



# DELAWARE SOLID WASTE AUTHORITY

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Via E-Mail

May 23, 2022

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The Honorable Thomas R. Carper  
Chair, Senate Environment and Public Works Committee  
301 North Walnut Street, Suite 102L-1 Wilmington  
Wilmington, DE 19801-3974

The Honorable Christopher A. Coons  
1105 N. Market Street, Suite 100  
Wilmington, DE 19801

The Honorable Lisa Blunt Rochester  
1105 N Market St, Ste. 400  
Wilmington, DE 19801  
Phone: (302) 830-2330

Dear Senators Carper, Coons, and Representative Blunt-Rochester,

**Re: *Environmental Protection Agency Notice of Proposed Rulemaking Adding Certain Polyfluoroalkyl Substances as Listed Hazardous Substances Under CERLA***

The Delaware Solid Waste Authority (“DSWA”) is a public instrumentality of the State of Delaware created in 1975 pursuant to Title 7, Chapter 64 of the Delaware Code. Since its creation, DSWA has been responsible for management of municipal solid waste throughout Delaware. This includes the operation of three state-of-the-art sanitary landfills (one in each county), three solid waste transfer stations (again, one for each county), the Delaware Recycling Center where single stream recyclables and construction and demolition waste from all over the State are processed, and multiple solid waste and recyclable drop off centers located throughout the State. DSWA receives and processes over 1 million tons of municipal solid waste annually.

Attached please find a joint letter from the Solid Waste Association of North America (“SWANA”) and the National Waste and Recycling Association (“NWRA”) expressing serious concern over potential regulatory developments regarding polyfluoroalkyl substances, commonly referred to as “PFAS.” The impetus for this letter is a proposed Notice of Proposed Rulemaking (the “Proposed Notice”) drafted by the U.S. Environmental Protection Agency that would designate two PFAS compounds – perfluorooctanoic acid (“PFOA”) and perfluorooctane sulfonate (“PFOS”) – as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”).<sup>1</sup> The Proposed Notice has not been made public yet, but we understand that the draft is currently under review within the Office

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<sup>1</sup> 42 U.S.C. § 9601 *et seq*

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of Management and Budget. By including these compounds in the list of CERCLA hazardous substances, the Proposed Notice would make any owner or operator of a facility that is determined to be a source of such compounds potentially liable for remediation costs.

Liability under CERCLA is not normally a serious concern for owners/operators of modern municipal solid waste landfills like DSWA because hazardous substances are prohibited from entry into these facilities. What makes PFAS compounds so different is their ubiquitous nature. PFAS compounds are found in all manner of consumer goods, including, for example, Teflon coatings on cookware and non-stick coatings on carpets to name just two. PFAS compounds are also found in food packaging materials and in aqueous film-forming foam that has been used as a firefighting agent at military and civilian airports for decades. Over the years, many tons of discarded materials that contain PFAS compounds have undoubtedly found their way into DSWA landfills. Although the waste materials that contain these compounds are safely contained within the landfills, small amounts of PFAS compounds are expected to be present in landfill wastewater, or “leachate” that is piped or trucked daily to local wastewater treatment plants.<sup>2</sup> If PFAS compounds are made CERCLA hazardous substances, the liability associated with any environmental damage they cause could find its way back to DSWA as the owner and operator of Delaware landfills.

DSWA does not oppose efforts to make owners and operators of facilities that *manufactured* or *used* PFAS compounds liable under CERCLA; however, sanitary landfills fit neither category. DSWA’s facilities are passive receptacles for waste generated by others. If municipal solid waste facilities are not granted relief from the Proposed Notice, the potential costs associated with CERCLA liability could be quite substantial and would ultimately pass through to DSWA’s end users, *i.e.*, Delaware consumers. Moreover, DSWA facilities are not permitted to accept hazardous substances, yet it is simply not feasible to screen every load coming into our landfills for material containing PFAS. At a minimum, DSWA would be forced to consider restricting access to our facilities for Delaware waste generators that we determine are sources of PFAS compounds. These could include:

- Waste sourced from Dover Air Force Base and the New Castle County Air National Guard Base (because both of these facilities are known users of AFFF firefighting agents).
- Waste sourced from large scale commercial generators (shopping malls, university dining facilities, and manufacturing plants are three potential examples).
- Waste, *i.e.*, biosolids, sourced from Delaware wastewater treatment facilities.
- Waste sourced from any environmental remediation activity regardless of treatment.

It is important to note that methods for treating PFAS compounds in wastewater are still in their infancy, and any attempts to address the problem by investing in treatment technology promises huge expenditures for limited benefit. Treatment is simply not a viable option for the foreseeable future.

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<sup>2</sup> Leachate treatment at wastewater treatment plants does not address PFAS compounds

The Honorable Thomas R. Carper  
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Although our industry is seeking “no action assurance” from the EPA, we have little confidence at this point that any such relief will be forthcoming. SWANA and NWRA have proposed narrowly tailored corrective legislation in the attached letter that we believe deserves your careful consideration, should the EPA finalize the proposed rulemaking without addressing these concerns. In hopes that this eventuality can be forestalled, we also ask that your offices communicate directly with EPA following publication of the proposed rulemaking – and before adoption – to ensure EPA is aware of how important this issue is to your Delaware constituents.

Respectfully,

A handwritten signature in black ink, appearing to read "Gerard L. Esposito". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gerard L. Esposito  
Chairman

Enclosure

cc: Christophe A.G. Tulou (US Senate Committee on Environment & Public Works)  
Kenneth Martin (US Senate Committee on Environment & Public Works)  
David Biderman, Esq. (SWANA)

May 10, 2022

**Re: Relief for Municipal Solid Waste Landfills from CERCLA Liability for PFAS**

Dear Chairman Carper, Ranking Member Capito, Chairman DeFazio, Ranking Member Graves, Chairman Pallone, and Ranking Member McMorris Rodgers:

The municipal solid waste (MSW) management sector strongly supports the goal of addressing per- and poly-fluoroalkyl substances (PFAS) contamination and holding accountable manufacturers and heavy users of these compounds. We are concerned, however, that regulation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) instead would assign environmental cleanup liability to essential public services and their customers. We therefore request that Congress provide MSW landfills and other passive receivers with a narrow exemption from liability if certain PFAS are designated as hazardous substances under CERCLA. Doing so would keep CERCLA liability on the industries that created the pollution in the first place.

**Context**

- Landfills neither manufacture nor use PFAS; instead, they receive discarded materials containing PFAS that are ubiquitous in residential and commercial waste streams. MSW landfills and the communities they serve should not be held financially liable under CERCLA for PFAS contamination, as landfills are part of the long-term solution to managing these compounds.
- Landfills are essential public services that are subject to extensive federal, state, and local environmental, health, and safety requirements. Further, MSW landfills are important to managing and limiting PFAS in the environment, as recognized by the Environmental Protection Agency (EPA) in its December 2020 draft Interim Guidance on the Destruction and Disposal of [PFAS] and Materials Containing [PFAS].
- **Just as certain airports are required by law to use firefighting foam containing PFAS, permitting authorities often require landfills to accept waste streams containing PFAS.**
- Most landfills rely on wastewater treatment facilities for leachate management. Wastewater and drinking water facilities increasingly rely on landfills for biosolids management and disposal of PFAS-laden filters. Efforts to address PFAS at MSW landfills and drinking water and wastewater facilities must avoid disrupting this interdependence among essential public services to communities.
- Landfill leachate typically represents a minor proportion of the total quantity of PFAS received at wastewater treatment facilities from all sources. PFAS manufacturers or users, by comparison, contribute PFAS at levels that can be orders of magnitude higher than landfills.

**Significant Economic Impacts**

- Removing PFAS from landfill leachate requires advanced treatment techniques which are prohibitively expensive. Estimated capital costs to implement leachate pretreatment at a moderate-sized landfill to the extent necessary to significantly reduce PFAS range from \$2 million to \$7 million, **with nationwide costs totaling \$966 million to \$6.279 billion per year** for the solid waste sector. Trace concentrations of PFAS nevertheless would remain in leachate following pretreatment, exposing landfills to CERCLA liability.
- Absent relief from CERCLA liability, manufacturers and heavy users of PFAS compounds will bring claims for contribution against landfills and other passive receivers, generating significant litigation costs. EPA's exercise of enforcement discretion will not insulate landfills from this litigation.

- These costs will be passed along to communities, water and wastewater treatment facilities, and biosolids management, all of which rely on the services of MSW landfills.

### Broad Unintended Consequences

- **CERCLA regulation will impel landfills to restrict inbound wastes and/or increase disposal costs for media with elevated levels of PFAS, including filters, biosolids, and impacted soils at Department of Defense facilities.** The mere prospect of regulation in this area is already disrupting the interdependence of the drinking water, wastewater, and solid waste sectors.
- Food waste compost may contain PFAS due to contact with PFAS-lined packaging materials. As a result, a CERCLA designation could result in communities diverting food waste from organics recycling programs, hindering federal, state, and local climate and waste reduction goals.
- Cost increases likely will have a significant disproportionate impact on low-income households that rely on the affordability of services that the solid waste sector provides.

### Recommendation

Although our sector is simultaneously pursuing “no action assurance” from EPA, the agency historically has been very hesitant to provide this relief given its policy that assurances should be given only “in extremely unusual cases.” As such, and acknowledging that EPA may have limited authority to act on our request, we recommend providing the following narrow exemption from CERCLA liability that affords relief to landfills and other passive receivers of PFAS<sup>1</sup>:

(a) IN GENERAL.—No publicly owned or operated community water system (as defined at 42 U.S.C. 300f), publicly owned treatment works (as defined at 33 U.S.C. 1292), or municipal solid waste landfill (as defined at 40 C.F.R. 258.2) shall be liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) for the costs of responding to, or damages resulting from, a release to the environment of a perfluoroalkyl or polyfluoroalkyl substance designated as a hazardous substance under section 102(a) of such Act that resulted from the discharge of effluent, the disposal or management of biosolids, the disposal of filtration media resin, or the discharge of leachate where such actions are in compliance with Federal or State law and all applicable permits.

(b) EXCEPTION.—Subsection (a) shall not apply with respect to any discharge described in such subsection that results from any gross negligence, willful misconduct, or noncompliance with any Federal or State law or permit governing the discharge of effluent, disposal or management of biosolids, disposal of filtration media resin, or waste disposal.

Thank you for your consideration of our request, and we look forward to continuing to partner with the federal government to ensure the safe and effective management of waste streams containing PFAS.

Sincerely,

National Waste & Recycling Association  
Solid Waste Association of North America

cc: Senate EPW Committee Members  
House T&I and E&C Committee Members

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<sup>1</sup> The exemption would not extend to underlying soil and groundwater contamination from a MSW landfill or to facilities other than MSW landfills that accept waste streams with elevated concentrations of PFAS.