

# PFAS Hurdles Ahead: Federal Regulations Impacting Reporting and Compliance Obligations

CIBO 2024 Policy & Technical Issues Conference

*Challenges Facing the Power House of the 21<sup>st</sup> Century –  
a Continued Look*



The National Association of Clean Water Agencies

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NACWA 



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## 2024 Mottos

***EPA: Must. Finalize. Everything.***

***Congress: Y'all Know It's An Election Year, Right?***

***PFAS: You Weren't Busy, Were You?***





# PFAS

# CERCLA

Be wary of any statute with commas in its title.

- **Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)**
  - Cleanups of hazardous substances
    - Short-term removal actions for releases or threatened releases requiring prompt response
    - Long-term remedial actions to permanently reduce dangers associated with releases or threatened releases
    - Reporting requirements for triggering releases
    - Separate from RCRA's focus on cradle-to-grave handling of hazardous wastes
  - Liability of persons "responsible" for releases of hazardous substances
  - Trust fund to pay for cleanups when no responsible party can be identified (the "Superfund")
    - Tax on manufacturers, producers, and importers of certain chemicals
  - Virtually nonexistent legislative history

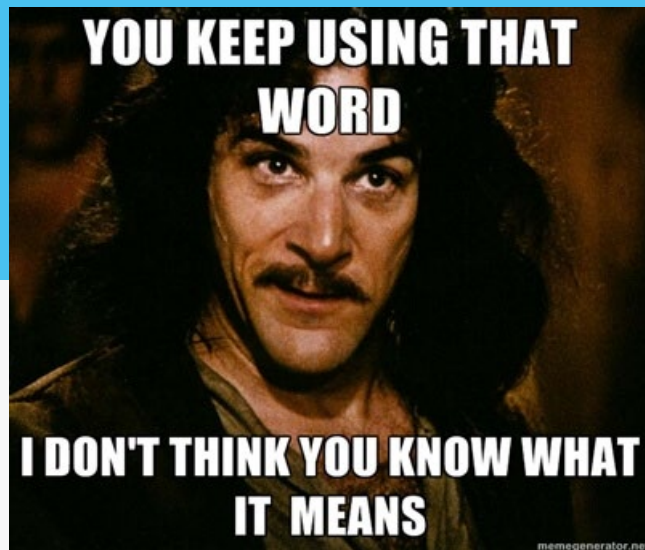


# EPA's PFAS CERCLA Actions



- **Sept. 2022** - EPA proposed for first time ever to use authority to designate two PFAS – PFOA and PFOS – as “hazardous substances” under Section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act
- **April 2023** – Agency took comment on whether to also designate: (1) any of the following 7 PFAS – PFBS, PFHxS, PFNA, HFPO-DA (GenX), PFBA, PFHxA, or PFDA; (2) precursors to PFOA, PFOS, or any of the 7 proposed PFAS; and/or (3) categories of PFAS
- **May 2024** – EPA finalized PFOA and PFOS designations while publishing corresponding enforcement discretion memo aimed at shielding POTWs, MS4s, community water systems, farmers land-applying biosolids, publicly owned/operated municipal solid waste landfills, publicly owned airports, and local fire departments from PFAS remediation costs
  - **Effective Date: July 8, 2024**

# CERCLA Liability – Potentially “Responsible” Parties (PRPs)



- Who is liable under CERCLA?
  - Parties responsible for “disposals” and “releases” of hazardous substances – current and past owners/operators of site, generators, and transporters are “potentially responsible parties” or “PRPs”
  - “Disposal” and “release” broadly defined – include effluent discharges and air emissions not subject to an exclusion, among others
- What Kind of Liability?
  - Retroactive.
  - Joint and Several.
  - Strict.



# CERCLA Enforcement Discretion Guidance

**THESE ARE NOT THE DROIDS  
YOUR LOOKING FOR**



- **The Good**

- Expresses EPA's position that "equitable factors do not support seeking response actions or costs under CERCLA" from wastewater, drinking water, or stormwater agencies or farms where biosolids land applied
- States EPA's intention to have major PRP settlements include ban on contribution claims and to settle out utility PRPs

- **The Bad**

- Guidance is not binding (on agencies or courts)
- Can be changed at any time
- Carves out where utility action/inaction may have "significantly contributed to or exacerbated the spread of significant quantities of PFAS"

- **The Ugly**

- Third parties can still bring utilities into litigation
- Utilities have to admit liability to get settlement protections
- Litigation and discovery can still be very costly
- Private cleanups/Section 107 cost recovery claims

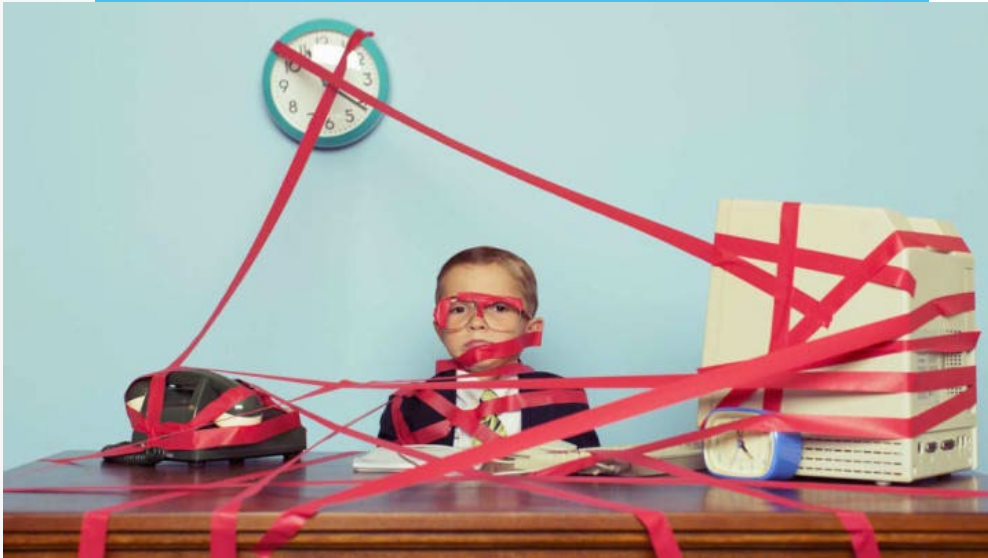


# CERCLA Third Party Lawsuits



- **CERCLA Section 113 Contribution Claims**
  - Other PRPs can bring any PRP into an EPA-ordered cleanup action regardless of culpability
  - Fiduciary duty to shareholders to defray costs
  - Utilities stable, reliable source of funding
- **CERCLA Section 107 Cost Recovery Claims**
  - Anyone performing a “voluntary” cleanup of hazardous substances to certain standards can also sue any PRP for cost recovery
  - When huge portions of U.S. exposed to substances designated as hazardous, private cleanups likely to occur

# CERCLA Reporting Requirements



- **CERCLA Sections 103 and 111(g):** Facilities must report releases of any PFOA, PFOS, their salts or structural isomers at or above the reportable quantity (RQ) of one pound or more within a 24-hour period to the National Response Center as soon as have knowledge of release
  - Must also provide reasonable notice to potentially injured parties through publication in local newspapers serving affected area
- **Emergency Planning and Community Right-to-Know Act (EPCRA):** Facilities must immediately notify their community emergency coordinator for the local emergency planning committee (LEPC) about any area likely to be affected by the RQ release, notify the State Emergency Response Commission (SERC) of any State or Tribal region likely to be affected, and submit a follow-up written report to their SERC and LEPC as soon as practicable after the release

# CERCLA As Applied to PFAS



- CERCLA is a cleanup statute, not a regulatory one. How do you:
  - Know how or what to report when there aren't reliable analytical methods or consistent inputs?
  - Have meaningful cleanups when PFAS ubiquitous and constantly being introduced and reintroduced into environment?
  - Set cleanup standards before you know risk levels?
  - Meet cleanup standards when there's no known treatment technology?
  - Deal with contaminated media?



# Resource Conservation and Recovery Act



## April 8, 2024 - Hazardous Constituents Listing Proposal

- Proposal to list 9 PFAS as RCRA “hazardous constituents” - chemicals that have toxic, carcinogenic, mutagenic, or teratogenic effects on humans or other life forms
- Chemicals of concern that should be considered for listing as hazardous wastes
- Allows them to be assessed and addressed as part of RCRA “corrective action” process at permitted and non-permitted hazardous waste treatment, storage and disposal facilities (TSDFs)

### • Potential Impacts

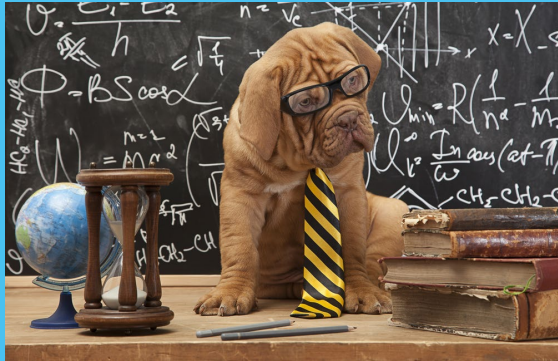
- No direct impacts to non-TSDFs
- Longer term:
  - If EPA designates PFAS as hazardous wastes, generated wastes will have to be evaluated for hazard characteristics (ignitability, corrosivity, reactivity, toxicity) through toxicity characteristic leaching procedure (TCLP)
  - If EPA instead decides to list certain PFAS, would only impact those specific listed wastes/industries

# Safe Drinking Water Act

- April 10, 2024 – National Primary Drinking Water Regulation for six PFAS finalized
  - Establishes Maximum Contaminant Levels (MCLs) for individual PFAS as well as Hazard Index MCL for mixtures
  - Public water systems have:
    - 3 years to complete initial monitoring (reporting beginning in 2027)
    - 5 years (by 2029) to come into compliance with MCLs
  - Divergent Cost Estimates:
    - EPA: \$1.5 billion annually
    - AWWA Cost Estimate: \$2.5 - 3.2 billion annually

Compound	Final MCLG	Final MCL (enforceable levels)
PFOA	Zero	4.0 parts per trillion (ppt) (also expressed as ng/L)
PFOS	Zero	4.0 ppt
PFHxS	10 ppt	10 ppt
PFNA	10 ppt	10 ppt
HFPO-DA (commonly known as GenX Chemicals)	10 ppt	10 ppt
Mixtures containing two or more of PFHxS, PFNA, HFPO-DA, and PFBS	1 (unitless) Hazard Index	1 (unitless) Hazard Index

# Clean Water Act Water Quality Criteria



- **Recommended Aquatic Life Criteria for PFOA and PFOS**

- Proposed summer 2022; likely finalized soon but with lower numbers than originally proposed
- Originally set reasonable acute and chronic freshwater criteria but EPA now reconsidering

Criteria Component	Acute Water Column	Chronic Water Column	Invertebrate Whole-Body	Fish Whole Body	Fish Muscle
<b>PFOA Magnitude</b>	49mg/L	0.094 mg/L	1.11 mg/kg ww	6.10 mg/kg ww	0.125 mg/kg ww
<b>PFOS Magnitude</b>	3.0 mg/L	0.0084 mg/L	0.937 mg/kg ww	6.75 mg/kg ww	2.91 mg/kg ww
<b>Duration</b>	1-hour average	4-day average	Instantaneous		
<b>Frequency</b>	Not to be exceeded more than once in three years, on average		Not to be exceeded more than once in ten years, on average		

- **Recommended Human Health Water Quality Criteria - PFOA and PFOS**

- Likely proposed late summer 2024
- Values dependent on reference doses and cancer slope factors established in National Primary Drinking Water Regulations/MCLs
- Expected to be very low criterion values



# Clean Water Act NPDES Permitting



## • PFAS in NPDES Applications and Permits

- February 2025 – EPA intends to propose modifications to existing NPDES permit applications to address monitoring and reporting of PFAS
- Based on EPA’s December 2022 memo *Addressing PFAS Discharges in NPDES Permits and Through the Pretreatment Program and Monitoring Program*, states and EPA Region 1 (MA and NH) are already beginning to include monitoring requirements in NPDES permits

# Analytical Methodologies and Disposal Methods

## Interim Guidance on the Destruction and Disposal of Perfluoroalkyl and Polyfluoroalkyl Substances and Materials Containing Perfluoroalkyl and Polyfluoroalkyl Substances— Version 2 (2024)

INTERIM GUIDANCE FOR PUBLIC COMMENT  
APRIL 8, 2024

- **Analytical Methods for Measuring PFAS**
  - Method 1633: Measures 40 different PFAS in influent, effluent, and biosolids
    - “Final” - i.e., completed multi-laboratory validation stage
    - Must be promulgated as approved method under 40 CFR Part 136 before being used in CWA compliance/enforcement
  - Method 1621 (Adsorbable Organic Fluorine): Measures total organic fluorine in aqueous matrices which reveals amount of all fluorine present including non-PFAS
- **Updated Interim Disposal/Destruction Guidance**
  - Required by FY2020 NDAA; Second iteration
  - Identifies 3 ways to manage PFAS-laden materials: thermal destruction, landfilling, and underground injection
    - Class I non-hazardous UI seen as likely most protective against environmental releases (deep well injection), followed by RCRA Sub C landfills (which don’t accept organic materials that decompose like biosolids)
    - Suggests SSIs operated at too low a temp, not long enough resident time, and could result in PFAS air emissions, but not enough data to know
  - Comments due October 15, 2024

# Clean Air Act (CAA) and Toxics Release Inventory (TRI)



- **CAA – Air Emissions Reporting Requirements (AERR) Proposal**
  - Proposes to significantly expand reporting requirements for hazardous air pollutants (HAPs) and potentially add TRI-reportable PFAS to 40 CFR Part 40 Sub A
- **CAA – Hazardous Air Pollutants (HAP) Additions Proposal**
  - Addresses applicable requirements when EPA adopts new HAP listing, including adding newly listed HAP to potential to emit (PTE) calculations on effective date of HAP listing
- **CAA – Reclassification of Major Sources Proposal**
  - Addresses when major sources can reclassify as area sources after implementation of emissions controls
- **TRI De Minimis Exemption**
  - October 2023 – EPA finalized rule eliminating *de minimis* exemption for PFAS reporting requirements under the Emergency Planning and Community Right-to-Know Act (EPCRA)



# U.S. Supreme Court – Makin' Waves



## *Loper Bright Enterprise v. Raimondo and Relentless v. Department of Commerce – Chevron Deference*

- Oral Arguments: Should *Chevron* deference be replaced and, if so, with what?
  - *Skidmore*?

## *Corner Post v. Federal Reserve – Timing of APA Challenges*

- Oral Arguments: When does the 6-year statute of limitations to bring a facial challenge to a rule under the APA begin to run?
  - When the rule becomes final?
  - When the rule injures an individual?

# Questions?

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