

Table of Contents

U.S. Senate
Date: Wednesday, March 20, 2024
Committee on Environment
and Public Works
Washington, D.C.

STATEMENT OF:	PAGE:
THE HONORABLE THOMAS R. CARPER, A UNITED STATES SENATOR FROM THE STATE OF DELAWARE	3
THE HONORABLE SHELLEY MOORE CAPITO, A UNITED STATES SENATOR FROM THE STATE OF WEST VIRGINIA	11
THE HONORABLE JAMES KENNEY, SECRETARY, NEW MEXICO DEPARTMENT OF ENVIRONMENT	19
KATE R. BOWERS, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE	24
SCOTT FABER, SENIOR VICE PRESIDENT OF GOVERNMENT AFFAIRS, ENVIRONMENTAL WORKING GROUP	29
MICHAEL D. WITT, GENERAL COUNSEL, PASSAIC VALLEY SEWERAGE COMMISSION	34
ROBERT FOX, PARTNER, MANKO GOLD KATCHER FOX, LIMITED LIABILITY PARTNERSHIP	40

HEARING ON EXAMINING PFAS AS HAZARDOUS SUBSTANCES

Wednesday, March 20, 2024

United States Senate

Committee on Environment and Public Works

Washington, D.C.

The committee met, pursuant to notice, at 10:02 a.m. in room 406, Dirksen Senate Office Building, the Honorable Thomas R. Carper [chairman of the committee] presiding.

Present: Senators Carper, Capito, Cardin, Whitehouse, Merkley, Stabenow, Padilla, Lummis, Ricketts.

STATEMENT OF THE HONORABLE THOMAS R. CARPER, A UNITED STATES
SENATOR FROM THE STATE OF DELAWARE

Senator Carper. Good morning, everybody. I am pleased to call this hearing to order this morning.

We are gathered here today for an important discussion to better understand PFAS as hazardous substances and the impacts of regulating them under the Comprehensive Environmental Response, Liability, and Cleanup Act, also known the Superfund Law, also known as CERCLA, but first I want to thank our distinguished panel of witnesses for joining us today to tackle what is a really difficult issue.

Before we get started, I like to tell stories. I am going to tell two quick stories. I used to be a Naval flight officer for many years. I am the last Vietnam veteran serving in the U.S. Senate. I spent a lot of time in Navy P-3 airplanes flying out of California and then all over Southeast Asia during the Vietnam War.

I remember two instances where we were coming in to land. We were back from Southeast Asia. We were in Moffett Field, and we shared Moffett Field between the Naval air station and NASA. They had a big NASA operation. NASA had big airplanes.

Early one morning, one of our Navy P-3s had been flying missions all night and was coming in to land at Moffett field to debrief. There are two runways, parallel runways, and they had

the Navy P-3 land in one of the runways. Traffic control made a mistake and directed the larger NASA airplanes to land in the same runway. It landed right on top of the P-3, right on top of the P-3.

We had 13-man crews. We lost about half of the crew. We would have lost everybody, except for the firefighting crews, who dispatched immediately, came and covered the planes in foam and saved half of the crews.

Fast forward to 20 years later, about 20 years later. In Delaware, we have a huge Air Force base, the Dover Air Force Base. It is the land bridge that connects the United States to the Ukraine, one of the things we do with our C-5 and C-17 aircraft.

One day, I was driving down on State Route 1, which connects, as some of you know, from I-95 to all our beaches, Rehoboth and others, getting just south of the town of Dover, our capital city, and approaching the Dover Air Force Base, and I could see black smoke coming up from the Air Force base.

I drove about another mile or two, and lo and behold, there was a huge Air Force cargo aircraft that had taken off. When they take off, they have four engines, and they have flight engineers and pilots, they had taken off and was flying up, and he got an engine warning light. Four engines, and he got an engine warning light on one of the engines, and instead of the

flight engineer shutting down the engine that was giving the warning light, he shut down another one.

So they ended up with a plane that was supposed to be flying to Europe with a full bag of fuel and a full load of cargo on two engines. That doesn't work very well. They turned around and tried to get back and land and get in the approach path and land on the runway, and didn't make it. They didn't make it. It went in about a mile short. Fire crews dispatched quickly to try to save the lives on the aircraft.

Every life was saved. Every life was saved. That is the good story. That is the good news. The bad news is, there were a number of communities around Dover Air Force Base that now have polluted water that they drink. Something that was designed to save lives has made life more difficult for some of the people who live there around that base. I just wanted to share that with you.

I think there is a lesson to be known and taken away from those two instances that maybe will help inform what we are doing here today.

This isn't a hearing just about firefighting foam, as you know. As we all know, thanks to modern chemistry, Americans have welcomed the use of PFAS in many other forms, from nonstick pans and waterproof jackets to stain-proof furniture fabric, and even as part of heart-valve replacements. My guess is almost

everybody here has PFAS in some form or fashion, on our clothing, on our shoes, our shirts, or whatever. Maybe even in our bodies with what we have had for breakfast, what we had for dinner last night.

Since the 1940s, more than 9,000 PFAS chemicals, yes, that is right, 9,000 PFAS chemicals have been manufactured and used around the world. Chemists are still finding more uses for these chemicals, from enabling lighter-weight materials for our electric vehicle batteries to ushering in high efficiency methods for cooling the energy hungry servers that keep us connected to the internet.

Frankly, PFAS chemicals have made, in many instances, life easier, but this has come at a significant cost. That is the cruel irony of these chemicals. The very substances that can save lives, as I mentioned earlier, and improve the quality of our lives may also put lives at risk.

The major reason that these chemicals are so effective is that they simply do not break down in the environment, as we know. That is why they are known as forever chemicals. They also accumulate, and one might ask, where do they accumulate? Well, they accumulate in plants; they accumulate in animals; they accumulate in our water and our soil, and most regrettably, in our bodies, as well as in the bodies of our children and our grandchildren.

A number of these forever chemicals have been found to be toxic, causing liver damage, fertility problems, and even cancer. As everyone on this committee knows, I am privileged to represent the State of Delaware, at least for the next 9 months, 7 days, 14 hours, 33 minutes.

Yet, we have three counties in our State, and every one of our three counties has been plagued by the presence of PFAS chemicals in our soil, in our air, and in our water. Every one of our colleagues in the U.S. Senate is dealing with the lasting effects of PFAS in their States and their communities as well.

The lasting effect of PFAS contamination is having a major impact not only on our public health, but also on our livelihoods. People in affected communities are worried about falling property values and, in too many instances, farmers with contaminated lands and livestock are being driven out of business.

I salute our utilities, who are bearing the brunt of this contamination and doing everything they can to remediate it while providing safe and reliable drinking water, wastewater, and solid waste services. As we will all recall, our colleagues and I fought to include more than \$10 billion in the Bipartisan Infrastructure Law to support their response efforts.

Last year, the Environmental Protection Agency took a significant step to address the impacts of PFAS by proposing to

designate two of these chemicals as hazardous substances under the Superfund Law. We anticipate that this rule will be finalized later this calendar year.

The Superfund Law provides the government, as you know, with the authority to hold polluters responsible for environmental contamination caused by dangerous substances. With this proposed designation, the EPA is doing good work to increase transparency around the prevalence of these chemicals while also protecting the environment and public health.

Though this designation is an important step forward, we have also heard concerns about the potential unintended impacts this designation could have on entities like municipalities and water treatment plants. These facilities and entities do not use these chemicals at all but could be held responsible for downstream contamination simply because the contamination traveled through their facility. To date, the EPA has never enforced an action against a passive recipient of contamination under the Superfund Law.

However, these facilities and entities are concerned that this designation could potentially saddle them with unjustified lawsuits until the EPA identifies the real responsible parties. As you know, working through Superfund liability could take years under the current legislative structure of the Superfund Law.

The goal of today's hearing is to better understand these concerns and to continue our efforts to confront this contamination where it exists. Cities and States around America are scrambling to protect citizens and restore contaminated lands and waters from PFAS, but with a hazardous substance designation on the horizon, these entities and their utilities are understandably worried about legal costs for contamination that someone else may have caused.

Ultimately, I believe that the Federal Government, States, and local communities should all come together to address these toxic pollutants. Our cities and their citizens are desperate for a solution, but we must keep in mind common sense as we work to identify who is responsible for cleaning up these chemicals.

The bottom line is this: while PFAS chemicals can serve useful purposes and do serve useful purposes in our lives, the other side of the coin is that PFAS chemicals are pervasive threats to our families' health and could cost our economy not just millions, but potentially billions of dollars in cleanup expenses every year. According to the Minnesota Pollution Control Agency, it costs \$50 to \$1,000 to buy a pound of PFAS to make consumer products, but it costs \$3 million to \$18 million per pound to remove it from wastewater. Think about that.

We need strategic national policies and investments to help us do several things. First, determine the spread of PFAS

contamination; second, identify the health threats that these chemicals can pose; and third, explore the best methods to rid our water and our lands of them, and finally, collectively find a path forward to make the actual polluters pay while protecting innocent parties.

All of us look forward to hearing from our witnesses today. We sincerely look forward to hearing from you today about how we can work together to address PFAS contamination. Senator Capito and I have been privileged to lead this committee through some really tough issues over the last several years, and this is maybe one of the toughest, maybe the toughest, but I get to work here with her for a while longer. This is something that I really want to have taken on and dealt with in a responsible way on my watch.

Senator Capito's home State of West Virginia, my native State, has endured far more than its fair share of PFAS contamination. I am delighted to be working on this issue with you. I look forward to making progress. Thank you.

[The prepared statement of Senator Carper follows:]

STATEMENT OF THE HONORABLE SHELLEY MOORE CAPITO, A UNITED STATES
SENATOR FROM THE STATE OF WEST VIRGINIA

Senator Capito. Thank you, Mr. Chairman, and I thank the witnesses for being here, and the full room is nice to see.

Addressing the challenges of a class of substances, collectively referred to as PFAS, is one of my highest environmental policy priorities. Due to their unique chemistry, PFAS has been used, as the Chairman said, in almost nearly every industrial application since the 1940s.

Given that PFAS is everywhere, we must carefully consider the best and most efficient way to address past contamination and limit future exposure. This means prioritizing actions that address PFAS, ones of greatest known health risks, and examining common routes of exposure for those chemicals.

I firmly believe that the most effective solutions for tackling PFAS require bipartisan collaboration, as the Chairman mentioned. Recognizing the urgency of the situation, I want to continue to work with him to develop tailored legislation. We have been trying; we have been trying.

Last year, the EPA announced it intends to designate two legacy PFAS as hazardous substances under CERCLA. Today's hearing offers us an opportunity to evaluate the potential consequences of that proposal. CERCLA was promulgated in 1980 after the enactment of the Clean Air Act, Clean Water Act, Safe

Drinking Water Act, and other foundational Federal environmental statutes. CERCLA imposes strict, joint, and several, and retroactive liability for releases of chemicals that are designated as hazardous substances.

CERCLA enshrines the core principle of the polluter pays. If you cause a release, you are responsible for the cleanup. Congress established CERCLA as the last stop in deeming a substance as hazardous. Generally, a substance is subject to regulation under CERCLA only after it has been first regulated by other statutes.

This leads us to the specific topic of our hearing today. Despite having years to evaluate and potentially regulate PFAS, the EPA is considering, as I mentioned, designating two PFAS under CERCLA before comprehensively addressing them under any other Federal environmental statute. By the EPA's own admissions, the CERCLA-first approach does not provide the EPA with the flexibility to exempt innocent parties from liability for cleanup costs. If an entity meets the definition of potentially responsible party, that entity is liable for all clean-up costs, regardless of intent or exercise of due care.

While I appreciate that EPA claims that it plans to exercise enforcement discretion, it will not provide a liability shield to those who had no role or responsibility for PFAS contamination. Absent Congressional intervention, the burden of

cleaning up sites tainted with PFAS will fall on the shoulders of entities like drinking water and clean water systems and waste management utilities. These entities are known as passive receivers. They did not manufacture or generate PFAS and were unknowingly or required by law to catch or to receive these contaminants.

Given that the EPA plans to finalize its proposal, Congress must step in, I think, to address the overly broad sweep of CERCLA liability, as Congress has done in the past, 11 times before.

If the agency regulates PFAS under CERCLA and then the EPA finalizes the drinking water standards, which I have been after them to do for several years, as it has proposed to do, the CERCLA listing will have put water utilities in an untenable position.

Communities would be required to remove six substances, two of which would be hazardous substances, through water treatment processes, therefore concentrating the PFAS in filters. Water systems are going to be stuck holding these filters because landfills would be unwilling to accept them due to liability concerns.

Wastewater and storm water utilities, although not responsible for generating these flows, could face similar liabilities, receiving PFAS chemicals through intakes or storm

water runoff. These passive receivers would bear the brunt of these liabilities, facing frivolous lawsuits for just providing essential services.

No EPA enforcement discretion policy can prevent those lawsuits by activist third parties. Without Congressional action, a wave of lawsuits could potentially raise taxes and utility rates on millions of Americans, all while enriching the trial lawyers. This result flips the polluter pays principle on its head, turning it into a consumer pays model.

This year presents us with a unique opportunity to confront the PFAS challenge. To effectively address these issues, which we should, we have crafted a draft piece of legislation that focuses on a comprehensive study to tackle PFAS pollution.

I have made it clear that my support of any PFAS legislation is contingent upon addressing this liability issue under CERCLA and providing liability protections for those passive receivers. This is a non-negotiable condition for me. Entities that had no role in creating or controlling these contaminants should not be penalized.

I am confident that carefully crafted bipartisan legislation can strike the right balance between public health and in the environment from PFAS contamination without imposing additional financial strain on American households already grappling with the challenge of daily living.

I look forward to our collective efforts in finding a comprehensive and fair solution to this pressing and, I would say, very complicated issue. I yield back.

[The prepared statement of Senator Capito follows:]

Senator Carper. Thanks very much for those words and for the partnership we have on this issue and on so many other issues.

As Senator Capito knows, my family is originally from a coal mining town in West Virginia called Beckley in Raleigh County. My grandfather was one of the co-founders of Raleigh County.

My dad used to say to my sister and me, when we were kids growing up, he used to say the hardest things to do are sometimes the things most worth doing. He said, the hardest things to do are sometimes the things that are most worth doing. He also used to say, quitters never win, and winners never quit.

Those words are, frankly, on my mind today, along with the words of a friend of ours who is actually from Wyoming, who was a witness on another committee that I serve on, who once, at a hearing, he said bipartisan solutions are lasting solutions. Think about that: bipartisan solutions are lasting solutions. We work on a lot of tough issues on this committee, but we are usually able to get to the right place by working across the aisle, and we are going to again do that as well.

I want to say a special thanks to our staffs, both majority and minority, and personal staffs for the work that you have done already and are prepared to do to try to get us to where we need to go.

With that, let us turn to our panel of witnesses. We are grateful to all of you for the time that you have taken to join us this morning, prepared for this, to discuss this important topic.

First, we are going to hear from Secretary James Kenney. He serves as the Cabinet Secretary for New Mexico Environment Department. Prior to his current appointment, Secretary Kenney spent more than 20 years across two stints at the USEPA and also as an environmental engineer, leading both criminal and civil investigations related to environmental statutes.

Thanks for joining us, Secretary Kenney.

Next, we have Kate Bowers. Kate serves as the Legislative Attorney in the American Law Division of the Congressional Research Service. Her work focuses primarily on environmental law, including the Clean Air Act, the Clean Water Act, hazardous substance response and regulation, and other pollution control laws and environmental enforcement.

Third, we are going to hear from Scott Faber, who is the Senior Vice President for Government Affairs at the Environmental Working Group. Scott has been a leading voice for the environmental community on addressing PFAS contamination while also serving as an adjunct professor at Georgetown University Law Center.

Next, we are going to hear from Michael Witt, General

Counsel for the Passaic Valley Sewerage Commission. Mr. Witt is testifying on behalf of the Water Coalition Against PFAS.

Welcome.

Finally, we are going to hear from Rob Fox, who serves as a partner at Manko Gold Katcher Fox, LLP. Mr. Fox is testifying on behalf of the National Waste and Recycling Association and Solid Waste Association of North America.

We thank you all for appearing today and taking your time. Thanks for your preparation and your willingness to answer some of our questions as we try to find the right path forward on a tough issue.

With that in mind, Secretary Kenney, go ahead.

STATEMENT OF THE HONORABLE JAMES KENNEY, SECRETARY, NEW MEXICO
DEPARTMENT OF ENVIRONMENT

Mr. Kenney. Good morning, Mr. Chairman, Ranking Member Capito, and members of the committee, and fellow panelists. My name is James Kenney. I am the Cabinet Secretary of the New Mexico Environment Department, and I appreciate the opportunity to be here today to talk to you about PFAS.

As you indicated, my experience is 20-plus years working across Federal and State government agencies looking at chemical plants as well as defense facilities, all of which are right at the center of PFAS discussions.

As you indicated, Mr. Chairman, the group of chemicals we are talking about are moving through our economy in both consumer goods and industrial goods. They are moving through our economy and then, ultimately, into our environment. They don't decompose, as we all know, hence the term forever chemicals. They bioaccumulate in our bodies. They bioaccumulate in our wildlife, and they move through our land and water at a significant cost to remediate.

We know that these chemicals can have serious health effects, which is why we are here today, and the New Mexico Environment Department is leading efforts to ensure that they don't continue to move into our environment.

When I was before this committee in 2001, I advocated for

the use of RCRA to address PFAS. The Resource Conservation and Recovery Act, our Nation's hazardous waste law, is something that States can take action on today to address PFAS contamination. This is because the Congress had the insight to give USEPA and States broad authority under RCRA.

In fact, Governor Michelle Lujan Grisham petitioned EPA to list even more chemicals as hazardous under RCRA, and the USEPA has taken up that petition. There are two rulemakings active right now that EPA hopes to finalize by the end of the year to again affirm that States and EPA can regulate PFAS under RCRA.

I continue to advocate here today, stating that PFAS is best addressed under RCRA as a starting point, either through direct Congressional action or continued USEPA creation of and finalizing rules. Addressing PFAS under RCRA brings a more common sense foundation, in my opinion, prior to implementing the CERCLA requirements.

Here is why: RCRA is largely implemented by the States. In contrast, CERCLA is primarily implemented by multiple Federal agencies with less involvement from EPA and States. Under CERCLA, implementation of those rules allows the Department of Defense, as one entity, to police itself.

That has not worked. It has produced inconsistent results in New Mexico and across the Country. There is no other industry that is allowed to police itself under CERCLA like the

Department of Defense does.

On my fifth day on the job as Cabinet Secretary five years ago, New Mexico was slapped with a lawsuit to undermine RCRA authority for the cleanup of PFAS by the United States. We are now in the fifth year of that lawsuit. What we have to show for it is \$8 million in defensive litigation, about \$3.7 billion of our agricultural industry threatened by migrating plumes of PFAS.

This would impact, again, New Mexico's ag industry, but also North America's largest cheddar cheese plant. In addition to that, New Mexico has paid \$850,000 to help a dairy farmer dispose of his euthanized cows for PFAS poisoning as RCRA hazardous wastes.

We plan to continue to work to test the service men and women, as well as residents who live around one of our bases for PFAS contamination. All this under the backdrop of not getting anywhere with the Department of Defense in terms of remediating PFAS off-base.

Given my experience with RCRA and CERCLA, I offer two recommendations for the committee. One, Congress should take immediate action to list PFAS as hazardous waste under RCRA to achieve better outcomes for communities sooner, and two, Congress should modify CERCLA and the Defense Environmental Restoration Program so that USEPA is the sole responsible

implementing agency, not the Department of Defense.

In doing so, we will create a strong program that is focused on both the polluter and giving States the ability to address the passive receivers with discretion.

Thank you.

[The prepared statement of Mr. Kenney follows:]

Senator Carper. I will just say to our witnesses, in baseball, they have a term called telegraphing a pitch. You can tell by the way the pitcher holds the ball and releases the ball, whether he is throwing a curveball, split finger, whatever it was.

I am going to telegraph a pitch. I am going to come back to his two recommendations, and I am going to ask each of you just to comment on the feasibility of those, okay? We will do that when we do the Q and A.

Next in the on-deck circle, coming into the batter's box, is Kate Bowers. Kate, welcome. Please proceed.

STATEMENT OF KATE R. BOWERS, LEGISLATIVE ATTORNEY, AMERICAN LAW
DIVISION, CONGRESSIONAL RESEARCH SERVICE

Ms. Bowers. Thank you, and good morning, Chairman Carper, Ranking Member Capito, and members of the committee. My name is Kate Bowers, and I am a legislative attorney in the American Law Division at the Congressional Research Service. Thank you for inviting me to testify today on behalf of CRS.

In my brief remarks, I will be addressing the mechanisms established in the Comprehensive Environmental Response, Compensation, and Liability Act, also called CERCLA or the Superfund Law, for holding parties responsible for the costs to clean up contaminated sites. My testimony will also address considerations that may be relevant to liability if EPA finalizes its proposal to designate one or more PFAS as hazardous substances under CERCLA.

CERCLA authorizes EPA to clean up contaminated sites and to compel entities that bear responsibility for contamination at a site to perform or pay for cleanup activities. Private parties that incur cleanup costs may seek to recoup those costs from other parties or from the Superfund Trust Fund. This framework is intended to ensure that there will be parties who can bear the cost of cleaning up contamination and that all responsible parties who are able can be required to share those costs.

Parties may be liable under CERCLA for response costs,

injury to natural resources, natural resource damages assessments, and Federal public health studies. But for a party to be liable for cleanup costs under CERCLA, several requirements must be met. There must be a release or threatened release of a hazardous substance into the environment. There must also be a response action, or cleanup, and response costs at the site.

Only certain categories of parties with a connection to the contamination may be held liable. Those parties are often called potentially responsible parties, or PRPs, and includes current owners or operators of a site, past owners or operators, arrangers, and transporters.

CERCLA allows any person, including EPA, States, local governments, tribes, and private parties to sue a potentially responsible party to recover response costs that they have incurred. It also allows a party that has been required to pay response costs to assert a contribution claim to compel other PRPs to bear an equitable share of those costs.

Parties that have resolved their CERCLA liability to the United States or a State cannot then be held liable for contribution claims by other PRPs regarding matters addressed in that settlement.

Liability under CERCLA is only associated with releases or threatened releases of hazardous substances. A substance may be

considered hazardous for purposes of CERCLA based on either designation under another statute to which CERCLA refers, or a direct designation pursuant to CERCLA itself. The proposed PFAS designations, if finalized, would represent the first use of EPA's direct designation authority under CERCLA.

Designation of one or more PFAS as a hazardous substance under CERCLA would subject releases of those PFAS to the statute's reporting requirements and liability framework. Designation would not trigger a public or private cleanup, alter the CERCLA response process or applicable cleanup standards, or determine the liability of any party.

If the preconditions to liability are met and no defenses or exemptions apply, entities that are associated with facilities or sites where PFAS was produced, used, or disposed of could be held liable in the event of a PFAS hazardous substances designation.

Because CERCLA liability extends to the Federal Government, this could also include Federal departments or agencies that released PFAS. But the determination of an individual party's liability is a site-specific, fact-intensive inquiry, and so, as a result, it is not possible to determine a party's or a category of party's liability in the abstract.

CERCLA also provides several exemptions and defenses to liability for categories of parties that meet certain criteria.

For example, the statute provides an exemption to CERCLA liability for response costs or damages resulting from a federally permitted release. If a release or a discharge is in accordance with a permit issued under another specified Federal statute, like the Clean Water Act, that discharge then might not be a basis for CERCLA liability.

EPA has also stated that it does not intend to pursue enforcement against certain entities, such as farmers, water utilities, airports, or local fire departments. Enforcement discretion does not alter the scope of liability as defined in the statute, nor does it bar States, local governments, tribes, or private parties from taking action against a PRP.

If a party has not resolved its liability by settling with EPA or a State, it won't receive protection from future contribution claims, but by limiting the number of response actions EPA undertakes, the agency's policy could limit the circumstances giving rise to the response costs that are a necessary condition for CERCLA liability.

Thank you, and I look forward to your questions.

[The prepared statement of Ms. Bowers follows:]

Senator Carper. Thanks very much, and our thanks to everybody at the Congressional Research Service for the service that you provide, not just for the Senate and the House, but for our Country. Thank you very, very much.

Next, we are going to hear from Scott Faber. Scott, please proceed. Thank you. Welcome.

STATEMENT OF SCOTT FABER, SENIOR VICE PRESIDENT OF GOVERNMENT
AFFAIRS, ENVIRONMENTAL WORKING GROUP

Mr. Faber. Thank you so much for inviting me.

This morning, I am joined by Nora Strande. Nora's sister, Amara, recently passed away from a form of liver cancer she believed was caused by PFAS. Amara and Nora grew up in the heart of the Nation's largest PFAS plume and, like all of us, Amara and Nora had no idea they were drinking water contaminated with PFAS.

Senator Carper. Scott, where is that plume? What State, where is it?

Mr. Faber. That is east of Saint Paul in Minnesota, Senator.

Senator Carper. Thank you.

Mr. Faber. Like all of us, Amara and Nora had no idea they were drinking water contaminated with PFAS. All of us, that is, except for the polluters. We are here today because the manufacturers of these chemicals hid their harms from their regulators, from their customers, from their neighbors, their workers, and from you, from Congress. That is why PFOA and PFOS were not added to the list of more than 800 hazardous substances decades ago, because the companies that make these chemicals concealed their harms from you.

None of us, least of all Amara and Nora, consented to be

polluted with PFAS, but all of us have PFAS in our blood. Some of us, firefighters, people who live or work for PFAS makers and users, people who live in defense communities, people living downstream or downwind of these companies, have far more PFAS in our blood. Yet, the same companies, many of the same companies, continue to release thousands of pounds of PFAS into the air and water every year.

Instead of taking action to reduce those releases, industry leaders are now urging you to create more loopholes. Our view is very simple: legal loopholes are the problem, not the solution. The good news, thanks to actions taken by Congress in the past, is that responsible stewardship of hazardous substances is nothing new, especially for water utilities and waste managers.

Right now, 66 hazardous substances, 66 are found in our drinking water systems, including equally notorious pollutants, like benzene, carbon tetrachloride, PCBs and TCE. Right now, nearly 250 hazardous substances are found in our landfills, including arsenic and lead and chromium.

If water utilities and waste managers are already addressing these other hazardous substances, what is different about PFOA and PFOS? When it comes to hazardous substances, the law allows EPA to use their discretion to focus on the polluters and to assign responsibility on those who

should bear responsibility. That is what EPA has always done, and that is what EPA has said it will do with regards to PFOA and PFOS.

In a recent letter to House leaders, EPA wrote "The agency will focus its enforcement efforts on manufacturers and does not intend to pursue entities such as farmers, water utilities, airports, or local fire departments, and will provide protections against third party cost recovery claims." This letter is consistent with EPA's long history of using the discretion provided by Congress to assign liability where it belongs, with the polluters.

The Superfund Law is not only designed to recover and fairly apportion the costs of cleanup. The law is also designed to ensure that public and private companies are good stewards of these hazardous substances. Creating loopholes in the Superfund law will remove a powerful incentive for water utilities and waste managers to be good stewards of these toxic forever chemicals.

Let's address the big challenges before us. Let's not make them worse. Congress has never created a Superfund exemption for a specific chemical, not even for notorious pollutants like PCBs and asbestos.

I know we all wish Amara was here today to deliver this testimony, not me. Just before Amara passed, she helped enact

the toughest PFAS law in the Nation, which was later named Amara's Law. Imagine the courage it took to sit where I am sitting now and fight for the rest of us.

Let's honor Amara by closing the loopholes that are making us sick, not creating new loopholes.

Thank you.

[The prepared statement of Mr. Faber follows:]

Senator Carper. How old was Amara when she passed, do you know?

Mr. Faber. Amara passed two days before her 21st birthday, Mr. Chairman.

Senator Carper. And this is her sister?

Mr. Faber. This is her sister.

Senator Carper. Thank you for joining us today. We are sorry for your loss.

Thank you, Mr. Faber.

Mr. Witt, you are next, Michael Witt. Go ahead, please.
Thank you for joining us.

STATEMENT OF MICHAEL D. WITT, GENERAL COUNSEL, PASSAIC VALLEY
SEWERAGE COMMISSION

Mr. Witt. Good morning, and thank you, Chairman Carper and Ranking Member Capito and all members of the committee for the invitation to testify about the need to protect water systems from PFAS liability under CERCLA. I am honored to be here.

My name is Michael Witt, and I am general counsel of the Passaic Valley Sewerage Commission in Newark, New Jersey or PVSC. Formed in 1897, PVSC is one of the oldest environmental agencies in the United States. We have been providing sewer service for 100 years this year, actually. We operate the fifth largest wastewater plant in the Nation, and every day, we provide service to about 1.5 million people spread across 48 communities in northeastern New Jersey.

I am testifying today on behalf of the Water Coalition Against PFAS. The Coalition includes organizations whose membership represents all facets of clean and safe water delivery: the National Association of Clean Water Agencies, the Association of Metropolitan Water Agencies, the American Water Works Association, the National Association of Water Companies, the National Rural Water Association, and the Water Environment Federation. Together, the Coalition advocates for tens of thousands of wastewater and drinking water and storm water utilities who keep our Country's vital water supply safe and

operating each and every day.

Water sector utilities were created to protect public health and the environment. Ironically, it is the very act of doing that, providing clean and safe drinking water and treating waste water, that exposes our utilities to liability under CERCLA. Utilities do not manufacture PFAS. We do not profit from PFAS. Industry did that, for decades.

In contrast, utilities passively receive PFAS via drinking water supplies and through influent. That fact and that fact alone exposes each and every utility in the United States to potential liability under CERCLA. It exposes our ratepayers to having to pay for the problem of funding PFAS cleanups. This is simply wrong, and Congress must act to fix it.

Our coalition is asking Congress to provide water systems with liability protections under CERCLA for PFAS to help ensure that the polluters, not the public, pay for cleanups. To be clear, as EPA and State agencies develop drinking water, wastewater, and storm water standards, utilities will be implementing these standards through costly treatment upgrades. We will be working hard to do this and still keep our rates affordable because we have to charge for it. CERCLA liability would come on top of that and despite those investments.

Some have expressed the opinion that if utilities just comply with their Federal permits, they won't have CERCLA

liability. That is not the case. The existing CERCLA exemptions tied to Federal permits generally would require that PFAS be directly addressed in permits before it could provide any sort of liability shield. But EPA and the States are still figuring out how to address PFAS and permits, so we don't have that yet.

CERCLA is also retroactive, meaning that in the future, when we can rely on those permit shields, CERCLA would still be able to look back and still keep up on the hook for remediating decades worth of PFAS that the chemicals companies have pumped into our water and our air and on our land.

I am also aware that EPA has proposed to exercise enforcement discretion and that they do not intend to target water systems. We welcome that policy, but it is not enough. It doesn't carry the force of law. It could change tomorrow. Its impact is limited to cleanups that are led by EPA, not by private parties. CERCLA provides even the most culpable parties with multiple avenues to drag innocent parties into extremely costly and complex litigation, and there is little EPA can do to stop it.

This is not a hypothetical statement. We know that this happens, because it has happened to my own utility. We have been involved in the largest Superfund case to date under that law for the last 28 years.

From 1951 to 1969, the Diamond Alkali Company manufactured Agent Orange on the banks of the Passaic River. A byproduct of Agent Orange is tetrachlorodibenzo-p-dioxin, or TCDD, which has been labeled by scientists as one of the most toxic synthetic chemicals that humans know how to make. Like PFAS, TCDD is persistent in the environment, and like PFAS, PVSC does not manufacture, use, or profit from TCDD.

During its time manufacturing Agent Orange, Diamond Alkali intentionally dumped TCDD into the Passaic River. The damage that the company did will run into the billions of dollars to remediate.

It is difficult to imagine a more culpable party under CERCLA, yet Diamond Alkali's successors in interest have been able to drag through decades of litigation hundreds of parties into it, including PVSC and 40 other public entities, into this fight. So we know that enforcement discretion by itself simply does not work.

We have also heard it said that utilities need the threat of CERCLA to ensure that they will do the right thing. This is insulting, it is unmoored from reality, and it doesn't take into account that we are already under permits. Everything we do, every time we operate, is under the Clean Water Act. We already have the Safe Drinking Water Act to provide those standards for us.

That is where the focus should be, on enforcement and on helping these communities to address PFAS, is through modification of our treatment systems. Let us put our money where it counts, not into lawsuits. Thank you all.

[The prepared statement of Mr. Witt follows:]

Senator Carper. Thank you, Mr. Witt.

Mr. Fox, please, and then we will go to questions. Thanks.

STATEMENT OF ROBERT FOX, PARTNER, MANKO GOLD KATCHER FOX,
LIMITED LIABILITY PARTNERSHIP

Mr. Fox. Chairman Carper, Ranking Member Capito, and members of the committee, thank you for the opportunity to appear before you today.

My name is Robert Fox. After graduating from Harvard Law School, I 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.

My testimony today is on behalf of the Solid Waste Association of North America and the National Waste and 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 nonstick 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 receive them due to the

presence in waste created by virtually every person in this Country. There is no practical way for landfills to identify or segregate household waste 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 and the Clean Water Act. Here, EPA is proposing to list PFAS compounds as hazardous substances before finalizing regulatory standards under those 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 water treatment plants are interdependent public services. 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 waste 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 landfills 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 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 that they meet 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 11 CERCLA exemptions over 40 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 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, if EPA chooses not to take any action, the passive receiver has no protection from a suit brought by any other potentially responsibly party. Even if EPA settles with the 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 been sued or 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 a passive receiver landfill.

[The prepared statement of Mr. Fox follows:]

Senator Carper. Mr. Fox, thanks. You have given us a lot to think about. Thank you so much.

I mentioned when I said earlier that today, I was going to telegraph my pitch and go back to Mr. Kenney and ask him to repeat what he said at the beginning of his testimony. Rather than do that, I am going to do that for the record. We will do that for the record. We will reach out to everybody on the panel and restate what he has already said and ask each of you your opinions.

One of the things I oftentimes do at the end, my colleagues know, at the end of a hearing, especially one as difficult to deal with as this one, I will ask the witnesses at the end of the hearing, where do you think we have, amongst the witnesses, where is there agreement? Maybe not total agreement, but some consensus. One of the things we have to do at the end of the day is to try to find consensus, and this is an opportunity for you to at least start that process.

We will start, Mr. Kenney, with you. Mr. Secretary, I want to take a minute, just take a minute. Where do you think there is some consensus on this panel?

Mr. Kenney. Mr. Chairman, I think there is consensus on the panel around that the Clean Air Act, Clean Water Act, and RCRA are foundational statutes that should be built upon, and CERCLA layering on top of that provides an added value of

protection. But that is a time-dependent approach. I think that is something that I suspect the panel, I know communities in New Mexico would be better protected with that approach.

Senator Carper. Thank you for that. Ms. Bowers?

Ms. Bowers. Thank you, Senator, thank you for the question.

I think we can say that, in the context of PFAS contamination, we have identified the parties that could be held liable as entities that have been involved in releases of PFAS, if no other preconditions to liability are met, and no exemptions apply.

What the committee may wish to consider is whether additional protections in the form of a liability exemption would be necessary to go beyond the enforcement discretion that the EPA has indicated that it intends to apply, and whether it wishes to go beyond exemptions such as the federally permitted release exemption from liability, which could potentially apply to some entities that could be held liable in the event of a cleanup of PFAS contamination.

Senator Carper. Good. Thank you for that.

Mr. Faber?

Mr. Faber. Thank you, Senator, for the question.

I was honored to be here five years ago when we first started working together to address PFAS contamination, and

thanks to your leadership, we now know a lot more about who is releasing PFAS and just how much is in our drinking water.

Unfortunately, we have learned that millions of people are drinking too much PFAS in their tap water. I think all of us agree that we should quickly finalize the drinking water standards. Senator Capito, I was so glad to hear you say that this morning. I am hopeful we will see something soon.

I think we would all also agree that we shouldn't be making this problem bigger, that we shouldn't be allowing manufacturers and users of these chemicals to continue to discharge these chemicals with no limits at all.

Imagine if I were sitting here today and testifying that people could release asbestos or PCBs or dioxins into the atmosphere or into the water with no limits at all. You would all think that was ridiculous, but that is exactly the case with regards to PFAS. There are likely more than 30,000 companies that are discharging PFAS into the air and water right now. If we were to take steps to limit those discharges, that would be less PFAS entering the drinking water systems and landfills that the other witnesses are here addressing. It feels like that is an area where there is an opportunity for real progress.

Senator Carper. Good, good. Thank you. Yes, thank you for that.

Mr. Witt?

Mr. Witt. Thank you, Chairman. I have to say, I am actually really quite encouraged by what I have heard so far this morning. I don't think that there is a lot of disagreement on this panel. We all acknowledge and recognize the problem that is there.

I think the only issues between this panel, where there may be some difference of opinion, is how to get there. We all recognize the importance, and certainly, from the water sector's point of view, of the water sector's role going forward under PFAS regulatory schemes on being part of the solution to this problem.

We just need to make sure that we are not, as Mr. Faber just said, we are not a manufacturer or user, and that is where the liability needs to be put, as Mr. Faber just said. The difference of opinion here may be about whether or not there is an exemption for this sector that is needed under CERCLA, and again, I think that it definitely has to happen.

Senator Carper. I am going to ask you to hold it there, if you will, okay? Finish your sentence, but then we need to go to the next witness.

Mr. Witt. Yes, I was just going to say, hope is not a good plan.

Senator Carper. Henry Ford used to say, if you think you can, or you think you can't, you are right. We need a sense of

optimism. This is a tough issue. Thank you for your optimism.

Mr. Fox?

Mr. Fox. Sure. I think there are probably two things that I heard that there was some consensus on. One is that listing PFOS and PFOA before it is regulated or designated under other statutes is out of sequence. In 44 years of CERCLA's history, it has never been done before, and there is a good reason for that, because you need the standards and the regulation, and I didn't hear any dispute on that issue in terms of the sequence.

The second was that the guiding principle under Superfund is polluter pays, and we don't want to create a situation where the people who are paying are ratepayers and taxpayers. So we have to do this carefully and deliberately so we don't have that law of unintended consequences.

Senator Carper. Thanks.

Now, we are going to hear from our Ranking Member of the committee, Senator Capito. I could not have a better partner, and I need a great partner on an issue like this.

Senator Capito?

Senator Capito. Thank you, Mr. Chairman. And I want to thank all of you. Mr. Faber mentioned five years ago. We have learned a lot; I have learned a lot, and this impacts all of our States. We had an issue with our DOD in West Virginia, so I empathize with that.

Anyway, I would like to note that we received letters from 250 entities requesting that Congress provide some passive receiver exemptions under CERCLA. They are like drinking water, waste water, ag groups, State and local governments, airports, and others. I would ask unanimous consent to submit those letters for the record.

Senator Carper. Without objection.

[The referenced information follows:]

Senator Capito. Good, thank you.

Let us talk about, I think one of the cruxes of this enforcement discretion point, the EPA says enforcement discretion to protect water and wastewater, and that their intent is to focus on the polluter pays and the producers and the users.

Mr. Witt, you had direct experience with this through the Passaic Valley Sewerage Commission during the dioxin Superfund litigation. Could you speak about your experience, and you did speak a little bit about this in your opening statement, how successful or unsuccessful the EPA's policy in protecting your utility from financial and legal challenges related to the cleanup of the site? How does it work if that is what their aim is?

Mr. Witt. Thank you for the question, Senator.

It hasn't worked because, as has been pointed out, and Mr. Fox is certainly more of a legal expert on CERCLA than I am, but it hasn't worked. Because as was pointed out, even if EPA doesn't sue you, everybody else involved in a Superfund case can sue you.

In PVSC's case, again, we don't make dioxin. We don't profit from it. We don't use it. Yet, for the last eight years, since 2016, by having been drawn into this lawsuit, PVSC has had to expend over \$4.6 million in legal fees defending this

case against a contaminant that is not our responsibility, that we didn't put into the river. We didn't make it; we don't use it, nevertheless, we are force marched through this lawsuit.

Forty other public entities are being force marched through lawsuits related to the Diamond Alkali site by the parties who are liable for putting this, again, most toxic chemical that human beings know how to make that is not radioactive, into the environment. There is no way to get us out except by settling with us directly. That is what EPA is trying to do, but it doesn't stop you from being involved in the lawsuit. That is the same exemption we are asking for under PFAS. We are trying to be part of the solution here. We are not part of the problem.

Senator Capito. Well, the good news is, I think that what I hear the panel saying is, we are at the precipice, we are so much closer at addressing this issue from our standpoint, and if we can get the drinking, let's talk about the drinking water standard. Let's just say you are a small water system, and Mr. Fox, this is for you, in West Virginia.

Let's say you have a certain level that you have to, that you can't pass through. We have the technology and the carbon filters, so they purchase those, which are several hundred thousands of dollars for a small water system. They catch it, hopefully all of it, but there might be some that could get

through. We know that is always a possibility.

I guess, what disproportionate problems would they have at a small water system because they can't bear the brunt of it? But then the other question is, and we have learned this through our investigations is, how do you destroy it? How do you, once you catch it, what do you do with it?

That is a big issue in our bill that we have looked at, is to try to award prizes to people that can figure out how to do this. If you burn it, does it go back up in the air and people are breathing it? All these kinds of issues. Mr. Fox?

Mr. Fox. Thank you for the question, and I think you are raising a really important point in two ways. First of all, municipal solid waste landfills are not going to take that material if they don't have passive receiver protection, because it will incur liability for them, so that granulated, activated carbon filtration systems will not have a place to go.

They will have to go to hazardous waste landfills or hazardous waste incinerators, if they will accept it. Order of magnitude more expensive for these small water authorities who are wastewater treatment plants, talking about five, eight times more expensive, not including the transportation costs. So it will have an incredibly disproportionately negative effect on those industries, because they will have no place to send them. I will say, that they may not even be able to dispose of them in

the hazardous waste incinerators and landfills because they may not be compatible with those facilities.

Senator Capito. Yes, that is a big issue. So, you know, we are talking a lot of technicalities here. I think what we are bypassing a little bit, not because we want to, but because we are trying to get to the right things, are how safe is this in our water, is there a level, how important?

I am just going to go really quickly, I know I am almost at my time, Secretary Kenney, let's go through quickly, what will the Safe Drinking Water Standard mean in this discussion? In other words, how important is that, and how quickly should that have been done? I think, yesterday, but that is my opinion. Really quickly.

Mr. Kenney. Senator, I agree. It should have been done yesterday. We are looking forward to it coming out. But how important is that is it will set a north star by which utilities will have to, anyone discharging, I should say, treating for drinking water, will have to meet that standard.

It will require some technology to be invested, but that is not a bad thing here, is that once we have a standard, that is usually what spurs the innovation to create the technology. I will keep it brief and hold it there.

Senator Capito. Ms. Bowers, do you have anything to add there?

Ms. Bowers. Yes, thank you, Senator.

I would just add that, if EPA finalizes that drinking water standard under the Safe Drinking Water Act, that standard could potentially be incorporated as a standard for cleanup under CERCLA. That determination is a site-specific one, again, but the statute does have room for drinking water.

Senator Capito. So that might beg the question as to, do you go to the CERCLA thing before you have the safe standard. I will move one to Mr. Faber really quickly.

Mr. Faber. Just a reminder, Senator, that even if the President finalizes the drinking water standard today, utilities will have three to five years to get into compliance. I think Mr. Fox's point is an important one that, while utilities should not be sending their GAC filters to subtitle D landfills, they can and should send them to subtitle C hazardous waste landfills. Indeed, they should have been. This is one of the things that I find troubling.

Senator Capito. Well, I want to stick on the water standard. Sorry about that, because I am out of my time.

Mr. Witt, do you have a comment on safe drinking water and how that might impact you?

Mr. Witt. Again, I concur with the panel that it is an important step forward and needs to happen. Again, it is a matter of putting the right regulation in place at the right

time, though.

Senator Capito. And what comes first? Yes, Mr. Fox?

Mr. Fox. Yes, that is really what I was going to say. It is a sequencing issue. It has to be regulated under those other statutes first before CERCLA.

Senator Capito. Before it goes to CERCLA. Thank you.

Senator Carper. Thanks for those questions.

Next, will be Senator Stabenow, and then, I think, Senator Ricketts.

Senator Stabenow. Thank you, Mr. Chairman and Ranking Member. This is so important. This is an issue that I have been focused on for years. It affects so many communities, as we know, and more importantly, lives.

Michigan as a manufacturing powerhouse over the years certainly has been in a very serious position now as we are uncovering all of this. I appreciate the State of Michigan really being at the front of the line of studying where the contamination is and taking action at the State level, which is also important.

I want to just refresh, because when we look at past defense budget bills, I am pleased that my legislation to study the impacts of PFAS exposure and improve nationwide PFAS testing and hold Federal agencies accountable for contamination on military bases has passed, so that is now law. We worked

together to get historic funding to address PFAS in the infrastructure bill that we all worked on together, which was very important.

I continue to push EPA to meet the objectives outlined in the strategic road map, which needs to happen, so we have moved forward. We have made a lot of strides. But there is so much more to do, and it is not being done quickly enough, which is my main concern.

One place where Michigan has faced significant challenges is when it comes to working with the Department of Defense. When we look at contamination around military bases, PFAS has been detected on at least 10 bases in Michigan, at one base, the former Wurtsmith Air Force Base in Oscoda, Michigan, we have readings as high as 213,000 parts per trillion, and DOD has kept the community waiting on a cleanup plan for 14 years.

Ms. Bowers, in your testimony, you mentioned that CERCLA liability extends to the Federal Government. DOD would be part of that, in terms of liability. But that said, my understanding is that this designation would ultimately not change much about DOD's cleanup responsibilities, their site prioritization, or the speed of remediation. Is that correct?

Ms. Bowers. Thank you, Senator. That is likely correct. DOD is required under the Defense Environmental Restoration Program to respond to pollutants and contaminants, as well as

hazardous substances at military installations. Designation of PFAS as a hazardous substance wouldn't change that requirement.

Senator Stabenow. So, we still need some fixes in this area, that is for sure.

Secretary Kenney and Mr. Faber, can you speak more to how Congress can help ensure more expeditious cleanup of DOD sites like we are needing to do in Michigan?

Mr. Kenney. Yes, and Senator, thank you for that question. With 715 bases nationally, and Michigan and New Mexico share a lot in common here, that you can look at DOD's website today and they are cleaning up to 70 parts per trillion, well above the proposed drinking water standard, which means that even when they are finished their CERCLA cleanup, and let's say your constituents, after 14 years, get that satisfaction, the cleanup is not adequate and it is not protective of the science that EPA is using.

So we still have a problem that CERCLA is perpetuating, which is why the drinking water standards and RCRA are so important for Congress to take action on, especially listing those PFAS chemicals as hazardous wastes and compelling then States to then implement those on a faster timeline with everybody, not just the public sector, but the private sector, as well.

Senator Stabenow. Thank you. Mr. Faber?

Mr. Faber. Yes, Senator, I was just in Michigan visiting my son in Ann Arbor. He lives with nine other young men, and so you can imagine what the kitchen must look like. I started to take some pictures, and sure enough, they all came down and started cleaning up the kitchen.

One of the benefits of designating PFOA and PFOS is that the releases, or threatened releases of hazardous substances would now have to be disclosed. When the DOD transfers a property to civilians, they would have to disclose the presence of PFOA and PFOS in the groundwater and the soil.

One of the big benefits of this designation is that while DOD is effectively treating these chemicals as hazardous substances thanks to some changes you made to the NDAA, there would be more disclosure; there would be more transparency.

Senator Stabenow. Thank you.

Thank you, Mr. Chairman.

Senator Carper. Thanks so much for your work on this, and certainly for being with us today.

Another former governor here, he and I are recovering governors, but we care about this issue with our old hats on, and certainly with our current hats on. Please proceed.

Senator Ricketts. Great, thank you very much, Mr. Chairman, and thank you to our witnesses for being here.

Mr. Faber, in an Environmental Working Group press release

from 2021, you stated "For decades, these corporations have knowingly contaminated our drinking water, food supplies, and the blood of virtually every person on the planet with these highly toxic chemicals. It is long past time that these polluters paid for their malicious drive toward profits over public health."

That 2021 statement seems to indicate your support for polluter pays and that polluter pays model. However, the current lobbying that you are doing seems to be contrary to that stance. Without passive receiver exemptions, entities who did not produce, manufacture, intentionally use PFAS for commercial benefits will now be on the hook for someone else's mistakes. I think Mr. Witt has described that.

It appears you have shifted beyond the polluter pays model. What prompted this change, and why are you against providing liability protections for passive receivers, given that this aligns with the principle of holding contaminators accountable?

Mr. Faber. Thank you for the question, Senator. I think it is a mistake to refer to folks as passive receivers. Landfills and waste managers, water utilities, elect to receive these wastes. They can refuse these wastes. They can require their customers, and their customers, to pretreat these wastes. They can require them to provide records of what is in these wastes.

As I mentioned in my testimony, this is nothing new for waste managers and water utilities. There are hundreds of these hazardous substances that they manage every day, and while I am sure that PVSC is an incredibly responsible water utility, not all water utilities are as responsible as PVSC. We are all familiar with Newark, Jackson, and of course, Flint. We are probably less familiar with other water utilities that have not responsibly managed hazardous waste. I am happy to provide those examples to you.

Senator Ricketts. Are you concerned though, that again, Mr. Witt's example of, even if the EPA is not holding them accountable, but a polluter who is actually using this, comes after and sues them after the fact, he is still going to be in this litigation?

Mr. Faber. No. Thank you for the question. As Ms. Bowers talked about, Congress added Section 113(f)(2) to CERCLA to address the contribution rights and to shield parties like wastewater utilities and landfills from being subject to additional litigation for matters addressed in a settlement. When they settle under 122 of CERCLA, they can use the contribution shield under 113 to be immune from future liability for matters addressed in that particular settlement.

That provides a powerful incentive for utilities and waste managers to settle with EPA so that we can focus, EPA, the

courts, can focus on the responsible parties, the real polluters, the folks who have contributed most of the waste to a listed site.

Senator Ricketts. Mr. Witt, given what Mr. Faber just said, why are you still in litigation and have spent \$4 million on litigation with the polluters who are suing you when you didn't actually use any of those chemicals?

Mr. Witt. Thank you for the question, Senator. Because nothing is ever as simple as we would like it to be, and especially under CERCLA, which is widely acknowledged to be one of the most confusing Federal laws, probably, on the books. There are still avenues of liability that private actors can use to keep public entities involved in these suits. When I talk about public entities, let's remember who we are really talking about here, which is the public. It is the ratepayers.

PVSC doesn't print money. That \$4.6 million came from our ratepayers. It is \$4.6 million that is not going into improving our plants. It is \$4.6 million that is not going into rate stabilization funds so that our lower income users can afford to continue to have sewer and water service and not have to make a choice, do I pay my sewer bills, or do I have to choose for my child so that they can go to school?

It is just money that goes into a black hole. It takes time to get you settled out, and while you are getting settled

out, you are still incurring all those legal costs. That is why.

Senator Ricketts. Mr. Fox, I have heard significant concerns from our agricultural community over the potential liability American farmers will face because of EPA's CERCLA designation. The agriculture sector's concern reflects their concern of CERCLA's normal application of fertilizer exemption is insufficient to shield them from liability under CERCLA.

Based on your experience in prior CERCLA litigation, what is your view on the agriculture community's concern about this exemption?

Mr. Fox. Thank you for that question. I am going to answer that, and then I want to respond to your last question too, if I may.

You are completely correct. That exemption would not protect them as it is currently standing. Because in order to be eligible for that exemption, you have to meet standards under the Clean Water Act standards for land application of sewage sludge.

There are no such standards for PFAS, and so you could be both retroactively liable because there were no standards, and then when they are promulgated, you are going to have to meet those standards. We don't know what they are yet.

So that exemption is not available now for land

application, normal application of fertilizer for PFAS because no standards exist.

I have to put my lawyer hat on now for one second. That is what I do, but I do want to answer this question about contribution protection that Mr. Faber said, because that is not correct. I argued this case in the Third Circuit. There is a Supreme Court case right on point.

If a private party has not been sued, so if the government does not take an action against a passive receiver, they do not have contribution protection. Even if they get contribution protection, it does not protect them from another PRP who either has not been sued or settled. So, any of those other PRPs who have not themselves been sued or settled can make an action against the settling passive receiver, and that settling passive receiver will have no protection under the contribution provisions of CERCLA.

Senator Ricketts. So again, if I can, because you said, you are using some acronyms there, and I am not sure. PRP, so you are saying, somebody who is actually doing the polluting, who actually may have been sued but hasn't settled can still sue somebody like Mr. Witt?

Mr. Fox. Absolutely, that is Supreme Court law. They would have that right to take that action. As Mr. Witt said, I have been involved in doing this for a very long time. I have

cases that have gone on for over 25 years. They are very expensive. They are very resource intensive. And that is going to put a tremendous burden on small players and other passive receivers.

Senator Ricketts. Great. Thank you, Mr. Fox.

Thank you, Mr. Chairman.

Senator Carper. Thank you. Senator Cardin is next.

Senator Cardin. Thank you, Mr. Chairman. I want to thank all of our witnesses.

I want to start by thanking CRS for the services you provide us, generally. We are asked to deal with a lot of subjects, like PFAS, that are not part of our background or our knowledge base, and you bring us up to speed pretty quickly. So I just want to thank CRS for all their services over the years and for your testimony here today.

I want to just acknowledge what some of you have already acknowledged about our leadership of this committee, Senator Carper and Senator Capito. They have taken on this issue. As a result, we have been able to make significant progress in identifying this hazard, getting resources to deal with it, and setting a path that we hope will lead to stronger public health attainment. I just want to thank our leadership on the committee for doing this.

You have my attention, not so much on the cows in your

State, but the rockfish in my State. We have taken a look, and we have specifically targeted for collection and analysis for PFAS. At eight separate locations, PFAS was collected for striped rock bass, and some of those sites resulted in consumption advisories.

This is an issue that is affecting all of our States and our economies, and we need to do things about this.

I want to just underscore what we can do to stop the pollutants and to deal with the public health challenges that we confront today. We will talk about the liability issues; we will talk about cleanup issues. All of that has to be done.

But we, for example, I am proud in Maryland that the Applied Physics Lab at Johns Hopkins University is looking at an adaptive and inexpensive off-the-shelf membrane that allows water to pass, but captures the destructive chemicals with whiskers or fibers of synthetic element engineered by APL. The good news about this is it removes, they believe, 90 percent of the PFAS. The end product is acceptable in landfills. That is the type of innovation and technology that is a win-win-win situation.

But as has been pointed out, some of our water managers, they have a dilemma on making improvements based upon the fact that they have to use their ratepayers, which is a political challenge and a financial hardship to the ratepayers.

What can we do to bring these types of technologies to the market faster and provide the resources so that our water treatment facility plants can make these improvements?

Senator Capito is absolutely right. We have some very small operators. I have been to some in my State of Maryland, and they just don't have the capacity within their ratepayers to make these types of improvements.

What can we do to get these type of technologies developed and implemented so that we can have safer water consumption in all parts of our Country? Any suggestions?

Mr. Faber. Senator, first of all, thank you for asking us the question. As we have heard, Congress has already provided \$10 billion in the Bipartisan Infrastructure Bill to help utilities. What we have not heard about is the now \$13 billion and counting that private water utilities and public water utilities have recovered under State law claims through litigation.

So, there are more resources coming through private recovery. So to Senator Ricketts' question, the manufacturers are not completely escaping liability. They are paying, but they are paying through State law claims before a multidistrict litigation in South Carolina, and they will be paying more.

In all likelihood, Congress will have to provide more. There are certainly costs that will be required. But let's not

forget the costs to the people who have been poisoned without their consent or knowledge.

Senator Cardin. My point is that \$10 billion is absolutely, incredibly important, and it has made a huge difference, and it will address these issues, and we will be able to offer certain incentives.

But as I go through my State and talk to our water managers, the capacity and financial abilities are still being challenged. If we want to advance technology, particularly with smaller water systems, what do we do here?

Mr. Faber. Can I just quickly add that, the technology is available, and according to EPA, in their analysis of the drinking water standard, only a few thousand systems out of many thousands are out of compliance, have more than four parts per trillion.

Senator Cardin. I understand that, but I want to go beyond that. I want to get these PFAS technologies implemented.

Mr. Fox. Landfills are solution providers, and the way we have structured what we have asked for presupposes that once there are PFAS standards for leachate, for example, that in order to have liability relief, you have to meet those standards. What that does is create technological incentives to create technology to treat that properly.

But landfills aren't waiting for that. In anticipation of

that, they have pilot studies doing exactly what you said, Senator. They have foam fractionation. They have super critical water oxidation pilots, plasma, reverse osmosis.

That is what you need. You need to establish this so that you create the proper technological incentives for passive receivers like landfills or water utilities to come up with the technology.

What we propose does that, and you can see by the way that we are interdependent, because the waste that they generate comes back to us ultimately. As you said, we want that to be something we can accept. We are already working on that technology.

Senator Cardin. Thank you.

Thank you, Mr. Chairman.

Senator Carper. Senator Cardin, thanks so much for those questions.

Senator Padilla, I think, was here earlier, and he has come back. Thanks for joining us. You are recognized now. Thanks.

Senator Padilla. Thank you, Mr. Chairman.

I am certainly glad to be here today and to hear from our witnesses on the issue of PFAS and CERCLA liability, because addressing PFAS pollution has been a priority of mine since I joined the Senate.

Just this morning, I spoke to and heard from a number of

water agencies at the Association of Metropolitan Water Agencies where this was a key topic of conversation. We have been tracking the issue very closely since EPA first issued their proposal to designate two of the most widely used PFAS as hazardous substances under CERCLA.

California is facing numerous threats to our drinking water and sanitation infrastructure, from water supply challenges due to sustained droughts, to water affordability challenges, which I focus on as the Chairman of the EPW Subcommittee on Water, Fisheries, and Wildlife, to the impacts of PFAS, lead, and other contaminants as well. I see the challenges that California water systems are facing when it comes to investing in infrastructure and delivering on our promise, our obligation, frankly, to provide clean drinking water and wastewater services to every Californian and every American.

So, thank you, Chairman and Ranking Member Capito, for allowing us to have this conversation today, because this is a complex issue that deserves nuance and careful deliberation. Ultimately, I think we can all agree that we want to hold polluters responsible and accountable for their contamination, and we need to develop the plans to remove PFAS from our water systems.

Mr. Faber, I am looking at a letter that you included in your testimony from EPA to members of Congress about EPA's

efforts to develop an enforcement discretion policy to focus on PFAS manufacturers. In the letter, EPA says they do not intend to pursue entities like water utilities or local fire departments, and they outline pathways for settlements to protect against third party cost recovery claims.

Can you talk about how EPA has historically used its enforcement discretion when dealing with utilities and municipalities and what ways going forward may be able to protect them and other minimal contributors from third party liability?

Mr. Faber. Thank you, Senator, and as EPA has indicated in this letter that you referred to, they do not plan to focus the responsibility for this PFAS contamination on water utilities.

That is nothing new. It has been a longstanding policy under EPA's municipal settlement policy, administrative settlement policy, by using Section 122 to quickly settle the liability of water utilities and other peripheral players and to focus on those who are truly responsible for creating the pollution caused by hazardous substances.

The other thing I will just quickly mention is, we have not yet seen the enforcement discretion policy that will accompany this final rule. It seems to me that it would be something Congress would want to see before asking whether to amend, in an unprecedented way, CERCLA to address a single chemical.

The other thing I will just quickly mention is, we filed a Freedom of Information Act request this morning to get all of the settlements ever that EPA has ever completed with water utilities and landfills so that we can show you the receipts, so that we can show you that for as long as EPA has exercised its authority under 122 and 113, that they have quickly, quickly, resolved the liability of water utilities and landfills to focus on those who should be responsible, the polluters.

Senator Padilla. Thank you for that.

Now, I, too, have heard, as all of you have, from water utilities and others about the potential for truly responsible parties, like a 3M or DuPont, who have been held liable for response costs to try to deflect by bringing in water utilities or other entities into these third party lawsuits.

Ms. Bowers, I know this was discussed earlier in the hearing already, but your written testimony outlines that EPA enforcement discretion wouldn't necessarily protect covered entities in this scenario. Can you walk us through what the options would be for water utilities in this scenario, where a reliable party brought that into a third party contribution claim?

Ms. Bowers. Sure, thank you, Senator. Just to make sure that I understand the question, this would be in an instance where a water utility has been brought into an enforcement

action, not by EPA, but this would be a third party contribution?

Senator Padilla. Correct, the truly liable.

Ms. Bowers. Sure. So, if in that instance, EPA has not entered into a settlement resolving that utility's liability under CERCLA, then that utility could still be liable under CERCLA, assuming no other exemptions apply. As I mentioned before, some of those other exemptions and defenses could potentially be relevant in this context.

How that could work is, if another entity has either incurred cleanup costs or has itself been the subject of enforcement action or has resolved its liability, that entity would have the opportunity to file what is called a third party contribution claim. So they may, as part of litigation or as part of a new lawsuit, file a lawsuit against other potentially responsible parties. As I mentioned, if those parties have not themselves resolved their liability to EPA or a State under CERCLA, then they could still be subject to suit.

Senator Padilla. Okay, so something else to look for in the proposal going forward. Thank you.

Thank you, Mr. Chairman.

Senator Carper. Senator Padilla, thanks so much for those questions.

The subcommittee that has significant jurisdiction over

these issues is chaired by Senator Merkley, and he is next in the line of questioning. Senator Merkley?

Senator Merkley. Yes, thank you very much, Mr. Chairman. Both my subcommittee and Senator Padilla's subcommittee are directly affected by water and by chemicals, and PFAS is a big deal.

I want to start, Mr. Faber, to follow up on the question from my colleague from California. I believe that the final regulation is expected the first week of April, and then a follow-up memo about enforcement strategy. Is that what you were referring to, were you referring to those two items when you said Congress might want to wait and see, kind of, read that ink before proceeding to exempt a specific entity or a specific chemical under CERCLA?

Mr. Faber. That is right. Thank you, Senator, for the question. Hopefully, we will see both of these final rules soon, the drinking water rule and the hazardous substance designation.

When EPA issues the hazardous substance designation, they will also issue an enforcement discretion memo that memorializes how they plan to address the liability of folks like water utilities, landfills, airports, fire training facilities. They have so far indicated in all of their writings and in their briefings that they plan to treat those folks as peripheral

players who will be quickly settled and will not ultimately bury the cost of cleanup associated with PFOA and PFOS. That is right.

Senator Merkley. So, but let us say we did pass a provision related to the liability of utilities, because utilities might say even just the court costs might be significant. As mentioned by the Chairman, you have often, very small utilities serving small communities that have no ability to even sustain the infrastructure they have, let alone bring it up to common standards, and certainly not to pay for lawyers, et cetera.

This would not, if that were to happen, that would not alleviate the role of a utility to test for chemicals and to inform the public. I want to clarify that utilities, even if the pollution is upstream, seem to have, a water utility, a specific responsibility to their customers for transparency to know what is in the water, so if there is PFAS in the water, that the public can know.

Would liability provisions at all affect that responsibility?

Mr. Faber. Thank you for the question, Senator. Thanks to this committee, utilities are now currently testing finished tap water for many PFAS. Those results are now rolling in.

Once these are regulated contaminants under the Safe

Drinking Water Act, utilities will have a duty to test for them to share those results with the public. That is as it should be. Consumers should know how much is in their tap water and whether utilities are in compliance with these new drinking water standards.

Senator Merkley. Okay, but this chemical family has sometimes been described as hundreds of elements or a thousand different kinds of cousins. Does that affect the ability to test, or can one test kind of collectively for things that fall into this category?

Mr. Faber. To their credit, the EPA developed a drinking water standard that includes a mixture of what are called long chain and short chain PFAS, so that the treatment technology that will be adopted by PFAS won't simply reduce the six PFAS that would be part of the drinking water standard but would reduce many of the PFAS.

It is also really important to note that adopting this treatment technology will remove other co-contaminants, other things from our water, in particular, a class of chemicals called total trihalomethanes that increase the risk of bladder cancer.

So, while we certainly talked a lot about the cost to utilities, it is really important to remember that every year, there are thousands of people who lose their lives to cancer,

especially testicular cancer, kidney cancer. There are many people who lose their lives to cardiovascular disease associated with PFAS in their drinking water. So there are other costs, not just the cost borne by utilities to provide safe water.

Senator Merkley. Back when I was in the State legislature in Oregon, we spent a lot of time exploring the issue of PFAS in carpeting and upholstery, which was related to kind of trying to decrease the fire hazard. I had little tiny kids crawling around on the carpet, and I was appalled to find out that my son's and daughter's noses picking up those carpet fibers were picking up PFAS almost from birth.

Do we have any sense of how the risk of PFAS in drinking water compares to the risk of PFAS on Teflon pans, popcorn poppers, pizza delivery plates, and carpeting and upholstery?

Mr. Faber. We are learning more about that, as we talked about earlier. But the single most effective way that we can reduce the amount of PFAS that is in our blood is finalizing this drinking water standard and getting utilities to work taking it out of our water.

One of the other loopholes that we really need to close is the loophole that allows companies to use PFAS in ways that are truly unnecessary, in our clothing, in our carpets, in our cosmetics, in our food packaging. One of the ways that we are all being exposed, unnecessarily, to PFAS is by allowing

companies to use PFAS in these everyday products we bring into our homes.

Senator Merkley. Thank you very much.

Thank you, Mr. Chairman.

Senator Carper. Senator Merkley, thank you.

We have been joined by Senator Lummis, who has spent a lot of time on this issue. Thank you for that, and thank you for being here today. You are recognized.

Senator Lummis. Thank you, Mr. Chairman. I appreciate you.

Senator Carper. You bet.

Senator Lummis. Mr. Fox, can you please explain why a nationwide enforcement policy does not adequately address the liability concerns for passive receivers?

Mr. Fox. Sure. It is similar to what I testified to, which is, and Ms. Bowers has also stated that, that is there is no settlement with the passive receiver, they are completely open to any lawsuit by a third party. Even if the passive receiver has settled with the government and obtained contribution protection, if the third party has not settled its liability with the government, then they can sue them. So it does not provide that protection.

If I might, I want to give you a specific example that I was involved in about this back in 2002. There was an EPA

policy, same thing, discretion, not to go against prospective purchasers who wanted to redevelop brownfield sites. It was an incredibly cumbersome policy. It did not work.

As a result of that and the inadequacy of that enforcement policy, what happened was we got the 2002 Brownfields Amendments, which created an exemption under the statute for exactly those circumstances, which actually was a win-win for everybody.

Senator Lummis. So is it true that Congress has amended CERCLA liability in response to the increased inefficiencies in administrative costs associated with implementing a nationwide enforcement discretion policy?

Mr. Fox. Absolutely, and that is the example that I just gave you, which is they had a very ineffective enforcement discretion policy for prospective purchasers. Our firm actually was involved in one of those. It took 18 months to even get it done. It doesn't happen very much, and so we needed a statutory exemption, and that is exactly what happened. Positive for everybody.

Senator Lummis. One of my concerns, and I once upon a time had some experience with RCRA, and I am a big fan of RCRA. It really bailed out a problem I was having, because I live right next door to a refinery.

There are volumes of case law relating to designating a

chemical as hazardous under RCRA and the Clean Water Act and the Clean Air Act. But for designating a hazardous substance directly under CERCLA, there is none. Correct?

Mr. Fox. There is absolutely no precedent in 44 years of CERCLA for EPA to ever designate something directly without it first being designated under the other statutes that you mentioned. Not one example of that.

Senator Lummis. So if utilizing a tailored approach under RCRA could address some of the liability concerns of passive receivers, do you think that it is a problem that the EPA has dedicated such minimal resources into using RCRA to regulate PFAS?

Mr. Fox. Currently, there are two proposed regulations under RCRA that would solve part of this problem. One is to list nine separate PFAS compounds as hazardous constituents and another one to say that those compounds could be subject to what is known as RCRA corrective action. At the sites, EPA could use their authority at RCRA corrective action sites to clean up those sites. Just to speak to what the gentleman from New Mexico was stating, a lot of those DOD sites are RCRA corrective action sites.

Senator Lummis. Thank you.

I am going to turn to Mr. Witt. In your view, and I want to read you something by the Environmental Working Group in

November 2023. They expressed concern about potential new measures. Here is the quote: "Congress is considering new loopholes and exemptions for PFAS polluters that will let them off the hook for PFAS contamination they may have contributed. Congress must hold polluters responsible."

So what I am focused on and very concerned about are these passive receivers and the expense that a passive receiver might incur to clean something up when it did not contribute to the contamination for which they are liable. In your view, does this characterization about loopholes and exemptions accurately reflect the role of the Passaic Valley Sewerage Commission in relation to PFAS contamination?

Mr. Witt. Thank you for the question, Senator.

No, I absolutely disagree with that characterization of PVSC or any wastewater treatment or drinking water plant as a polluter, in this case. As we have stated, we are passive receivers of this contaminant or these contaminants.

I know it was stated earlier that, well, you can just say you are not going to take them anymore. Well, we can't, because it gets into our sewer system one way or another. It gets into our sewer system from people's homes. We can't just tell people, well, we are not going to take your sewage anymore. We can't tell landfills, well, we are not going to take your leachate anymore, and you are just going to have to figure out

some other way to dump it somewhere, and that is what will happen.

If wastewater treatment plants can't take this material, which is what our job is, is to treat wastewater, if we can't take it, where is it going to go? Who is going to be treating this? You want us treating it. This is what we do all day every day, and we are very good at our jobs.

We want to be part of the problem of solving PFAS and getting it out of the environment. But when we have to do things like fight 28-year-long CERCLA cases, or 25-year-long CERCLA cases, or however long, we can't do that, because that is where our resources are going.

Let's remember something about the contribution protection, which hasn't been brought up yet, which is an extraordinarily important point. You can't get a settlement with EPA under CERCLA unless they designate you as a PRP, as a potentially responsible party. Contribution protection doesn't just exist out there in the ether. You have to be brought into the case, and under CERCLA, liability is joint and several.

That means, once you are in as a PRP, you could be responsible for the entire cleanup cost. That means the public could be responsible for the entire cleanup costs. That is what we have going on in the Diamond Alkali site right now. There is a proposed consent decree for 85 private parties in that case

pending before Federal court in New Jersey right now, and yet, there are public entities who are still in it.

If those parties get out, we are still there. We are still potentially on the hook. Let's not forget, when we talk about enforcement discretion and what happens with that, and the protections you might get, they are really quite ephemeral. The way that we get protection under this is to get this exemption. It is not a loophole.

Senator Lummis. Gentlemen and lady, thank you so much for being witnesses today. Mr. Chairman, I yield back.

Senator Carper. Thank you so much for those questions.

Senator Capito needs to leave, but she is going to ask, maybe, another question or two, and then Senator Whitehouse has joined us. Thank you.

Senator Capito. Yes, I really just had a comment, and thanks. I don't know if Senator Whitehouse gave me a few minutes, but thank you, Senator Whitehouse, for that.

Senator Carper. Yes, he did.

Senator Capito. Thank you, Senator Carper.

I have been listening to this. I want everybody to know who is here testifying and our members to know that this is a public forum to get into sort of the nitty-gritty of what we have been trying to work on in private by getting stakeholders from every single aspect of this issue. We have had, to the

Chairman's credit, we have had two very major roundtables to understand the issue as well as we possibly can, so now we are honing in on it.

I guess my final comment would be, I think there is agreement that third party or passive receivers are not what we are aiming at here. We are aiming at the polluter pays. The polluter should pay the cleanup and pay the cleanup.

The third parties, because of past 11 exemptions in CERCLA, or because of what Mr. Witt just mentioned in the statute of CERCLA, don't feel like the EPA writing a letter of enforcement discretion or mentioning enforcement discretion, and of course, that only lasts as long as that EPA lasts, I would imagine, provides that bright line, I guess I would use that term.

So, Mr. Faber has said that this will be written into the verbiage that third party water systems and wastewater systems and landfills are not where we are aiming here, or not to be held liable. If we all agree on that, why wouldn't we just agree on putting it in the statute and making it a bright line and making it very clear?

It is not a question, Mr. Faber. That would be my parting thought, because we have a lot of agreement on a lot of this, and I think the more explicit, I am not an attorney, but the more explicit we can make this, I think the better it is, so that Amara and others that have been affected by this will have

the peace of mind that the greatest protections are being offered to her and her family for the clean water that they drink. Thank you, Mr. Chairman.

Senator Carper. Thank you for those closing thoughts. Senator Whitehouse, as you heard earlier, we have members here with different background, some in business, some in government, some in military. One of the best legal minds in the U.S. Senate is not me, but it is the man that I am going to yield to right now. Sheldon, thanks for joining us.

Senator Whitehouse. When I used to travel with Senator McCain, we would often meet the head of state in a foreign country, and he would introduce me sometimes by saying, "This is Senator Whitehouse. He is a very well-regarded lawyer. By the way, do you know the difference between a lawyer and a catfish?" The head of state would look confused and befuddled, and he would say, as many of us have heard him say, "Well, one is a scum-sucking bottom feeder, and the other is a fish." It always got the conversation with the foreign head of state off to a really nice start that way.

[Laughter.]

Senator Whitehouse. Ms. Bowers, are there steps that passive receivers can take to preemptively protect themselves or reduce their exposure to third party litigation under CERCLA?

Ms. Bowers. Thank you, Senator, for the question. One of

the potential exemptions that we have talked a little bit about today and that I mentioned in my written testimony is the federally permitted release exemption. This just provides that, if a release is in accordance with one of a number of federally issued permits under several Federal environmental laws, then there is no liability under CERCLA to be associated with that release.

The specific types of permits are enumerated in the definition. Several Clean Water Act permits could potentially be applicable, could be a basis for that exemption. It is a very site-specific inquiry. It depends on the terms of the permit, and there are some open questions right now about the extent to which that exemption would apply where a permit does not either specify discharge limits for PFAS or otherwise specified best management practices. There is some suggestion that the exemption may still apply. It is somewhat untested in the courts.

Senator Whitehouse. So, a passive receiver that has a Federal permit would be well-advised to pursue an upgrade to that permit for PFAS?

Ms. Bowers. It would certainly involve discussions with EPA or with a State permitting entity regarding the terms of the permit and regarding what discharges have been disclosed as part of the permitting process. Again, though, it is a very site-

specific determination.

Senator Whitehouse. Yes.

Mr. Faber, are there many other chemicals that are fairly ubiquitous in the environment like PFAS, and are there lessons from the experience with those chemicals as to how they have been handled by EPA and under CERCLA?

Mr. Faber. Thank you for the question. As we have talked about, there are more than 800 hazardous substances. More than 600 are still being produced. More than 300 are being produced in high volume, including sulfuric acid.

Hundreds are already found in landfills. Sixty-six are found in our drinking water systems, and to answer, I think, both of your questions, where we might politely disagree, is water utilities, wastewater utilities in particular can certainly require their customers to pretreat their wastes. Some do, in Michigan, for example. The State has a pretreatment program. It is, unfortunately, far too rare. That would help reduce, ultimately, their liability.

Water utilities could have gone to their State regulators and modified their NPDES permits to address PFOA and PFOS, while the manufacturers hid the truth of these harms from you when you were writing these lists that got incorporated by reference into 102. It is not a secret that PFAS is a toxic forever chemical, and it has certainly not been a secret to water utilities. They

could have amended their permits to address those releases and taken advantage of the permitted release liability shield. They still can. They could today.

Very few of them have. Very few are requiring the folks who are sending them waste to pretreat their wastes, which they can do. Very few of them have gone to their State regulators and said, I want to amend my permit to reduce my releases of PFAS so that I can benefit from the liability shield Ms. Bowers talked about. We know that because we have been dealing with hazardous substances for decades.

Senator Whitehouse. Thanks very much. Thank you, Chairman.

Senator Carper. Thank you, and thank you for sharing the wisdom of John McCain. John McCain and I served in the Navy together for many, many years. He was a hero and a great colleague in the House and here, so thank you for invoking his name and his wonderful sense of humor: sometimes irreverent, never irrelevant.

I have a couple of questions. We may have another one or two of our colleagues straggling in. We have a bunch of other committees that are underway and we are about to start a vote, so I will ask a couple of questions, and we will see if anyone else arrives.

I said earlier, I like to telegraph pitches, and I will

telegraph one right now before I jump into a couple of questions for each of you. Senator Ricketts and I are recovering governors. When we were governors, we were part of the National Governors Association. We were very active in something called NGA, the National Governors Association Center for Best Practices.

What we do in the Center for Best Practices is States, we dealt with a lot of different issues, but a lot of the same issues, and we would share ideas with one another as how to deal with a particular challenge we were facing in our respective States. I like to say, find out what works, do more of that.

As we get ready to close out here in a few minutes, one of the things I will be asking about is, is there anything we can learn, not from necessarily the States, maybe the States, but maybe from some other countries. I will probably ask that for the record. This is not an issue that is peculiar just to our Country and our people. It is something that affects people all over the world.

Mr. Witt, Mr. Fox, a question with respect to waste and water utility liability. In determining responsibility for chemical contamination when cleanup is required, the EPA first tries to define the various parties that are responsible for contamination. The Superfund Law defines potentially responsible parties to include anyone who has ever touched the

contamination in some way.

The EPA assigns an amount of liability for each party later in the process. The EPA reviews each contamination situation individually and tends to absolve water utilities of ongoing liability, though this process may take years in some cases.

Question, again, for Mr. Witt and Mr. Fox. If there are already legal mechanisms, there are already legal mechanisms to solve the utility liability question, what is different about PFAS contamination compared to other types of chemical contamination? Why should the EPA treat PFAS contamination at waste and water utilities differently from other hazardous substances under the Superfund Law?

Mr. Witt, why don't you go first?

Mr. Witt. Thank you, Chairman, for the question. I think, as we have described here today, there really aren't very many good ways for water sector utilities to avoid liability in this case. Let me go back to the question that Senator Whitehouse just asked Ms. Bowers about, the permit liability shield. That is only going forward. That doesn't go back. CERCLA goes back and goes forward, so it doesn't help for any past discharges for which a utility could be subject to liability for.

As the Senator said, and we were talking about here, yes, wastewater and drinking water entities can list PFAS in their permits as a discharge, and many of us do. I can tell you that

PVSC has done that as well. But the problem with doing that is there is no set limits for anything yet. So you are acknowledging that you have it in your discharge, but you are essentially saying, you have to tell us what you want us to do with it yet.

Now, we are very fortunate in New Jersey under the administration of Governor Murphy and our New Jersey Department of Environmental Protection and our Commissioner Shawn LaTourette, they have been very proactive on PFAS, very proactive in working with the regulated community to develop those limits and to start gathering information, to gather information, as Mr. Faber said, from industrial dischargers about what PFAS materials they have in their discharge so we can start developing those limits.

There are other States like New Mexico and Secretary Kenney and Governor Lujan Grisham who are doing the exact same thing. We applaud those people for doing it, and we want to be part of that solution and keep doing it.

Senator Carper. Okay, thank you for that.

Same question, Mr. Fox.

Mr. Fox. Sure. I will just build on what was just said, because I agree with that. I think there are two things. One is the ubiquity of PFAS. It is probably the most common chemical in usage and it is in everyday trash that any one of us

throws out, so that is one.

The second issue is really what was just said, and that is, there are no standards for which you can comply with, for example, to meet the federally permitted release exemption that currently exists. You can't comply with that.

Think of the consequences, think of the real-world consequences of that, which is that you would impose strict, joint, and several and retroactive liability on people who had no standard they had an opportunity to meet in order to get to defense, and that is inequitable.

Senator Carper. Thank you for that.

Senator Lummis, would you like to ask another question?

Senator Lummis. I will follow up, especially if it gives someone who wants to make it here from another hearing.

Senator Carper. From another planet?

Senator Lummis. From another planet, time to get here.

Thank you.

For Ms. Bowers, CERCLA focuses liability on those who dispose of hazardous substances. So the courts created a useful products exclusion if they are not the parties actively disposing of PFAS-laden products or wastes, right?

Ms. Bowers. Thank you, Senator, for the question. This doctrine that you have mentioned refers to the potential liability of a manufacturer under CERCLA. CERCLA identifies

different categories of potentially responsible parties. It does not identify a manufacturer as potentially liable merely because it manufactured a product.

Senator Lummis. So, could that be used, this useful products exclusion, be used by a manufacturer of PFAS to potentially escape liability under CERCLA?

Ms. Bowers. The way the doctrine works is that if a manufacturer produces a useful product, sells it, sells the useful product, distributes it, downstream it is released into the environment by another user or purchaser, unless there is evidence that the manufacturer sold the product as waste specifically with the intent to dispose of the product, the manufacturer would not be held liable for that downstream release.

Senator Lummis. Another question, if no manufacturer of PFAS is liable under CERCLA for PFAS pollution because of that exclusion, who would be responsible?

Ms. Bowers. Senator, I just want to clarify that it is not necessarily the case that no manufacturer would be liable. If there was a release that occurred as part of the manufacturing process itself, that manufacturer could be liable under CERCLA as an owner or an operator, in that category.

So it is not that no manufacturer ever is held liable, it is just that by virtue of manufacturing a product, if it is

released downstream by a subsequent purchaser or user, you as a manufacturer would not necessarily be liable under CERCLA unless you sold the product with the intent of it being disposed.

Senator Lummis. Okay. Can you envision it being used as a loophole by manufacturers?

Ms. Bowers. It is a little difficult, Senator, to answer the question. Thank you for the question, but I am just struggling a little bit because it has more to do with the way, with what happens to a product after it is manufactured and the way that it is used.

It is not really something that courts have characterized as a loophole so much as just a principle that relates to CERCLA's overall liability framework, which is that manufacturers may be liable under other State or Federal laws. But that was not what CERCLA was initially designed for.

Senator Lummis. Okay. Thank you very much, Ms. Bowers.

Mr. Witt and Mr. Fox, I would like to give you each one minute to say what you would like to say leaving this hearing that no one has asked you.

Mr. Fox. What I would like to say is, as I said previously, landfills are solution providers, and we have narrowly tailored this exemption to avoid the law of unintended consequences. So we are not seeking an exemption for groundwater impacts that occur because of landfill operations.

We are really focused on the leachate discharges, and we need an exemption that allows us not to have retroactive liability for discharges for which we could not meet an exemption that currently exists. Once those standards are in place, we can only meet the exemption if we meet the discharge requirements.

So, I know this committee always likes to talk about compromise. That is a compromise. That is a sensible, real world solution to this problem, and it creates the proper incentives for the landfills to come up with technology to meet those discharge limits.

Senator Lummis. Mr. Witt?

Mr. Witt. Thank you, Senator.

I would like to repeat what I said at the beginning of this hearing, which is that I am actually optimistic from a lot of what I have heard today, both from panel members and from the questions from the committee.

I am going to use an analogy. I am from out west, so I am going to use an analogy that works from out that way for folks. It is like, if you walk out your door and there is a wild boar standing out there and it is going to charge, I can either close my eyes and hope it goes away or I can go back inside and close the door and know that I am going to be safe.

That is really what we are asking for here. If we want to stand out and hope that that boar, in the form of EPA, doesn't

charge us in the form of enforcement discretion, well, that is all well and fine, but that can change, and that boar is going to do what that boar is going to do.

We want to go back in and close that door so that there isn't the possibility here, so that we can focus our resources and more importantly, our ratepayers' resources on putting treatment systems in place so that we can start resolving this PFAS problem and not paying litigation costs on the back end.

Thank you.

Senator Lummis. Thank you both. I come from a State where we have really small water systems for which potential liability would literally bankrupt, seriously, the water users. So I want to make sure that the cleanest water that we can deliver to people's taps is available to them at a price they can afford.

Mr. Chairman, thank you so much.

Senator Carper. Thank you. Thanks again for all the time that you and your staff have invested in trying to get us to the right place on this issue. Thank you. We are not there yet, but working together, we will get there.

I have a couple of questions that I will ask for the record dealing with, among other things, manufacturer liability. I said earlier that I would ask you, is there anything we might be able to learn from other countries dealing with similar kinds of issues around the world that might be transferrable to us?

Let me just start with Secretary Kenney. Any thoughts you have on that?

Mr. Kenney. Mr. Chairman, it is a great question. A couple thoughts that do come to mind are one, as I have listened to the discussion, utility operator training in the United States is not on the front lines of maybe our educational systems.

Senator Carper. Although you may be surprised how often we hear about this.

Mr. Kenney. I think what we can learn from other countries is that public service, especially when you are learning how to treat drinking water from a STEM perspective is something that we could invest more in at the Federal level. That is number one.

Number two, I think the other piece is when we move something like PFAS from the waste ledger to off the waste ledge, I don't want to call it a product once it has come out of the ground, but let us just say we move it from waste to some other kind of maybe commodity where the tech market can come in and reduce it or destroy it or manage it better, I think we will see it managed appropriately.

That, whether I am referring to work that our national labs are doing in New Mexico or around the Country or what we are seeing in other countries in developing technologies, that sort

of race to solve the problem, could be incentivized better in the U.S. That would, with an anti-backsliding regulatory scheme, I think would serve our Nation much better.

Senator Carper. Others? Ms. Bowers?

Ms. Bowers. Chairman, thank you for the question.

I don't have information today about what other countries are currently doing with respect to research development or regulation of PFAS. If it is of interest to the committee, we would be happy to perform additional research and provide it for the record.

Senator Carper. Very good. We will probably make this into a question for the record for you. Thank you.

Mr. Faber?

Mr. Faber. Yes, thank you, Senator.

Other countries are racing to eliminate needless uses of PFAS. We are falling behind the rest of the world when it comes to eliminating the use of PFAS in carpets and clothing and the things we bring into our homes, and we should really shift the presumption.

We should put the burden on industry to prove that these chemicals are absolutely necessary to make the things we need in our economy, not put the burden on EPA or FDA or CPSC to prove that these chemicals are too dangerous to have in the everyday products we are bringing into our homes.

Senator Carper. Mr. Witt, what can we learn from outside of our borders?

Mr. Witt. Thank you, Chairman. I think one thing that we can learn is, when there are technical issues that come up, especially in Europe, and that are cross-border, they tend to focus resources much better than we do, a lot of the time. I think that that is a lesson we definitely need to take on PFAS here.

There was a PFAS working group within EPA on developing technologies, and I think that that working group needs to be reconstituted. I think it may still be going. I think that that is the kind of innovation that we need, where, as opposed to looking at this from 50 different points of view or even from just the Federal level, there needs to be a collaborative effort on this to say, here is where we are going to go, here is the technologies we are going to invest in.

There are places, like at PVSC, where we are one of the places doing pilot programs on PFAS treatment, so that we can keep taking leachate from landfills and places like that, and there is a safe and responsible way to dispose of it. I think that is an important thing.

They say in Europe, they have one design for a power plant and 300 kinds of cheeses, and in America, we have 300 designs for nuclear power plants and only one kind of cheese. I think

we need to go to the one design for the PFAS and start really focusing our efforts on getting a solution to this problem.

Senator Carper. Good. Thank you for that.

Mr. Fox?

Mr. Fox. Sure. I don't have a specific example, but I can tell you something general, which I think is applicable here. That is, in Europe, oftentimes, when they look at the environmental problems, they look at the interdependence. You can't just pull out one piece, because if you push on the toothpaste tube at one end, it comes out the other end.

One of the things that we should use as a model is the fact of the interdependence that I have tried to talk about here, as we have leachate discharges that go to a POTW. It creates a biosolid. You have water treatment systems that need to go someplace. We need to figure out a way to resolve that as an interdependent whole as opposed to each individual piece.

Senator Carper. Thank you.

I announced about three months ago that I was not going to run for re-election, and almost every day since then, people have said to me, how are you enjoying your retirement?

[Laughter.]

Senator Carper. They say, we are really going to miss you. You have done a great job. I said to my wife the other day, I said if I had known people were going to be this nice, I would

have quit a lot sooner.

[Laughter.]

Senator Carper. Not really. People have been very nice.

I have indicated that, there is a saying that they have in track and field, you have probably heard it, run through the tape, and I have every intention to spend every day, every week, every month, between now and high noon, January 3rd, 2025 dealing with some of the tough issues and actually making sure that some of the legislation we have enacted is being implemented. It is one thing to pass laws; it is another thing to make sure that they are fully implemented.

The issue that we have discussed here today is thornier and actually more difficult than most that we come in contact with. I get good advice from a lot of different sources, but I mentioned earlier the advice from one of our witnesses a couple years ago from Wyoming who said in his confirmation hearing, bipartisan solutions are lasting solutions. That really has been something that I have taken to heart. I know Senator Capito and other colleagues have, as well.

Another thing I learned a long, long time ago is when I am trying to figure out what is the right thing to do is to put myself in other people's shoes and say, how would I want to be treated if I were in their shoes? That is probably a pretty good rule to follow here.

There is something called the Golden Rule that, believe it or not, is in every major religion of the world. I don't care if you are Jewish; I don't care if you are Protestant or Catholic, Buddhist, Hindu, Muslim, they all have the same, and it is almost the same exact words: treat other people the way you want to be treated. Love thy neighbor as thyself.

I think we will be able to overcome, hit paydirt, and find out what is the right thing to do that will, because we remember that advice.

In closing, I want to thank each of you for taking the time to be here with us today and help us deal with these issues. The issue of PFAS is one of critical importance, with impacts reaching each and every one of us in our 50 States. These chemicals are pervasive in commerce, as we have been reminded today, having been shown to be useful, though, in many situations, as we have heard today.

Yet, these forever chemicals are a pervasive threat in many instances to our health, to our livelihoods, and we need to make sure we are acting to protect our communities and the people who live in them.

We have also heard today about some of the serious challenges associated with regulating these chemicals while ensuring that those responsible for PFAS contamination are held accountable. It is important that we act carefully to prevent

unintended consequences, particularly for actors like municipalities and water treatment plants, who, as referred to repeatedly today, are concerned about legal costs for contamination that someone else caused.

I look forward to continuing this conversation, frankly, with some of you, especially our friends at CRS. We look forward to continuing this conversation, working together toward common sense solutions to address these pollutants.

We will be sending some follow-up questions for the record. This is my favorite part of the hearing. For some final housekeeping, I ask unanimous consent to submit for the record a variety of materials that include letters from stakeholders and other materials that relate to today's hearing. When I ask unanimous consent and I am the only Senator here, nobody can object.

[Laughter.]

Senator Carper. Without objection.

[The referenced information follows:]

Senator Carper. Senators will be allowed to submit questions for the record through the close of business on April 3rd. We will compile those questions, send them to our witnesses, and ask our witnesses to reply by April 17th, if you would.

With that, let me again thank our staffs on either side of me. We are different parties, but we are a team. We are a good team. Your testimony is going to make us a better team, I think. It will make us better servants for the people that we serve.

With that, anything else? I am going to go vote. Thank you all. God bless. This hearing is adjourned.

[Whereupon, at 12:13 p.m., the hearing was adjourned.]