



May 22, 2023

## **Memo: CERCLA Tools to Limit Utility Liability**

Trade associations have expressed concerns about the potential liability that may be faced by public drinking water and wastewater utilities as the EPA works to designate PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act, or federal Superfund law. These concerns are overstated and rooted in a misunderstanding of how CERCLA works. The reality is that there are various tools available under Superfund to ensure those most responsible for the pollution pay the lion's share of the cleanup costs.

### **Creating permit requirements will limit future CERCLA liability for water utilities**

Drinking and wastewater utilities would be largely protected from future liability from PFAS releases if releases of PFAS were subject to permits under the Clean Water Act.

PFAS discharges are not currently restricted on an industry-wide level under the Clean Water Act, though a handful of facilities have PFAS requirements included in their National Pollutant Discharge Elimination System, or NPDES, permits. However, EPA and state regulators have clear authority to update these permits to address PFAS. Permit limits and pretreatment standards would limit the amount of PFAS in contaminated water received by wastewater and drinking water utilities. This would reduce the cleanup burden on utilities and also reduce the amount of PFAS waste generated by utilities.

Furthermore, section 107(j) of CERCLA limits liability from “federally permitted releases,” including releases subject to NPDES permits.<sup>1</sup> This provision in CERCLA was Congress’ recognition that an entity whose releases are being regulated under the Clean Water Act should not be penalized for those releases under CERCLA. If wastewater utilities release PFAS in compliance with an NPDES permit that includes limits on PFAS releases, those utilities will be protected from future liability stemming from those releases.

### **Drinking water utilities have experience treating CERCLA hazardous substances**

There are 66 substances subject to national primary drinking water regulations that are also listed as hazardous substances under CERCLA including arsenic, benzene, carbon tetrachloride, lead, mercury, PCBs, and trichloroethylene.<sup>2</sup> By law, drinking water utilities are already required to treat for these substances and properly dispose of contaminated media created from treatment.

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<sup>1</sup> 42 U.S.C. § 9607(j).

<sup>2</sup> Compare 40 C.F.R. § 302.4, Designation of Hazardous Substances, with List of Substances with National Primary Drinking Water Regulations, [https://www.epa.gov/sites/production/files/2016-06/documents/npwdr\\_complete\\_table.pdf](https://www.epa.gov/sites/production/files/2016-06/documents/npwdr_complete_table.pdf)

Many drinking water utilities likely also treat for other CERCLA hazardous substances that aren't subject to a national primary drinking water regulation like 1,4-dioxane.

As such, water utilities are accustomed to receiving and treating hazardous substances and disposing of contaminated waste properly and safely. Adding PFAS to the hazardous substance list will merely add to the list of hazardous substances that drinking and wastewater utilities already routinely handle.

### **Land application of sewage sludge as fertilizer is unlikely to create new liability for water utilities under CERCLA**

The wastewater facilities that produce sewage sludge are unlikely to be held liable under CERCLA. Section 101(22) of CERCLA exempts “the normal application of fertilizer” from the definition of “release.”<sup>3</sup> Applying biosolids to farm fields would likely constitute the normal application of fertilizer and therefore would not be considered a “release” of a hazardous substance.

Application of biosolids as fertilizer is a longstanding practice that has not yet resulted in significant liability for farmers or utilities. Because they are often a product of wastewater treatment, biosolids can contain a variety of pollutants, even when treated. A 2018 report by the EPA Office of Inspector General identified more than 350 contaminants identified in biosolids applied to lands.<sup>4</sup> Among the 352 contaminants, 61 contaminants were identified as “acutely hazardous, hazardous, or priority pollutants” in other programs, including CERCLA. The presence of these CERCLA hazardous substances in biosolids has not historically resulted in any significant liability for wastewater treatment facilities or farmers. The OIG report also found that “EPA has reduced staff and resources in the biosolids program over time, creating barriers to addressing control weaknesses identified in the program.” Given the presence of other CERCLA hazardous substances in biosolids, EPA’s limited resources in the biosolids program, and the application of the fertilizer exemption, the mere addition of PFAS chemicals to the CERCLA hazardous substance list is unlikely to create any new liability risk.

James Slaughter, an attorney with Beveridge & Diamond and an expert on biosolids issues told *Inside EPA* in 2019 that he also believes that concerns over CERCLA liability from biosolids are overblown.<sup>5</sup> He pointed to the fertilizer exemption and explained “Biosolids have long had trace amounts” of chemicals that are CERCLA hazardous substances, and that designating PFAS as hazardous substances “won’t likely trigger new liability.”<sup>6</sup> He also told a Water Environment Federation webinar in August 2022 that utilities “can have a fair amount of confidence that that fertilizer exemption, which Congress put in place when it passed CERCLA, is going to protect biosolids from any liability for PFAS being a hazardous substance.”<sup>7</sup>

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<sup>3</sup> 42 U.S.C. § 9601(22)(D).

<sup>4</sup> [https://www.epa.gov/sites/production/files/2018-11/documents/epaoig\\_20181115-19-p-0002.pdf](https://www.epa.gov/sites/production/files/2018-11/documents/epaoig_20181115-19-p-0002.pdf).

<sup>5</sup> <https://insideepa.com/daily-news/potws%E2%80%99-legal-uncertainty-drives-fear-over-pfas-superfund-designation>.

<sup>6</sup> *Id.*

<sup>7</sup> <https://www.bdlaw.com/content/uploads/2022/08/2022-08-24-Inside-EPA-Lawyer-Touts-CERCLA-Waivers-For-Biosolids-As-EPA-Readies-PFAS-Rule.pdf>.

## **Concerns about liability from landfill disposal are overstated**

Utilities have expressed concern that they could be liable for disposal of PFAS treatment byproducts like spent carbon filters that are disposed of in non-hazardous landfills and may leach into the surrounding community. There is unlikely to be a significant amount of municipal liability due to landfill disposal of PFAS treatment byproducts.

There are no current federal requirements for water utilities or municipal water treatment facilities to treat water for PFAS. It is unclear how much PFAS treatment waste is being generated by these facilities or how long they have been disposing of this waste in landfills. To the extent that utilities are generating PFAS waste and sending it to landfills, this alone is unlikely to trigger significant CERCLA liability. Even non-hazardous waste landfills today are subject to strict state requirements and are designed to limit releases into the environment. Landfills cannot be built in environmentally sensitive areas, and they have monitoring systems that check for releases into groundwater and the air.<sup>8</sup> If there is a release of PFAS, it is still unlikely that utilities will face significant CERCLA liability. Landfills accept multiple kinds of waste from multiple sources. As such, landfill cleanups under CERCLA are complex and often involve multiple contaminants, and liability is distributed among hundreds, if not thousands, of potentially responsible parties. For these reasons, it is highly unlikely that utilities with limited resources would be targeted for significant liability under one of these cleanups.

Although not required under current law, utilities can take extra precautions by disposing of PFAS waste in landfills that accept waste regulated under Subtitle C of the Solid Waste Disposal Act. This is a proactive approach to limiting potential liability from PFAS waste. Utilities can and should take steps to protect themselves from future liability by treating PFAS as Subtitle C waste.

## **There are existing tools under CERCLA like liability limits, affirmative defenses, and enforcement discretion to make sure polluters, not innocent parties, pay for cleanup**

The vast majority of PFAS contamination has been caused by industrial polluters and through the discharge of PFAS-laden firefighting foam. EPA's approach to CERCLA liability has evolved over the statute's 40-year history, and there are many tools – including liability exemptions, affirmative defenses, and enforcement discretion – designed to distribute liability equitably. In practice, the major contributors to PFAS pollution will pay the lion's share for cleanups.

CERCLA includes some provisions specifically directed at limiting municipal liability. Municipalities are not liable for costs or damages in response to costs related to emergencies created by the release of hazardous substances,<sup>9</sup> and EPA can reimburse municipalities for temporary emergency measures.<sup>10</sup> Municipalities and other government entities like utilities can also be exempted from liability if they are conducting a cleanup in compliance with a state cleanup program.<sup>11</sup>

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<sup>8</sup> <https://www.epa.gov/landfills/basic-information-about-landfills>.

<sup>9</sup> 42 U.S.C. § 9607(d)(2).

<sup>10</sup> 42 U.S.C. § 9623.

<sup>11</sup> 42 U.S.C. § 9628(b).

EPA has significant enforcement discretion. Under Section 122(g) of CERCLA, EPA can, and often does, quickly make “de minimis” settlements with parties that contributed only a small amount to the pollution.<sup>12</sup> EPA also has the discretion to make “ability to pay” settlements.<sup>13</sup> A settlement with EPA creates a contribution shield protecting that party from additional CERCLA liability from other PRPs and removing them from the case. That means other potentially responsible parties at a site are barred from seeking financial contribution from parties that have already settled with EPA. EPA also has discretion to allowed delayed payments, payment schedules, and in-kind contributions from municipal parties in settlement agreements.

In a March 2023 listening session on CERCLA PFAS enforcement, the EPA stated clearly that it intends, “to focus its CERCLA enforcement efforts on PFAS manufacturers, federal facilities, and other parties whose actions contribute to the release of significant amounts of PFAS.”<sup>14</sup> The EPA also said that it plans to settle with utilities and other parties when they are being pursued by third parties because, “such settlements would provide protection against litigation by other liable parties.”<sup>15</sup>

Potentially responsible parties can also protect themselves by taking proactive cleanup actions through state programs. EPA sees listing on the National Priorities List as the option of last resort at most contaminated sites. Cleanup is often conducted instead through state programs, which can be quicker, more efficient, and less costly. In some cases, these cleanup programs are voluntary but subject to state oversight. Cleanups satisfactorily conducted under one of these state response programs are subject to an “enforcement bar” under CERCLA, meaning that EPA will not take any Superfund actions against parties involved in the cleanup.<sup>16</sup>

### **Utilities will have ample input into cleanup and access to Superfund alternatives**

It’s unlikely that drinking water and wastewater utilities will face substantial liability from PFAS cleanups under Superfund. However, to the extent a cleanup does involve utilities, that will be a long process with ample opportunity for input. Moreover, most cleanups take place through alternative programs.

The release of a hazardous substance does not trigger immediate liability. The Superfund process is lengthy and involves a preliminary assessment, site investigation, and hazard ranking score before a site can be placed on the National Priority List, or NPL, EPA’s list of priority sites for cleanup most commonly associated with Superfund. During that process it may be determined that no further Superfund assessment is needed, or the site may be referred to another cleanup program. There are multiple opportunities throughout the process for potentially liable parties to provide input and coordinate with EPA if a site is considered for listing on the NPL.

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<sup>12</sup> 42 U.S.C. § 9622(g).

<sup>13</sup> <https://www.epa.gov/enforcement/guidance-superfund-ability-pay-determinations>

<sup>14</sup> <https://www.epa.gov/enforcement/cercla-pfas-enforcement-listening-sessions>

<sup>15</sup> *Id.*

<sup>16</sup> <https://www.epa.gov/enforcement/guidance-superfund-ability-pay-determinations>

That said, the vast majority of contaminated sites never make it onto the NPL, and the same is likely to hold true for sites contaminated with PFAS. Today, NPL listing is considered the “option of last resort”<sup>17</sup> for EPA and is often reserved for highly contaminated sites or so-called orphan sites where potentially responsible parties cannot be found.

A number of Superfund alternatives have evolved over the 40 years that CERCLA has been in place. Most cleanups happen under these programs, rather than through the formal NPL process.<sup>18</sup>

One program is the Superfund Alternative Approach. This program allows potentially responsible parties to enter into consent agreements with the EPA to ensure the cleanup is completed but without the formal NPL process. These programs are also sometimes referred to as “NPL equivalent” cleanups and tend to be quicker and more cost-effective than the NPL process. NPL-equivalent cleanups also do not carry the stigma of an NPL listing.

States and tribes also have their own Superfund laws. Some state Superfund programs, like New York’s,<sup>19</sup> already include some PFAS chemicals on their state hazardous substances lists, and others like Pennsylvania<sup>20</sup> and Wisconsin<sup>21</sup> are considering adding them. Cleanups under these state programs can also be more flexible and efficient than the NPL process. If contamination is being effectively cleaned up under a state program, EPA will not pursue Superfund liability.

Many contaminated sites are also already subject to regulation under the Resource Conservation and Recovery Act, or RCRA, and often cleanup is pursued under RCRA rather than Superfund. EPA has a policy of not placing any sites on the NPL that could be comparably addressed under a RCRA Subtitle C Corrective Action,<sup>22</sup> and it is possible that many potential PFAS sites could be cleaned up this way.

## Conclusion

CERCLA is the primary environmental cleanup law in the United States and critical to jumpstarting the cleanup process at PFAS contaminated sites across the United States. Never in the 40-year history of the statute has Congress carved out specific industries from liability from specific contaminants. Instead, EPA and potentially responsible parties have relied on tools like permit shields, limited liability provisions, affirmative defenses, and enforcement discretion to ensure that those most responsible for pollution pay for cleanup. There is no reason for Congress to create new loopholes now.

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<sup>17</sup> <https://www.epa.gov/sites/production/files/documents/saa-baseline-rpt.pdf>

<sup>18</sup> <https://www.epa.gov/superfund/superfund-site-assessment-process>

<sup>19</sup> <https://www.dec.ny.gov/regulations/104968.html>

<sup>20</sup> [legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2019&sind=0&body=H&type=B&bn=1364](https://legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2019&sind=0&body=H&type=B&bn=1364)

<sup>21</sup> <https://www.gklaw.com/Godfrey-Kahn/Full-PDFs/StateofWI2019-2020Legislature-2019CompoundsBill.pdf>

<sup>22</sup> <https://www.epa.gov/superfund/superfund-cleanup-alternatives>