

April 24, 2023

Dear Senator:

We write on behalf of our millions of members and supporters in strong opposition to any legislation that would provide a shield for any class of polluters from liability for cleanup of PFAS (per- and polyfluoroalkyl substances) under the Superfund law, formally CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act). We urge you to join us in opposition to any such legislation.

PFAS pollution of the environment and drinking water is widespread, contaminating drinking water in all 50 states at hundreds or thousands of locations due to incautious or irresponsible use and disposal of these toxic “forever chemicals.”¹ Indeed, EPA recently estimated that as many as 94 million Americans are drinking tap water contaminated with PFAS in excess of the agency’s proposed standards for just six of the more than 12,000 forever chemicals in this toxic family.² PFAS are extremely persistent and toxic and can be highly mobile in the environment--whether they come from manufacturers or wastewater treatment plants. They often disproportionately harm certain already overburdened environmental justice communities that deserve far more robust protection.³

It is critical that incentives are properly set to ensure that all parties exercise due care in handling highly toxic chemicals like PFAS. A complete carve-out from all liability eliminates incentives for potential polluters to exercise due care in handling these dangerous compounds. Such a policy would only further compound the regulatory and enforcement failures that have led us into the PFAS crisis now wracking the nation.

The toxicity of PFAS have long been understood and have been publicly discussed for at least two decades. Nearly 20 years ago, EPA publicly announced that it had settled its case against DuPont for the largest administrative penalty in EPA history, noting that the company had failed to disclose information about the toxic effects of one of the most notorious PFAS chemicals, PFOA.⁴ Certainly since that time, the health threats posed by PFOA, PFOS and other PFAS have garnered widespread attention in the media and scientific journals. Over the past two decades, parties using or releasing PFOA or PFOS, for example, were on notice of the health risks inherent in these chemicals and that even minimal exposure can lead to adverse health effects. Thus, it is not only PFAS manufacturers who have long known of the threats posed by the continuous cycling of PFAS through our environment, but also wastewater treatment plants, landfills, and other entities. While we agree that the cost of cleanup of PFAS ideally should primarily be borne by the companies who produced the chemicals, marketed them for use in products, and profited from their production, the downstream or passive receivers of PFAS must play a role in limiting egregious contamination incidents.

These sources that choose to accept waste containing concentrated PFAS can and should participate in identification, control and elimination of PFAS exposures. Wastewater treatment plants already routinely handle large amounts of CERCLA-designated hazardous substances (see list at 40 C.F.R. 302.4) other than PFAS and are still operating. We note that some publicly owned treatment works (POTWs) that receive industrial discharges of PFAS contend that they have little control over the PFAS and other contaminants entering their systems. However, these entities have the responsibility to identify and control PFAS from upstream sources as EPA clarified in recent Clean Water Act guidance issued to state agencies late last year. As EPA made clear, wastewater treatment plants that accept industrial waste have existing legal tools and should be acting to prevent PFAS pollution—they have the responsibility to actively control, rather than passively accept, PFAS-laden waste. As we have learned from data collected in Michigan, POTWs can dramatically reduce PFAS inputs into wastewater by meeting pretreatment program requirements. We note also that **CERCLA section 101(10) provides that federally permitted releases (such as discharges of pollutants that are specifically regulated under a Clean Water Act permit) generally are exempt from CERCLA liability.** Compliance with the Clean Water Act could provide the protection that wastewater

treatment plants seek without creating a broad exemption that will ensure continued PFAS pollution. An additional blanket liability exemption could remove all incentives to operate responsibly.

It is important to maintain incentives for careful handling of PFAS. Consider a scenario that could be occurring in many communities in which a POTW is aware that a major industrial corporation is discharging large quantities of concentrated PFAS-contaminated wastewater into its system, the POTW is paid for wastewater treatment by that company, and the POTW makes no effort to monitor or require pretreatment by that industry. Suppose further that this POTW, knowing that its sludge is contaminated with PFAS, sells that sludge as fertilizer to a farmer who is unaware of the PFAS contamination and who then uses that sludge as fertilizer on crops and grazing pastures used by dairy cows and beef cattle that then take up the PFAS and contaminate food. And assume that private wells near the farm are contaminated with PFAS. This all causes an imminent and substantial endangerment to public health. This is not a remote hypothetical—it is likely happening now at many wastewater treatment plants across the country.

To the extent that there are truly innocent parties (such as the farmer in the previous example) that do not have the legal authority to prevent PFAS contamination and those entities cooperate with EPA, the agency has announced that it intends to continue to use enforcement discretion under CERCLA and other laws to ensure reasonable results. It is also important to note that **CERCLA already includes a specific exemption from liability for the “normal application of fertilizer”** such as that done by a farmer. Ensuring reasonable results for such parties is a longstanding EPA practice in implementing CERCLA. EPA says that it intends to focus on manufacturers, federal facilities and other industrial parties whose actions result in the release of significant amounts of PFAS, an approach that we generally support. We understand that in using its enforcement discretion, EPA can choose not to take CERCLA enforcement action against certain entities who were unaware that they released PFAS, and may settle and provide CERCLA contribution protection to such parties. While such entities may be potentially responsible parties under CERCLA, their share of response costs may be zero.

Because the appropriate use of enforcement discretion is fact and case-specific, we support its careful use based on transparent, clear criteria and parameters, but strongly oppose any absolute carve-out from liability for any class of potentially responsible parties—particularly when those parties’ liability stems from failure to meet their obligations under the Clean Water Act. It is critical that incentives are properly set to ensure that *all* potentially responsible parties exercise due care in handling highly toxic forever chemicals like PFAS and meet requirements to stop PFAS pollution at the source.

Thank you for your attention to this important matter.

Sincerely,

Alaska Community Action on Toxics
Alliance of Nurses for Healthy Environments (ANHE)
Biomonitoring resource center
California Safe Schools
Center for Environmental Health
Clean Air Coalition Laredo
Clean Cape Fear
Clean Water Action
Defend Our Health
Earth Ethics, Inc.
Earthjustice
Ecology Center
Environmental Defense Fund

Environmental Justice Task Force Tucson
Environmental Working Group
Fight for Zero
Green Science Policy Institute
GreenLatinos
International Living Future Institute
La Trenza
League of Conservation Voters
Maryland PIRG
MASSPIRG
Merrimack Citizens for Clean Water
Mujeres de la Tierra
Nantucket PFAS Action Group
National Wildlife Federation
North American Climate, Conservation and Environment(NACCE)
NRDC
Potomac Riverkeeper Network
Safer States
Sierra Club
Songbird Farm
South Carolina Indian Affairs Commission
Southern Environmental Law Center
Testing for Pease
Toxic-Free Future
Vermont Conservation Voters
Vermont Natural Resources Council
Women's Voices

NOTES

¹ David Q. Andrews and Olga V. Naidenko, Population-Wide Exposure to Per- and Polyfluoroalkyl Substances from Drinking Water in the United States, *Environ. Sci. Technol. Lett.* 2020, 7, 12, 931–936, <https://pubs.acs.org/doi/10.1021/acs.estlett.0c00713>; EWG, Mapping the PFAS contamination crisis: New data show 2,858 sites in 50 states and two territories, https://www.ewg.org/interactive-maps/pfas_contamination/.

² EPA, Preliminary regulatory determination and proposed rule; request for public comment; notice of public hearing, 88 FR 18638. At 18680, March 29, 2023 <https://www.federalregister.gov/documents/2023/03/29/2023-05471/pfas-national-primary-drinking-water-regulation-rulemaking>

³ Avi Kar, Anna Reade, and Susan Lee, Dirty Water: Toxic “Forever” PFAS Chemicals Are Prevalent in the Drinking Water of Environmental Justice Communities, August 18, 2021, NRDC, <https://www.nrdc.org/resources/dirty-water-toxic-forever-pfas-chemicals-are-prevalent-drinking-water-environmental>; Genna Reed, PFAS Contamination Is an Equity Issue, and President Trump’s EPA Is Failing to Fix It, October 30, 2019, UCS <https://blog.ucsusa.org/genna-reed/pfas-contamination-is-an-equity-issue-president-trumps-epa-is-failing-to-fix-it/>.

⁴ EPA, Press Release: EPA Settles PFOA Case Against DuPont for Largest Environmental Administrative Penalty in Agency History, December 14, 2005,

https://www.epa.gov/archive/epapages/newsroom_archive/newsreleases/fdcb2f665cac66bb852570d7005d6665.html

⁵ EPA, Listening Session: CERCLA PFAS Enforcement, March 2023,

<https://www.epa.gov/system/files/documents/2023-03/cercla-pfas-enf-listen-session-march-2023.pdf>