

Inside PFAS Policy

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EPA Eyes ‘Avenues’ To Expand PFAS Superfund Liability Relief

EPA is pledging to consider “other avenues” to limit Superfund liability for water utilities and others that are seen as innocent downstream recipients of PFAS beyond its plans to craft an enforcement discretion policy, with a key agency enforcement official acknowledging stakeholders’ concerns during a recent “listening session.”

“This is some of what we have heard today, and that we will take back and consider,” EPA’s Ken Patterson said at the conclusion of a March 23 virtual listening session on the agency’s upcoming “enforcement discretion policy” to target Superfund liability actions at manufacturers and major releases of per- and polyfluoroalkyl substances (PFAS).

Among the comments made by stakeholders during the listening session were that “enforcement discretion is not sufficient to shield third-party actions” and that “EPA should look at other avenues to protect parties from third-party actions including explicit exemptions from CERCLA liabilities,” noted Patterson, who is director of regional support in the Office of Site Remediation Enforcement within the Office of Enforcement and Compliance Assurance.

EPA has proposed to designate two of the most studied types of PFAS — perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) — as “hazardous substances” under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), or Superfund law.

But water utilities, in particular, have raised concerns that under such a designation they could be saddled with CERCLA liability for disposal of materials used to remove PFAS from drinking water or limit their ability to land-apply biosolids.

Patterson emphasized at both a March 14 listening session and the March 23 session that EPA will not pursue Superfund enforcement actions for PFAS contamination against publicly owned drinking water and wastewater facilities, city-owned solid waste landfills that accept PFAS-laced trash, publicly owned airports and local and state fire departments that store and use PFAS-containing firefighting foams, and farmers who often unknowingly apply PFAS-contaminated biosolids as fertilizer to their fields.

But multiple participants at the event urged EPA to provide explicit liability protections for certain groups or types of facilities in its CERCLA rulemaking, or some other “legally binding” documentation.

Summarizing the remarks from the listening sessions, Patterson said, “We’ve heard that there are many implications of EPA’s enforcement discretion for landfills, wastewater treatment facilities, contractors, liquid terminals, biosolids applicators, passive receivers, and communities.”

Specifically, stakeholders have urged EPA to limit public dollars spent on litigation “in particular, contribution actions, look at flexibility in defining the public entity category, aggressively pursue the polluter pays model, look at threatened releases of PFAS to communities more closely, and focus on source control and risk assessments,” Patterson said.

But it remains unclear how much EPA can do to alleviate stakeholders’ concerns, especially for CERCLA liability connected to the disposal of PFAS-containing water treatment media.

Agency officials have repeatedly said they understand water utilities’ concerns, with Jennifer McLain, director of EPA’s Office of Ground Water and Drinking Water, telling a conference of the Association of Metropolitan Water Agencies (AMWA) March 7, “You know, we really have definitely heard and understand the concerns that the water sector and others have raised about the CERCLA actions.”

Liability Concerns

But water utilities have said enforcement discretion will be insufficient to shield them from liability, especially from being sued by third parties not covered by the agency’s discretion, noting that water utilities have been pulled into Superfund litigation in the past for other types of contaminants.

A coalition of water groups that includes AMWA is seeking a statutory exemption from Congress.

Rep. Paul Tonko (D-NY), the ranking member of the Energy and Commerce Committee’s environment panel, told AMWA at the March 7 conference that he is willing to work with them to address their concerns.

“If you’re left with that liability, there should be some [type of] statement made in statute or legalese that, you know, is cognizant of the fact” that utilities are seeking to reduce PFAS contamination but are still exposed to CERCLA liability. “So we could work with you on what would be the best response,” Tonko said.

AMWA Chief Advocacy Officer Dan Hartnett said at the meeting that utilities have discussed the issue with EPA,

and while the agency appears sympathetic to the utilities' concerns, the agency also lacks the statutory authority to exempt "passive receivers" of PFAS, like utilities, from liability.

"Right, it would require legislative action, most likely, so this would fall in our court," Tonko said.

Other sources, however, have suggested that EPA has existing authority to limit liability tied to land-application of biosolids.

For example, James Slaughter, a principal at Beveridge and Diamond, said last year that there are "several layers of defense" from liability.

"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 regard 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.

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."

Additionally, he 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.

And in formal comments on EPA's CERCLA proposal, the Environmental Protection Network of EPA alumni urged the agency to "consider using a variance or some other means to delay the effective date of applying the hazardous waste designation to biosolids until after EPA promulgates a CWA Section 503 rule identifying safe levels of PFOA and PFOS in biosolids for various beneficial uses.

"This delay would provide a much needed grace period for wastewater utilities to monitor their biosolids and evaluate their reuse/disposal options," the group wrote. — *Rick Weber* (rweber@iwpnews.com)
