April 28, 2022

Re: Necessity of Protecting Water Systems from CERCLA Liability for PFAS

Dear Chairman Carper, Ranking Member Capito, Chairman DeFazio, Ranking Member Graves, Chairman Pallone, and Ranking Member McMorris Rodgers,

On behalf of organizations representing the nation's drinking water, wastewater, and water reuse utilities, we request that Congress provide an explicit exemption from liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) if PFAS chemicals are designated as hazardous substances.

As organizations dedicated to the protection of public health and the environment, we call on Congress to maintain CERCLA's bedrock principle of polluter pays, and to reject any policy that seeks to shift the burden for PFAS cleanups onto the public. Where appropriate, Congress has protected certain entities in the past from CERCLA liability, and we ask Congress to do the same for the nation's water sector in the case of PFAS contamination.[1] We further urge robust federal funding to advance understanding of PFAS risks, exposure pathways, and treatment and destruction technologies.

A hazardous substance designation under CERCLA will have far reaching implications and severe unintended consequences on water systems that have played no role in producing, using, or profiting from PFAS being placed into commerce.

CERCLA's core strength, the "polluter pays" model, is intended to hold entities financially responsible for the cleanup of contaminated sites they created, which is a principle we strongly support. But without a clear, narrowly tailored PFAS exemption under CERCLA, our members and their ratepayers will be facing a "community pays" outcome that unfairly shifts the clean-up and liability costs onto municipalities and the public they serve—who are already facing affordability challenges. When acting in accordance with all applicable laws, the water sector should be provided with an exemption to avoid this outcome.

The unique suite of synthetic PFAS chemicals that have been in use for over 50 years has led to its ubiquity in the environment. We are extremely concerned that, without a water sector exemption for PFAS, CERCLA will, ironically impose cleanup liability on utilities protecting public health and safety—but not on the chemical and manufacturing companies who profited by placing PFAS into commerce as "useful products" but took no role in a product's ultimate

[1] *See e.g.,* 42 U.S.C. §§ 9607(p)(1), 9627(a) (demonstrating two examples where Congress has provided CERCLA statutory liability exemptions and exclusions where applicable and qualified).

disposal. This will leave the water sector and communities squarely on the hook through their everyday water treatment activities.[2]

If PFAS are designated under CERCLA, the exemption we are seeking will help ensure that federal policy does not shift potential CERCLA liability and clean-up costs from those that created the problem to the public. PFAS are unique in that a vast array of domestic, commercial, and industrial sources contribute to environmental contamination.

Water, wastewater, stormwater, and water reuse systems *passively receive* PFAS from these sources. Water systems, and the public, have limited control over their contributions of PFAS to the environment given the overwhelming presence of this family of chemicals in the chain of commerce and in our homes.

Any CERCLA hazardous substance designation for PFAS, absent an exemption for the water, wastewater, and water reuse sectors would lead to increased management costs for byproducts created during the normal water and wastewater treatment processes. Utilities could face unwarranted liability and legal defense costs at Superfund sites—such as landfills or agricultural sites—and through our discharges, diverting vital resources from their primary responsibilities of protecting public health and the environment. This is the case because under CERCLA any party who has contributed in any part to disposing of hazardous substances, even trace amounts, may be held liable for remediation.

For example, when drinking water or water reuse utilities remove PFAS from source water via filtration media, they are responsible for the disposal of these potentially PFAS-laden filter media. The media will typically be recycled or disposed of in accordance with applicable law. But should that disposal location ever become a Superfund site, the water utility could be held liable under CERCLA as a PRP due to its lawful disposal of this necessary byproduct of a vital public health service—thereby forcing local ratepayers to cover the cleanup bill after they already paid to remove the PFAS from their source water.

Wastewater and water reuse utilities would face similar liability through no fault of their own because they receive PFAS chemicals through the raw influent that arrives at the treatment plant. This influent comes from domestic, commercial, and industrial sources. Utilities may be able to achieve targeted reductions through industrial pretreatment programs, but even that will not address the concentrations arriving from countless households. Utilities are responsible for managing the tons of biosolids and treatment residuals created as a byproduct of the treatment process each day.

The argument that an exemption may not be necessary for water systems because U.S. EPA would not seek to target local utilities as potentially responsible parties (PRPs) to bear liability is a false sense of protection. In the highly litigious world of CERCLA contribution actions, any PRP can—and do—bring utilities into actions to try to reduce their own portion of the overall cleanup bill. To date, at least 650 municipalities and counties have been pulled into CERCLA litigation by other PRPs.

---

[2] Burlington N. v. U.S., 556 U.S. 599 (2009) (clarifying that unless the company producing the hazardous waste itself engages in the ultimate disposal of the product, CERCLA liability and costs associated with clean up cannot extend to chemical and products manufacturing companies merely placing useful products into commerce).

In sum, a CERCLA hazardous substance designation threatens to shift the burden of significant cleanup costs and liability onto our communities. Congress can and should avoid this by exempting the water and wastewater sectors from any CERCLA designation and instead rely on the time-tested effectiveness of the Clean Water Act (CWA) and Safe Drinking Water Act (SDWA) which are designed to address the unique demands of our sectors.

Regardless of whether U.S. EPA moves ahead with a PFAS hazardous substances designation or Congress does so itself, if PFAS are designated as CERCLA hazardous substances, it is imperative that Congress step in with a water system exemption to protect the public. Congress has provided similar protections as necessary in the past—and must do so again.

As entities charged with protecting clean and safe water for all, our members stand ready to do their part under SDWA and CWA programs. We support EPA's efforts to better understand PFAS sources, take measured and practical approaches in gathering data, and assess the risks of PFAS to public health and the environment. Greater focus on eliminating PFAS in consumer products, source control, and destruction technology is truly necessary to achieve progress in mitigating PFAS risks and exposure.

We urge the federal government to be a partner in protecting the public, ensuring clean and safe water, and protecting our sector from unintended costs and liabilities as we work together to address the PFAS challenge.

Sincerely,

American Water Works Association
Association of Metropolitan Water Agencies
National Association of Clean Water Agencies
National Association of Water Companies
National Rural Water Association
National Water Resources Association
Water Environment Federation
WateReuse Association
Association of California Water Agencies
California Association of Sanitation Agencies

cc: Senate Armed Services Committee; House Armed Services Committee