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Superfund: The Wrong Tool For PFAS Cleanup Efforts

By **Philip Comella** (September 1, 2021, 5:38 PM EDT)


Philip Comella

Given the growing notoriety of per- and polyfluoroalkyl substances, or PFAS, as "forever chemicals," it is not surprising that many states and the federal government are taking steps to regulate the discharge of PFAS into the environment and, consequently, to limit human exposure to these chemicals.

Hand in hand with regulating the discharge of PFAS into the environment will be establishing a mechanism to remediate environmental PFAS contamination. The go-to statute for addressing the remediation of environmental contamination is the Comprehensive Environmental Response and Compensation Liability Act, or CERCLA, commonly known as Superfund.

The purpose of Superfund is to remediate uncontrolled or abandoned hazardous waste sites, as well as accidents, spills and other emergency releases of pollutants and contaminants into the environment. Superfund works in tandem with the Resource Conservation and Recovery Act, or RCRA.

Superfund looks backward, and addresses abandoned sites where the owner is financially unable or simply unwilling to clean up the site. In contrast, RCRA looks forward, and imposes a comprehensive regulatory scheme to ensure newly generated waste is managed in a responsible manner to prevent future environmental threats.

PFAS are a class of over 4,700 man-made compounds that were originally manufactured because they were found to possess a pronounced ability to repel water and oil. It wasn't long before manufacturers transformed the beneficial properties of PFAS — most notably, perfluorooctanoic acid, or PFOA, and perfluorooctane sulfonate, or PFOS — into consumer products, such as Teflon and Scotchgard.

In this sense, PFAS are similar to polychlorinated biphenyls, which originally were used as a dielectric fluid to avoid sparking in electrical equipment, before becoming a notorious contaminant. The PFAS Action Act of 2021, which passed the U.S. House of Representatives in July, directs the U.S. Environmental Protection Agency to list PFOA and PFOS as hazardous substances under Superfund within one year of enactment.

This action is just one of the measures Congress is proposing to address the release of PFAS into the environment. But Superfund, an environmental remediation statute passed in a different era to solve a different problem, is ill-suited to deal with the unique challenges posed by PFAS.

The problem centers on the vast reach of Superfund liability. All Superfund liability requires is (1) hazardous substances to be present at a site; (2) a release or threatened release of such substances; (3) the incurring of cleanup costs by the EPA and/or other parties; and (4) a defendant who is a potentially responsible party, or PRP.[1]

Congress set the trigger for Superfund liability much lower than traditional tort liability, and broadly defined the key elements to state a cause of action. With no financially viable owner to pay for the cleanup of many abandoned sites, Congress was led to expand Superfund's reach to snare any available party to help pay for the expensive cleanups required.

The definition of "PRP" essentially covers any entity with any connection to a site, or to the hazardous substances found there, however indirect the connection. In the language of Superfund, PRPs can include: (1) current owners and operators of a site; (2) anyone who owned or operated the site at the time hazardous substances were disposed there; (3) "arrangers," including, in particular, waste generators and brokers; and (4) transporters.[2]

Along with defining a broad class of entities as potentially responsible for a site cleanup, Superfund also leaves these responsible parties little room for escape. Those accustomed to the classic tort elements of duty, breach, causation and damages were surprised to discover none of this mattered in the world of Superfund.

Instead, a PRP can be completely free of fault for the hazardous substance winding up at the Superfund site. A PRP's waste need not cause any environmental harm — or even lead to the incurring of response costs. Rather, waste similar to the unlucky PRP's need only be found at the site.[3]

Once this locational fact is established, the PRP is exposed to the Superfund joint and several liability scheme.[4] Unless there is a basis to allocate the harm, the PRP is theoretically liable for the entire site remediation.[5]

This is bad enough for any PRP at a traditional Superfund site, but there is another feature of Superfund's expansive liability scheme that makes it a particularly bad fit for PFAS. Unlike the regulation of hazardous wastes under RCRA, Superfund does not contain a quantitative concentration threshold for what separates a hazardous substance from a nonhazardous substance.[6]

Nor does Superfund require that any particular hazardous substance actually pose a threat to anyone.[7] It is the lack of a concentration threshold for a hazardous substance, combined with the extremely low concentration levels used for PFAS, that makes Superfund a particularly bad fit PFAS.

Another problem arises from the sheer number of different PFAS chemicals, with the current count at more than 4,700. The PFAS Action Act directs the EPA to determine if all PFAS should be listed as hazardous substances within five years. The long list of PFAS chemicals will raise further questions — including whether some of them should be combined to determine contributions to a site, whether PFAS in addition to other contaminants listed as hazardous substances should be considered, and which PFAS should be tested for.

Moreover, Superfund itself is not based on actual threats to human health and the environment. Instead, the law specifies that hazardous substances are those that when released into the environment "may present substantial danger to public health or welfare or the environment."[8] Remedial actions are those addressing a "release or threatened release of hazardous substances into the environment."[9]

According to the statute, the government may take a CERCLA response action if there is "a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare."[10] Section 106 authorizes the government to seek injunctive relief where "there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance."

At this point, it is uncertain at what concentration level in soil, groundwater or surface water PFAS contamination will satisfy these standards, or justify the expenditure of response costs "consistent with the national contingency plan," as required under Superfund.[11] But with PFAS environmental standards now set at concentrations of parts per trillion, it will likely not take much PFAS to trigger a Superfund case.

In light of the ubiquity of PFAS in the environment, the broad definition of release and the lack of a concentration threshold for a hazardous substance, listing PFAS as hazardous substances will not only lead to overbreadth problems never before encountered in environmental law, but also threatens to create a long-running sideshow as courts and litigants struggle with applying Superfund's broad enforcement scheme to a chemical measured in parts per trillion.

Once Superfund's enforcement mechanism is activated, any PRP who contributed a substance containing even one part per trillion of PFOA, PFOS or other listed PFAS will theoretically be liable for the entire site cleanup. Although equitable considerations, such as de minimis settlements, may come into play to lessen this severe outcome, the question is whether it makes sense to allow for the possibility of such a result even occurring.

As we have already seen with Superfund, the enforcement of an overly broad regulatory scheme against anyone defined as potentially responsible typically leads to contentious, time-consuming and expensive litigation — diverting resources to transactional costs rather than remediation.

This is not to say that potential threats from the wrongful disposal of PFAS-containing substances should be ignored. It is to say that Superfund is not the solution to the problem. Superfund was intended to address the nation's worst sites — those uncontrolled hazardous waste sites that were either abandoned by their owners or required extensive cleanup efforts so costly that the owner could not pay for them.

The broadly worded, strict liability provisions of Superfund were intended to capture as many financially viable PRPs as possible, by casting the widest possible net. But the same expansive language that loops in roomfuls of PRPs arguing over allocation may lead to the predicament where, because of the ubiquity of PFAS in the environment and household goods, the net will be cast so far that little is actually accomplished in terms of minimizing the environmental threat.

A better solution might be to devise an amendment to Superfund, or a stand-alone statute, specifically tailored to the unique features and threats of PFAS. Any such legislation might have one or more of these features:

- Identifying PFAS as a characteristic hazardous waste under RCRA, which requires setting a concentration level and using RCRA's cradle-to-grave management system, and triggers the application of treatment standards under the land disposal restrictions program;
- Establishing cleanup levels in different environmental media similar to state voluntary programs to expedite cleanups;
- Focusing on controlling exposure pathways;
- Increasing efforts to keep PFAS-containing products out of the consumer marketplace; and
- Better consumer education on the actual risks of these substances.

In sum, legislators should resist the strong urge to solve the looming PFAS environmental problem by jumping on the Superfund bandwagon. Yes, it is an available remedial statute. But it was passed in a different era, with different goals and different problems to solve.

PFAS presents unique problems that need a tailored remedial program to effectively — and efficiently — minimize the threats to human health and the environment this class of chemicals presents.

Philip L. Comella is a partner and leader of the environment and energy practice group at Freeborn & Peters LLP.

[1] 42 U.S.C. § 9607(a); see Burlington N. & Santa Fe Ry. v. U.S., 129 S. Ct. 1870, 1878 (2009).

[2] See Burlington N., 129 S.Ct. at 1878.

[3] See U.S. v. Monsanto Co., 858 F.2d 160, 168 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

[4] Burlington N., 129 S. Ct. at 1878.

[5] See U.S. v. Chem-Dyne Corp., 572 F. Supp. 802, 810-11 (S.D. Ohio 1983).

[6] See U.S. v. Alcan Aluminum Corp., 964 F. 2d 252, 260-62 (3d Cir. 1992).

[7] U.S. v. Alcan Aluminum Corp., 990 F.2d 711, 721 (2d Cir. 1993).

[8] CERCLA § 102(a).

[9] CERCLA § 101(24).

[10] CERCLA § 104(a)(1)(B).

[11] 42 U.S.C. §9607(a)(4).