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TESTIMONY

Statement of

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Hearing on

"Examining PFAS as Hazardous Substances"

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Executive Summary

Chairman Carper, Ranking Member Capito, and Members of the Committee:

My name is Kate Bowers, and I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for the opportunity to testify on the U.S. Environmental Protection Agency's (EPA's) proposed designation of per- and polyfluoroalkyl substances (PFAS) as hazardous substances pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This testimony will focus on CERCLA's framework for holding parties responsible for the costs to clean up contaminated sites, including the mechanisms by which private parties may sue other private parties to recoup cleanup costs. This testimony will also address considerations that may be relevant in the event EPA finalizes its proposed designation.

Designation of one or more PFAS as a hazardous substance under CERCLA would subject releases of those PFAS into the environment to CERCLA's reporting requirements and liability framework. Designation alone would not trigger a public or private response action to address PFAS contamination at any site, however, and also would not determine any party's liability. Financial liability under CERCLA requires (1) a release or threatened release (2) of a hazardous substance (3) from a facility into the environment (4) that causes the incurrence of response costs. Only certain categories of parties with a connection to the contamination—current owners or operators of a site, past owners or operators when the hazardous substances were disposed of there, arrangers, and transporters—may be held liable.

Liability under CERCLA is retroactive, strict, and joint and several. Parties may be liable under CERCLA for response costs, injury to natural resources, natural resource damage assessments, and public health studies. CERCLA authorizes EPA to clean up contaminated sites, subject to annual appropriations, and to compel entities that bear responsibility for all or part of the contamination at a site to perform or pay for cleanup activities. Additionally, private parties that incur cleanup costs may seek to recoup those costs from other parties or from the Superfund Trust Fund.

Entities that have been involved in releases of PFAS could be held liable if the other preconditions to liability are met and no exemptions apply. These entities include parties associated with facilities or sites where PFAS was produced, used, or disposed, such as chemical manufacturing or processing facilities, firefighting training areas that used fluorinated aqueous film-forming foam, landfills or incinerators, wastewater treatment facilities, and sites with land application or disposal of biosolids. While a hazardous substance designation of one or more PFAS would raise questions regarding the potential liability of those entities, the determination of an individual party's liability under CERCLA is a fact-intensive and site-specific inquiry. Parties that fall into one or more categories of liability under CERCLA could be held liable for certain costs covered under the statute, but some of CERCLA's numerous defenses to and limitations on liability could apply.

Additionally, EPA has indicated that it plans to use its enforcement discretion and will not seek to recover cleanup costs from entities where equitable factors do not support CERCLA responsibility. That exercise of enforcement discretion would not necessarily protect covered entities from enforcement by states or third-party lawsuits from entities who themselves have been held liable for response costs and who are seeking to recoup costs from other liable parties. It might, however, reduce the number of cleanups for which a non-federal party would incur response costs that could form the basis for a lawsuit.

There have been congressional debates regarding the scope of liability and legislative options to limit liability associated with certain categories of parties or releases. CRS remains available to the Committee to provide research and analysis of these issues or other questions related to CERCLA and the regulation of PFAS through testimony, briefings, and confidential memoranda.

Introduction

Chairman Carper, Ranking Member Capito, and Members of the Committee:

My name is Kate Bowers, and I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for the opportunity to testify on the impact of the U.S. Environmental Protection Agency's (EPA's) proposed designation of per- and polyfluoroalkyl substances (PFAS) as hazardous substances pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This testimony will focus on CERCLA's framework for holding parties responsible for the costs to clean up contaminated sites, including the mechanisms by which private parties may sue other private parties to recoup cleanup costs. This testimony will also address considerations that may be relevant in the event EPA finalizes its proposed designation.

On September 6, 2022, EPA proposed to designate two PFAS—perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS)—as hazardous substances pursuant to CERCLA.[1] PFAS are a large, diverse group of fluorinated compounds that have been used in numerous commercial, industrial, and military applications. PFAS are persistent in the environment and have been detected in soil, surface water, groundwater, and public water supplies. Studies suggest that exposures to PFAS above certain levels may lead to adverse health effects.[2]

Designation of one or more PFAS as a hazardous substance under CERCLA would have several effects. Releases of designated PFAS would be subject to the reporting requirements for releases of hazardous substances pursuant to Section 103 of CERCLA.[3] Failure to comply with those reporting requirements could result in criminal penalties.[4]

Releases of any PFAS designated as hazardous substances would also be subject to CERCLA's liability framework. Financial liability under CERCLA requires (1) a release or threatened release (2) of a hazardous substance (3) from a facility into the environment (4) that causes the incurrence of response costs.[5] To be held liable under CERCLA, an entity must fall within one or more of the categories of "covered persons" or "potentially responsible parties" (PRPs) set forth in the statute. Each element of liability—and thus the scope of liability—is defined under the statute. Various exceptions and defenses further limit the scope of liability where applicable.

A PFAS hazardous substance designation under CERCLA would not, on its own, trigger a public or private response action and would not determine the liability of any party. Determination of liability is a fact-intensive and site-specific inquiry that would depend on factors including a party's relationship to the contamination, the nature of the PFAS contamination, and the party's status under several federal environmental permitting regimes. Additionally, a party's liability for third-party contribution claims under CERCLA would depend in part on whether that party had resolved its liability to EPA or a state and thus was entitled to protection from future suits.

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[1] Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, Proposed Rule, 87 Fed. Reg. 54415 (Sept. 6, 2022).

[2] For further discussion of the properties, uses, and health effects of PFAS, see CRS Report R45986, *Federal Role in Responding to Potential Risks of Per- and Polyfluoroalkyl Substances (PFAS)*, coordinated by Elena H. Humphreys.

[3] 42 U.S.C. § 9603.

[4] *Id.* § 9603(b).

[5] *Id.* § 9607(a). For purposes of this testimony, "cleanup costs" encompasses "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan" and "any other necessary costs of response incurred by any other person consistent with the national contingency plan." *Id.*

CRS remains available to the Committee to provide research and analysis of these issues or other questions related to CERCLA and the regulation of PFAS through testimony, briefings, and confidential memoranda.

Federal Response Authority and Overview of Cleanups

Congress enacted CERCLA to "promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination."[6] Liability under CERCLA is generally contingent on a response action, or cleanup, at a site, and the consequent incurrence of response costs. The response action may be caried out by a private party, but it may also be a federal action: Section 104(a) of CERCLA authorizes the President to respond to a release (or substantial threat of a release) of a hazardous substance into the environment, or of a pollutant or contaminant that may present an "imminent and substantial danger to the public health or welfare."[7] The President has delegated CERCLA's response authority to EPA and other agencies that administer federal facilities.[8]

CERCLA response actions for the purposes of cleanup fall into two categories. Removal actions are generally shorter-term actions taken to address immediate risks.[9] Remedial actions are generally longer-term actions to address contamination more permanently and may involve long-term containment of wastes in place.[10]

A hazardous substance designation of one or more PFAS would not alter the CERCLA response process or applicable cleanup standards. The level of cleanup that CERCLA requires is a site-specific determination. Section 121(d) specifies that the selected remedial action "shall attain a degree of cleanup . . . and of control of further release at a minimum which assures protection of human health and the environment."[11] Section 121(d) further specifies that a cleanup must comply with applicable, relevant, and appropriate requirements (ARARs), including standards or requirements set forth in federal or state environmental or facility siting laws.[12]

CERCLA also identifies two sets of federal standards under other statutes that apply to the selection of remedial actions at any site (so long as those standards are relevant and appropriate to the circumstances of an individual release or threatened release). First, Section 121(d) requires remedial actions to achieve a level of cleanup that at least attains Maximum Contaminant Level (MCL) goals established under the Safe Drinking Water Act.[13] Second, the cleanup must be consistent with any water quality criteria established under Sections 303 or 304 of the Clean Water Act (CWA).[14]

[6] Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 602 (2009).

[7] 42 U.S.C. § 9604(a).

[8] *Id.* § 9615. For more general information regarding CERCLA, see CRS Report R41039, *Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act*, by David M. Bearden.

[9] 42 U.S.C. § 9601(23).

[10] *Id.* § 9601(24).

[11] *Id.* § 9621(d)(1).

[12] *Id.* § 9621(d)(2).

[13] *Id.* § 9621(d)(2)(A)(ii); *see also* 42 U.S.C. § 300g-1.

[14] 42 U.S.C. § 9621(d)(2)(A)(ii); *see also* 33 U.S.C. §§ 1313, 1314.

EPA announced a proposed national primary drinking water regulation for PFOA and PFOS on March 14, 2023.[15] The proposed regulation includes MCLs for PFOA and PFOS each at 4.0 parts per trillion.[16] In May 2022, EPA published draft recommended water quality criteria for PFAS to protect aquatic life.[17] The agency has not finalized those water quality criteria or published draft or final water quality criteria to protect human health.[18] Designation of an MCL or finalization of water quality criteria for any PFAS would not trigger a hazardous substance designation under CERCLA, but those requirements could be incorporated into site-specific cleanup standards to the extent those requirements are deemed "relevant and appropriate," consistent with the underlying premise of an ARAR.

Many states and tribes have enacted separate authorities (often called "mini-Superfund laws") for their own programs to clean up contaminated sites.[19] Section 114 of CERCLA specifically provides that states may impose additional liability or requirements with respect to the release of hazardous substances within their borders.[20] The regulations governing response actions taken under CERCLA, which are referred to as the National Contingency Plan (NCP), specify procedures for EPA and states to enter into memoranda of agreement for carrying out cleanups.[21] Private parties may also undertake response actions, either at their own initiative or subject to an order issued by EPA or a court under CERCLA.[22]

Overview of Liability Under CERCLA

CERCLA imposes liability on parties responsible for the presence of hazardous substances at a site. Parties with specific relationships to contamination at a site may be held liable when there is (1) a release or threatened release (2) of a hazardous substance (3) from a facility into the environment (4) that causes the incurrence of response costs.[23] The definitions of "release" and "hazardous substance"—and, by extension, EPA's response authority and parties' liability for response costs—exclude multiple types of releases and substances.

Liability under CERCLA may take the form of an obligation to carry out a response action, or an obligation to pay response costs incurred by another party. In general, a party that incurs response costs under the conditions stated above may seek to recover some or all of those costs from other parties that are potentially liable for the costs under CERCLA.[24] CERCLA litigation can thus provide a framework

[15] PFAS National Primary Drinking Water Regulation Rulemaking, Proposed Rule, 88 Fed. Reg. 18638 (Mar. 29, 2023). For additional information about the proposed drinking water standards, see CRS In Focus IF11219, *Regulating Drinking Water Contaminants: EPA PFAS Actions*, by Elena H. Humphreys, and CRS In Focus IF12367, *Safe Drinking Water Act: Proposed National Primary Drinking Water Regulation for Specified PFAS*, by Elena H. Humphreys.

[16] PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. at 18638.

[17] Draft Recommended Aquatic Life Ambient Water Quality Criteria for Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonic Acid (PFOS), 87 Fed. Reg. 26199 (May 3, 2022).

[18] For additional discussion of the regulation of PFAS under the Clean Water Act, see CRS In Focus IF12148, *Regulating PFAS Under the Clean Water Act*, by Laura Gatz.

[19] *See* EPA, *State Response Programs*, https://www.epa.gov/enforcement/state-response-programs (last updated July 5, 2023); *see also* JAMES B. POLLACK ET AL., PFAS DESKBOOK 102–07 (2023) (discussing use of state mini-Superfund laws to address PFAS contamination).

[20] 42 U.S.C. § 9614(a).

[21] *See* 40 C.F.R. §§ 300.500–300.525.

[22] *See id.* § 300.700.

[23] For general overview of liability under CERCLA, see CRS In Focus IF11790, *Liability Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, by Kate R. Bowers; *see also* EPA, *Superfund Liability*, https://www.epa.gov/enforcement/superfund-liability (last updated May 23, 2023).

[24] 42 U.S.C. §§ 9607(a), 9613(f). CERCLA does not provide a cause of action for members of the public at large, including those who may have been harmed by the release of hazardous substances, to seek damages from parties that are liable for response costs under CERCLA. *See infra* "Scope of Liability."

for a large number of potentially liable parties to arrive at an equitable allocation of liability for response costs, based on their share of responsibility determined on a case-by-case basis.

The scope of these definitions, as well as the range of parties that can be held liable under CERCLA, is therefore relevant in considering the potential effect of a PFAS hazardous substance designation. Accordingly, this testimony focuses on the universe of potentially liable parties and the definitions of "release" and "hazardous substance."

Who May Be Liable Under CERCLA

CERCLA provides a mechanism to compel covered persons or potentially responsible parties (PRPs) to perform or pay for a cleanup of hazardous substances. Private parties and federal, state, and local governmental entities can be liable as PRPs.[25] CERCLA establishes financial liability for four categories of PRPs:

- The current owner or operator of a facility;
- Former owners or operators of a facility at the time hazardous substances were disposed of there;
- Generators and parties that arranged for the transport, disposal, or treatment of hazardous substances; and
- Transporters of hazardous substances to a facility.[26]

Consideration of whether a party is liable as an owner, operator, generator, or transporter is a fact-specific inquiry based on the circumstances of an individual case. As a result, it is not possible to predict with certainty the kinds of entities that would face liability under CERCLA if EPA designates PFAS as hazardous substances. The parties that *could* be held liable, if the other preconditions to liability are met and no exemptions apply, are entities that have been involved in releases of PFAS. This includes parties associated with facilities or sites where PFAS was produced, used, or disposed, such as owners or operators of chemical manufacturing or processing facilities that released PFAS; persons who released PFAS from the use of fluorinated aqueous film-forming foam (AFFF), such as airport owners and operators and local fire departments; landfill owners and operators; generators and transporters of PFAS wastes released at landfills or other disposal or treatment sites; and owners and operators of wastewater treatment facilities that discharge PFAS. Because CERCLA liability extends to the federal government, the Department of Defense and other federal departments or agencies that released PFAS, such as through the use of AFFF, would also be potentially liable.

Some stakeholders have raised concerns regarding the potential liability of "passive receivers" such as drinking water treatment plants, municipal wastewater treatment facilities, solid waste landfills, and composting facilities.[27] Although the term "passive receivers" is not defined in CERCLA, it is generally understood to refer to parties that receive media containing PFAS (and other hazardous substances) but do not themselves manufacture or use those substances. While some of the liability exemptions discussed below may apply, such as the federally permitted release exemption, passive receivers are sometimes named as defendants in third-party CERCLA contribution claims brought by PRPs seeking to recoup some of the cleanup costs for which they have been held liable. Whether a passive receiver would be

[25] *See* 42 U.S.C. § 9601(21) (defining "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body").

[26] *Id.* § 9607(a).

[27] *E.g.*, Am. Pub. Works Ass'n, Comment Letter on Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances (Nov. 7, 2022), https://downloads.regulations.gov/EPA-HQ-OLEM-2019-0341-0344/attachment_1.pdf.

obliged to perform or pay for a cleanup under CERCLA in the event of a PFAS hazardous substance designation would depend on numerous factors, including the existence of a response action and the incurrence of response costs, the applicability of various defenses to and exemptions from liability, and (in the case of a federal cleanup effort) EPA's exercise of enforcement discretion.

Questions have also arisen on whether manufacturers of PFAS could be held liable for cleanup costs under CERCLA. In general, CERCLA does not provide a standalone mechanism for holding the manufacturer of a hazardous substance liable solely based on its manufacture of a chemical that another party released into the environment subsequent to purchase. Courts typically do not hold a manufacturer selling a "useful" commercial product liable under CERCLA for the hazardous waste contained in those products.[28] Still, a manufacturer could be liable if a release occurred as part of the manufacturing process at a site the manufacturer owned or operated. If a company intended to dispose of a hazardous substance that it manufactured, it might also be liable as an arranger.[29]

In 2009, the Supreme Court held in *Burlington Northern v. United States* that a manufacturer of chemicals that leaked at a storage and distribution facility was not liable as an arranger after selling toxic chemicals that would eventually be disposed of because the manufacturer did not intend for the disposal to occur.[30] The Court clarified that, although CERCLA liability would attach "if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance," an entity would not be liable as an arranger "merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination."[31] The Court concluded that a company's awareness of minor, accidental spills did not support an inference that the company *intended* the spills to occur.[32]

Accordingly, if EPA finalizes a hazardous substance designation for one or more PFAS, the manufacturers of designated PFAS or products containing designated PFAS likely would not be liable under CERCLA simply because the chemicals were released into the environment subsequent to manufacture by entities using those products. If, on the other hand, the manufacturer took intentional steps to dispose of the PFAS-containing products or sold the products with the specific intent to dispose of them, a finding of arranger liability could be more likely. In any case, a court evaluating potential liability would closely examine the manufacturer's intent, the nature of any transaction in selling products to its customers, and the nature and commercial value of the product being sold.[33]

Definition of Release

One prerequisite to liability under CERCLA is a release or threatened release. CERCLA defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)."[34] The definition excludes certain types of activities, including releases that result in exposure only within a workplace; emissions from engine exhaust of a motor vehicle, train, aircraft,

[28] *E.g.*, Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990) (holding that manufacturers of electrical transformers containing mineral oil contaminated with polychlorinated biphenyls were not liable under CERCLA absent evidence that the manufacturers intended to dispose of hazardous waste when selling the transformers).

[29] *E.g.*, United States v. Gen. Elec. Co., 670 F.3d 377, 385–86 (1st Cir. 2012); Cadillac Fairview/California, Inc. v. United States, 41 F.3d 562, 566 (9th Cir. 1994).

[30] 556 U.S. 599 (2009).

[31] *Id.* at 610.

[32] *Id.* at 612–13.

[33] *E.g.*, Cal. Dep't of Toxic Substances Ctrl. v. Alco Pac., Inc., 508 F.3d 930, 938 (9th Cir. 2007).

[34] 42 U.S.C. § 9601(22).

vessel, or pipeline pumping station engine; certain releases of nuclear material; and the "normal" application of fertilizer.[35]

Questions have arisen regarding whether a hazardous substance designation of one or more PFAS could give rise to CERCLA liability arising from the presence of PFAS in biosolids, which are the sewage sludge from wastewater treatment facilities. In some cases, biosolids may be applied to agricultural land to fertilize crops.[36] EPA has not addressed this question specifically with respect to PFAS, but it has indicated more generally that biosolids placed on the land for a beneficial purpose (such as a fertilizer substitute or soil conditioner) would not constitute a "release" that could give rise to CERCLA liability if the biosolids were applied in accordance with relevant federal requirements.[37]

Definition of Hazardous Substance

A substance may be considered a "hazardous substance" for purposes of CERCLA based on either a designation pursuant to CERCLA itself or a designation under another statute to which CERCLA refers. Section 102 of CERCLA authorizes EPA to designate as hazardous substances elements, compounds, mixtures, solutions, and substances "which, when released into the environment may present substantial danger to the public health or welfare or the environment."[38] Section 101(14) of the statute defines "hazardous substance" to include hazardous substances designated pursuant to Section 102.[39] It also defines the term with reference to several other statutes to include (1) any substance designated as a hazardous substance under Section 311(b)(2)(A) of the CWA; (2) a characteristic or listed hazardous waste under Section 3001 of the Solid Waste Disposal Act, often referred to as the Resource Conservation and Recovery Act (RCRA); (3) any toxic pollutant listed under Section 307(a) of the CWA; (4) any hazardous air pollutant listed under Section 112 of the Clean Air Act (CAA); and (5) any imminently hazardous chemical or substance or mixture with respect to which EPA has taken action pursuant to Section 7 of the Toxic Substances Control Act.[40]

Approximately 800 substances are currently considered hazardous substances pursuant to CERCLA by virtue of their designation under one of the statutes cross-referenced in Section 101(14) of CERCLA.[41] To date, EPA has not used its Section 102 authority to designate a substance as hazardous under CERCLA. The proposed designation of PFOS and PFOA, if finalized, would represent the first use of EPA's designation authority under Section 102.[42]

EPA's designation of PFOS and PFOA as hazardous substances would affect the status of those two PFAS under CERCLA and not under other federal laws. Additionally, state mini-Superfund laws may provide their own definition of hazardous substances, though some states define the term to include elements and compounds that are considered hazardous substances under CERCLA.[43] To the extent a state incorporates by reference CERCLA hazardous substances and has not specified that releases of PFAS or PFOA are

[35] *Id.*

[36] EPA, *Land Application of Biosolids*, https://www.epa.gov/biosolids/land-application-biosolids (last updated Feb. 23, 2024).

[37] Standards for the Use of Disposal of Sewage Sludge, 58 Fed. Reg. 9248, 9262 (Feb. 19, 1993). EPA regulates the land application of biosolids pursuant to Section 405(d) of the Clean Water Act. *See* 33 U.S.C. § 1345(d); 40 C.F.R. pt. 503.

[38] 42 U.S.C. § 9602(a).

[39] *Id.* § 9601(14).

[40] *Id.*

[41] EPA, *CERCLA Hazardous Substances Defined*, https://www.epa.gov/epcra/cercla-hazardous-substances-defined (last updated Feb. 2, 2024).

[42] *See* Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, Proposed Rule, 87 Fed. Reg. 54415, 54421 (Sept. 6, 2022).

[43] *E.g.*, N.J. STAT. ANN. § 58:10-23.11b; 35 PA. STAT. § 6020.103.

covered in its cleanup framework, a CERCLA hazardous substance designation could alter the applicability of that state's requirements.

Scope of Liability

Liability under CERCLA is retroactive, strict, and joint and several.[44] Retroactive liability means that parties may be liable for the release of hazardous substances prior designation and prior to CERCLA's enactment in 1980. Under CERCLA's strict liability framework, a party may be liable regardless of whether it was negligent. Under joint and several liability, any single party may be liable for all cleanup costs at a site if the harm is indivisible, even if other parties also contributed to the contamination.

PRPs in the listed categories are liable under CERCLA for cleanup costs incurred by the U.S. government or a state or tribe that are "not inconsistent" with the National Contingency Plan (NCP), the regulations governing response actions taken under CERCLA.[45] This means that after a government or private party incurs cleanup costs, it may sue one or more PRPs under CERCLA to recover those costs. Those PRPs, in turn, often have the right under CERCLA to seek contribution from any other PRPs, and may seek to join them as additional parties to the same CERCLA action. These actions are described in more detail below.[46] Although each of those PRPs is jointly and severally responsible for all of the applicable cleanup costs, this liability framework allows many parties that are potentially liable for the contamination at a given site to seek an equitable allocation of those costs in a single litigation. This framework is also intended to encourage capable parties to carry out response actions even before liability is settled, and to ensure that response actions take place even if some PRPs are no longer available to contribute.

PRPs are also liable for injury to natural resources, meaning that they must either restore natural resources that are injured as a result of a release or pay for restoring or replacing the injured or lost natural resources.[47] Unlike claims for cleanup costs, claims for natural resource damages may be brought only by federal, state, or tribal trustees.[48] Additionally, PRPs may be liable for the cost of natural resource damage assessments and federal public health studies at release sites.[49]

CERCLA and its liability framework largely focus on cleanup actions and on the costs incurred for those actions. The scope of liability under CERCLA does not include product liability, liability for personal injury or property damages, or health effects or medical costs resulting from a release. Such claims may be available under state law, including common law. Additionally, the Federal Tort Claims Act authorizes some tort claims against the U.S. government, but not when claims implicate government actions involving the exercise of judgment or choice.[50]

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[44] *See* EPA, *Superfund Liability*, https://www.epa.gov/enforcement/superfund-liability (last updated May 23, 2023).

[45] 42 U.S.C. § 9607(a).

[46] *See* Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 161–63 (2004); United States v. Atl. Research Corp., 551 U.S. 128, 131–33 (2007).

[47] 42 U.S.C. § 9607(a).

[48] *Id.* § 9607(f).

[49] *Id.* § 9607(a).

[50] 28 U.S.C. §§ 1346, 2680(a). The United States has invoked the discretionary function exemption to the Federal Tort Claims Act to argue that it is not liable in pending multidistrict litigation challenging the United States military's use and handling of aqueous film forming foam (AFFF), which allegedly resulted in PFAS contamination of groundwater. *See* United States of America's Memorandum of Law in Support of Its Omnibus Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1), In re: Aqueous Film-Forming Foams Products Liability Litigation, MDL No. 2:18-mn-2873-RMG, ECF No. 4548 (D.S.C. Feb. 26, 2024). For additional information on the Federal Tort Claims Act, see CRS Report R45732, *The Federal Tort Claims Act (FTCA): A Legal Overview*, by Michael D. Contino and Andreas Kuersten.

Federal Enforcement Mechanisms

The scope of EPA's enforcement authority under CERCLA is narrower than its response authority. Although CERCLA authorizes federal actions to respond to a release of pollutants, contaminants, and hazardous substances, the statute only authorizes EPA to compel a party to pay for or perform a response action if that party caused or contributed to a release of a hazardous substance. Because EPA has not designated any PFAS as hazardous substances to date, the agency's authority to compel parties to clean up or finance the cleanup of PFAS contamination is currently limited.

CERCLA establishes three mechanisms that EPA may use to enforce liability under the statute—that is, to require parties to bear the response costs for which CERCLA makes them liable. First, EPA can compel PRPs to perform a cleanup. Section 106(a) authorizes EPA to issue a unilateral administrative order, or to seek a judicial order, requiring a PRP to take actions to address "imminent and substantial endangerment to the public health or welfare or the environment" resulting from a release or threatened release of a hazardous substance.[51] CERCLA also authorizes fines and punitive damages for noncompliance with such an order.[52] If a party complies with an order and can establish that it is not liable under CERCLA or that the required cleanup actions were arbitrary and capricious, it may seek reimbursement from the Superfund Trust Fund.[53] Alternatively, a liable party may seek to recover response costs from other PRPs, as explained below.

Second, EPA can conduct a cleanup itself and seek to recover its response costs from one or more PRPs pursuant to Section 107(a).[54] These lawsuits are known as "cost recovery" actions. EPA typically pursues cost recovery after a removal action or one of its phases is completed.[55] States and tribes may also pursue cost recovery under Section 107(a). Cleanup actions must be "not inconsistent" with the NCP for the costs to be recoverable by the United States, states, or tribes.[56] Prior to seeking cost recovery from a PRP in court, EPA generally sends a written demand letter to that PRP that includes information about the site, the response action, costs already incurred or to be incurred, and a demand for payment.[57]

Finally, EPA can enter into a negotiated settlement with PRPs to perform some or all of the cleanup. CERCLA authorizes EPA to enter into an agreement with a PRP to allow the PRP to conduct or finance a response action if EPA determines that the PRP will do so properly and promptly.[58] EPA's preference is to seek to resolve liability through negotiated settlement agreements instead of pursuing a Section 106 order or a cost recovery action.[59] Consistent with the statute's directive to facilitate settlement "[w]henever practicable and in the public interest" to expedite effective cleanups, and minimize litigation, the majority of cleanups are resolved through negotiated agreements.[60]

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[51] 42 U.S.C. § 9606(a).

[52] *Id.* § 9606(b).

[53] *Id.*

[54] *Id.* § 9607(a).

[55] *See* Office of Solid Waste and Emergency Response, EPA, OSWER Directive No. 9832.3-1A, *Cost Recovery Actions/Statute of Limitations* 2 (1987).

[56] 42 U.S.C. § 9607(a).

[57] *See* Office of Solid Waste and Emergency Response, EPA, OSWER Directive No. 9832.18, *Written Demand for Recovery of Costs Incurred Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* 5–6, 8–9 (1991).

[58] 42 U.S.C. §§ 9604(a), 9622(a).

[59] EPA, *Negotiating Superfund Settlements*, https://www.epa.gov/enforcement/negotiating-superfund-settlements (last updated June 8, 2023).

[60] *See* Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1355 (2020) (describing settlements as "the heart" of CERCLA and noting that EPA's efforts to negotiate settlement agreements and issue cleanup orders account for approximately 69 percent of cleanup work underway as of 2020).

EPA enforcement generally begins early in the cleanup process with the identification of PRPs, collection of information regarding the site, and initial communication with PRPs.[61] EPA typically issues general notice letters once it has identified one or more PRPs to inform them of their potential liability and provide them with advance notice of possible future negotiations.[62] Section 122(e) establishes a mechanism for EPA to send "special notice" letters to PRPs, which commence a formal negotiation period and trigger a 120-day moratorium on Section 104(a) or 106 enforcement actions to facilitate negotiations to allocate responsibility for response costs.[63] Those negotiations may result in an agreement, in the form of either an administrative settlement or a judicial consent decree, for one or more PRPs to perform a cleanup, pay for EPA or a third party to conduct a cleanup, or repay the government for its cleanup costs. Alternatively, EPA may issue a unilateral administrative order requiring a PRP to conduct work or take other actions, as described above.

All settlement agreements under CERCLA must be in the public interest and consistent with the NCP.[64] Depending on the nature of the agreement, EPA uses either administrative settlement agreements and consent orders or judicial consent decrees, which must be approved by a federal district court and are subject to an opportunity for public comment prior to entry.[65]

Under Section 122, voluntary settlement agreements may include a covenant not to sue, which limits a PRP's future liability to the United States related to the release or threatened release.[66] Additionally, parties to voluntary settlement agreements receive protection from other types of CERCLA lawsuits, as described below. A settlement with one PRP does not preclude EPA from taking action under Sections 106 or 107 with respect to other PRPs.[67]

Some parties have unique circumstances that affect EPA's settlement procedures. For example, Section 122(g)(1) of CERCLA directs EPA to negotiate expedited settlements "[w]henever practicable and in the public interest" with parties that contributed a relatively small amount of wastes to a site.[68] EPA maintains policies and streamlined model settlement documents that apply specifically to these de minimis contributors.[69] For other categories of parties, EPA may exercise its discretion and decline to pursue enforcement, as described below.

Suits by Private Parties to Recoup Cleanup Costs

Although CERCLA allows any one party to be held liable for all cleanup costs even if other parties also contributed to contamination at a site, the statute also allows private parties to recoup their cleanup costs

[61] *See* EPA, *Superfund "Notice of Liability" Letters*, https://www.epa.gov/enforcement/superfund-notice-liability-letters (last updated June 5, 2023).

[62] *See* EPA, *Negotiating Superfund Settlements*, https://www.epa.gov/enforcement/negotiating-superfund-settlements (last updated June 8, 2023).

[63] 42 U.S.C. § 9622(e)(2)(A). EPA has developed guidance regarding the notification process, including whether, when, and to whom to issue notice letters. *See* Office of Solid Waste and Emergency Response, EPA, OSWER Directive No. 9834.10, *Interim Guidance on Notice Letters, Negotiations, and Information Exchange* (1987).

[64] 42 U.S.C. § 9622(a).

[65] *Id.* § 9622(d)(1)(A).

[66] *Id.* § 9622(c)(1).

[67] *Id.* § 9622(c)(2).

[68] *Id.* § 9622(g)(1).

[69] *See* Office of Waste Programs Enforcement, EPA, OSWER Directive No. 9834.7-1D, *Streamlined Approach for Settlements with De Minimis Waste Contributors under CERCLA Section 122(g)(1)(A)* (1993); EPA, *De Minimis Contributor Consent Decree*, https://cfpub.epa.gov/compliance/models/view.cfm? model_ID=538 (last revised Mar. 15, 2023); *see also* EPA, *Unique Parties and Superfund Liability*, https://www.epa.gov/enforcement/unique-parties-and-superfund-liability (last updated Oct. 5, 2023).

from other PRPs through two separate mechanisms. First, when a private party incurs costs, it may sue under Section 107(a) to recover from another PRP *all* costs that are necessary and consistent with the NCP.[70]

Second, when a private party is sued under Section 106 or 107(a) or has resolved its liability to the United States or a state for some or all of a response action, it may then assert a claim or counterclaim under Section 113(f) to require other PRPs to bear an equitable share of the response costs.[71] Claims under Section 113(f) are generally referred to as contribution claims. Cost recovery and contribution actions are mutually exclusive. A party that *may* bring a Section 113(f) contribution action *must* proceed under Section 113(f); the party is precluded from proceeding with a cost recovery action under Section 107(a).[72]

Section 113(f) specifies that a court resolving contribution claims "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."[73] The most commonly considered factors in an equitable allocation relate to the degree to which the contamination and cleanup costs are attributable to each party's actions, the nature and amount of the hazardous substances involved, the extent of each party's culpability, and the degree to which each party benefited from the disposal.[74]

Section 113(f) also protects a party that has resolved its CERCLA liability to the United States or a state in a settlement.[75] The party cannot be held liable for contribution claims by other PRPs regarding matters addressed in that settlement. This is referred to as *contribution protection*. Other PRPs that are not parties to the settlement do not receive contribution protection unless the agreement specifically provides for their liability to be discharged, but their potential liability is reduced by the amount of the settlement.[76]

The question of whether a specific contribution claim relates to a "matter addressed" in a prior settlement depends on the specific terms of the settlement agreement. In evaluating whether contribution claims are barred against a settling PRP, courts have considered the hazardous substance at issue in the settlement, the location of the site, the time frame covered by the settlement, and the cost of the cleanup.[77]

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[70] United States v. Atl. Research Corp., 551 U.S. 128, 141 (2007).

[71] 42 U.S.C. § 9613(f)(1), (f)(3)(B). Congress added an explicit right of contribution to CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (SARA). Pub. L. No. 99-499, § 113(b), 100 Stat. 1613, 1647 (1986). Prior to SARA's enactment, courts had inferred an implied right of contribution as a corollary to the joint and several liability scheme imposed under Section 107(a). *E.g.*, United States v. New Castle Cnty., 642 F. Supp. 1258, 1268–69 (D. Del. 1986); Colorado v. Asarco, Inc., 608 F. Supp. 1484, 1490–91 (D. Colo. 1985); United States v. Conservation Chem. Co., 619 F. Supp. 162, 214–15 (W.D. Mo. 1985); United States v. Wade, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1395 (D.N.H. 1985). Congress intended the 1986 amendments to "[clarify] and [confirm]" the right of PRPs to seek contribution from other PRPs. S. REP. NO. 99-11, at 44 (1985).

[72] *See Atl. Research*, 551 U.S. at 139; Whittaker Corp. v. United States, 825 F.3d 1002, 1007 (9th Cir. 2016) ("[E]very federal court of appeals to consider the question . . . has said that a party who *may* bring a contribution action for certain expenses *must* use the contribution action, even if a cost recovery action would otherwise be available.").

Cost recovery actions under Section 107(a) and contribution actions under Section 113(f) are subject to differing statutes of limitations. *See* 42 U.S.C. § 9613(g)(2)(A)–(B) (six-year statute of limitations for cost recovery actions), 9613(g)(3)(B) (three-year statute of limitations for contribution actions).

[73] 42 U.S.C. § 9613(f)(1).

[74] *See, e.g.*, Env't Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 508 (7th Cir. 1992) (describing the six "Gore" factors, named for an amendment proposed by Rep. Al Gore identifying factors to be considered in apportioning costs).

[75] 42 U.S.C. § 9613(f)(2).

[76] *Id.*

[77] *E.g.*, Akzo Coatings, Inc. v. Aigner Corp., 803 F. Supp. 1380, 1385 (N.D. Ind. 1992); United States v. Union Gas Co., 743 F. Supp. 1144, 1154 (E.D. Pa. 1990).

Citizen Suits

Section 310, CERCLA's citizen suit provision, provides a right of action to private parties that is distinct from the cost recovery and contribution claims allowed under Sections 107(a) and 113(f). It allows "any person" to file a lawsuit against any person, including the U.S. government and "any other governmental instrumentality or agency . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective" pursuant to CERCLA.[78] It also authorizes suits against the U.S. government for failure to perform a nondiscretionary duty under the statute.[79] Citizen suits may be used to challenge the adequacy of a CERCLA cleanup, but they do not provide a mechanism for determining that an entity is liable for response costs as a PRP. Additionally, Section 113(h) limits the filing of a citizen suit until after a cleanup is completed, and parties may not challenge a removal action at a site where a remedial action is planned.[80]

Defenses to and Limitations on Liability

In addition to the various exclusions to the elements of CERCLA liability described above, CERCLA establishes defenses to and limitations on liability associated with certain kinds of releases or parties that further circumscribe the scope of liability under the statute. Section 107(b) of CERCLA provides defenses to liability where an otherwise liable party can establish that a release or threat of release and resulting damages were caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party with whom the defendant has no contractual relationship, where the defendant exercised due care and took precautions against the third party's foreseeable acts or omissions and their consequences; or (4) any combination of the three circumstances listed above.[81] Other subsections of Section 107 provide exemptions and protections for parties who meet certain criteria, including municipal solid waste generators, recyclers, service station dealers, cleanup contractors, contiguous landowners, bona fide prospective purchasers, lenders and fiduciaries, and parties that are not responsible for contamination but volunteer to help with cleanup.[82]

This testimony highlights one statutory exemption and two limitations on EPA's enforcement authority—one discretionary and the other prescribed by statute—that could be relevant if EPA finalizes a PFAS hazardous substance designation. Depending on the circumstances of a specific release and the parties involved in it, however, other defenses and limitations could also apply.

Federally Permitted Releases

Section 107(j) of CERCLA provides an exemption to CERCLA liability for response costs or damages resulting from a *federally permitted release*.[83] In general, the statute defines "federally permitted release" as a release or discharge that is in accordance with a permit issued under an enumerated list of federal statutes, including the CWA, RCRA, and the CAA.[84] Releases or discharges that are potentially relevant in the PFAS context include but are not limited to the following:

[78] 42 U.S.C. § 9659(a)(1).

[79] *Id.* § 9659(a)(2).

[80] *Id.* § 9613(h).

[81] *Id.* § 9607(b).

[82] *Id.* §§ 9607(p), 9614(c), 9619(a), 9607(q), 9607(r), 9607(n), 9607(d).

[83] *Id.* § 9607(j).

[84] *Id.* § 9601(10). The definition includes "any emission into the air *subject to* a permit or control regulation under" specific
(continued...)

- Discharges in compliance with permits under Section 402 of the CWA (i.e., National Pollutant Discharge Elimination System (NPDES) permits);
- Discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a NPDES permit and subject to a condition of such permit;
- Continuous or anticipated intermittent discharges from a point source, identified in a NPDES permit or permit application, which are caused by events occurring within the scope of relevant operating or treatment systems; and
- The introduction of any pollutant into a publicly owned treatment works when the pollutant is specified in and in compliance with applicable pretreatment standards of Section 307(b) or (c) of the CWA.

Under Section 107(j), recovery for response costs or damages resulting from a federally permitted release "shall be pursuant to existing law in lieu of" CERCLA.[85] By its express terms, Section 107(j) does not modify any obligations or liability under other state or federal law, including common law, for harm resulting from a release or for the costs of cleaning up a hazardous substance. If another statute or common law provides a cause of action associated with a federally permitted release, that cause of action remains available even though CERCLA does not.

Some of the categories of industrial operators that have expressed concerns regarding their liability in the event of a PFAS hazardous substance designation likely have permits under one or more of the federal environmental statutes identified in the definition of "federally permitted release." For example, municipal wastewater treatment plants would be subject to the requirements of a NPDES permit issued by EPA or a state. Whether a party's PFAS discharges constituted a federally permitted release would depend on the specific permits issued to that party. If a CWA permit issued by EPA or a state imposed PFAS-specific requirements, a court evaluating the applicability of the federally permitted release exemption would consider whether the PFAS discharge complied with the terms of the permit. Similarly, if EPA issued pretreatment standards for PFAS, a court would consider whether a facility's discharges to publicly owned treatment works were specified in and in compliance with applicable pretreatment standards. Some states with delegated CWA permitting authority have issued permits to industrial operators that include PFAS discharge limits.[86]

Somewhat less clear is whether a discharge of a designated PFAS from an entity that is permitted under the CWA could constitute a federally permitted release if the permit does not specify effluent limits or pretreatment standards specifically for discharges of PFAS. It is also less clear whether a discharge would be a federally permitted release if the permit specifies only monitoring requirements or best management practices for a designated PFAS. Currently, EPA has not specified discharge standards for PFAS under the CWA, whether in nationally applicable standards for categories of dischargers or in individual permits. Courts have not interpreted this aspect of the federally permitted release exemption, and EPA's CERCLA regulations do not address it.

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provisions of the Clean Air Act. *Id.* § 9601(10)(H) (emphasis added). A federal court of appeals has distinguished this language from the sections of the definition that refer to discharges *in compliance* with permits issued under other laws, concluding that a release from a permitted facility that did not comply with relevant Clean Air Act permits was nevertheless "federally permitted" for the purposes of CERCLA's reporting requirements. Clean Air Council v. U.S. Steel Corp., 4 F.4th 204 (3d Cir. 2021).

[85] 42 U.S.C. § 9607(j).

[86] *See, e.g.*, Colorado Dep't of Public Health & Environment, *List of Colorado Discharge Permit System (CDPS) Permits and General Permit Certifications with PFAS Monitoring and Limits Based on Policy 20-1*, https://docs.google.com/document/d/1KyRl6b-t1o73jK7mlZ8mhHn8ubbBbgZL-2hk6A1PyaA/edit? pli=1 (last viewed Mar. 11, 2024); Press Release, North Carolina Dep't of Env't Quality, *DEQ Approves Permit to Reduce PFAS Contamination in the Cape Fear River* (Sept. 15, 2022), https://www.deq.nc.gov/news/press-releases/2022/09/15/deq-approves-permit-reduce-pfas-contamination-cape-fear-river.

The CWA provides an analogy that may be helpful to understanding a portion of the federally permitted release exemption from CERCLA liability. Section 311 of the CWA establishes liability for discharges of oil and hazardous substances but excludes certain discharges that are regulated pursuant to the NPDES program.[87] Three excluded discharges under Section 311 mirror three of the discharges identified as federally permitted releases under CERCLA.[88] As EPA has interpreted the Section 311 exclusions in its CWA implementing regulations, they encompass not only discharges in compliance with an NPDES permit but also other types of discharges that may result from circumstances identified and addressed in the permit application or that occur as part of the scope of the operating or treatment system, whether or not those discharges are in compliance with the NPDES permit.[89]

In 1994, EPA took the position in a policy statement that the liability exclusion for the federally permitted release exemption in CERCLA is defined, in part, by the regulations implementing the liability exclusion under Section 311 of the CWA.[90] If the agency continues to take that position, then some discharges of designated PFAS could be excluded from CERCLA liability as federally permitted releases, even if the applicable NPDES permit did not specify an applicable effluent limitation for the designated PFAS.

EPA's Enforcement Discretion

Response actions and cost recovery under CERCLA are discretionary. CERCLA does not require EPA to take enforcement action with respect to every release of a hazardous substance over which the agency has response and enforcement authority. EPA may exercise its enforcement discretion on a site-by-site basis to pursue, or decline to pursue, cost recovery against PRPs that meet the statutory criteria for liability. When EPA does take action with respect to an individual site, the agency has discretion to pursue enforcement against one, some, or all PRPs, and to select which enforcement mechanism—a negotiated voluntary settlement agreement, a Section 106 order, or a Section 107(a) cost recovery action—to apply.

In some instances, EPA has issued written guidance describing its enforcement discretion policy with respect to specific categories of sites or PRPs. For example, prior to CERCLA's amendment in 2002 to provide a statutory exemption from liability for certain generators of municipal solid waste,[91] EPA had a general policy of not identifying generators and transporters of municipal solid waste as PRPs.[92] EPA has also identified circumstances in which it intends to exercise its enforcement discretion as to entities that might not qualify for protection as bona fide prospective purchasers or contiguous property owners.[93]

EPA has stated that it is developing a CERCLA PFAS enforcement discretion and settlement policy, and the agency has held listening sessions to solicit stakeholder input regarding enforcement concerns.[94] According to EPA, the policy "will take into account various factors, such as EPA's intention to focus enforcement efforts on PFAS manufacturers and other industries whose actions result in the release of

[87] 33 U.S.C. § 1321(a)(2).

[88] *Compare id.* §§ 1321(a)(2)(A), (B), (C) *with* 42 U.S.C. §§ 9601(10)(A), (B), (C).

[89] 40 C.F.R. § 117.12(b)–(d).

[90] EPA, *Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits* 4 (July 1994), https://www3.epa.gov/npdes/pubs/owm0131.pdf.

[91] Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118 (2002).

[92] *See* Office of Enforcement and Compliance Assurance, EPA, *Transmittal of Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites* (Feb. 5, 1998).

[93] *See* Office of Enforcement and Compliance Assurance, EPA, *Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections* (Sept. 21, 2011).

[94] *See* EPA, *CERCLA PFAS Enforcement Listening Sessions*, https://www.epa.gov/enforcement/cercla-pfas-enforcement-listening-sessions (last updated Apr. 3, 2023).

significant amounts of PFAS into the environment."[95] EPA has explained that in the event of a hazardous substance designation, it "does not intend to pursue entities where equitable factors do not support CERCLA responsibility, such as farmers, water utilities, airports, or local fire departments."[96] The agency has not announced a timeline for finalizing its policy.

Enforcement discretion is distinct from a statutory exemption from liability in multiple ways. While EPA's exercise of enforcement discretion may allow some parties that would ordinarily be vulnerable to liability to avoid paying for some or all of a response action, the agency's decision to exercise its discretion and decline to pursue enforcement does not alter the scope of liability defined in the statute.[97] Additionally, EPA is not bound to apply an enforcement discretion policy uniformly and may deviate from it—such as for parties that fail to cooperate with the agency, or in situations presenting an imminent and substantial endangerment to public health or the environment—or subsequently modify or revoke it.[98]

Furthermore, EPA's enforcement discretion only applies to *EPA*'s decision not to pursue enforcement against PRPs. States, tribes, and private parties may seek cost recovery or contribution against a PRP even if EPA does not. A PRP is not entitled to contribution protection unless it has resolved its liability to EPA or a state through a settlement. Therefore, a discretionary decision by EPA not to pursue enforcement against particular parties may leave that party vulnerable to contribution claims by third parties.

A non-federal or private party seeking CERCLA cost recovery or contribution against an entity covered by an EPA enforcement discretion policy would still need to meet the requirements to establish liability: that a release or threatened release of a hazardous substance caused the incurrence of response costs, and that the entity qualifies as a PRP under the statute. To the extent EPA undertakes fewer cleanups as a result of its PFAS enforcement policy, there may be fewer circumstances giving rise to the requisite response costs, unless states, tribes, local governments, or private parties choose to clean up PFAS contamination that EPA has declined to address.

Limitation on EPA's Enforcement Authority for State-Law Responses

The 2002 amendments to CERCLA provide a statutory limit to the sites over which EPA may exercise its enforcement authority. Section 128(b) bars EPA from taking enforcement action under Sections 106(a) or 107(a) of CERCLA at certain sites where there is or has been a response action undertaken in pursuant to a state's cleanup authorities.[99] Similar to EPA's enforcement discretion policy, to the extent Section 128(b) limits EPA's ability to enforce CERCLA liability arising from PFAS contamination, it may serve to limit the number of sites that could give rise to a private contribution claim under CERCLA. Moreover, where

[95] *Id.*

[96] Memorandum from David M. Uhlmann, Assistant Administrator for Enforcement and Compliance Assurance, EPA, to Regional Administrators, FY 2024–2027 National Enforcement and Compliance Initiatives 3 (Aug. 17, 2023), https://www.epa.gov/system/files/documents/2023-08/fy2024-27necis.pdf; Public Comment on EPA's National Enforcement and Compliance Initiatives for Fiscal Years 2024–2027, 88 Fed. Reg. 2093, 2096 (Jan. 12, 2023).

[97] *See* Kelley v. EPA, 15 F.3d 1100, 1107–08 (D.C. Cir. 1994) (holding that "courts and not EPA [are] the adjudicator of the scope of CERCLA liability" and vacating EPA rule limiting CERCLA liability for secured creditors).

[98] *See*, *e.g.*, Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta, 785 F.3d 710, 716 (D.C. Cir. 2015) (explaining that a policy statement explaining how an agency "will exercise its broad enforcement discretion . . . under some extant statute or rule" is "binding on neither the public nor the agency, and the agency retains the discretion and the authority to change its position . . . in any specific case").

[99] 42 U.S.C. § 9628(b)(1). EPA retains some enforcement authority, including where a state has requested federal assistance in the response action, there is migration of contamination across state lines or onto federal property, an imminent and substantial endangerment to public health or welfare or the environment necessitates further cleanup, or newly discovered information indicates that further remediation is necessary to protect public health or welfare or the environment. *Id.* § 9628(b)(1)(B).

a party has recovered costs, damages, or claims under state law, Section 114(b) bars recovery under CERCLA for the same costs, damages, or claims.[100]

In states with mini-Superfund laws that allow for remediation and liability associated with PFAS contamination, some cleanups are now proceeding under those state laws,[101] which would bar federal enforcement action under CERCLA at those sites. CERCLA cost-recovery or contribution claims for which a party has already recovered costs would also be barred under Section 128(b) of CERCLA. Accordingly, to the extent PFAS contamination is addressed under state law, Section 128(b) could limit both the sites at which EPA undertakes a cleanup and the ability of any party to recoup cleanup costs pursuant to CERCLA.

Options for Congress

Although EPA has expressed an intent to take a PFAS-specific approach to its enforcement discretion under CERCLA in the event it finalizes a hazardous substances designation, Congress could still determine that PFAS contamination presents unique concerns that merit a different approach to liability. Congress has numerous options for addressing those concerns through statutory amendments. While Congress has authorized previous exemptions from liability for certain types of parties or in certain situations, Congress has not more broadly authorized exemptions from liability under CERCLA for releases of specific hazardous substances.

Congress could bar EPA from designating any PFAS as hazardous substances or amend CERCLA to narrow the types of releases of PFAS that could give rise to liability under the statute in the event EPA designates one or more PFAS as a hazardous substance. Congress could also specify that certain categories of parties are exempt from liability for response costs associated with PFAS contamination. Members have introduced various bills in the 118th Congress to exempt agricultural operators, solid waste management and compost facilities, water utilities, entities with fire suppression systems using AFFF, and airports from CERCLA liability under certain circumstances.[102]

Alternatively, Congress could direct EPA to designate various PFAS as hazardous substances under CERCLA, thus triggering the statute's reporting and liability provisions for the release of those substances. The PFAS Action Act, which has been introduced in the 116th, 117th, and 118th Congresses, would require EPA to designate PFOA and PFOS as hazardous substances as well as impose requirements under other statutes.[103]

Congress has previously amended CERCLA to create statutory exemptions to liability, sometimes to codify existing EPA practice. In 2002, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Act) to authorize EPA to administer a program for the cleanup of "brownfields," abandoned or underused properties the redevelopment of which may be complicated by actual or potential contamination.[104] Prior to enactment of the Brownfields Act, EPA had used its existing enforcement discretion and authority under Section 122 to enter into voluntary settlement agreements with prospective purchasers of contaminated property who had no involvement in the

[100] *Id.* § 9614(b). Section 114(b) also bars recovery under state law or any other federal law for costs, damages, or claims for which a party has already been compensated under CERCLA. *Id.*

[101] *See* POLLACK ET AL., *supra* note 19, at 102–07.

[102] Agriculture PFAS Liability Protection Act of 2023, S. 1427, 118th Cong.; Resource Management PFAS Liability Protection Act of 2023, S. 1429, 118th Cong.; Water Systems PFAS Liability Protection Act, S. 1430, 118th Cong. (2023); Fire Suppression PFAS Liability Protection Act, S. 1432, 118th Cong. (2023); Airports PFAS Liability Protection Act, S. 1433, 118th Cong. (2023).

[103] *E.g.*, PFAS Action Act of 2023, H.R. 6805, 118th Cong.

[104] Pub. L. No. 107-118, 115 Stat. 2356 (2002).

contamination as a mechanism to limit their cleanup liability.[105] The Brownfields Act provided explicit criteria for a prospective purchaser to qualify for this exemption.[106] Section 222 of the Act exempts "bona fide" prospective purchasers of contaminated properties from liability under CERCLA if they satisfy the requisite statutory criteria.[107] Additionally, Section 221 created a statutory liability exemption for owners of property that became contaminated as a result of the migration of a hazardous substance from a contiguous property owned by another person.[108] Section 223 also amended the definition of the term "contractual relationship" to establish more specific criteria for "innocent" landowners to claim the third-party defense against liability under Section 107(b)(3) of CERCLA.[109]

Other exemptions to liability under CERCLA date to the original enactment of the statute. For example, the statute generally excludes crude oil and petroleum products from the definitions of "hazardous substance" and "pollutant or contaminant."[110] As a result, response authority and liability are not available under CERCLA for petroleum releases. Instead, other federal statutes, including the Oil Pollution Act, the CWA, and RCRA authorize federal agencies to respond to releases of petroleum.[111] While most early bills that were precursors to CERCLA did not contain a petroleum exclusion,[112] the version of the bill that was ultimately passed by the Senate and placed before the House as an amendment of an earlier House bill added the exclusion.[113] Debate regarding the competing bills was limited, and there is no discussion in the contemporaneous legislative history regarding the basis for the petroleum exclusion. CERCLA's exclusion of the "normal application of fertilizer" from the definition of "release" was similarly included in the statute as enacted in 1980.[114]

[105] *See* Memorandum from Steven Herman, Office of Enforcement and Compliance Assurance, EPA, to Regional Administrators, Guidance on Agreements with Prospective Purchasers of Contaminated Property (May 24, 1995).

[106] *See* S. REP. NO. 107-2, at 11–13 (2001).

[107] Pub. L. No. 107-118, § 222, 115 Stat. 2356, 2370.

[108] *Id.* § 221, 115 Stat. at 2368.

[109] *Id.* § 223, 115 Stat. at 2372.

[110] 42 U.S.C. § 9601(14), (33); *see also* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 101(14), 94 Stat. 2767, 2769.

[111] 33 U.S.C. §§ 2701 *et seq.*; *id.* § 1321(c); 42 U.S.C. § 6991b(h).

[112] Oil Pollution Liability and Compensation Act, H.R. 85, 96th Cong (1979); Oil, Hazardous Substances, and Hazardous Waste Response, Liability, and Compensation Act of 1979, S. 1341, 96th Cong.; Environmental Emergency Response Act, S. 1480, 96th Cong. (1979). *But see* Hazardous Waste Containment Act, H.R. 7020, 96th Cong. § 3021 (1980) (excluding oil from application of bill regarding regulation of inactive sites containing hazardous waste).

[113] S. 1480, 96th Cong. (reported with amendments July 11, 1980); H.R. 7020, 96th Cong. (as amended Nov. 24, 1980).

[114] Pub. L. No. 96-510 § 101(22), 94 Stat. 2767, 2770 (1980).

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