

# POTWs' Legal Uncertainty Drives Fear Over PFAS Superfund Designation

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As Congress weighs defense authorization legislation that would designate perfluorinated chemicals as hazardous substances under the Superfund law, wastewater utilities are opposing the language, fearing it would impose significant liability due to the presence of the chemicals in the biosolids they generate

Some industry officials say they are seeking to kill the House-passed amendment, which would require EPA to declare within one year that all per- and polyfluoroalkyl substances (PFAS) are hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), citing the need for legal certainty amid concerns about unintended consequences if the provision survives a House-Senate conference.

CERCLA already includes language that some experts say provides liability protection for publicly owned treatment works (POTWs) that land apply biosolids, or use treated wastewater sludge as fertilizer.

But other POTW sources say this language has never been tested in court and note that some states, such as Maine, are already prohibiting the land application of biosolids that contain PFAS above certain levels.

As such, maintaining the CERCLA language contained in [the House version](#) of the fiscal year 2020 defense authorization bill would just exacerbate this legal uncertainty, these sources say.

As Congress weighs the legislation, EPA is also weighing whether to list perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) -- two of the most well known PFAS -- as hazardous substances. But the House language would go farther and mandate the designation for all PFAS.

The Senate version of the bill does not include the CERCLA language, due in part to opposition from Environment and Public Works Committee (EPW) Chairman John Barrasso (R-WY), who [has expressed concerns](#) about imposing Superfund liability on parties that used the chemicals in good faith, following regulations or industry best practices, or in the case of POTWs, were unknowing recipients of the chemicals.

Barrasso's public opposition to the CERCLA provision came after the National Association of Clean Water Agencies (NACWA), which represents POTWs, and the Water Environment Federation (WEF), which

represents water quality professionals, urged EPW to exclude a CERCLA provision from a PFAS package the committee eventually passed and which was included in the Senate version of the bill.

"We continue to support the Senate bill," one POTW source says, noting that the Senate bill's PFAS provisions were carefully considered by EPW before being added to the defense bill.

In contrast, "the House rushed the regulatory process," the source says, allowing PFAS amendments that had not been publicly approved by the committees with jurisdiction over environmental laws.

NACWA and WEF [told EPW](#) in a May letter that designating PFAS as CERCLA hazardous substances could create liability for POTWs that had been land applying their biosolids for decades and that if lawmakers pursued such a designation, they should include "clear, unambiguous statutory language excluding municipal wastewater residuals from potential CERCLA liability."

"The majority of the biosolids generated in the US is land applied, and a clear municipal wastewater exclusion from CERCLA hazardous substances designation would ensure that efforts to address PFAS do not have unintended consequences for the POTWs who must receive these chemicals from their sources," the groups said.

### **Safe Harbor**

Both CERCLA and EPA's rule governing biosolids, known as the Part 503 rule, include language that appears to give a safe harbor for the land application of sewage sludge.

CERCLA section 101(22) defines "release" to exclude the "normal application of fertilizer" and section 101(10) exempts "federally permitted releases" from the definition of "release" under CERCLA. Additionally, the preamble to the Part 503 rule states that if the placement of the sewage sludge on land is considered to be either the normal application of fertilizer under CERCLA, or a "federally permitted release," then CERCLA liability would not result.

But a second POTW source says these protections have never been tried in court, and it is not clear if they would apply if PFAS are declared hazardous substances, especially since it is not clear what concentrations of PFAS are in biosolids. "We are researching some of these questions," the source says

[A 1999 article](#) in the *Boston College Environmental Affairs Law Review* on biosolids liability notes that "CERCLA's fertilizer and federally permitted release exemptions, and EPA's brief discussion about the exemptions' applicability to sewage sludge land application, raise as many questions as they answer."

If sewage sludge is applied in violation of a permit, a farmer could be liable under CERCLA, and if a POTW's sewage sludge contractors disregard accepted management practices, then CERCLA liability may rest with the POTW, the article says.

"Furthermore, neither CERCLA's language nor its legislative history indicates whether the exclusion of the initial application of a fertilizer (first release) extends to any later contamination of groundwater caused by chemicals in the sewage sludge. Thus, despite EPA's assertions to the contrary, CERCLA liability *may* exist in certain circumstances," the article says.

But James Slaughter, an attorney with Beveridge & Diamond who has extensive expertise in biosolids issues, says the concern over potential CERCLA liability is overblown, noting the existing fertilizer exemption in CERCLA.

"Biosolids have long had trace amounts" of chemicals that are CERCLA hazardous substances and declaring PFAS hazardous substances "won't likely trigger new liability," Slaughter said. The amount of PFAS in biosolids "is low and continuing to get lower," he said.

NACWA and WEF in their May statement to EPW agree that typical biosolids with no direct large industrial inputs are unlikely to impact ground and surface waters at levels above EPA's existing health advisories of 70 parts per trillion for PFOA and PFOS.

### **Maine Rules**

But POTWs remain concerned about how the growing attention on PFAS could affect land application of biosolids. For example, last year the Maine Department of Environmental Protection revised its solid waste management rules to include screening concentrations for three PFAS in biosolids -- 0.0025 milligrams per kilogram (mg/kg) for PFOA, 0.0052 mg/kg for PFOS and 1.9 mg/kg for perfluorobutane sulfonate (PFBS).

The change was prompted by the discovery in 2016 of high PFAS levels in a monitoring well at a dairy farm in southern Maine that had land applied biosolids for many years. Although not conclusive, the state says testing indicates land application of biosolids may have contributed to the contamination.

And in March, the state began requiring all sludge/biosolids program licensees and composting facilities to test their material for PFOA, PFOS and PFBS. If the screening levels are exceeded, "sludge/biosolids and sludge/biosolids-derived compost or products may not be land applied," Maine said in [a March 22 memorandum](#).

The second POTW source says it is unclear how Maine derived its screening levels, and POTWs are concerned that other states may take similar actions. -- *Lara Beaven (lbeaven@iwpnews.com)*