Testimony of Robert D. Fox, Esquire, on Behalf of the Solid Waste Association of North America and the National Waste Recycling Association
Regarding a Narrowly Tailored Exemption from
CERCLA Liability for Municipal Solid Waste Landfills

Submitted to the U.S. Senate Committee on Environment and Public Works
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Chairman Carper, Ranking Member Capito, and Members of the Environment and Public Works Committee, thank you for the opportunity to appear before you today. My name is Robert Fox. After graduating from Harvard Law School, I have practiced environmental law for 38 years and have taught Superfund as an adjunct professor for 27 years at Penn Carey Law School. My clients on Superfund matters include all industry sectors and municipalities, such as the City of New York and New Castle County, Delaware.

My testimony today is on behalf of the Solid Waste Association of North America and the National Waste & Recycling Association, two organizations representing municipalities, the private sector, and essential public service providers throughout all 50 states and the District of Columbia.

EPA has proposed listing PFOA and PFOS as hazardous substances under CERCLA. PFAS compounds are ubiquitous in consumer products, including in non-stick cookware, dental floss, nail polish, and carpets. Once discarded, these materials are ultimately disposed of in municipal solid waste landfills.

As a result, landfills are and were passive receivers of these waste streams containing PFAS. They never manufactured or used PFAS in their operations but only received them due to the presence in waste created by virtually every person in the country. There is no practical way for landfills to identify or segregate household wastes containing PFAS from general waste.

Three facts are important to keep in mind. First, listing PFAS compounds directly as CERCLA hazardous substances is unprecedented. CERCLA defines hazardous substances by including any substance already regulated pursuant to federal environmental statutes, such as RCRA or the Clean Water Act. Here, EPA is proposing to list PFAS compounds as hazardous substances **before** finalizing regulatory standards under these other authorities.

Second, there are no current standards for PFAS compounds in permits for landfill leachate—the liquid found in landfills that is either managed via a permit to a publicly-owned treatment works, or POTW, or discharged directly pursuant to a NPDES permit. As a result, CERCLA designation would impose liability—both retroactively and prospectively—on landfills that historically and currently do not have any PFAS requirements in their permits.

Third, landfills, POTWs, and drinking water treatment plants are interdependent public services. For example, POTWs managing leachate from landfills and discharges from other sources generate biosolids while POTWs routinely and increasingly handle those biosolids by disposal in landfills.

As a practical matter, CERCLA designation of these PFAS compounds in the absence of Congressional relief would compel landfills to restrict inbound wastes with elevated levels of PFAS compounds, including spent water filtration systems, biosolids, and contaminated soils from CERCLA sites, including DOD sites. As a result, EPA's goal of promptly remediating PFAS contamination at other sites will be delayed and frustrated. More basically, CERCLA liability will completely disrupt the well-established municipal waste infrastructure in this country. Certain wastes will have no place to go. And increased disposal costs will turn CERCLA's objectives from a "polluter pays" policy into a "community pays" reality.

The solid waste sector is not looking for relief where the groundwater at a landfill has been impacted by these PFAS compounds due to landfill operations. Rather, we are seeking a narrowly tailored exemption from CERCLA liability arising from permitted leachate discharges. The exemption would apply to any PFAS release where the release of PFAS compounds from a landfill are or were contained in an otherwise permitted discharge.

Once landfills become subject to PFAS permit discharge requirements, they would be exempt only to the extent they meet those discharge requirements and qualify for the existing "federally permitted release" exemption from CERCLA liability. In anticipation of these discharge limits, landfills are proactively piloting a range of cutting-edge treatment technologies for PFAS in leachate.

I want to address two arguments that have been asserted against this proposal. First, this type of exemption from CERCLA is nothing new. Congress has exempted parties who were inequitably held liable under CERCLA by creating ten CERCLA exemptions over forty years for parties as diverse as lenders, fiduciaries, brownfields developers, recyclers, and most apropos here, for residential and small business generators of household waste.

Second, EPA has stated that its policy to exercise enforcement discretion under CERCLA for certain passive receivers renders unnecessary the need for a statutory exemption. EPA enforcement discretion is insufficient.

As a matter of law, EPA's decision not to pursue a passive receiver does not protect the passive receiver from a lawsuit from other potentially liable parties. If EPA chooses not to take any action, the passive receiver has no protection from a suit brought by another potentially responsible party. Even if EPA settles with a passive receiver and provides those parties with statutory contribution protection, prevailing case law holds that settlement will **not** protect those settling parties from cost recovery actions brought by parties who have not settled with EPA.

For all of these reasons, SWANA and NWRA respectfully support the limited statutory exemption discussed herein for leachate discharges containing PFAS from passive receiver landfills.