

This article originally appeared at <https://insideepa.com/dailynews>. It is reprinted here with permission of the publisher, Inside Washington Publishers. Copyright 2022. No further distribution is permitted. The content of this article does not represent the views of Inside Washington Publishers or its staff. IWP and its publications take no position on this article's subject matter or any other issue.

REGULATION REMEDIATION LIABILITY

## Lawyer Touts CERCLA Waivers For Biosolids As EPA Readies PFAS Rule

August 24, 2022

A leading water sector lawyer says the Superfund law provides multiple cleanup liability exemptions for the use of biosolids as a fertilizer on land, seeking to assure industry officials who fear EPA's imminent plan to list two PFAS as Superfund "hazardous substances" could impose new liabilities and block disposal of the material.

Current law provides numerous "defenses" to allow for continued land application of biosolids even though additional "congressional relief" might be preferable, James Slaughter, a principal at Beveridge and Diamond, said during an Aug. 24 webinar hosted by the Water Environment Federation (WEF), which represents water quality professions.

"There's a lot of good news there," Slaughter said about implementation of EPA's upcoming rule.

His comments come as EPA **is poised to issue** its long-awaited plan for listing perfluorooctane sulfonic acid (PFOS) and perfluorooctanoic acid (PFOA) as "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), or Superfund law.

The pending proposal has prompted significant concerns from water treatment officials who generate biosolids from the wastewater collected by industrial and other dischargers as trace amounts of per- and polyfluoroalkyl substances (PFAS) have been found in those biosolids, which are sold or given to farmers for use as fertilizers as a cheap and easy disposal option for water treatment facilities.

State officials in Maine have already banned the land application of biosolids because of PFAS exposure concerns, prompting groups like the National Association of Clean Water Agencies, which represents treatment works, to step up their efforts to prevent the spread of such policies. For example, the group **is forming a coalition** with agriculture groups to advocate on the issue and is also raising concerns with EPA.

But Slaughter, who has long represented municipal officials in their efforts to dispose of the material, sought to quell concerns about the potential impact of EPA's anticipated rule.

"I don't think our biggest threat is designation of PFAS as CERCLA hazardous substance" because "we have several layers of defense there," he said, noting EPA's rule is likely to go final in 2023.

"Number one, CERCLA has always had in the statute itself a carve-out for quote, fertilizer, unquote, used for agricultural purposes," which includes biosolids under EPA's rule 503 issued in the 1990s under the Clean Water Act in order to encourage the disposal of sludge from treatment plants as an agricultural fertilizer.

"And as we all know what better fertilizer is there in great bulk quantities than biosolids as governed under the 503 rules," he said.

Nevertheless, he acknowledged that the reach of Superfund cleanup liability "hasn't been tested a lot" with regards to farming sites. Most of the Superfund cleanups involve former industrial facilities that are being cleaned up for reuse or to prevent contamination from spreading into local groundwater.

"But I think we can have a fair amount of confidence that that fertilizer exemption, which Congress put in place when it passed CERCLA, is going to protect biosolids from any liability for PFAS being a hazardous substance," he said.

### 'No Need To Regulate'

Slaughter noted that biosolids already contain hazardous substances "beyond the regulated metals under 503," and regulators have not been rushing in to "designate farms as Superfund sites despite the presence of a wide variety of anthropogenic compounds" because the

risk assessment was done in the late 1980s and 1990s and “there was no need to regulate.”

Slaughter equated recent concerns about PFAS in biosolids to dioxin fears in the 1990s with EPA deciding in 2001 not regulate because of the low risk from exposure to dioxin in biosolids.

“There are also other exemptions under CERCLA that should protect land application of biosolids,” Slaughter said.

“There's an exemption to liability for federally permitted release[s], either under [a national pollutant discharge elimination system (NPDES)] permit, or the 503 regulations.” Slaughter said EPA's 503 rule designates land application of biosolids as “nationwide federally regulated” through the use of NPDES permits.

Therefore, “it should qualify as a federally permitted release that is not subject to CERCLA liability,” according to Slaughter.

“Finally, CERCLA is usually designated for old industrial sites, sites that need to be cleaned up for future use, such as residential housing or brownfields development, to put a site back into commercial use, and we've never seen rural agricultural areas be much of a focus of CERCLA regulation either at the state or the federal level,” Slaughter noted in arguing the Superfund program is not likely to refocus on agricultural sites because of EPA's listing of PFOA and PFOS.

“But again, it's something we need to keep an eye on,” he added.

EPA's issuance of the proposed rule is expected just days after the Office of Management and Budget (OMB) designated the plan as “economically significant” and required the agency to provide a detailed look at the plan's potential direct and indirect costs and benefits.

OMB's designation of the upcoming rule prompted some industry sources to predict that its highly anticipated release might be delayed.

But Slaughter rejected such notions, telling WEF members that OMB's requested cost review will be just a “bump in the road” since EPA appears determined to move quickly on its proposed listing of PFOA and PFOS under Superfund.

“EPA is determined to designate PFAS as a CERCLA hazardous substance [and] they are already at work on what you know, frankly, may be a fairly lowball estimate of what the cost” of the designation will be. “And it's not expected to be a significant deterrent to the designation of PFAS,” he said, adding chemical manufacturers and others will definitely file lawsuits challenging the rule. — *Rick Weber* ([rweber@iwpnews.com](mailto:rweber@iwpnews.com))

---

#### SITE LICENSE AVAILABLE

Economical site license packages are available to fit any size organization, from a few people at one location to company-wide access. For more information on how you can get greater access to InsideEPA.com for your office, contact Online Customer Service at 703-416-8505 or [iepa@iwpnews.com](mailto:iepa@iwpnews.com).

#### STAY CONNECTED

