

FACT SHEET

Why Liability Exemptions to the Superfund Law are Unjustified

CERCLA (“Superfund”) was designed by Congress to identify those responsible for contaminating the environment and endangering public health, and hold them accountable for cleanups. If “responsible parties” refuse to clean up contamination, EPA is authorized to conduct the clean up itself and recover the costs from responsible parties.

How does EPA’s proposed designation of “Forever Chemicals” as hazardous substances change liability for cleanups?

- When EPA’s proposed designation becomes final, communities, water systems, and others harmed by PFAS can pursue financial contributions from polluters to pay their share of cleanups costs.
- The designation will help EPA shift responsibility to polluters to pay for cleaning up PFAS contamination.
- PFOA and PFOS will be treated no differently than other hazardous substances. The designation of PFOA and PFOS is not novel or unprecedented under Superfund.
- There are many tools, including statutory exemptions, liability limits, affirmative defenses, and enforcement discretion – designed to protect businesses and industries acting in good faith.

Will the Superfund law impose unfair liability on innocent parties?

- No, the Superfund process identifies those responsible for clean ups depending on fact-specific and site-specific investigation.
- Parties who acted responsibly are not the target for liability or clean up cost recovery, and the liability framework for Superfund has worked as intended over the last four decades of Superfund implementation.
- EPA has successfully implemented specific policies for parties that contribute small amounts, and focuses efforts on major waste contributors.
- EPA has significant enforcement discretion. Under Section 122(g) of CERCLA, the EPA often quickly makes “de minimis” settlements with parties that contributed only a small amount to the pollution. EPA also has the discretion to make “ability to pay” settlements.
- While industries will often attempt to evade responsibility for cleanups, there’s no evidence that the law has unfairly penalized innocent parties.
- Those who contributed the most to the problem pay the most for cleanup.

Are wastewater treatment systems and small contributors vulnerable to third-party lawsuits?

- PFAS will be treated no differently than the dozens of CERCLA hazardous substances also regulated under the Safe Drinking Water Act, Clean Water Act, and other environmental statutes that treatment systems handle everyday.
- When a small contributor makes a settlement with the EPA, it creates a contribution shield protecting that party from additional CERCLA liability and removing them from the case. Other potentially responsible parties at a site are barred from seeking financial contributions from these parties.
- Similarly, PFAS releases subject to, and in compliance with, National Pollutant Discharge Elimination System (NPDES Clean Water Act permits) have liability protection. Section 107(j) of CERCLA limits liability from “federally permitted releases,” including releases subject to NPDES permits. 42 U.S.C. § 9607(j).
- When Congress passed CERCLA, it recognized that an entity whose releases are being regulated under the Clean Water Act should not be penalized. If a release is “federally permitted,” and a facility is in compliance with those permits, there is no CERCLA liability for the costs of responding to those releases.

Is PFAS included in existing Clean Water Act (NPDES) permits?

- EPA has recognized that PFAS are regulated pollutants under the Clean Water Act and that utilities have the responsibility to manage PFAS using the pretreatment program.
- If wastewater utilities release PFAS in compliance with a NPDES permit that includes limits on PFAS, those utilities would be protected from future liability under CERCLA related to those releases.

Shouldn't PFAS pollution be controlled “upstream” rather than passing the problem on to wastewater utilities?

- Yes. PFAS can pass through wastewater systems and contaminate biosolids, or sludge, which is then sold to farmers as fertilizer and spread on nearby fields. PFAS-contaminated sludge also leaches into groundwater and pollutes rural wells.
- Fortunately, the Clean Water Act provides important tools, like pretreatment authority, to address PFAS at the source. Publicly owned treatment works (POTWs) have authority to direct industries sending PFAS-laden wastewater to remove these chemicals *before* sending the wastewater to the POTW.
- EPA issued guidance in December 2022 clarifying that POTWs have Clean Water Act authority to use the pretreatment program, in the absence of federal pretreatment standards, to address PFAS. Many utilities have not yet used this authority.
- By implementing the pretreatment program, POTWs can keep PFAS out of their systems and avoid contaminating biosolids or otherwise discharging PFAS. They would also reduce the risk of potential liability under CERCLA, and therefore alleviate the cause for concern regarding an exemption.
- Alternatively, granting liability exemptions under CERCLA would only exacerbate the PFAS crisis. An exemption would remove an incentive for

wastewater treatment plants to use pretreatment to keep PFAS out of our waterways and would in turn pass the burdens of PFAS pollution downstream to communities and ratepayers. Stopping PFAS pollution at the source is the most efficient, effective, and equitable solution.

- Granting liability exemptions for one industry would also open the door to exemptions for even more industries, making it hard to ensure that much-needed cleanups are adequately funded.

Does technology exist that can remove PFAS from industrial wastewater before it reaches POTWs?

- Yes. There are several technologies that are capable of reducing PFAS in wastewater to nearly undetectable levels, including reverse osmosis (RO) and granular activated carbon (GAC). Since their effectiveness may vary based on the industry or facility, permit writers can decide which technology should be used on a case-by-case basis.
- Importantly, treatment costs are tied to the volume of contaminated water requiring treatment, rather than the amount of PFAS present. Since industries typically treat a fraction of the water that utilities treat, it is not only fair for industries to treat their own pollution, but far more cost-effective.
- Technology for PFAS removal, and even destruction, is rapidly developing.

Will local facilities, like airports, local fire departments, and landfills find themselves in endless Superfund litigation?

- These facilities are eligible for the same enforcement discretion as any other party, such as “de minimis” settlements, and “ability to pay” settlements. A settlement with the EPA creates a contribution shield protecting that party from additional CERCLA liability and removing them from the case. Other potentially responsible parties at a site are barred from seeking financial contributions from these entities.
- Facilities can also limit liability by proactively cleaning up under state programs.
- It’s highly unlikely that a large number of airports, landfills, and local fire stations will be added to the National Priorities List, beyond those already listed for other hazardous substances. For those already listed, PFOA and PFOS would likely be added to existing cleanup plans.
- Small local fire stations may have used PFAS-based firefighting foams infrequently, and are very unlikely to become new Superfund sites.
- Likewise, landfills are unlikely to be subject to a significant amount of liability. Even non-hazardous waste landfills today are subject to strict state requirements and are designed to limit releases into the environment.
- Utilities and other generators of PFAS waste can take 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 to ensure the waste is safely handled and not re-released into the environment.

Will farms become Superfund sites?

- Farmers who apply biosolids as a fertilizer and the wastewater facilities that provide the sludge are unlikely to be held liable under CERCLA.
- Some farms that have industrial chemicals or improperly managed hazardous wastes have been added to the NPL.
- No farms have been added to the NPL solely for the use of biosolids. [Section 101\(22\) of CERCLA](#) exempts “the normal application of fertilizer” from the definition of “release.” Applying biosolids to farm fields would constitute the normal application of fertilizer and therefore would not be considered a “release” of a hazardous substance.