

# PFAS Superfund listing backs Dems into a corner

By Annie Snider

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The Biden administration's plan to [list a pair of highly toxic PFAS “forever chemicals”](#) under the Superfund law next year promises to give contaminated communities a powerful tool to prod polluters to pay for cleanups — but the prospect is already giving Democrats a political headache.

That’s because the law’s stringent liability rules mean it’s not only chemical manufacturers and the Defense Department that could be on the hook for billions of dollars’ worth of cleanups, but also wastewater utilities, farmers, airports and oil refineries that contributed to the contamination by spreading the PFAS-tainted sludge on the fields or using firefighting foam laced with the toxins.

A political fight has been brewing for months over whether Congress should exempt these entities from liability. That effort is backed by Republicans, led by Wyoming Sen. [Cynthia Lummis](#), who [want broad exemptions](#) they say are needed to protect the thousands of unwitting, small-time players in the contamination crisis that could be pulled into a tangle of litigation that would drive up water rates and gas prices.

But environmental groups have come out in force against any such legislation, fearing it could weaken the nation’s bedrock cleanup law. They argue the Superfund law already allows federal regulators to shield parties from financial liability and the Biden EPA has already pledged to protect utilities. Moreover, they say Republicans' legislative language is too broad, and would prevent action against those water utilities or other entities acted irresponsibly.

Democrats are stuck in the middle. Lobbyists for the water utilities say Senate Democrats are sympathetic to their concerns about overwhelming costs that would get passed on to ratepayers, especially with a [pandemic-era water assistance program](#) expiring, but that they are wary of creating a loophole that could let other parties off the hook and undermine effort to clean up contaminated sites.

"PFAS is in communities across our nation, and Democrats and Republicans agree that we need to do something about it," Senate Environment and Public Works Chairman [Tom Carper](#) (D-Del.) said in a statement. "We must figure out how to help address PFAS contamination and ensure that cleanup efforts are happening by holding polluters accountable."

Republicans are targeting an [otherwise noncontroversial bill](#) that would give the federal government new authorities relating to PFAS. That bill, which is being drafted on a bipartisan basis by Carper and ranking member [Shelley Moore Capito](#) (R-W. Va.), did not initially touch on the Superfund issue, but the committee’s Republicans have united in a demand that it be addressed in the bill in order to win their support.

Capito spokesperson Peter Hoffman said the senator “does not believe Congress should miss the opportunity” to deal with the liability problem for water utilities and other so-called passive receivers that had to handle the toxic chemicals but didn’t produce them or profit from them.

“Without the implementation of passive receiver liability protections, we risk transitioning from a 'polluter pays' model to an inequitable 'consumer pays' model, where ratepayers are forced to cover the bill for someone else’s mistakes,” he said in a statement.

Lobbyists and staffers say two issues are at the center of the negotiations: Which industries should qualify as “passive receivers” and win exemptions, and whether water utilities and other entities must prove that they acted responsibly to be exempt — or if that burden of proof falls on the plaintiffs to show the entities acted with gross negligence and shouldn’t fall under the liability shield.

While the Superfund designation isn’t likely to go into effect for several years after it’s finalized, proponents of liability exemptions say now is their best shot at advancing the changes. Carper, who has long wanted to pass bipartisan PFAS

legislation, will leave the Senate in early 2025 and Sen. [Sheldon Whitehouse](#) (D-R.I.) who is positioned to take Democrats' top spot on the committee, is seen as less willing to compromise with Republicans.

“There is not a lot of opportunity for bipartisanship on EPW, and when Sen. Carper and Sen. [Ben] Cardin both retire, that will dwindle further. So you have a retiring chairman angle to all of this that I think presents some opportunities for us in this Congress that I think will be fewer and farther between,” said a Republican staffer working on PFAS, who was granted anonymity to discuss ongoing negotiations.

Should committee negotiations fail, Lummis has signaled she will seek to advance her legislation through other means. She's already filed an amendment to the Senate's defense policy bill, and this year's FAA reauthorization offers another potential vehicle, since airports were for decades required by regulation to store and use firefighting foam containing PFAS.

But the politics aren't cut and dry. Exemptions are opposed by both the trial lawyers association, which is influential with Democrats, and the chemicals industry, which largely aligns with Republicans and would benefit from spreading the liability among a broader number of entities.

The Superfund law — officially named the Comprehensive Environmental Response, Compensation and Liability Act — is built on a system of strict liability that can draw any party that has contributed to contamination, regardless of intent or negligence, into litigation to determine their share of the blame. Parties that unknowingly or unintentionally contributed to contamination can — and often are — required to help pay for cleanups, especially when the chemical company or other entity at the top of the contamination chain is no longer in business.

Water utilities argue that that approach to liability is especially unfair to public entities that provide basic sanitation services.

“Water and wastewater ratepayer should not have to foot the bill for chemical companies who knew very well the dangers of this compound and chose never-the-less to put into the stream of commerce,” said Adam Krantz, CEO of the National Association of Clean Water Agencies.

It's not clear that the Superfund listing poses a risk to a large number of utilities, though. EPA typically only has the resources to address the sites with the worst contamination. And Jim Woolford, who headed EPA's Superfund remediation office for a decade and a half before retiring in 2020, said that initial analyses suggested the designation for the two PFAS chemicals was unlikely to significantly alter which sites make the National Priorities List.

Woolford said the agency developed an “enforcement fairness” policy under the Clinton administration to help address inequities in the law's strict liability provisions.

“Since the mid-90's the agency has developed a pretty good track record,” he argued.

But parties other than EPA could launch litigation themselves. For instance, a farmer who spread a water utility's PFAS-laden sludge on his or her fields as fertilizer could file a third-party suit under the Superfund law. While a water utility that got pulled into such litigation could ask EPA to weigh in in its defense, it remains to be seen whether the agency would have the capacity or the interest to do so.

Matthew Holmes, CEO of the National Rural Water Association, warned that even the threat of liability will change how utilities design and operate systems, sucking money away from other priorities.

“For communities where affordability is already such a big issue and they have to make choices about what they have to prioritize, this is a major problem,” he said.

But environmentalists argue that water utilities should be changing how they handle the chemicals. In particular, they want sewage treatment plants that receive wastewater from industrial facilities to use their authority under the Clean Water Act to require those facilities to pretreat their flows — something [EPA has been urging as well](#).

“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,” a coalition of the major environmental groups [wrote to lawmakers this spring](#), after Lummis' bills were introduced.

An exemption would not only disincentivize such proactive steps, but could also let utilities and other entities off the hook for irresponsible actions, greens argue.

“Water utilities are generally good actors, but they are not saints and the people who are responsible for Flint, or Jackson, Miss., or Newark are obviously capable of making mistakes and we should not simply exempt them from all liability,” said Scott Faber, who leads government affairs for the Environmental Working Group.

Congress has not exempt a single industry from the Superfund law in the nearly 43 years it has been on the books, and PFAS pose a particularly challenging situation for lawmakers who might want to begin.

Since the chemicals don’t break down naturally and were widely used, they are pervasive in the environment, and are toxic at very low levels. They were used by a huge range of industries, including electroplating facilities, textile manufacturers, food packaging producers and the cosmetics industry — many of which could claim ignorance about the chemicals’ harms. And the more exemptions that are issued, the less money there is to cover the cost of cleanups.

Faber argued that the water utility legislation is a “Trojan Horse” and that exempting any industry from liability would open the floodgates for others.

“This isn’t even a conversation that Democrats should be having because where does it end? There’s no natural end to this question. Which chemicals should be exempt? Who’s a passive receiver? Who’s an innocent party?” he asked.