

PFAS Litigation - Recent Developments

What the D.C. Circuit's Decision Means for Water and Wastewater Utilities

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1. The PFAS Conversation Is Changing

From treatment and compliance to liability and cost allocation

The familiar question

What must utilities do about PFAS in water?

The CERCLA question

Who should ultimately pay?

CERCLA is intended to make polluters pay. PFAS complicates that principle when utilities receive and manage contamination created by others.



2. CERCLA 101: Why Water Utilities Should Care

Cleanup

Federal framework for responding to releases of hazardous substances.

Responsibility

Identifies categories of potentially responsible parties, or PRPs.

Cost Allocation

Provides mechanisms to recover or allocate response costs.

Why CERCLA gets attention

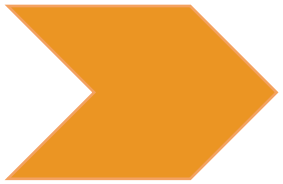
STRICT LIABILITY | **HISTORICAL REACH** | **COST RECOVERY** | **CONTRIBUTION**

CERCLA is not simply another environmental compliance statute. At its core, it is also about who pays.

3. What Changed When PFAS Became a CERCLA Hazardous Substance?

BEFORE

Treatment
Compliance
Operational cost



AFTER DESIGNATION

Treatment + Compliance

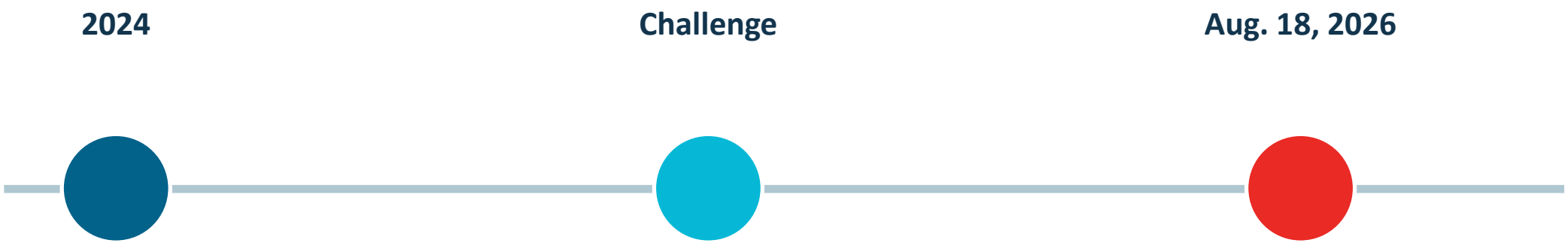
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Cleanup Liability + Cost Allocation

PFOA and PFOS are now expressly within CERCLA's hazardous-substance framework.

4. The D.C. Circuit Case: What Happened?

Chamber of Commerce of the United States v. EPA



Central dispute

Could EPA act when a release "may present substantial danger," despite uncertainty about future releases and cleanups?

5. What You Need to Know About the Court's Reasoning

1. EPA Had Authority

CERCLA allows designation where a release may present substantial danger.

2. Uncertainty Was Not Fatal

EPA did not need certainty about every future release or cleanup.

3. Process Was Sufficient

The court rejected challenges to EPA's economic analysis and rulemaking process.

Bottom line: EPA won. The designation remains in place.

6. What the Court Decided, and What It Didn't

DECIDED

Did EPA have authority to designate PFOA and PFOS?

YES

NOT DECIDED

Who should ultimately bear PFAS cleanup costs?

UNRESOLVED

The designation survived. The allocation problem did not go away.

7. The Water and Wastewater Utility Problem: The Passive Receiver



THE DISCONNECT

Manufacturers and users

Manufacture or use PFAS
PFAS enters the environment

↓

Water and wastewater utilities

Receive, treat, and manage PFAS introduced by others

Should they occupy the same position when cleanup costs are allocated?

8. EPA Recognizes the Passive-Receiver Problem

EPA enforcement priority

Focus on parties that significantly contributed to PFAS contamination

Manufacturers • Manufacturing users • Industrial parties

But…

Enforcement discretion is not the same thing as a liability exemption

EPA policy does not rewrite CERCLA or bar private claims.

The key question is not only whether EPA will act, but whether another party may seek to allocate costs to a utility.

9. The Liability Gap

EPA POLICY

Passive receivers are not the enforcement priority

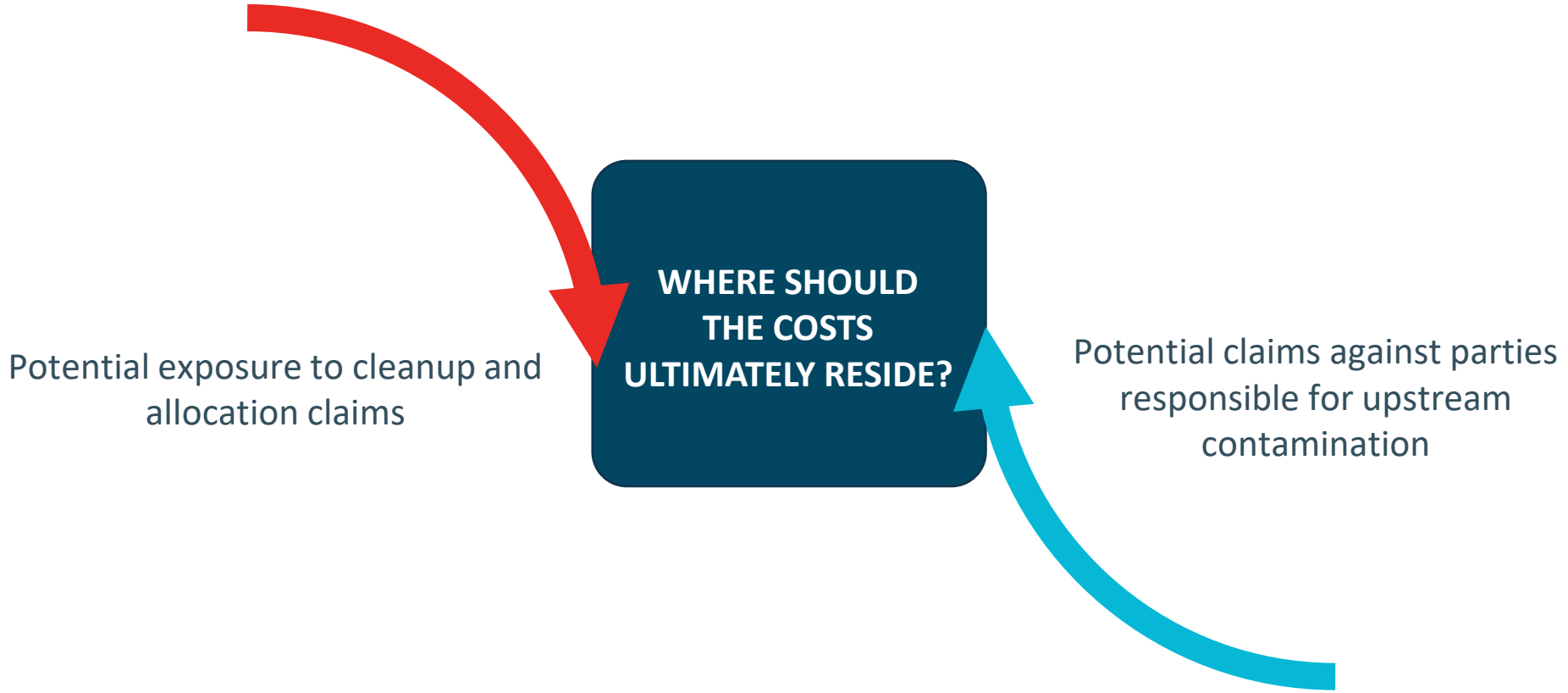
CERCLA STATUTE

No general utility exemption based on passive receipt

Reduced federal enforcement risk ≠ **CERCLA immunity**

When significant PFAS costs arise, who gets drawn into allocating them?

10. CERCLA as Both Risk and Potential Remedy

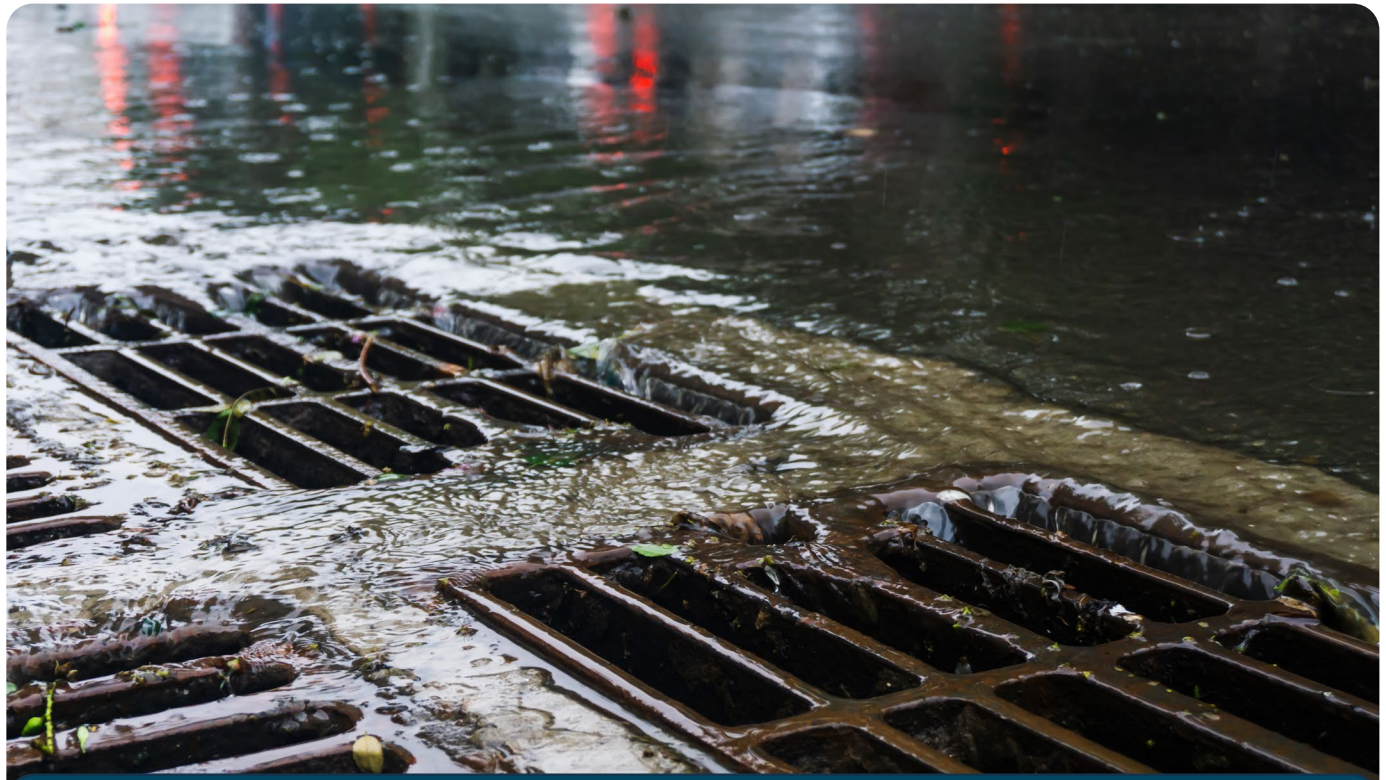


CERCLA should not be viewed solely as a defensive issue.

11. What Comes Next?

Developments to watch and the larger policy question

1. **Private-party PFAS litigation**
2. **The passive-receiver issue**
3. **EPA enforcement policy**
4. **Congressional action**
5. **Cost-allocation disputes**



Does liability for passive receivers advance or undermine “polluter pays”?

12. AWWA: “Polluters Should Pay”

AWWA’S POSITION

Responsibility

Companies and industries that manufactured, used, and released PFAS should bear remediation costs.

Protection

Utilities and customers should not pay for contamination they did not create.

Congressional Action

AWWA urges a specific CERCLA exemption for water and wastewater utilities.

The court settled EPA’s authority.
It did not settle who should ultimately bear the cost.