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September 18, 2019

Designation of PFAS as hazardous substances under CERCLA

The following two amendments were included in H.R. 2500, which passed the House of Representatives on July 12, 2019.

- Pappas Amendment 665, which would require EPA to add PFAS to the list of toxic pollutants under the Clean Water Act, and by virtue of that listing would designate PFAS as hazardous substances under the Comprehensive Environmental Response Compensation and Liability Act, better known as Superfund. The Pappas amendment would also require the development of effluent limitation guidelines and pretreatment standards.
- Dingell Amendment 537, which would designate PFAS as hazardous substances under CERCLA Section 102 within one year.

Superfund designation is urgently needed to jump start the cleanup process in contaminated communities across the U.S. and ensure that polluters are held accountable.

We understand trade associations and groups have expressed concerns about the potential liability that may be faced by public drinking and wastewater utilities, farmers, and some users of PFAS. These concerns are overstated and rooted in a misunderstanding of how CERCLA works.

CERCLA designation is not a de facto ban

Some groups have expressed concern that a hazardous substance designation under Superfund would create a de facto ban and prevent the use of PFAS in things like medical devices or fighter jets. This is simply not true and not consistent with the 40-year history of Superfund.

CERCLA is a cleanup statute and does not regulate the use or manufacture of toxic substances. CERCLA only regulates releases of toxic substances that threaten human health or the environment.

The full list of CERCLA hazardous substances, which includes roughly 800 substances, can be found at 40 C.F.R. § 302.40. The hazardous substances list contains many common, widely used chemicals. Sulfuric acid is included on the CERCLA hazardous substance list and is also the most-produced chemical in the world, with more than 40 million tons manufactured annually in the U.S.¹ Even though it is listed as a CERCLA hazardous substance, sulfuric acid continues to be widely used in a variety of sectors and products, including fertilizer, petroleum products,

¹ <https://www.marketwatch.com/press-release/sulfuric-acid-market-2018---2022-global-industry-outlook-dynamic-demand-supply-chain-business-opportunity-top-key-players-analysis-growth-factors-share-size-research-report-by-mrfr-2018-12-19>

origins and similar sources of exposure, as well as similar health and environmental effects, as a basis for regulating as a class.²⁸

The EPA also groups chemicals as classes to facilitate party reporting of hazardous chemicals. The EPA regulates dioxin and dioxin-like compounds as a class under the Emergency Planning and Community Right to Know Act, or EPCRA, because they are produced in extremely small amounts compared to other chemicals reported on the TRI. They are grouped together to make meeting the reporting requirements easier.²⁹ Regulating chemicals as classes also facilitates reporting because it can be more efficient than regulating chemicals individually. The CWA's Priority Pollutant List was revised from individual pollutants to chemical classes because regulating a large number of individual pollutants "threatened to make the program unmanageably large and costly," since it required laboratory analyses for hundreds of potential pollutants.³⁰

Chemical categorization is a widely accepted scientific practice. For example, the National Academy of Sciences recently published a comprehensive report on studying organohalogen flame retardants as a class, stating that class categorization provides stronger guidance to industries than does individual chemical regulation, because it allows industries to consider the broadest possible class and avoid that entire class because of its environmental and health costs, rather than just one chemical.³¹ Categorization allows regulators like EPA to extrapolate information about known risks from some class members and apply it to lesser-studied chemicals. The EPA and other federal agencies use tools like Quantitative Structure-Activity Relationship, or QSAR, methodologies and computer modeling to make risk estimates about less-studied chemicals within a chemical class.³²

Land application of sewage sludge as fertilizer is likely exempt from CERCLA

Farmers who apply biosolids as a fertilizer and the wastewater facilities that provide the sludge are unlikely to be held liable under CERCLA. Section 101(22) of CERCLA exempts "the normal application of fertilizer" from the definition of "release."³³ Applying biosolids to farm fields would constitute the normal application of fertilizer and therefore would not be considered a "release" of a hazardous substance.

Application of biosolids as fertilizer is a longstanding practice that has not yet resulted in significant liability for farmers or utilities. Because they are often a product of wastewater treatment, biosolids can contain a variety of pollutants, even when treated. A 2018 report by the EPA Office of Inspector General identified more than 350 contaminants identified in biosolids applied to lands.³⁴ Among the 352 contaminants, 61 contaminants were identified as "acutely hazardous, hazardous, or priority pollutants" in other programs, including CERCLA. The

²⁸ 77 Fed. Reg. 19862.

²⁹ 64 Fed. Reg. 58666.

³⁰ John C. Dernbach, *The Unfocused Regulation of Toxic and Hazardous Pollutants*, Harv. Envtl. L. Rev. 33 (1997), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103662

³¹ <https://www.nap.edu/catalog/25412/a-class-approach-to-hazard-assessment-of-organohalogen-flame-retardants>

³² <https://www.epa.gov/chemical-research/toxicity-estimation-software-tool-test>.

³³ 42 U.S.C. § 9601(22)(D).

³⁴ https://www.epa.gov/sites/production/files/2018-11/documents/epaig_20181115-19-p-0002.pdf.

presence of these CERCLA hazardous substances in biosolids has not historically resulted in any significant liability for wastewater treatment facilities or farmers. The OIG report also found that “EPA has reduced staff and resources in the biosolids program over time, creating barriers to addressing control weaknesses identified in the program.” Given the presence of other CERCLA hazardous substances in biosolids, EPA’s limited resources in the biosolids program, and the application of the fertilizer exemption, the mere addition of PFAS chemicals to the CERCLA hazardous substance list is unlikely to create any new liability risk.

James Slaughter, an attorney with Beveridge & Diamond and an expert on biosolids issues, recently told *Inside EPA* that he also believes that concerns over CERCLA liability from biosolids are overblown.³⁵ He pointed to the fertilizer exemption and also said that “Biosolids have long had trace amounts” of chemicals that are CERCLA hazardous substances, and that designating PFAS as hazardous substances “won’t likely trigger new liability.”

Creating permit requirements will limit CERCLA liability for water utilities

The Pappas amendment would limit future liability for utilities, because it would require EPA to establish effluent limitation guidelines and pretreatment standards under the Clean Water Act. PFAS releases would also be subject to National Pollutant Discharge Elimination System, or NPDES, permits. Section 107(j) of CERCLA limits liability from “federally permitted releases,” including releases subject to NPDES permits.³⁶ This provision in CERCLA was Congress’ recognition that an entity whose releases are being regulated under the Clean Water Act should not be further penalized for those releases under CERCLA. If a release is “federally permitted,” there is no CERCLA liability for costs of responding to those releases. If wastewater utilities release PFAS in compliance with an NPDES permit that includes limits on PFAS releases, those utilities will be protected from future liability. Establishing these effluent and pretreatment requirements would also reduce the amount of PFAS going to drinking water utilities, reducing their cleanup burden.

There are liability limits, affirmative defenses, and enforcement discretion to make sure polluters, not innocent parties, pay for cleanup

The vast majority of PFAS contamination has been caused by industrial polluters and through the discharge of PFAS-laden firefighting foam. EPA’s approach to CERCLA liability has evolved over the statute’s 40-year history, and there are many tools – including liability exemptions, affirmative defenses, and enforcement discretion – designed to distribute liability more equitably. In practice, the major contributors to PFAS pollution will pay the lion’s share for cleanups.

EPA has significant enforcement discretion. Under Section 122(g) of CERCLA, EPA can, and often does, quickly make “de minimis” settlements with parties that contributed only a small

³⁵ <https://insideepa.com/daily-news/potws%E2%80%99-legal-uncertainty-drives-fear-over-pfas-superfund-designation>.

³⁶ 42 U.S.C. § 9607(j).