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Consequences Must Be Carefully Assessed before PFAS Are Pushed into the Superfund Quagmire

by Glenn G. Lammi

As the Carter Administration neared its end, and under pressure to respond after the Love Canal revelations, Congress rushed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or more commonly, Superfund) into law in December 1980. Despit good intentions, robust amendments, and billions of public and private dollars spent, hundreds of thousands of properties remain contaminated with hazardous substances as CERCLA nears its 40th anniversary. Yet, in 2019 and with little debate, scores of professional activists and elected officials want to subject another group of man-made chemicals to the law's deeply flawed process.

Per- and poly fluoro alkyl substances (PFAS) are a class of several thousand chemicals. A stable structure makes PFAS chemicals such as PFOA and PFOS ideal for food packaging, cookware production, textile- and leather-product waterproofing, and firefighting. PFAS structures are so stable, in fact, that despite their being largely phased out at the turn of this century, traces of PFOS, PFOA, and others persistently turn up in testing of soil and water, as well as animals and humans.

Scientific views differ on whether, and at what level, the presence of PFAS pose environmental and public-health risks. Studies of workers exposed to PFAS chemicals reach divergent conclusions on an association between the substances and health harms. No studies have established and cause-and-effect relationship for any health condition. Federal agencies have conducted a limited amount of research, but the Centers for Disease Control emphasized in a 2018 report that "[f]inding a measurable amount [of PFAS] in blood does not imply that the levels . . . cause an adverse health effect."

Over the past several years, many states and localities have conducted PFAS testing, prompting some states to lower the regulatory tolerance levels for the chemicals› presence in soil and water. Individuals and government entities, some represented by private contingent-fee counsel, have sued PFAS manufacturers and users under state-tort theories such as trespass, negligence, and public nuisance. One firefighter filed a class action on behalf of 99% of the nation's population seeking monetary damages and the creation of an "independent science panel." A July 18 WLF Webinar addressed these and other aspects of the PFAS regulatory and litigation landscape.

Through one proposal being considered at the federal level, Congress would order EPA to designate the entire class of PFAS as hazardous under CERCLA. If PFAS in fact threaten public health and the environment, CERCLA is an entirely inapt tool for accomplishing the rapid response activists

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and elected officials demand.

The Superfund process has become more about assigning blame and apportioning costs than hazardous-waste cleanup. The search for "potentially responsible parties" (PRPs) may begin with the targeted substance's manufacturer, but it rarely ends there, leading to litigation and negotiation that can drag on for years. That's great for lawyers, but not good for the environment or public health. In 1994, EPA Administrator Carol Browner said of CERCLA, "A lot of time and money is taken up with companies suing each other over how much they owe to clean up a particular site." The problem persists.

A hazardous designation for every PFAS, rather than one that focuses on specific, more prevalent substances like PFOA or PFOS, could seriously complicate remediation. Overwhelmed by the number of chemicals, regulators will struggle to single out those that pose the most risk. The CERCLA designation proposal would lead to the designation of hundreds, if not thousands, of PFAS sites as brownfields, areas that possibly contain hazardous substances and could at some point become priorities. There are over 450,000 such sites stuck in a regulatory state of purgatory. Those vacant properties, many in urban areas, lie mostly dormant. Their Scarlet Letter status spooks real estate developers and lenders alike from investing capital. Perhaps PFAS hazardous-designation supporters should ask mayors what they think before imposing yet more brownfields on their cities.

A massive number of PRPs could be on the hook for cleanup, natural resources damages, and other costs. Under CERCLA, EPA can hold each entity jointly and severally liable for entire Superfund sites. The Environmental Working Group (EWG), which supports CERCLA for PFAS, declares in a September 18 analysis that affirmative defenses and EPA "enforcement discretion" will protect public utilities and other "non-polluters" from federal action. That's a quaint notion. Once the CERCLA regulatory wrecking ball swings into action, however, no PRP can realistically rely on government to *not* act.

EWG also states that "[m]ere designation does not impose any potential liability on current manufacturers and users . . . unless there has been a 'release.' Statutorily speaking, that's correct. But the statement takes a decidedly cramped view of a hazardous designation's impact. A federal law or regulation that labels something "hazardous" is catnip for the plaintiffs' bar. Such an official pronouncement will supercharge pending PFAS litigation and inspire a new wave of lawsuits against the many businesses that manufactured and used PFAS. We've seen this happen before to makers and users of lead, MTBE, and PCBs, whose CERCLA-hazardous designation fueled years of collateral public-nuisance and other state-tort litigation.

Finally, even once a business has accepted and funded a cleanup, they still remain vulnerable to state-law claims that demand additional or different remediation. Atlantic Richfield faces this conundrum in Montana, where the state supreme court awarded private landowners cleanup costs for a cleanup plan that conflicts with the EPA-directed cleanup of the Anaconda Smelter Superfund site. The company persuaded the U.S. Supreme Court (helped by a WLF *amicus* brief) to review the state court's decision. The Court will hold oral arguments on whether CERCLA preempts such state actions on December 3.

Given the many potential downsides of labeling every chemical in the PFAS class as *per se* hazardous, policymakers should fully debate the idea's pros and cons before acting. CERCLA's many shortcomings are thanks in no small part to the haste in which it was passed. As George Santayana wrote in *Reason in Common Sense*, "Those who cannot remember the past are condemned to repeat it."

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