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BEFORE THE SUBCOMMITTEE ON ENVIRONMENT
OF THE COMMITTEE ON ENERGY AND COMMERCE,
HEARING ON "EXAMINING THE IMPACT OF EPA'S CERCLA DESIGNATION FOR TWO PFAS CHEMISTRIES AND POTENTIAL POLICY RESPONSES TO SUPERFUND LIABILITY CONCERNS"
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Chairman Palmer, Vice Chaiman Crenshaw, Ranking Member Tonko, and members of the Subcommittee, thank you for the invitation to testify today on "Examining the Impact of EPA's CERCLA Designation for Two PFAS Chemistries and Potential Policy Responses to Superfund Liability Concerns."

I am currently a partner with the firm Earth & Water Law. I have worked on issues relating to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or Superfund) for my entire career, including while serving as the Assistant Administrator for the EPA Office with responsibility for implementing the liability authorities of the Superfund program, as the Assistant Administrator for the EPA Office with responsibility for implementing the cleanup authorities of the Superfund program, as the Chief Counsel for the Senate Environment and Public Works Committee, as the Staff Director for the Subcommittee on Water

[1] Former Senior Counsel and Subcommittee Staff Director, House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment; former Assistant Administrator, U.S. Environmental Protection Agency, Office of Solid Waste and Emergency Response (now Office of Land and Emergency Management); former Chief Counsel, Senate Committee on Environment and Public Works; former Assistant Administrator, U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance. In my current position as a partner at Earth & Water Law, I am representing the American Forest and Paper Association in the D.C. Circuit challenge to the final CERCLA PFOA and PFOS designation rule and I previously worked with the American Water Works Association on their 2022 comments on the proposed CERCLA PFOA and PFOS designation rule. However, those entities had no input into this testimony. I am appearing on behalf of myself, not any organization.

Resources and Environment of the Transportation and Infrastructure Committee, and while in private practice.

My goal today is to help the Subcommittee understand the impacts of EPA's 2024 rule designating Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as hazardous substances under CERCLA and to offer some considerations as the Subcommittee develops potential policy responses.

I want to make five points.

1. Superfund liability ensnares parties with little to no responsibility for contamination and creates significant transaction costs.
2. The consequences of PFOA and PFOS liability are different from other Superfund hazardous substances because, although these substances are almost ubiquitous in the environment, in 2024 EPA released risk assessments that diverged from the scientific judgments of the public health organizations of other countries and suggest that PFOA and PFOS is associated with harm to public health at extremely low levels.
3. The prior administration recognized the overbreadth of liability for PFOA and PFOS under CERCLA and identified categories of entities that it believed should not be held liable in an enforcement discretion guidance that applies only to EPA.[2] The current administration has maintained this policy.
4. Congress has a long history of codifying EPA enforcement discretion guidance to make it applicable to third party litigation as well as EPA enforcement.

[2] https://www.epa.gov/system/files/documents/2024-04/pfas-enforcement-discretion-settlement-policy-cercla.pdf

5. As a result of the reinstatement of the Superfund taxes in 2021 and 2022 and the permanent appropriation of those taxes, the EPA Superfund program is now funded at historically high levels and can take action to address any actual health risks caused by releases associated with an exempt party.

I. Superfund Liability.

Listing a substance under CERCLA creates liability based on a person's *status*, not on whether the person caused or contributed to contamination. Under CERCLA, if there is a release of PFOA or PFOS to the environment, the United States, a state or local government, any other person who is liable for cleanup costs, and any other person who incurs cleanup costs all can sue the following classes of persons:

> (1) the current owner and operator the facility (the term facility broadly includes pipes and tanks, etc. as well as land and buildings) from which the release took place (current owner/operator liability),
> (2) any person who owned or operated the facility at the time of hazardous substance disposal (past owner/operator liability),
> (3) any person who arranged for hazardous substance disposal or treatment, or arranged for the transportation of their hazardous substances (arranger liability), and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person (transporter liability).[3]

Courts have interpreted liability broadly, sweeping in persons who had nothing to do with causing or creating the contamination.

Superfund liability also is joint and several. That means that any one person can be compelled to take responsibility for contamination caused by others, if they fall within one of the classes of liable parties listed above. It is a common strategy for EPA to pursue only a few parties for cleanup costs, usually parties with deep pockets, because it is easier for EPA to negotiate with a smaller number of people. It is common for the parties targeted by EPA to turn around and file

[3] 42 U.S.C. § 9607(a)(1)-(4).

third-party contribution claims to bring as many other entities into a Superfund case as possible, to spread the costs. For example, at the Operating Industries Superfund Site in California, the corporations targeted by EPA for the cleanup of this landfill sued 29 cities and towns, which over the course of three years spent *$7 million* on legal fees and technical experts.[4] Similarly, after entering into an agreement with EPA and New Jersey to carry out the remedial investigation at the Passaic River Superfund Site, the defendants filed a third-party complaint under the New Jersey Spill Act against 80 local governments, the port, the New Jersey Department of Transportation, and the State of New Jersey.[5]

It also is common for private parties to bring Superfund actions against each other outside the context of any EPA enforcement or cleanup action. In fact, only about of third of Superfund cases are filed by the federal government.[6] Often this takes place where a subsequent property owner sues a former owner or a neighbor sues a neighbor.

It also is important to note that CERCLA liability has *no threshold*. Unless a person meets the narrow criteria for the *de micromis* exemption from liability, discussed below, if a person falls into a class of responsible parties, then they can be found liable irrespective of the volume or concentration of hazardous substances associated with them (as current or past owners, arrangers, or transporters).[7]

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[4] *See* Steinzor, R and Kolker, D, "Superfund Liability dumped onto local governments," Government Finance Review, Aug. 1, 1993, available at https://www.thefreelibrary.com/Superfund+liability+dumped+onto+local+governments.-a014379911 and attached.

[5] *See* Third-Party Complaint*, NJ DEP, et. al v. Occidental Chem. Corp., et al*, Superior Ct N.J., docket no. ESX-L-9868-05 (Feb. 4, 2009), available at https://www.nj.gov/dep/passaicdocs/njdepoccpleadings.html and attached.

[6] "Superfund Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements," GAO-09-656 (July 2009), at 39, available at https://www.gao.gov/assets/gao-09-656.pdf

[7] *See Arizona v. Motorola*, 774 F. Supp. 566, 571 (D. Ariz. 1991) (denying Allied-Signal's motion for summary judgment that argued that the "grinding sludge" it sent to the 19th Street Landfill contained only small particles of metals on CERCLA's hazardous substance list because "CERCLA does not impose any quantitative requirement on what constitutes a 'hazardous substance.'"). A person can be held liable for disposing of hazardous substances at "less than background" concentrations. *United States v. Alcan*, 755 F. Supp. 531, 536-37 (N.D.N.Y. 1991).

The only way for EPA to protect parties from third party lawsuits is to enter into enforcement agreements with individual entities that protect the settling parties from third-party contribution actions. However, each settlement must include an allegation that the settling party is liable under CERCLA, some payment or other consideration for the settlement, and must be negotiated by EPA and Department of Justice (DOJ) attorneys and attorneys representing the settling parties.

A recent study by researchers from Northeastern University and the National Institute for Environmental Health Sciences estimates that there are 57,000 sites in the United States with probable PFAS releases.[8] Each PFAS release site will have owners, operators, generators, and transporters associated with it.

When it proposed listing PFOA and PFOS as CERCLA hazardous substances, EPA recognized that the overbreadth of CERCLA liability would ensnare "inadvertent parties" that did not "manufacture and release significant amounts of PFOA or PFOS to the environment" and promised to take steps to protect these parties from liability.[9] However, given the enormous number of "inadvertent parties" ensnared by CERCLA's liability scheme, EPA, DOJ, and those parties would need to expend significant time and resources to enter into settlement agreements to provide protection for those parties from contribution claims brought by others who respond to PFOA and PFOS releases.

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[8] Derrick Salvatore, Kira Mok, Kimberly K. Garrett, Grace Poudrier, Phil Brown, Linda S. Birnbaum, Gretta Goldenman, Mark F. Miller, Sharyle Patton, Maddy Poehlein, Julia Varshavsky, and Alissa Cordner, "Presumptive Contamination: A New Approach to PFAS Contamination Based on Likely Sources, Environmental Science & Technology Letters," available at https://pubs.acs.org/action/showCitFormats?doi=10.1021/acs.estlett.2c00502&ref=pdf .

[9] "EPA will use enforcement discretion and other approaches to ensure fairness for minor parties who may have been inadvertently impacted by the contamination." Press Release, EPA Proposes Designating Certain PFAS Chemicals as Hazardous Substances Under Superfund to Protect People's Health (Aug. 26, 2022), available at https://www.epa.gov/newsreleases/epa-proposes-designating-certain-pfas-chemicals-hazardous-substances-under-superfund

A similar situation arose in the context of brownfields redevelopment. Until enactment of liability protections in 2002, many persons inadvertently became potentially liable parties for contamination they did not cause if they sought to redevelop brownfields. EPA attempted, unsuccessfully, to protect these parties with enforcement discretion guidance and ended up using individual prospective purchaser agreements to provide liability protections. Saving time and transaction costs was a primary reason that EPA supported the Bona Fide Prospective Purchaser liability protections enacted by Congress in 2002.[10]

Even if a party engaged in responsible disposal activities, they could fall prey to Superfund lawsuits. For example, the litigation surrounding the Omega Chemical Corporation Superfund site included hundreds of parties who thought they were responsibly recycling their refrigerants and solvents by sending them to Omega. In a consent decree filed in October 2016, EPA settled with and provided contribution protection to 243 parties, including three cities and one county, several state agencies, school districts, and universities.[11]

Parties providing water and wastewater services could fall prey to third party lawsuits. For example, in Montgomery County, Maryland, a developer successfully sued the Washington Suburban Sanitary Commission to recover costs for cleaning up groundwater contaminated with dry cleaning solvents (tetrachloroethylene a.k.a PCE) that were disposed of in the sewer. In this case, *Westfarm Assocs. Ltd. Pshp. v. Washington Suburban Sanitary Commission (WSSC)*, the court found that WSSC owned sewer pipes, that a sewer pipe was a CERCLA facility, that leaks from a pipe was a CERCLA release, and that WSSC could not prove it was an innocent third

[10] After Congress enacted CERCLA section 107(r), EPA's enforcement office issued a memorandum noting that one of the effects of the new liability limitation was a "significant savings of time and transaction costs." *See* EPA, Bona Fide Prospective Purchasers and the New Amendments to CERCLA (May 31, 2002), at 3, available at https://www.epa.gov/sites/default/files/documents/bonf-pp-cercla-mem.pdf and attached.

[11] *United States, et al v. Abex Aerospace, et al,* C.D. Cal. No. 16-cv-02696, document 19-1. In a 2020 administrative *de minimis* settlement at the same Superfund site, EPA settled with another 269 parties, including 10 cities and two counties. *In the Matter of: Omega Chemical Superfund Site*, *Administrative Settlement Agreement and Order on Consent (ASAOC)*, EPA Docket No. 2019-13. These settlements are in addition to a 2005 settlement with 171 *de minimis* parties and a 2006 settlement with 12 "ability to pay" parties. *See Omega Chemical Superfund Site 2020 ASAOC*, at paragraph 16.

party.[12] Because PCE in wastewater leaked from the WSSC collection system and contaminated groundwater under the plaintiff's property the court held that WSSC could be held liable under CERCLA for cleaning up that contamination.[13] EPA did not bring this case.

Similarly, in 1990, EPA and the State of California sued Montrose, other corporate entities, and the Los Angeles County Sanitation District (LASCD) for both response costs and natural resource damages for DDT contamination transported to the Pacific Ocean through the county's sewer system.[14] Montrose Chemical Corporation disposed an estimated 1,800 tons of DDT into the county sewer system that discharged to the ocean. LASCD settled with EPA but the court initially declined to enter the consent decree because EPA did not at the time of the settlement have sufficient information on the extent of LACSD's contribution or the total costs. After *nine years of litigation*, LACSD finally was able to settle with EPA and the natural resource trustees in 1999.[15]

1. Insignificant contributors will expend more money on litigation than cleaning up PFAS.

CERCLA is notorious for its inefficiencies and transaction costs.[16]

Insignificant or inadvertent parties have to pay expensive legal and consultant fees even if they have good arguments that their share of Superfund cleanup costs should be *de minimis*. In

[12] *Westfarm Assocs. Ltd. Pshp. v. Washington Suburban Sanitary Commission*, 66 F.3d 669 (4th Cir. 1995) (granting the developer's motion for summary judgment).
[13] 66 F.3d 669 (4th Cir. 1995).
[14] *United States v. Montrose Chemical Corp*., 50 F.3d 741 (9th Cir. 1995). In the *Montrose* case the chemical companies also filed third-party lawsuits against 150 local government defendants. 50 F.3d at 747.
[15] *United States v. Montrose Chemical Corp*., No. 90-cv-03122 (C.D. Cal.), document 1671, (amended consent decree with settling local government entities) Aug. 19, 1999. The docket for this Superfund case is *319 pages* long.
[16] *See* Superfund, Information on the Program's Funding and Status, at 11, GAO/RCED-00-25 (Oct. 1999) (estimating responsible party transaction costs to be between $3 billion and $8 billion from 1980 through 1998), available at https://www.gao.gov/products/rced-00-25 and attached; K. Probst, D. Fullerton, R. Litan, Paul Portney, Footing the Bill for Superfund Cleanups, Who Pays and How?, at 111 (the authors estimate responsible party and insurer transaction costs to add an additional 50 percent of costs on top of responsible party cleanup costs), The Brookings Institution and Resources for the Future (1995).

CERCLA litigation, the allocation of costs occurs after liability is found. That means parties incur extensive transaction costs to resolve liability issues before they incur even more costs to demonstrate that, if found to be liable, their share of costs should be insignificant.

Those transaction costs could even exceed cleanup expenditures for an insignificant contributor that is dragged into Superfund litigation. In 1993, EPA's Office of Environmental Economics contracted with Rand Corporation to conduct a study on private sector cleanup expenditures and transaction costs.[17] That study found that for the smaller firms (annual revenues of less than $15 million and those with revenues between $15 million and $100 million) transaction costs averaged *60 percent* of total costs expended on Superfund by those firms.[18] The smaller the volumetric share of waste, the larger the percent of transaction costs.

As discussed above, EPA can enter into settlement agreements that would shield "inadvertent" or insignificant parties from third-party lawsuits. But, as noted above, negotiating such an agreement involves significant transaction costs.

2. CERCLA's existing liability protections will not address the inequities that will result.

CERCLA already has some exclusions from liability. However, those exclusions will not help most insignificant contributors or inadvertent parties that may face liability for PFAS contamination.

CERCLA's exclusion from owner or operator liability for local governments applies only to governments that acquire property when carrying out a governmental function, as long as the local government did not cause or contribute to the contamination.[19]

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[17] "Private-Sector Expenditures and Transaction Costs at 18 Superfund Sites," Paper Number EE-0265, Rand (1993), available at https://www.epa.gov/environmental-economics/private-sector-cleanup-expenditures-and-transaction-costs-18-superfund-sites and attached. The Rand study looked at costs incurred between 1981 and 1991, when Superfund was relatively new. However, it can be expected that liability for new hazardous substances, like PFOA and PFOS, will create a similar litigation environment.

[18] *Id*. at xii.

[19] 42 U.S.C. § 9601(20)(D).

CERCLA's exclusion from generator or transporter liability for *de micromis* parties (parties contributing 110 gallons of liquid materials or less than 200 pounds of solid materials) applies only at sites listed on the National Priorities List and does not address very low concentrations of contaminants.[20]

CERCLA's exclusion from generator liability for the disposal of municipal solid waste applies only at sites listed on the National Priorities List and covers only material that is essentially the same as waste generated by a household and this is collected as part of normal solid waste collection services. It applies to institutional entities only if they employ no more than 100 persons.[21]

CERCLA also includes a liability exclusion for innocent landowners (where contamination is caused solely by a third party) and contiguous property owners (where contamination migrates from the source to an unrelated property, typically the migration of groundwater contamination).[22] However, even if it can prove that the PFAS plume came from another property, the burden will be on the landowner to show that it is eligible for the innocent landowner or contiguous property owner defense and the costs of demonstrating they are not liable would include the costs of retaining hydrological experts and lawyers.[23]

CERCLA's exclusion from owner or operator liability for bona fide prospective purchasers applies only to a person whose sole relationship to a release is as the new owner of property at which the release occurred.[24]

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[20] 42 U.S.C. § 9607(o).
[21] 42 U.S.C. § 9607(p).
[22] 42 U.S.C. § 9607(b)(3) (innocent landowner) and 42 U.S.C. § 9607(q)(1)(A) (contiguous property owner).
[23] To understand the extensive showing that must be made, *see generally* "Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners (Common Elements)," (Jul. 29, 2019), available at https://www.epa.gov/sites/default/files/2019-08/documents/common-elements-guide-mem-2019.pdf
[24] 42 U.S.C. § 9607(p).

In short, none of these existing exclusions will protect most insignificant contributors or "inadvertent parties" from third-party claims related to the cleanup of PFOA and PFOS and will not prevent those parties from incurring significant transaction costs.

II. PFOA and PFOA are different from other hazardous substances.

Environmental groups sometimes argue that many CERCLA hazardous substances that are ubiquitous in the environment and that EPA and courts have learned how to address those fact patterns. However, the consequences of PFOA and PFOS liability are different.

Not only are PFOA and PFOS ubiquitous, but in 2024 EPA released two risk assessments that suggest that exposure to PFOA and PFOS is associated with harm to public health at extraordinarily low levels, even below levels that can be reliably quantified.[25]

PFOA

For noncancer effects, EPA's reference dose (safe level) for PFOA is 0.03 ng/kg (parts per trillion). For context, one part per trillion is equivalent to one drop of water in 20 Olympic-sized swimming pools. To reach the conclusion that exposure above 0.03 parts per trillion is not safe EPA relied on:

1. A 2018 observational study of persons in the Faroe Islands that observed reduced responses to tetanus and diphtheria vaccines and concluded that the response was associated with PFOA exposure. EPA considered this result to be a critical effect to be

[25] https://www.epa.gov/sdwa/human-health-toxicity-assessment-perfluorooctanoic-acid-pfoa and https://www.epa.gov/sdwa/human-health-toxicity-assessment-perfluorooctane-sulfonic-acid-pfos

used to derive a reference dose even though there was no evidence of any increase in disease as a result and the study did not take possible confounding factors into account.

2. A 2019 observational study that concluded that an increase in total cholesterol was associated with PFOA exposure. EPA considered this result to be a critical effect to be used to derive a reference dose even though no increase in disease was observed and the conclusion was contradicted by a subsequent clinical study.[26]
3. A 2020 observational study that concluded that decreased birth weight was associated with PFOA exposure. EPA considered this result to be a critical effect to be used to derive a reference dose even though the opposite result was observed in seven out of 15 studies reviewed by EPA and the high confidence studies showed no evidence of a relationship between PFOA exposure and birth weight.[27]

In that risk assessment EPA also changed its categorization of PFOA from "suggestive evidence" to "likely carcinogen" by finding that PFOA exposure was associated with kidney cancer. EPA reached this conclusion even though the study relied on by EPA stated: "It remains unclear whether PFOA or other PFAS are renal carcinogens or if they influence risk of renal cell carcinoma (RCC) at concentrations observed in the general population."[28] Based on its conclusion that PFOA is a likely carcinogen EPA determined that there is no safe level of exposure. EPA's conclusion that PFOA is likely carcinogenic has been questioned.[29]

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[26] Mauro Convertino et al., Stochastic Pharmacokinetic Pharmacodynamic Modeling for Assessing the Systemic Health Risk of Perfluorooctanoate (PFOA), 163 Toxicol. Sci. 293 (2018).
[27] EPA PFOA (2024) at page 3-222 (noting that seven of 15 studies showed an inverse association between PFOA exposure and low birth weight and that none of the 5 high confidence studies (Eick et al., 2020; Wikström et al., 2020; Sagiv et al., 2018; Shoaff et al., 2018; Bach et al., 2016) showed any evidence of exposure response relationships between PFOA exposure and birth weight.
[28] Shearer et al. Serum concentrations of per- and polyfluoroalkyl substances and risk of renal cell carcinoma. Journal of the National Cancer Institute 113: 580-587, available at http://dx.doi.org/10.1093/jnci/djaa143
[29] Boston C, Keck S, Naperala A and Collins J (2025) The evolution of PFAS epidemiology: new scientific developments call into question alleged "probable links" between PFOA and kidney cancer and thyroid disease. Front. Public Health 13:1532277, available at

PFOS

For noncancer effects, EPA's reference dose (safe level) for PFOS is 0.01 ng/kg (parts per trillion). To reach the conclusion that exposure to PFOS above 0.01 parts per trillion is not safe EPA relied on:

1. The same 2020 study of birth weight discussed above.
2. The same 2019 study of cholesterol discussed above.

EPA also concluded that PFOS is associated with liver cancer, based on a 2002 and a 2012 study of female rats even though liver effects in rats are different from liver effects in humans. With that conclusion, EPA determined there is no safe level of exposure to PFOS.

I don't believe anyone would argue that PFOA and PFOS are benign. But, it is possible that EPA has overstated the risks through its selection of critical effects and studies. Significantly, the health organizations of other countries have reviewed the same body of literature and have declined to rely on the studies that EPA relied on. Most recently, the Food Safety Commission of Japan concluded that the daily ingestion of up to 20 ng per kilogram of body weight of PFOA or PFOS was safe.[30]

The Japan Food Safety Commission had this to say about the studies that formed the basis for EPA's assessment of PFOA and PFOS risk:

> Total cholesterol:
>
> *1. Serum ALT and total serum cholesterol levels were associated with PFOS and PFOA. The serum levels*

https://www.frontiersin.org/journals/public-health/articles/10.3389/fpubh.2025.1532277/full

[30] https://www.jstage.jst.go.jp/article/foodsafetyfscj/13/1/13_D-25-00009/_article

> *increased slightly, but the clinical significances were not evident due to the lack of their links with the onset of diseases afterwards. No clear relationships existed between levels of the clinical parameters and of PFOS or PFOA as the whole.*
>
> Immune response:
>
> *2. Antibody response after vaccination was also one of the endpoint candidates but the influence remained undefined.*
>
> Birth weight:
>
> *3. Data of PFOS or PFOA on the effects of birth weight reduction, such as small for gestational age (SGA) and low birth weight (< 2,500 g), were reported, but limited, and thus judged not to reach consensus findings. Furthermore, the impact of PFOS or PFOA on postnatal growth remained unclear.*

Japan also evaluated carcinogenicity and rejected using carcinogenicity as an endpoint because liver cancer "results in rats might not be directly extrapolated to humans" and associations with kidney cancer "were reported but not consistent among epidemiological studies."

The discrepancies in evaluations of PFOA and PFOS risk demonstrate that the evaluation of risk is as much of a policy call as a scientific determination.[31] However, that discrepancy has real consequences when you consider the draconian nature of Superfund liability, discussed above.

The public is being told that if you can detect PFOA and PFOS, there is a risk. Unlike other ubiquitous contaminants, like lead, EPA has not provided risk management guidance that would inform the public of the levels in the environment below which no response is needed. Further,

[31] See Bodine, "Best available science" and agency decision-making, 1 Journal of Toxicology and Regulatory Policy (2025), available at https://isrtp kglmeridian.com/view/journals/jtrp/1/1/article-p1_5.xml

EPA has not provided the public with guidance on how to manage the millions of tons of material generated each year that may have very low but detectable levels of PFOA and PFOS. All this, combined with fear of Superfund liability, has created an untenable situation for the management of treatment residuals, construction debris, and the movement of soils, even for materials that traditionally have been recycled or beneficially reused.

III. EPA's Enforcement Discretion Policy

As noted above, when it issued the PFOA and PFOS CERCLA rule in 2024 (the Biden Administration), EPA's Office of Enforcement and Compliance Assurance also issued a policy stating it would not seek to recover cleanup costs for parties where the result would be inequitable.[32] In the Trump Administration, EPA's enforcement office is continuing to follow this policy.

According to EPA, it would be inequitable to impose Superfund liability for PFOA or PFOS contamination on the following categories of entities, whether public or private, that perform a public service by:

1. Providing drinking water.
   This category could address concerns raised by water suppliers.
2. Managing municipal solid waste.
   This category could address concerns raised by landfill operators.
3. Treating or managing stormwater or wastewater.
   This category could address concerns raised by municipalities and POTWs and privately owned treatment works.
4. Arranging for the disposal of pollution control residuals.
   This category could address concerns raised by water suppliers and others.

[32] https://www.epa.gov/system/files/documents/2024-04/pfas-enforcement-discretion-settlement-policy-cercla.pdf

5. Ensuring beneficial application of products from the wastewater treatment process as a fertilizer substitute or soil conditioner.

   This category could address concerns raised by POTWs and privately owned treatment works, composters, and other generators of residuals that can be beneficially used.

6. Performing emergency fire suppression services or training exercises.

   This category could address concerns raised by airports and airlines and could be extended to address persons managing any contamination that resulted from such services or exercises, like contractors working on construction at airports. It also could be narrowed to exclude federal agencies, whose cleanup work is funded by Congress and is not eligible for funding from the Superfund Trust Fund.

In addition, EPA considers it inequitable to impose Superfund liability on farms.

However, as noted above, an EPA enforcement discretion policy does not provide any protection from third party lawsuits. It also is not binding on EPA.

Administrator Zeldin recognized this fact when announcing his decision in September 2025 to defend the CERCLA PFAS rule, noting that it is a challenge for EPA to provide certainty for "passive receivers that did not manage or generate those chemicals."[33] In EPA's September 2025 announcement, the agency included the unintentional use of PFOA and PFOS within the definition of "passive receiver," defining it as entities that did not manufacture or generate a hazardous substance, "but received it in feedstocks, products, or waste" and called on Congress to enact a "statutory fix to protect passive receivers from liability."

In that same September announcement, EPA also announced that it plans to issue a rule to guide any future CERCLA hazardous substance designations that would "take costs to manufacturers, passive receivers, consumers, and the economy at large very seriously." In any future action, hopefully EPA will also carefully consider whether CERCLA is the correct tool to address risks

[33] https://www.epa.gov/newsreleases/trump-epa-announces-next-steps-regulatory-pfoa-and-pfos-cleanup-efforts-provides

associated with releases of substances to the environment and select an alternative approach that avoids the draconian consequences of CERCLA.

IV. Liability Exemptions Codified by Congress

Some in the environmental community have argued that CERCLA is sacrosanct and that any liability exemptions would gut the statute. Not true. In fact, Congress has a long history of creating exemptions from Superfund liability, many of which codified EPA enforcement discretion policy.

Below is a list of CERCLA exemptions created by Congress and the enforcement discretion policy that was codified:

- Lender liability (1996 Asset Conservation, Lender Liability, and Deposit Insurance Protection Act, P.L. 104-208, enacting 42 U.S.C. 9601(F)).
    - Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily (1995)
- Bona Fide Prospective Purchasers (2002 Small Business Liability Relief and Brownfields Revitalization Act, P.L. 107-118, enacting 42 U.S.C. 9607(r)).
    - Guidance on Landowner Liability under Section 107(a)(l) of CERCLA, De Minimis Settlements under section 122(g) (l) (B) of CERCLA, and Settlements with Prospective Purchasers of contaminated Property (Jun 1989)
- De micromis parties (2002 Small Business Liability Relief and Brownfields Revitalization Act, P.L. 107-118, enacting 42 U.S.C. 9607(o)).
    - Guidance on Landowner Liability under Section 107(a)(l) of CERCLA, De Minimis Settlements under section 122(g) (l) (B) of CERCLA, and Settlements with Prospective Purchasers of contaminated Property (Jun 1989)
- Municipal solid waste (2002 Small Business Liability Relief and Brownfields Revitalization Act, P.L. 107-118, enacting 42 U.S.C. 9607(p)).

        - EPA's ''Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites'' (Feb. 1998).
- Contiguous property owners (2002 Small Business Liability Relief and Brownfields Revitalization Act, P.L. 107-118), enacting 42 U.S.C. 9607(q)).
        - Guidance on Landowner Liability under Section 107(a)(l) of CERCLA, De Minimis Settlements under section 122(g) (l) (B) of CERCLA, and Settlements with Prospective Purchasers of contaminated Property (Jun 1989)
- State and local governments acquiring land while carrying out a governmental function (2018 BUILD Act, Division N of Pub. L. No. 115-141, Consolidated Appropriations Act, 2018), revising 42 U.S.C. 9601(20)(D)).
        - Guidance on Landowner Liability under Section 107(a)(l) of CERCLA, De Minimis Settlements under section 122(g) (l) (B) of CERCLA, and Settlements with Prospective Purchasers of contaminated Property (Jun 1989)
- Tenants as Bona Fide Prospective Purchasers (2018 BUILD Act, Division N of Pub. L. No. 115-141, Consolidated Appropriations Act, 2018), revising the definition of bona fide prospective purchaser at 42 U.S.C. 9601(40)).
        - Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition on CERCLA 101(40) to Tenants (Jan. 1009).

In addition, Congress has created liability exemptions not addressed by a specific EPA enforcement discretion policy. For example, to address the untenable situation where Alaska Native Village Corporations could not receive brownfields grants to address contamination left by the U.S. military on land that was transferred to the Alaska Native Village Corporations under the Alaska Native Claims Settlement Act of 1971 Congress created a liability exemption for them. 2018 BUILD Act, Division N of Pub. L. No. 115-141, Consolidated Appropriations Act, 2018, enacting 42 U.S.C. 9601(20)(E).

As a result of the CERCLA PFOA and PFOS rule, we are likely to see similar untenable situations for persons seeking brownfields funding assistance. EPA recently updated its frequently asked questions document on "What EPA's Designation of PFOA and PFOS as CERCLA Hazardous Substances Means for EPA's Brownfields and Land Revitalization Program." That document makes it clear that: "*Now that PFOA and PFOS are designated as CERCLA hazardous substances, Brownfields Grant recipients who wish to use funding to assess and cleanup sites with PFOA or PFOS must demonstrate that they cannot be held potentially liable under CERCLA § 107 for the contamination at the brownfield site.*"[34]

This makes it clear that any owners of property where PFOA and PFOS may be found who are not a bona fide prospective purchaser because they were unaware of the need to establish that protection or they inherited property or they participated in the disposal through use of fertilizers or soil amendments are not eligible for brownfields grants.

V. EPA Superfund Resources

Some argue that protecting certain categories of parties from CERCLA liability will make an already unfair statute even more so. However, that does not need to be the result of a liability exemption. Congress could transfer the equitable share of any response costs attributable to a party that is relieved of liability to the Superfund Trust Fund, so other parties are not left "holding the bag."

Such a proposal may raise alarm from persons concerned that EPA will not have sufficient funding to pick up that responsibility. However, by reinstating the Superfund taxes on the sale of oil and chemical feedstocks, and automatically appropriating those taxes upon receipt, Congress has now provided EPA's Superfund program with more money than it has had in decades.

A 2015 Government Accountability Report shows that between 1999 and 2013, Superfund appropriations declined from about $2 billion to $1.1 billion in constant 2013 dollars.[35] As

[34] https://www.epa.gov/brownfields/faqs-what-epas-designation-pfoa-and-pfos-cercla-hazardous-substances-means-epas#:~:text=Now%20that%20PFOA%20and%20PFOS,contamination%20at%20the%20brownfield%20site.
[35] https://www.gao.gov/assets/gao-15-812.pdf

shown in Figure 3 of a 2023 CRS Report on EPA Appropriations, Superfund appropriations remained relatively flat (at about $1.1 billion) for the next eight years, which is actually a decline given the impact of inflation.[36]

That changed with the 2021 Infrastructure Investment and Jobs Act and the 2022 Inflation Reduction Act, which reinstated taxes on the sales of certain chemicals and certain petroleum products respectively, and permanently appropriated all tax receipts to carry out the Superfund program.

The historical tables accompanying the President's budget request for 2026 show that in 2024 the U.S. Treasury received $1.405 billion in receipts from the Superfund excise taxes.[37] The Appendix to the President's 2026 budget request for EPA shows OMB estimates that the Treasury will collect $1.592 billion in Superfund taxes in 2025 and $1.660 billion in 2026. The total receipts to the Superfund Trust Fund, including transfers from the general fund (which are being phased out), settlements, cost recoveries, and interest, were $2.559 billion in 2024 and are expected to be $2.540 billion in 2025 and $2.502 billion in 2026.[38]

The budget appendix shows that the total unexpended balance of the Superfund Trust Fund is expected to be $11,329 billion at the end of 2025, of which $5.166 billion will be unobligated. The remainder of the balance consists of receipts from settlements or state cost shares that are obligated to specific Superfund sites as well as funds that have been obligated to cleanup contracts but not yet expended. If you compare the budget appendix from FY 2025 to FY 2026, it shows that the total unexpended balance is continuing to grow.

The purpose of reciting all these numbers is to demonstrate that the Superfund Trust Fund has adequate funding to cover the costs of any necessary PFOA or PFOS cleanup that EPA might determine is needed.

[36] https://www.congress.gov/crs-product/IF12349
[37] https://www.whitehouse.gov/omb/information-resources/budget/historical-tables/ (table hist02z4).
[38] https://www.whitehouse.gov/wp-content/uploads/2025/05/appendix_fy2026.pdf