

**U.S. Environmental Protection Agency
Responses to Questions for the Record
House Energy & Commerce Committee
Subcommittee on Environment, Manufacturing, and Critical Minerals
“Revitalizing America Through the Reauthorization of the Brownfields Program”
September 27, 2023**

The Honorable Earl L. “Buddy” Carter

I wanted to follow up on the questions my colleague, Representative Balderson, asked you about the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). I am getting several questions in my district on this subject.

1. CERCLA covers “releases” into the environment by a potentially responsible party.
 - a. The definition of “release” is very broad is it not?
 - b. With a few exceptions, isn’t a “release” statutorily defined to be any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).

Response: Yes, CERCLA section 101(22) defines a release as including “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant),” with, as noted, several specific exclusions in section 101(22)(A)–(D). These exclusions include certain releases within a workplace, certain engine exhaust emissions, certain releases related to nuclear material, and the normal application of fertilizer.

EPA does view the definition of “release” as being broad. Courts have similarly construed CERCLA’s definition of “release” broadly. *See, e.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1152 (1st Cir. 1989), *decision clarified sub nom. In re Dedham Water Co.*, 901 F.2d 3 (1st Cir. 1990).

2. As for CERCLA liability, does it apply to the following parties:
 - a. Current owners or operators of the site at which hazardous substances were disposed?
 - b. Past owners or operators of a site at the time hazardous substances were disposed of at the site?
 - c. Anyone, including generators, who arranged for the disposal, transport or treatment

- of hazardous substances found at the site?
- d. Transporters or anyone who arranged for transport of hazardous wastes to the facility?

Response: Under the language of the statute, CERCLA, 42 U.S.C. section 9607, four classes of parties are liable for a release of a hazardous substance:

- current owners and operators of a facility;
- past owners and operators of a facility at the time hazardous substances were disposed of;
- generators and parties that arranged for the disposal or transport of the hazardous substances; and
- transporters of hazardous waste that selected the site where the hazardous substances were brought.

3. As for the type of liability that attaches to parties under CERCLA:

- a. Is it true that CERCLA liability is retroactive, joint and several, and strict?
- b. Is it true that strict liability essentially means that a person does not need to be a fault in order to be liable?
- c. Is it true that joint and several liability means that the amount a responsible party contributed to a release is irrelevant to the amount of liability they assume for the “release”?
- d. Is it true that CERCLA imposes liability on parties responsible for, in whole or in part, the presence of hazardous substances at a site?
- e. It is also true that retroactive liability applies under CERCLA – it doesn’t matter that what they did happened before CERCLA became law?
- f. So, if a substance is a CERCLA hazardous substance, it’s not just the manufacturer of the substance, or the user of the substance that is liable, it could also be a party who encounters, removes, and arranges to have the substance legally disposed. Is that correct?

Response: Determination of CERCLA liability requires a fact-specific analysis of the particular circumstances and activities that occurred at every site.

Under 42 U.S.C. section 9607, CERCLA liability is triggered when:

- hazardous substances are present at a facility;
- there is a release (or a threat of a release) of hazardous substances;
- response costs have been or will be incurred; and
- the person is a liable party.

CERCLA liability is:

- **Retroactive, meaning that parties may be held liable for acts that happened prior to Superfund's enactment in 1980;**
- **Joint and several, meaning that any one potentially responsible party may be held liable for the entire cleanup of the site; and**
- **Strict, meaning that a potentially responsible party can be held liable even if that party was not negligent, or was operating according to industry standards at the site.**

Some parties may have an affirmative defense to CERCLA liability if their release of hazardous substances was caused by an act of God, acts of war, or acts or omissions of a third party with whom a potentially responsible party has no relationship.

Federal courts have consistently and uniformly held that under the language of the statute, 42 U.S.C. section 9607, CERCLA liability is retroactive. Accordingly, as noted above, parties may be held liable for contamination of sites that occurred before Superfund's enactment in 1980.

However, if a liable party believes it paid more than its fair share of response costs at a site, in certain circumstances the party may seek contribution from other liable parties under 42 U.S.C. section 9613(f). Courts allocate response costs among liable parties by using equitable factors.

As to part "f" of your question, manufacturers of materials that contain hazardous substances are not automatically potentially responsible parties. There must be a release of that hazardous substance into the environment at the facility. They must also qualify as one of the four classes of responsible parties at a site (described in response to Question 2): current owners of the site; parties who operated the site; owners of the site at the time of disposal; parties who arranged for disposal of the hazardous substances; or parties who transported the hazardous substances to a site of their selection.

4. My office has heard serious concerns about how a CERCLA hazardous waste designation for PFAS substances would affect water utilities. Because the nature of the work these utilities perform, the definition of "release" being broad, the types of activities that could trigger CERCLA liability, and the no fault nature and the financial commitment regardless of contribution, it seems likely that – as a strict matter of law -- honest actors will become liable potentially responsible parties.
 - a. When EPA proposed to designate PFOA and PFOS as CERCLA hazardous substances, I think it seemed to acknowledge that water utilities and wastewater utilities – through no fault of their own – be labeled as a potentially responsible party and held liable for PFAS. Do you agree that is true?
 - b. The agency believed it could use enforcement discretion to shield entities from enforcement actions and being held liable for the presence of PFAS. Is that correct?

- c. But, is it true that another potentially responsible party (PRP) could sue these water and waste water utilities for contribution to offset a portion of the cleanup for which that (PRP) paid?
- d. Is the only way to prevent that contribution lawsuit against a water or wastewater utility from another PRP is if EPA settles with that utility?
- e. Is EPA committed to always using this tool to protect utilities who are just doing their jobs from CERCLA liabilities?
 - i. If not, does EPA have eligibility criteria for who it will try to protect in this fashion?
 - ii. If this eligibility criteria does exist, please share as part of your response for the record.
- f. Is it the position of EPA or this Administration that a generally innocent utility should be forced to retain legal counsel and incur legal costs to legally shield itself for a “release” it did not cause?

Response: Pursuant to Superfund authority, EPA proposed to designate PFOA and PFOS as CERCLA hazardous substances. These substances, if designated, would be added to an existing list of more than 800 hazardous substances. A designation alone does not require the EPA to take response actions, does not require any response action by a private party, and does not determine liability for hazardous substance release response costs.

EPA is in the process of considering public comments on the proposal. The Agency has heard from various stakeholders, including farmers, water utilities, airports, local fire departments and others, and understands their concerns about potential CERCLA liability should EPA finalize the designation. EPA is developing an enforcement discretion policy that will reflect the Agency’s enforcement priorities. If the designation is finalized, EPA will focus its enforcement efforts on, for example, PFAS manufacturers and facilities whose actions result in the release of significant amounts of PFAS into the environment. EPA does not intend to pursue entities where equitable factors do not support assigning CERCLA responsibility, such as farmers, water utilities, airports, or local fire departments. The policy will also describe how EPA can settle with parties to provide contribution rights and protections against third-party contribution claims under CERCLA.

We believe this approach to enforcement will addresses stakeholder concerns and will lead to more equitable outcomes, consistent with EPA’s decades-long experience with implementing CERCLA. As EPA states in the FY 2024-2027 National Enforcement and Compliance Initiatives (NECI), the Agency expects to “focus on implementing EPA’s PFAS Strategic Roadmap and holding responsible those who significantly contribute to the release of PFAS into the environment...” The NECI also clarifies that EPA’s Office of Enforcement and Compliance

Assurance (OECA), “does not intend to pursue entities where equitable factors do not support CERCLA responsibility, such as farmers, water utilities, airports, or local fire departments, much as OECA exercises CERCLA enforcement discretion in other areas.”

EPA has a proven track record of developing and applying enforcement discretion policies that are effective and well-received, and courts have sanctioned this approach. In several instances, Congress has subsequently codified EPA’s enforcement discretion policies as statutory exemptions or protections once the effectiveness of the policies was established through practice. These statutory protections and enforcement discretion policies historically have given EPA the needed flexibility to offer liability protections when circumstances warrant.

The Honorable Russ Fulcher

1. I want to follow up on our conversation regarding the Justice40 Initiative. My understanding of the Justice40 Initiative, and feel free to clarify, is that it stipulates that at least 40% of the benefits of federal environmental investment must go to underserved or disadvantaged communities.
 - a. EPA has specifically stated that the Brownfields Program will strive to meet Justice40 goals. What does this mean for brownfields grants EPA provides under sections 104(k) and 128?

Response: Specifically, the Justice40 Initiative has made it a goal that 40 percent of the overall benefits of certain covered Federal investments flow to disadvantaged communities, also known as Justice40 communities. The Climate and Economic Justice Screening Tool (CEJST) is a geospatial mapping tool designed to identify disadvantaged communities that are marginalized and overburdened by pollution and underinvestment. The CEJST features a user-friendly, searchable map that identifies disadvantaged communities across all 50 states, the District of Columbia, and the U.S. territories. One goal of the EPA Brownfields Program is to support underserved communities and communities with limited financial resources in their efforts to assess and cleanup brownfields properties, which are often located in these communities. Many communities with limited resources available to address the challenges related to assessing and cleaning up brownfield sites also meet the Biden-Harris Administration’s definition of Justice40 communities. The Brownfields Program has many successful grant applicants who address brownfield sites in underserved communities and in neighborhoods that meet the definition of a Justice40 community. Small and rural communities have also benefitted as successful recipients of Brownfields Grants.

When my staff and I looked at the EPA portion of the White House Environmental Justice Advisory Council’s Final Recommendations for the Justice40 Initiative submitted to Congress May 20, 2022, under the Federal Advisory Committee Act, we saw numerous references to issues such as clean electric buses, getting lead out of drinking water, air monitoring for buildings, and refitting stormwater systems mainly for municipalities. And yet, rural areas don’t seek much of these types of particular needs. Tell me how, under Justice40, you are addressing needs for small rural communities under brownfields?

Response: EPA’s Brownfields Program has a proud history of supporting small and rural communities through our various grants and technical assistance programs. Consistent with the statutory ranking criteria discussed in CERCLA section 104(k)(6)(C)(vi) and (viii), the Program is required to support small communities and non-urban areas and considers those statutory criteria in the evaluation of the Brownfields Multipurpose, Assessment, Revolving Loan Fund, and Cleanup Grant competitions.

Statistically, grant applicants representing small and rural communities are as successful, if not more so, in obtaining Brownfields Grant funding as applicants representing larger communities. Over the last five fiscal years, Brownfields Grant applicants representing communities with populations of less than 50,000 had a success rate of 34%. The success rate for applicants across all community sizes for the same period is 33%.

EPA uses OMB’s core-based statistical area definitions¹ to define rural communities.² What many consider to be a “rural” community is often a community that is located in a non-Metro/non-Micro statistical area or in a Micropolitan Statistical Area (MicroSA). EPA’s recent data analysis reflects that across all selected applicants, 25% planned to address properties outside of Metropolitan Statistical Areas (MSAs) and MicroSAs.

The Brownfields Program offers free technical assistance to all communities, including small and rural communities, under the Technical Assistance to Brownfields (TAB) program. In addition, EPA’s section 128(a) Technical Assistance Grant (TAG) program provides states and tribes with funding to assist small communities, Indian Tribes, rural areas, or disadvantaged areas to carry out technical assistance activities (as outlined in CERCLA section 104(k)(7))³.

- b. Have particular applicants that would have otherwise qualified for funding under these Brownfields programs lost out on funding because 40 percent of the funding was reserved for the Justice40 Initiative?

Response: No.

- c. Are applicants or states directly or indirectly expected to make certain changes or guarantees under Justice 40 as a condition of obtaining brownfields funding?

Response: No. Brownfields Grant applications are evaluated on the merits of each applicant’s demonstration that it meets the statutorily imposed eligibility criteria and on

¹ <https://www.census.gov/programs-surveys/metro-micro/about.html>

² A Metropolitan Statistical Area (MSA) must have at least one urbanized area of 50,000+ people; a Micropolitan Statistical Area (MicroSA) must have at least one urbanized area of 10,000 - 50,000 people; and areas that do not meet either the MSA or MicroSA definition are described as “Non-Metro/Non-Micro.” Approximately 94% of the U.S. population lives in MSA and MicroSAs.

³ See EPA Brownfields and Land Revitalization CERCLA Section 128(a) Technical Assistance Grant (TAG) Factsheet available at: https://www.epa.gov/system/files/documents/2022-08/Updated_128a_TAG_Fact_Sheet_FINAL_080422_1.pdf

its overall responses to the statutorily provided ranking criteria. No applications are rejected on the basis of the applicant's ability to serve Justice40 communities, which are primarily identified by the Climate and Economic Justice Screening Tool.

The ranking criteria provided in CERCLA include considerations that align with factors associated with environmental justice communities. For example, criterion 104(k)(6)(C)(iii) instructs EPA to consider: "The extent to which a grant would address or facilitate the identification and reduction of threats to human health and the environment, including threats in areas in which there is a greater-than-normal incidence of diseases or conditions (including cancer, asthma, or birth defects) that may be associated with exposure to hazardous substances, pollutants and contaminants." Further, criterion 104(k)(6)(C)(x) instructs the EPA to consider: "The extent to which a grant would address or facilitate the identification and reduction of threats to the health or welfare of children, pregnant women, minority or low-income communities, or other sensitive populations". The Brownfields Program recognizes the need for assistance to sensitive populations in a way that is consistent with all applicable laws.

2. At the end of this past May, EPA announced the award of \$12 million for 24 Brownfields Job Training Grants of \$500,000 each. The announcement emphasized that 40 percent of these grants had to meet the Biden administration's Justice40 Initiative requirements. Do rural communities themselves qualify under the set aside for Justice40, or do they need to meet other criteria to qualify?

Response: The FY 2023 Brownfields Job Training Grant Guidelines state: "EPA expects that funding awarded will advance the Biden Administration's Justice40⁴ priorities which promise to deliver at least 40 percent of the overall benefits from key federal investments to disadvantaged communities." The Brownfields Program did not limit eligibility for Brownfields Job Training Grants to Justice40 communities, nor is there a "set aside" for Justice40 in the Brownfields Program. Brownfields Grant applications are evaluated on the merits of each applicant's demonstration that it meets the statutorily imposed eligibility criteria and, on the applicant's overall responses to the statutory ranking criteria. No applications are rejected based on the applicant's ability to serve Justice40 communities.

The Honorable Frank Pallone, Jr.

1. How does the Brownfields Program ensure that disadvantaged communities in small and rural areas are provided the same opportunities as large urban areas?

Response: EPA's Brownfields Program has a proud history of supporting small and rural communities through our various grants and technical assistance programs. Grant applicants representing small and rural communities are just as successful in obtaining Brownfields Grant funding as applicants from larger communities. Over the course of the last two fiscal years,

⁴ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>

Brownfields Grant applicants representing communities with populations of less than 50,000 had a success rate of 55%. The success rate for all applicants over the last two fiscal years is also 55%.

2. What other opportunities, besides grants, exist to help small and rural communities that don't necessarily have the capacity to compete for other grants?

***Response:* The Brownfields Program offers technical assistance under our Technical Assistance to Brownfields (TAB) program to all communities, including small and rural communities, free of charge. In addition, EPA's section 128(a) Technical Assistance Grant⁵ (TAG) program provides states and tribes with funding of up to \$20K to assist small communities, Indian Tribes, rural areas, or disadvantaged areas to carry out technical assistance activities (as outlined in CERCLA section 104(k)(7)). Finally, EPA's Targeted Brownfields Assessment program authorized by CERCLA section 104(k)(2)(A)(ii) provides support from Federal contractors to help small and rural communities assess sites.**

⁵ See EPA Brownfields and Land Revitalization CERCLA Section 128(a) Technical Assistance Grant (TAG) Factsheet available at: https://www.epa.gov/system/files/documents/2022-08/Updated_128a_TAG_Fact_Sheet_FINAL_080422_1.pdf