



1130 Connecticut Ave. NW, Suite 1050
Washington, DC 20036

T (202) 833-2672
F (888) 267-9505

March 31, 2023

EPA Office of Enforcement and Compliance Assurance
1200 Constitution Avenue, N.W.
Washington, D.C. 20460

Submitted online via: <https://www.epa.gov/enforcement/forms/contact-us-about-cercla-pfas-enforcement-listening-sessions>

Re: Comments of the National Association of Clean Water Agencies on the Environmental Protection Agency's Potential CERCLA PFAS Enforcement Discretion and Settlement Policy

To Whom It May Concern:

The National Association of Clean Water Agencies (NACWA) appreciates this opportunity to comment on the U.S. Environmental Protection Agency's (EPA) potential development of a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) enforcement discretion and settlement policy related to per- and polyfluoroalkyl substances (PFAS).

NACWA represents the interests of over 350 publicly owned wastewater and stormwater agencies of all sizes across the country. NACWA's members are environmental pillars of the communities they serve; they protect public health and the environment by managing and treating billions of gallons of our nation's wastewater and stormwater each day.

NACWA appreciates EPA's commitment to having polluters pay for PFAS cleanups and welcomes the development of an enforcement policy aimed at shielding public clean water agencies from liability under CERCLA for such cleanups.

Municipal wastewater and stormwater agencies do not produce or profit from PFAS, but instead passively receive PFAS by virtue of the vital public services they provide through the collection and treatment of wastewater and management of stormwater.¹ NACWA therefore supports EPA's adoption of a policy clarifying that clean water agencies should not be the subject of EPA CERCLA PFAS enforcement actions and providing instruction to courts grappling with cost allocation and equity considerations in CERCLA litigation.

¹ As extensively detailed in [NACWA's comments on EPA's proposed PFAS hazardous substances designations](#), the collection, management, treatment, and sustainable reuse of the billions of gallons of wastewater and stormwater generated throughout the country each day provides untold benefits for our modern society. Nevertheless, because those activities often fall within CERCLA's broad categorizations of "disposal" and "releases," their performance can also lead to clean water agencies being incongruously labeled as CERCLA "potentially responsible parties."

Such a policy should focus on ensuring that settlement agreements with water and wastewater agencies occur as quickly as possible, as the cost of participating in prolonged CERCLA litigation – even absent the ultimate imposition of cleanup liability – can in and of itself be a substantial burden for communities to bear, particularly for smaller utilities and disadvantaged communities. Those settlements should also shield settling parties from third party contribution claims to the maximum extent allowable under the law.

EPA's enforcement discretion policy should also provide information concerning how EPA intends to identify sites contaminated with PFAS at sufficient levels to warrant cleanup activities, as well as prioritize determinations of PFAS toxicity as compared to any other contaminants that may be present at a site.

Importantly, however, while NACWA appreciates that EPA does not generally intend to take legal action itself against, or seek funding from, clean water agencies for PFAS cleanups under CERCLA, it is an undeniable fact that private parties – including those responsible for causing and profiting from PFAS pollution – can and will continue to do so. And because, at least as currently drafted, CERCLA provides even the most culpable of parties with multiple avenues to drag innocent parties into extremely costly and complex litigation, there is often little EPA can do to stop it through application of its enforcement discretion.

In short, even with EPA's exercise of its enforcement discretion, CERCLA's provisions will treat public clean water agencies as part of the problem, when in fact they will be key partners with EPA and the states in finding solutions to PFAS contamination.

To help remedy this issue, in addition to developing a CERCLA enforcement policy, NACWA strongly encourages EPA to support the Congressional adoption of a true "polluter pays" model for PFAS cleanups, focus resources on product substitution and enhanced source control efforts, and clarify that the CERCLA "normal application of fertilizer" exclusion includes the continued practice of sustainable land application of municipal biosolids. As the case study outlined below underscores, such critical steps are necessary to protect communities nationwide, including disadvantaged communities, from being subjected to the financial burdens of cleaning up contamination that has already harmed their health and environment.

The CERCLA Conundrum: "Responsible" Parties vs. Culpable Parties

Diamond Alkali Superfund Site in Newark, New Jersey provides an eye-opening example of how CERCLA's statutory purpose can be subverted when large corporations and major cleanups are involved. The site is one of the largest Superfund cleanups to date, and continues to significantly impact NACWA member Passaic Valley Sewerage Commission (PVSC) and the 1.5 million residents it serves. Though the case involves dioxins, similar scenarios will likely take place around the country in the context of PFAS.

From 1951 to 1969, the Diamond Alkali Company manufactured Agent Orange² at a site on the banks of the Passaic River. A by-product of Agent Orange is a highly toxic dioxin called tetrachlorodibenzo-p-dioxin, or TCDD. TCDD causes skin and liver disease, cancer, and disorders of the immune, nervous, endocrine and reproductive systems. It is persistent in the environment and dangerous at very low levels. Simply stated, it is “one of the most toxic synthetic compounds ever tested under laboratory conditions.”³

During its time manufacturing Agent Orange, Diamond Alkali intentionally bypassed PVSC's public sewer system that services the area so that it could discharge TCDD directly into the Passaic River undetected. The company even had an alarm system that would be triggered when PVSC inspectors came onto the property so that they could hide what they were doing, which, to reiterate, was dumping one of the most toxic compounds mankind has ever created directly into the Passaic River.

It is difficult to envision a party more culpable for pollution which has had damaging health and environmental impacts on many disadvantaged communities. Yet Diamond Alkali's successors in interest (now Occidental Chemical Corporation) have through decades of litigation been able to draw hundreds of parties, including PVSC and 40 other public entities as well as a host of private companies, into its fight over responsibility for the site's cleanup. That cleanup is still ongoing, and likely to cost in the billions of dollars by its completion.

Whether through contribution claims under CERCLA Section 113, cost recovery suits under CERCLA Section 107, or, as Occidental is testing in court, a creative combination of both, even the most egregious polluters can often successfully defray cleanup costs onto other “potentially responsible parties” under CERCLA. And because of CERCLA's focus on nuanced concepts of “disposal” and “release” rather than actual culpability, that means polluters can, more often than not, force innocent parties, including public clean water agencies and the communities they serve, to ultimately bear at least some of the costs for cleaning up contamination that has already harmed their health and environment.⁴

² Never the start of a story that ends well.

³ Eisler, R. 1986. Dioxin hazards to fish, wildlife, and invertebrates: a synoptic review. U.S. Fish & Wildlife Biol. Rep. 85 (1.8).

⁴ NACWA also notes that, in many instances, PFAS manufacturers may even be able to fully escape liability under CERCLA. Federal court cases interpreting CERCLA, including one from the U.S. Supreme Court, have held that companies that manufactured, but were not involved in disposing of, a hazardous substance are not responsible for cleaning it up. Thus, unless the manufacturer was involved in the actual disposal, CERCLA would currently not hold it accountable for the environmental damage its product caused. See, e.g., *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599 (2009) (holding where a company makes a “useful product” but is not engaged in its ultimate “disposal,” the company is not responsible for CERCLA cleanups necessitated by contamination from that product).

With respect to the Passaic River, even though Occidental is clearly responsible for the TCDD contamination, and any “disposal” of contaminants from PVSC’s system (among others) was found to be negligible and the result of other actors discharging those contaminants into the system, PVSC has already spent several million dollars in litigation costs alone, and that litigation has no end in sight. The money PVSC has and continues to spend on the litigation comes in large part from the residents in the very municipalities most affected by the TCDD pollution, some of which are amongst the more economically disadvantaged communities in the country and all of which have communities within them that have been designated by the State of New Jersey as “environmental justice communities.”⁵

Ubiquitous Chemicals Will Cause Problems in Communities Across the Country

Public entities have incurred these significant costs in the Passaic River cleanup in spite of EPA taking active steps to try to prevent the public from being “held hostage” by Occidental. Those steps have included the types of settlement negotiations EPA has pointed to as its primary tool to shield parties from potential CERCLA liability in the context of PFAS.

As well intentioned as EPA is, the existing statutory structure of CERCLA is such that the Agency’s authority over third party actions – and thus its ability to shield public clean water utilities and their ratepayers from liability – is extremely limited. CERCLA simply does not work that way. Given the ubiquity of PFAS throughout the country,⁶ this issue will be exacerbated by EPA’s proposed designation of certain PFAS as CERCLA hazardous substances.

A recent letter⁷ from the U.S. Chamber of Commerce to EPA and the U.S. Department of Justice underscores how contentious the problem may become. The letter notes the “potentially

⁵ New Jersey’s Environmental Justice Law, [N.J.S.A. 13:1D-157](#), defines an “overburdened community” as any census block group in which (1) at least 35 percent of the households qualify as low-income households (at or below twice the poverty threshold as determined by the United States Census Bureau); (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency (without an adult that speaks English “very well” according to the United States Census Bureau).

⁶ A recent study estimates that there are over 57,000 sites where PFAS contamination can be presumed. The estimate is based on presumed contamination at three types of facilities: (1) fluorinated aqueous film-forming foam (“AFFF”) discharge sites, (2) certain industrial facilities, and (3) sites related to PFAS-containing waste. Among these sites are 4,255 wastewater treatment plants. Given the ubiquity of PFAS in industrial and consumer products, this study likely underestimates the number of sites with detectable levels of PFAS in environmental media such as soil, surface water, and groundwater. Derrick Salvatore, et al., *Presumptive Contamination: A New Approach to PFAS Contamination Based on Likely Sources*, *Environ. Sci. Technol. Lett.*, 9, 11, 983-990 (October 2022). Available at <https://pubs.acs.org/doi/10.1021/acs.estlett.2c00502>.

⁷ Available at [230321 Comments CERCLA EPA DOJ.pdf \(uschamber.com\)](#).

major environmental and financial exposure for businesses, government, and individuals” CERCLA’s broad strict, retroactive, and joint and several liability scheme imposes.

However, rather than supporting EPA’s potential use of its enforcement discretion to shield some of those entities – namely, public water and wastewater agencies – from that exposure in the context of PFAS, the letter instead calls any such attempt a potential “protection racket.” To limit the ability of companies – including, presumably, those culpable for contamination – to sue “any entity, public or private” to recover cleanup costs raises “due process and takings issues” as well as other “policy concerns,” the letter alleges.

The reality is, when faced with the significant costs CERCLA cleanups can often entail, corporate America will utilize every tool it has to recover its losses, even from parties that in no way caused the pollution at issue. And CERCLA provides plenty of tools. Including, as has unfortunately been the case with the Diamond Alkali Superfund Site, the potential for culpable corporations to use the public as a bargaining chip to work out a better deal for themselves and their shareholders.

More Must Be Done to Protect Communities

NACWA does not point out these limitations and challenges to discourage EPA from seeking ways to protect public entities from unfair liability under CERCLA. To the contrary, NACWA appreciates the Agency’s efforts to seek public feedback on this critical issue, and supports a “polluter pays” policy towards PFAS contamination. Development of an EPA enforcement policy aimed at alleviating the undue burdens CERCLA can place on clean water agencies and their public ratepayers is a critical part of the equation.

But more must be done by the Agency to avoid placing public wastewater and stormwater agencies nationwide in untenable positions and subjecting communities across the country, including disadvantaged communities, to unprecedented amounts of legal liability and costs.

First and foremost, NACWA asks EPA to support legislation that would ensure the costs of cleaning up PFAS contamination are borne by the companies that manufactured and profited from PFAS, not clean water agencies and the public they serve.

NACWA likewise reiterates its request that the Agency supplement its development of a PFAS enforcement discretion policy with the promulgation of a regulation clarifying that the land application of municipal biosolids constitutes the “normal application of fertilizer,” and is therefore not a “release” under CERCLA. Ensuring that the sustainable and well-regulated land application of biosolids, which currently accounts for the management of over 60% of biosolids generated in the U.S. each day, does not subject clean water utilities and farmers to potential CERCLA liability is vital to maintaining the public health, water quality, and economic benefits produced by the modern wastewater treatment cycle.

NACWA also continues to strongly encourage EPA to utilize its ample authority under other bedrock environmental statutes to address PFAS contamination prior to listing PFAS as CERCLA hazardous substances. NACWA urges EPA to remain focused on source control efforts, including through the application of its Toxic Substances Control Act authority, as well as on efforts to advance the understanding of the risks from PFAS to human health and the environment under the Clean Water Act. Stopping the constant introduction and reintroduction of PFAS into the environment and understanding exposure risks are important precursors to lasting and successful nationwide PFAS cleanup efforts.

NACWA looks forward to continuing its productive engagement with EPA on this issue, which is of critical importance to the clean water community. Please contact me with any questions concerning these comments, or if any additional information is needed.

Sincerely,



Amanda Aspatore
General Counsel