFFFs on fuel storage tanks below 400 m2 (providing they are Seveso sites). It is so far unclear on what arguments ECHA is basing this proposal on.
 - 2.3.2. In the same sentence, your letter suggests that ECHA's assessment is made fitter-for-purpose by recognising that "PFAS containing foams are challenging to substitute" in large tanks, but also on "sites where multiple types of flammable liquids are used". In the PFHxA restriction process, stakeholders were asked to provide feedback to consultations. SEAC did not conclude that the latter "challenges" justified a derogation. It is unclear to us on what basis ECHA proposes measures contradicting an earlier SEAC opinion.³

¹ Following ECHA's wording in the letter, we use "ECHA proposal" to refer to the restriction proposal on PFAS in fire fighting foams, available <u>here</u>.

² REACH Art. 73 (1) second paragraph.

³ It should be noted that RAC did not recommend any derogation for large tanks at all.

2.3.3. Finally, on this topic, the text mentions "as recognised by SEAC in their recommendation in their opinion on the PFHxA proposal to review the proposed five year transitional periods for class B fires prior to its entry into force". Could you please clarify why this sentence refers to a 5-year transitional period, whereas the preceding sentence referred to the suitability of the large tanks derogation, i.e. a 12-year period? More importantly, please also clarify what passage in the final opinion this statement refers to.

3. Thank you very much for building on our table comparing the two restriction proposals:

- 3.1. Your assumption of an entry into force in 2024 of the ECHA proposal appears indeed realistic, given the currently very fast progress. Our initial assessment, assuming an entry into force, was indeed based on average development times of restrictions.
- 3.2. Thank you also for clarifying that condition 5(c)⁴ of the PFHxA restriction (final opinion) applies also to uses on class B fires by municipal firefighters, on civilian ships and using portable extinguishers.
- 3.3. ECHA's comparative assessment appears biased in favour of the foams restriction, by omitting or downplaying points in which the PFHxA restriction is stronger.
 - 3.3.1. Your letter states that "in many instances, the ECHA proposal would result in significant short phase out timelines". This disregards the fact that the transition periods under the PFHxA scenario are the longer ones proposed by SEAC whereas the foams restriction may still suffer the same fate. It also overlooks that the reverse is also true for many instances. Especially the uses leading to the highest emissions (according to the ECHA's Annex XV dossier) are the ones delayed most by the foams restriction proposal. Please see the refined comparative table at the bottom of this document for the specific anticipations and postponements.
 - 3.3.2. Your letter then claims that ECHA's proposal contains stronger provisions than the PFHxA proposal regarding the use of PFAS-containing foams on fires other than class B fires. While the exact statement in your letter is correct, it disregards the actual provisions of the PFHxA proposal: in the PFHxA restriction, this transition period is three years (SEAC FO) or 1.5 years (RAC or DS), as non-class B uses are covered by condition 3 of the proposal. The phase-out date would consequently be 2026 (SEAC opinion) or 2024 or 2025 (RAC and DS). Under the ECHA's proposal, this date will be 2024 or 2025 in other words, both Annex XV dossier proposals are equal. It is only when comparing the SEAC opinion on the PFHxA proposal that the latter can be made to look less good than ECHA's proposal for which a SEAC opinion does not exist yet.
 - 3.3.3. Another inconsistent element is the "NA" in your table, regarding the status of Seveso sites under the PFHxA proposal. Indeed, Seveso establishments "without large tanks" are not mentioned explicitly in the PFHxA proposal. This means that condition 5(c) applies to those non-derogated Seveso establishments, i.e. that they must phase out PFAS-containing foams on class B fires within 5 years.
 - 3.3.4. The comparison in your letter on the 'PFAS management plan' disregards the relevant counterpart in the PFHxA proposal. Both text proposals are reproduced in the following table (emphasis added).

⁴ This paragraph reads: "[The ban] shall not apply until [after 5 years after entry into force] to concentrated firefighting foam mixtures that are used or are to be used in the production of other firefighting foam mixtures for cases of class B fires". The wording "foam mixtures used in the production of other foam mixtures" caused us to think that this applied to re-working or blending existing stocks into new mixtures.

⁵ Exact wording in the letter: "It is also important to note that the ECHA proposal contains two important provisions that the PFHxA proposal does not. The first is a requirement after six months to only use PFAS containing foams on class B fires (PFAS foams are also used on other types of fires)."

PFHxA proposal	ECHA's proposal
Condition 11	Condition 4(c)
From (entry into force + 36 months), a natural or legal person benefiting from the derogation in paragraph 7(a) shall provide by 31 January of each calendar year a report to the European Chemicals Agency containing: (a) a description of their efforts on substitution of firefighting foams that contain PFHxA, its salts and PFHxA-related substances;	Six months after entry into force users [] shall establish a site-specific 'PFAS-containing firefighting foams management plan' which shall include: i. a justification for the use of each firefighting foam concentrate where the concentration of total PFASs is greater than 1 ppm (including an assessment of the technical and economic feasibility
(b) quantities they used in the previous year of firefighting foams that contain PFHxA, its salts and PFHxA-related substances per sector specifying: (i) share in training and in operation (ii) whether emission was contained, collected and disposed safely or emitted into the environment.	of alternatives). ii. details of the conditions of use and disposal of each PFAS containing foam used on site specifying how paragraph 4(b) is achieved (including plans for the containment, treatment and appropriate disposal of liquid and solid wastes arising in the event of foam use, routine cleaning and maintenance of equipment or in the event of accidental leakage/spillage of foam).
The European Chemicals Agency shall consolidate and forward the data to the Commission by 31 March every year.	iii. The management plan shall be reviewed at least annually and be kept available for inspection by enforcement authorities on request.

Whereas the ECHA proposal provision applies to all uses, the PFHxA provision only applies to the large tanks derogation. The report/management plan are relatively similar in content under both proposals. However, most notably the PFHxA proposal fares much better regarding enforceability and transparency. In this case, both ECHA and the Commission will be able to monitor, year by year, efforts made and concrete advances in site conversions. Citizens and NGOs would be able to access this environmentally relevant data. In contrast, the ECHA's proposal's provisions are much weaker: inspectors will only be shown the management plan on request; no information will be available by default to ECHA, the Commission, environmental authorities, citizens or NGOs.

Appendix II: Comparison table of restriction conditions and transitional periods proposed in the PFHxA and PFAS in firefighting foams restrictions:

	PFHxA and related substance (DE proposal as modified by RAC/SEAC)		PFASs in firefighting foams (ECHA proposal)		Emissions (t/y) ⁶
Entry into force	Assumed 2023 (1 year from opinions sent to COM – Q2 2022)		Assumed 2024 (1 year from opinions sent to COM – Q2 2023)		
Manufacture of substance	EiF+3y	2026^{7}	NA	-	
Formulation of firefighting foams	EiF+5y	2028	EiF+10y	2034	
Reports/ Management plans	EiF+5y 2028 ⁸		EiF+6m	2024	
Uses (class B fires only; transi	tional period 3	years PF	HxA and 6 months EC	THA proposal)	
Training	EiF+5y	2028	EiF+1.5y	2026	low
Testing	(emissions must be minimised)				
Municipal (class B)	EiF+5y	2028	EiF+1.5y	2026	50
Civilian ships (class B)			EiF+3y	2027	50
Portable extinguishers (class B)			EiF+5y	2029	10
Seveso establishments (class B)	EiF+5y	2028	EiF+10y	2034	200
Large tanks	EiF+12y	2035	(they are Seveso establishments)		
Other (incl. defence)	EiF+5y	2028	EiF+5y	2029	>60

⁶ Based on ECHA's proposal, table 2, p. 35.

⁷ The shades and intensity of the colour-coding in this table are motivated by the difference in date as well as the overall environmental impact of the use.

⁸ The colour-coding in this line is motivated by the weaker monitorability and enforceability of the ECHA proposal, as detailed in section 3.3.4.