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Examining the Impact of EPA's CERCLA Designation for Two PFAS Chemistries and Potential Policy Responses to Superfund Liability Concerns

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Congressional Testimony of ICSC
PFAS Regulation and CERCLA Liability

Introduction

Chairman Gutherie, Subcommittee Chairman Palmer, Ranking Member Pallone, and Subcommittee Ranking Member Tonko, and Members of the Subcommittee, my name is Lawrence W. Falbe and I am Chair of ICSC's Environmental Policy and Land Use Subcommittee. Thank you for the opportunity to testify on how federal PFAS policy—particularly the designation of PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) – also known as "Superfund" – is impacting the commercial real estate sector. As Chair of ICSC's Environmental and Land Use Policy Committee, we specifically focus on environmental issues impacting the commercial real estate sector. For the last several years, ICSC's Environmental and Land Use Policy Committee has focused on the impact of PFAS to our sector.

PFAS, or per- and polyfluoroalkyl substances, are a large family of related chemical compounds (numbering in the thousands), characterized by long-chain carbon and fluorine atoms that form incredibly strong atomic bonds. The strength of these bonds gives PFAS compounds valuable properties such as oil, water and stain resistance. These properties have resulted in widespread use of PFAS for decades, in consumer products such as food packaging and clothing, and commercial and military applications such as fire-fighting foam. However, the same qualities that make PFAS compounds so useful also make them persistent in the environment and difficult (and expensive) to remediate. They have also been deemed harmful to human health and the environment at minute levels — down to the parts-per-trillion—that for years could not commonly be detected by commercial laboratory analysis. The issue of PFAS contamination and the lack of meaningful, coordinated and reasonable policy to address its pervasive presence is adversely affecting retail real estate, community shopping centers, the broader "Main Street" economy, and urban and suburban revitalization and development. As you know, on April 19, 2024, the U.S. Environmental Protection Agency (EPA) announced the final rule designating two PFAS compounds, PFOA (perfluorooctanoic acid) and PFOS (perfluorooctane sulfonic acid), as CERCLA hazardous substances, with an effective date of July 8, 2024; the rule was formally published in the Federal Register on May 8, 2024. My testimony today is intended to share with you the real-world impacts of the new designation, and the chilling effect on real estate transactions and development that we have already seen, and which we expect will increase in the coming years.

ICSC represents businesses, property owners, lenders, and local employers driving retail and mixed-use development that anchors tax bases and services in every congressional district. ICSC supports effective and commonsense PFAS management and remediation policy. But ICSC is deeply concerned that CERCLA's strict, joint-and-several, retroactive liability framework—applied to ubiquitous legacy chemicals—will unintentionally shift cleanup costs onto passive receivers - like shopping center owners and small businesses - that did not cause the release of

PFAS compounds to the environment. ICSC and its members are passive receivers but are also uniquely positioned to be the most likely to address persistent and pervasive cleanup through the development of land and the return of contaminated land to useful and beneficial economic conditions.

What EPA's CERCLA Designation Does

EPA's rule adds two specific PFAS compounds -PFOA and PFOS (including their salts and structural isomers) to 40 C.F.R. § 302.4, as CERCLA "hazardous substances," thereby triggering CERCLA § 103 and EPCRA § 304 release reporting at the one-pound threshold (in a 24-hour period), and enables federal and state cleanup actions where state law incorporates CERCLA lists by reference. Designation does not itself mandate cleanup at any specific site and does not alter statutory defenses such as the Bona Fide Prospective Purchaser (BFPP) defense. However, this designation does significantly expand the universe of potential CERCLA sites and potential cleanup cost recovery. This universe is expanded significantly because of the advancements in testing technology that can now detect minute amounts of PFAS (down to the part-per-trillion) and the pervasive nature of the chemical in the environment – even in the absence of a specific PFAS source on a particular parcel. By the way, for comparison, a part per trillion is commonly compared to a drop of water in 20 Olympic-sized swimming pools.

Interestingly, EPA's direct designation of PFOS and PFOA as CERCLA hazardous substances using its authority under CERCLA § 102(a), differs from how nearly all other hazardous substances (over 800 total) have been designated in CERCLA's 45-year history. In the past, CERCLA hazardous substances have been incorporated from designations under other environmental statutes, such as the Clean Air Act (CAA), Clean Water Act (CWA), Resource Conservation and Recovery Act (RCRA) and the Toxic Substances Control Act (TSCA). Typically, other substances have undergone extensive analysis and consideration in their parent statutes; here, however, EPA's direct designation may well have been precipitous, and has been challenged in court as an overreach of EPA's statutory authority. Additionally, none of these statutes share CERCLA's strict, joint and several liability scheme; rather, in most cases, liability rests with the party that generated hazardous wastes or caused a release of such substances into the environment.

Besides designating PFOS and PFOA as hazardous substances under CERCLA, on April 14, 2024, EPA issued the PFAS Enforcement Discretion and Settlement Policy, stating it will prioritize enforcement against parties that played a significant role in manufacturing or industrial use that contributed to PFAS contamination and generally not pursue certain secondary entities. The Enforcement Policy is non-binding on the federal government and provides no categorical exemption for private commercial property owners or landlords. Moreover, the Policy is not binding upon, and does not limit, third-parties from suing potentially liable property owners and other parties in contribution. It does, however, reveal even EPA's concern that creating CERCLA liability for these two compounds has the potential to upend the economy.

Understanding CERCLA 101

CERCLA is a statute that was passed in response to a perceived crisis of contaminated sites like Love Canal, amidst a time and era where rampant environmental pollution occurred and few, if any, legal avenues existed to hold responsible polluters liable to pay for needed environmental cleanups. Thus, CERCLA is commonly known as the "Polluter Pays" statute.

According to EPA's website, CERCLA is *The Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA), 42 U.S.C. § 9601 et. seq, commonly known as Superfund, was enacted by Congress on December 11, 1980. This law created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. Over five years, $1.6 billion was collected and the tax went to a trust fund for cleaning up abandoned or uncontrolled hazardous waste sites (*i.e.*, the "Superfund.").

CERCLA allows for EPA to designate certain substances as "hazardous substances" – notably petroleum is expressly excluded. This designation then triggers remediation options when hazardous substances are detected on property that require remediation. CERCLA authorizes two kinds of response actions: the first kind are short-term removals, where actions may be taken to address releases or threatened releases requiring prompt or even emergency response. The second kind are long-term remedial response actions, that permanently and significantly reduce the dangers associated with releases or threats of releases of hazardous substances that are serious, but not immediately life threatening. These remedial actions can be conducted only at sites listed on EPA's National Priorities List, which is a list of the most significant CERCLA sites across the country. Under CERCLA, EPA can sue to recover costs of response for the cleanup of hazardous substances, or it can issue an order under CERCLA §106 to force a Potentially Responsible Party (PRP) to perform a cleanup. However, CERCLA also allows for **any person** who has incurred costs of response to remediate hazardous substances to sue in contribution against any category of liable parties under CERCLA §107(a); that includes the current owner of contaminated property.

Indeed, the most rigid feature of CERCLA is its no-fault liability regime. Under CERCLA, if a landowner owns a property that was contaminated in the past by a hazardous substance, then that landowner can fall under CERCLA's draconian strict and joint liability regime. It is this no-fault liability that causes most challenges in the commercial real estate development market. Further, CERCLA allows for adjacent landowners and other third-parties to also sue the landowner for the recovery of response costs. CERCLA liability can attach even when the original release of hazardous substances on the property was not illegal at the time; indeed, many such releases occurred long before CERCLA was passed in 1980, but the long-arm of CERCLA can impose liability for such occurrences regardless of when they originally happened.

Why CERCLA Liability Sinks Opportunities for Retail Real Estate and Community Centers

PFAS contamination impacting real estate often originates off-site—from upstream industrial sources. For example, historic uses of firefighting foams at airports, or municipal biosolids—and migrates via groundwater or infrastructure into commercial areas. There is mounting evidence of other pathways for passive deposition of PFAS compounds, such as air or precipitation. Shopping centers rarely use PFAS intentionally, but can be swept into Potential Responsible Party (PRP) status due to the presence of PFAS on properties, especially if the property has neighboring or prior industrial uses – or even something as mundane as a fire for which PFAS-containing foam was used to extinguish it. If PRP status is conferred, as current owners and/or operators, then liability for the contamination and remediation costs can be imposed– even if the party had nothing to do with the contamination – under CERCLA's strict and joint liability. Although, EPA's Enforcement Policy acknowledges this inequity for certain public entities, similar logic applies to passive owners and BFPPs in commerce like commercial real estate developers. Additionally, when confronted on the EPA enforcement policy, EPA admits that it cannot control the actions of other parties to avail themselves of the law. This opens potential real estate developers and landowners to additional suits.

Most commercial real estate transactions begin, in part, with environmental due diligence to assess the target property for potential contaminants or other environmental risks. The initial investigation generally begins with a Phase I Environmental Site Assessment, performed according to the American Society for Testing and Materials (ASTM) Standard Practice E1527-21. In general, the Phase I investigation is concerned with whether CERCLA hazardous substances may have been released or impacted at the target property (or migrated to it from off-site). Such potential contaminants are identified as "Recognized Environmental Conditions" or "RECs." Now that PFOA and PFOS have been designated CERCLA hazardous substances, any Phase I performed after the designation must include an assessment of such risks. If a consultant determines that PFOA or PFOS are likely present on the target property, they will be identified as a REC, which may trigger the need to sample for such contaminants – an expensive and time-consuming process. Sometimes, a deal dies at the Phase I stage, simply because a buyer is spooked by the potential risk that PFAS compounds could be present. Many buyers (and sellers) become concerned that if PFAS is detected, the costs of investigation and remediation will quickly outweigh the value of the property itself. The lack of federal cleanup standards for PFAS remediation and the current patchwork of inconsistent (and non-existent) state cleanup standards only add to the risk and uncertainty. And, what cleanup standards do exist are generally at the parts-per-trillion level, as noted above, suggesting challenges in even successfully performing a remediation.

In fact, as recently as this month, EPA doubled-down on the significance of PFAS with respect to qualifications for Brownfield grant money. According to the updated EPA website, "a grant recipient must establish liability protection for any release of PFOA or PFOS at a Brownfield site. For example, All Appropriate Inquiries investigations conducted on a Brownfield site must now consider conditions indicative of releases or threatened releases of PFOA and PFOS to

establish liability protection under CERCLA." How this new guidance will actually be implemented and applied is anyone's guess, as Phase I reports generally do not make legal determinations, which is the essence of establishing defenses under CERCLA. This new guidance is sure to add to confusion to an already-perplexing process.

ICSC has publicly cautioned that the PFAS designation risks upending Phase I due diligence and financing – this is what undermines commercial real estate development. Due to the concerns – and uncertainty – of PFAS contamination and remediation liability, the commercial real estate industryand many communities suffer. Simply put, because PFAS are pervasive and deemed to be harmful at extremely minute levels (and extremely expensive to remediate), this leads to increasing deal friction and uncertainty when it is found – or even suspected. This is turn leads to lender hesitation, insurance exclusions, and the failure of retail, large-scale residential and mixed-use development deals.

Why Current CERCLA Defenses and Exemptions, and the EPA Enforcement Discretion Policy, Do NOT Protect ICSC Member Developers

CERCLA provides several narrowly crafted defenses, exemptions, and protections from liability. These defenses are often not available for commercial real estate developers for practical reasons, or simply provide inadequate protection. One significant defense that is often discussed is the Bona Fide Prospective Purchaser (BFPP) defense. While generally useful for transactions, the application of the BFFP to PFAS compounds is uncertain at best. First of all, the BFPP is potentially available only for the acquisition of property that occurs after January 11, 2002. That means that an owner of real property who acquired the land before the applicable date cannot use the BFPP. Second, even if a property owner acquired the parcel after the statutory date, in order to potentially invoke the defense, the owner must have performed "All Appropriate Inquiry" (AAI) prior to acquisition. A properly performed Phase I Environmental Site Assessment is generally recognized to meet the AAI standard, but if a Phase I was not performed prior to acquisition, the owner is out of luck. Moreover, the quality of Phase I investigations vary significantly among consultants, and an inadequate investigation may expose the defense to court challenges. Third, even if the BFPP defense is potentially available in a given situation, the property owner can subsequently **lose it** by failure to take appropriate care to stop any continuing releases, prevent any future release, and/or prevent exposure to any release.

Finally, another major problem with the BFPP defense is that it is self-certifying; EPA issues no certification or approval that a party qualifies for the BFPP in any particular transaction. In other words, a party who seeks to potentially rely on the defense in the future never really knows if the assertion of that defense will be successful unless and until it is tested in litigation, when the defense is raised in the context of a CERCLA cost recovery action.

As noted above, EPA's Enforcement Discretion Policy is inapplicable and non-binding to third party CERCLA lawsuits, which severely limits its usefulness.

Overall, the limitations and uncertainties of existing defenses and federal policy inject risk and uncertainty into each and every real estate transaction – in a market where risk and uncertainty are a primary cause of deals failing to be consummated.

ICSC Supports Effective Remediation, Safe Drinking Water, and Holding Polluters Liable

It is important to mention that ICSC supports science-based evaluation of potential PFAS health risks. However, while some standards make sense in certain exposure scenarios, like drinking water, such standards do not necessarily translate to the risks posed by soil contamination, which can often be addressed in the context of property redevelopment by reducing exposure pathways through the use of institutional controls (e.*g.*, restrictions on the use of groundwater for drinking water) and engineering controls (e.*g.*, using parking lots or building pads to reduce dermal or ingestion exposure to impacted soil). Suffice it to say that further scientific study is needed in this area.

ICSC also supports the assertion of liability for traditional responsible parties covered under CERCLA, particularly those individuals who caused the release of hazardous substances onto a property or into waterbodies, etc. In general, real estate owners, particularly in the retail sector, do not fit the CERCLA responsible party profile, but can become easily ensnared, due to CERCLA's strict liability scheme and the pervasiveness of PFAS in the environment (and the very low levels that trigger liability concerns). Relief from Congress in the form of a "passive receiver" exemption would enable the industry to avoid the uncertainty and risk that are anathema to successful real estate deals. Model precedent for exempting a category of otherwise liable party can already be found in CERCLA under the Secured Creditor Exemption, which provides protection from liability for lenders, as long as they meet certain well-defined requirements.

It should also be noted that EPA's Enforcement Discretion Policy, while not extending far enough to protect certain passive owners from third-party liability, at its core evidences EPA's acknowledgement that parties that did not cause pollution should not face unlimited CERCLA liability. Congress can take the next logical and appropriate step by enlarging that policy to include passive real estate owners, and enacting it into law through a passive receiver exemption.

This is why on behalf of ICSC and its members and stakeholders, I am thankful for the opportunity to talk with you about meaningful policy changes that can help unlock economic investment and jobs in communities across America. Because EPA is not eliminating the CERCLA designation and because EPA lacks authority to create new defenses, exemptions, and exclusions under CERCLA, Congress must take action to provide predictability to the real estate industry.

Generally, ICSC asks Congress to align CERCLA and PFAS policy with these simple principles:

1) Polluter Pays—Not Passive Landlord
2) Protect Clean Drinking Water
3) Preserve Economic redevelopment and housing construction
4) Consider creative ways to increase the use of the EPA Brownfields Program and focused CERCLA "delisting" to allow for our industry to return more parcels to useful economic uses.

Specific Legislative and Oversight Recommendations

1) Clarify Passive Receiver Liability Under CERCLA for PFAS
2) Strengthen BFPP Protections and Due Diligence Safe Harbor
3) Establish a PFAS Source-Focused Remediation Fund
4) Direct EPA to Issue Binding Guidance on Contribution and Allocation
5) Harmonize Federal and State Implementation
6) Oversight of Reporting and Compliance Burdens
7) Protect Brownfields & Housing-Linked Redevelopment

Conclusion

ICSC stands ready to work with Congress, EPA, the States, and communities to remediate PFAS effectively and protect public health—without imposing unfair, retroactive burdens on passive property owners who play no role in PFAS manufacture or industrial use. With targeted statutory clarifications and practical guidance, we can ensure polluters pay, communities are protected, and commerce and housing continue to thrive. Thank you for the opportunity to testify. I am happy to answer your questions.