Environmental Protection Network

(202) 656-6229
environmentalprotectionnetwork.org
info@environmentalprotectionnetwork.org

April 17, 2024

The Honorable Tom Carper
Chairman
Environment and Public Works Committee
United States Senate
Washington, DC 20510

The Honorable Sam Graves
Chairman
Transportation and Infrastructure Committee
United States House of Representatives
Washington, DC 20515

The Honorable Shelley Moore Capito
Ranking Member
Environment and Public Works Committee
United States Senate
Washington, DC 20510

The Honorable Rick Larsen
Ranking Member
Transportation and Infrastructure Committee
United States House of Representatives
Washington, DC 20515

Re: CERCLA Exemptions in Proposed PFAS Legislation

Dear Senators Carper and Capito and Representatives Graves and Larsen,

The Environmental Protection Network (EPN) harnesses the expertise of more than 650 former U.S. Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

We are writing to express our concern that the Senate Environment and Public Works Committee (SEPW) and the House Transportation and Infrastructure Committee (House T&I) are considering legislation on per- and polyfluoroalkyl substances (PFAS) that will include exemptions from the potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or the Superfund program) for releases or threatened releases into the environment of PFAS compounds. EPA has proposed to designate two PFAS compounds, PFOA and PFOS, as CERCLA hazardous substances. In addition, EPA is planning to issue the first chemical-specific enforcement discretion memo soon after the CERCLA PFOA/PFOS designation rule is finalized stating that EPA does not intend to pursue wastewater treatment plants, drinking water treatment plants, certain landfills, airports, and farmers for CERCLA liability ("2024 PFAS Enforcement Discretion memo"). On August 9, 2023, EPA confirmed the planned issuance of this policy in a letter to the House Committees on Energy and Commerce and on Transportation and Infrastructure.[1] Those entities can be assured that EPA will protect them from liability under the circumstances described in the upcoming enforcement discretion memo.

There are significant downsides to Congress enacting exemptions from CERCLA liability for PFAS dischargers. Such first-ever exemptions would set the precedent for exemptions for other hazardous substances or for other entities. PFAS are by no means the only hazardous substances that are ubiquitous and found in most publicly-owned wastewater treatment plants (POTWs), landfills and elsewhere; other

[1] https://static.ewg.org/upload/pdf/PFAS_Letter_to_RM_Pallone_and_RM_Larsen_8.9.2398.pdf

examples include PCBs, mercury, lead, and a common group of chemicals known as PAHs (polycyclic aromatic hydrocarbons, associated with many oily wastes). Moreover, even if Congress were to exempt these entities from CERCLA liability for PFAS contamination, such action would not be able to shield utilities from citizen suits or tort claims, which are far more likely than Superfund enforcement actions. Exemptions would also decrease the incentive of these entities to reduce their PFAS contamination, many of whom have not yet initiated pollution controls or best management practices despite the extent and severity of public health and environmental risks from PFAS contamination and the widespread recognition of those risks over the past decade or longer.

We urge Congress to postpone action until there has been adequate time for EPA to implement the final rule, implement its enforcement discretion policy, and identify any problems that may arise. If Congress considers it essential to take action this year, we recommend that the House and Senate add report language to any PFAS bill being enacted that directs EPA to implement the 2024 PFAS Enforcement Discretion memo and to report annually to Congress on any situations involving those five protected entities. This report language would prevent a future EPA administration from abandoning or weakening the policy without Congressional authorization and would not have any of the detrimental effects caused by exemptions. EPA has a long history of following program guidance provided in congressional report language.

We believe that the potential for these five entities to be held liable under this new CERCLA hazardous substance designation has been greatly exaggerated. Firstly, the Superfund program only addresses the most contaminated sites in the country. There are an estimated 500,000 contaminated sites in the U.S. Of these, only about 50,000 have been evaluated by EPA through a Superfund "preliminary assessment" since the beginning of the program in 1981. And of the assessed sites, only about 1,800 have ever been added to the National Priorities List, the list of sites at which EPA expects to carry out a cleanup..

Secondly, EPA assigns liability using multiple factors including allocating liability among different parties' contributions equitably; considering parties' ability to pay; the amount and toxicity of waste disposed of; the degree of a party's involvement; the degree of care taken with respect to the waste; and the degree of cooperation with the government. As a result, it is extremely rare for one of these entities to be included in a Superfund site. There are 16,000 POTWs and 153,000 public drinking water systems in the U.S., many of which routinely handle over 60 hazardous substances. Despite the large number of these facilities handling hazardous substances, Superfund liability cases rarely involve these facilities. The Superfund FOIA 11 report[2] available on EPA's Superfund Enterprise Management System (SEMS) identifies all the entities that have received a CERCLA notice of being a responsible party for a cleanup since the 1980s. Very few of these parties are POTWs. EPA's CERCLA enforcement has always focused on holding major polluters accountable and has used enforcement discretion to protect minimal contributors or parties that are unable to pay significant sums.

In the rare case in which one of these five types of entities becomes involved in a Superfund site, EPA has multiple tools to protect those entities. EPA can enter into settlement agreements with major parties that prohibit actions by the major settling parties against these entities. In situations where utilities are concerned about being targeted by third party lawsuits, EPA can proactively enter into settlement agreements that provide them with "contribution protection" under CERCLA. Since the 1980s, EPA has addressed *de*

[2] https://semspub.epa.gov/work/HQ/401406.pdf

minimis parties (those whose releases of hazardous substances into the environment are relatively minor) using enforcement discretion under CERCLA where it is "practicable and in the public interest." EPA has issued multiple policies to implement CERCLA Section 122(g), which describes EPA's goal to expeditiously settle with "small" parties and minimize their transaction costs.

In the few cases where EPA has sought to recover cleanup costs from wastewater utilities, those utilities were acting irresponsibly or contributed more significantly to the contamination; even in those circumstances, EPA still gave them special settlement terms including delayed payments, payment installments, or in-kind contributions. Under EPA's 1997 Ability to Pay Policy[3], entities facing financial constraints can make a case for a smaller settlement amount based on an "undue financial hardship" standard. If POTWs get sued by private parties responsible for a Superfund cleanup, they can seek a *de minimis* or other settlement with EPA that would provide them with protection from such third party contribution suits. If POTWs get sued by a private party for a cleanup that is not subject to EPA CERCLA oversight or settlement, the party seeking reimbursement must demonstrate that it has funded and performed a CERCLA quality cleanup consistent with the National Contingency Plan[4]. Any private party CERCLA claim will also need to overcome CERCLA defenses (described herein) and fairness factors. To the extent POTWs spend money on cleanups, they may recover their response costs by bringing cost recovery actions against private responsible parties or receiving payments through the settlement process. Utilities will likely be successful pursuing cost recovery from private parties that discharged PFAS into their systems.

Utilities can also take steps to protect themselves from liability. If POTWs have PFAS limits in their Clean Water Act permits, they will be shielded from CERCLA liability for discharges in compliance with their permit. States have the authority to set Best Professional Judgment (BPJ) technology-based permit limits for PFAS in POTWs, industries, and landfills today. They do not have to wait for EPA to promulgate national technology-based PFAS permit limits for industries and landfills. POTWs that receive PFAS from industries and landfills can and should use their pretreatment authority to require removal of those chemicals today. Pretreatment requirements can be highly effective in reducing PFAS in POTW wastewater and biosolids. The state of Michigan reports a 90% reduction in discharges of PFOS (a common PFAS compound) from their POTWs since the state required PFAS pretreatment by dischargers to those plants. While essentially all POTWs have the authority to impose pretreatment requirements, Michigan is unfortunately so far the only state that has required POTWs to ensure pretreatment of PFAS by the industries and landfills discharging to those POTWs. Congress should consider enacting legislation requiring all Clean Water Act permitting authorities – the states or EPA – to ensure PFAS dischargers pretreat their waste before sending wastewater to POTWs. EPN previously recommended a national requirement for POTWs to monitor PFAS from their industrial contributors in a letter to the Senate Armed Services Committee and SEPW regarding the 2023 National Defense Authorization Act[5]. Pretreatment places the costs of properly managing PFAS where they belong – with the industries that use these chemicals. Pretreatment is not costly for POTWs, and POTWs can seek reimbursement from their industrial dischargers for costs associated with monitoring and identifying these dischargers.

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[3] https://www.epa.gov/sites/default/files/2013-09/documents/genpol-atp-rpt.pdf
[4] https://www.epa.gov/emergency-response/national-oil-and-hazardous-substances-pollution-contingency-plan-ncp-overview
[5] https://www.environmentalprotectionnetwork.org/wp-content/uploads/2022/08/EPN-letter-on-PFAS-Amendments-in-NDAA-2023.pdf

EPN urges Congress to postpone any action until after the final CERCLA designation rule has been implemented for a period of time to see what, if any, problems arise for POTWs and wastewater treatment plants, landfills, airports, or farmers. If Congress is convinced action needs to be taken this year, we recommend your committees add report language to an enacted PFAS bill that directs EPA to implement its forthcoming 2024 PFAS Enforcement Discretion memo and to report annually on any impacts on these five types of entities.

Thank you in advance for considering our concerns and recommendations. We would welcome the opportunity to discuss this in more detail with you and your staff.

Sincerely,

Michelle Roos

Michelle Roos
Executive Director
Environmental Protection Network

cc: Cliff Villa, Assistant Administrator, EPA Office of Land and Emergency Management
David Uhlmann, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance
Courtney Taylor, Staff Director, SEPW
Murphie Barrett, Deputy Staff Director, SEPW
John Kane, Infrastructure Director, SEPW
Jack Ruddy, Staff Director, House T&I
Kathy Dedrick, Staff Director, House T&I (Minority)
Ryan Hambleton, Staff Director, House T&I Subcommittee on Water Resources and Environment
Ryan Seiger, Staff Director, House T&I Subcommittee on Water Resources and Environment (Minority)
Joe Sheehy, Legislative Director, House T&I Subcommittee on Water Resources and Environment