



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

August 9, 2023

The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Rick Larsen
Ranking Member
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Ranking Member Pallone and Ranking Member Larsen:

Thank you for your June 21, 2023, correspondence requesting information on the Environmental Protection Agency's ("EPA's") existing authorities to address PFAS liability issues under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA", or "Superfund") in the event PFOA and PFAS are designated as a hazardous substance. This letter provides a summary response, and we would be happy to discuss this important issue further.

EPA's mission is to protect human health and the environment across our great country. Superfund is one of our Nation's landmark laws that EPA uses to achieve our mission. For more than 40 years, Superfund has protected the health of people in rural and urban areas, including children and others who are especially vulnerable to the harmful impacts of dangerous chemicals. Superfund cleanups also help revitalize communities, contributing to economic growth and job creation.

Pursuant to Superfund authority, EPA proposed to designate PFOA and PFOS as CERCLA hazardous substances. EPA is in the process of considering public comments on that proposal. EPA has heard from various stakeholders, including farmers, water utilities, airports, local fire departments and others, and understands their concerns about potential CERCLA liability should EPA finalize the designation.

Informed by public comments received on the proposed designation, EPA is developing an enforcement discretion policy that will reflect the agency's enforcement priorities. If the designation is finalized, EPA will focus its enforcement efforts on, for example, PFAS manufacturers and facilities whose actions result in the release of significant amounts of PFAS into the environment. EPA does not intend to pursue entities where equitable factors do not support assigning CERCLA responsibility, such as farmers, water utilities, airports, or local fire departments. The policy will also describe how EPA can settle with parties to provide contribution rights and protections against third-party cost recovery claims under CERCLA. We believe this approach to enforcement will address stakeholder concerns and will lead to more equitable outcomes, consistent with EPA's decades-long experience with implementing CERCLA.

Indeed, EPA has a proven track record of developing and applying enforcement discretion policies that are effective and well-received, and courts have sanctioned this approach. In several instances, Congress

has subsequently codified EPA's enforcement discretion policies as statutory exemptions or protections, once the effectiveness of the policies was established through practice. These statutory protections and enforcement discretion policies historically have given EPA the needed flexibility to offer liability protections when circumstances warrant. Examples of such statutory protections and enforcement discretion policies are:

- ***De minimis or de micromis parties:*** EPA generally does not pursue and may settle with parties who are responsible for very small percentages of waste or costs.
- ***CERCLA 107(b)(3) Third-Party Defense:*** Parties are not liable if they can show that the contamination was solely caused by acts or omissions of a third party.
- ***Normal Application of Fertilizer:*** CERCLA provides that the "normal application of fertilizer" does not constitute a release and, therefore, does not trigger liability under the statute.
- ***Permit Shield Defense:*** Cost recovery is limited for releases that fall within the federally permitted release provision of CERCLA.
- ***Residential, small business and non-profit generators of municipal solid waste ("MSW") exemption:*** This exemption provides an equitable methodology for resolving CERCLA liability of certain MSW generators and transporters.
- ***Bona Fide Prospective Purchasers ("BFPP"):*** Parties that meet the threshold criteria and continuing obligations for a BFPP are provided with CERCLA liability protection.
- ***Innocent Landowners:*** Certain entities that acquire contaminated property with no knowledge of the contamination at the time of purchase may be protected from CERCLA liability.
- ***Contiguous Property Owners:*** This provision protects parties whose property is contaminated by a neighbor's property.
- ***Ability-to-pay determinations:*** EPA may enter into "ability to pay" settlements with parties to resolve CERCLA response costs where payment could result in undue financial hardship.
- ***Policy for owners of residential property at Superfund sites:*** If certain obligations are met, residential owners of property located on a Superfund site will not be required to incur response costs if the owner's activities did not lead to a release or threat of release.

Your letter also asks about our efforts to help prevent the addition of PFAS to wastewater treatment facilities and systems, and how these actions can help to identify releases of PFAS. EPA recently issued guidance providing a framework that wastewater utilities may implement to monitor and prevent or reduce the discharge of PFAS into wastewater and associated biosolids generated at the facility. Among other provisions, this guidance cites Clean Water Act regulations at 40 CFR 122.44 and 40 CFR 403.8. These rules state that publicly owned treatment works ("POTWs") should identify and locate all possible industrial dischargers to the POTW that might be subject to the pretreatment program, especially those in industry categories expected to discharge or suspected of discharging PFAS. The guidance highlights existing requirements in the National Pollutant Discharge Elimination System permitting program that can be employed to identify and address industrial PFAS discharges to POTWs. Some states and utilities had already implemented these existing authorities, even before EPA issued its guidance.

Consistent with EPA's 2021-2024 PFAS Strategic Roadmap, EPA is committed to holding polluters and other responsible parties accountable for their actions, ensuring that they assume responsibility for remediation efforts and prevent, to the extent possible, future releases of PFAS. The proposed designations of PFOA and PFOS as hazardous substances under CERCLA are centerpieces of EPA's

strategy to cleaning up PFAS contamination around the country. An associated enforcement discretion policy would ensure equitable outcomes in addressing PFAS contamination.

If you have any questions, please contact me, or your staff may contact Carolyn Levine in EPA's Office of Congressional and Intergovernmental Relations, at Levine.Carolyn@epa.gov or (202)-564-1859.

Sincerely,

Lawrence E. Starfield
Principal Deputy Assistant Administrator