ASSOCIATION OF METROPOLITAN WATER AGENCIES

LEADERS IN WATER

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The Honorable Tom Carper
Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

The Honorable Shelley Moore Capito
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Chairman Carper and Ranking Member Capito:

The Association of Metropolitan Water Agencies (AMWA) appreciates the opportunity to submit this statement for the record of today's hearing on "Examining PFAS as Hazardous Substances." AMWA's members provide quality drinking water to more than 160 million Americans from coast to coast, but today one of the greatest challenges facing our member utilities is how to effectively and affordably address emerging contaminants like Per- and Polyfluoroalkyl Substances, which are commonly known as PFAS.

AMWA recognizes and appreciates the Environmental Protection Agency's efforts to use the regulatory tools it has available to reduce the public's exposure to PFAS in drinking water, and to hold polluters accountable for addressing environmental contamination related to PFAS use and disposal. However, AMWA strongly believes that Congress must intervene to ensure that those entities truly responsible for introducing PFAS into the environment are those that ultimately pay for PFAS remediation costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Proposed Drinking Water Standards for PFAS

AMWA's concerns about potential water system liability for PFAS remediation under CERCLA stem in part from EPA's proposed National Primary Drinking Water Regulation (NPDWR) for perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), and four other PFAS that may be present in drinking water supplies. EPA's proposal, issued in 2023, followed action in the preceding years by several states to set their own standards for PFAS in drinking water. Under EPA's proposed NPDWR, public water systems across the country would have as little as three years to come into compliance with new drinking water standards for PFOA and PFOS that would limit concentrations to four parts-per-trillion, the equivalent of one drop in five Olympic-sized swimming pools.

While AMWA was supportive of the determination to set federal standards for these contaminants in drinking water, we must be honest about what the costs of compliance will mean for water systems, and by extension the ratepaying public. A study completed last year by the Policy Navigation Group on behalf of AMWA estimated that the NPDWR would cost community water systems across the country as much as $6.4 billion each year – a sum that translates to additional annual per-household costs of $1,700 for community water systems serving between 501 and 1,000 people.[1]

Even for larger water systems that serve more than one million people, AMWA's estimate found that the per-household cost of compliance could average $110 per year nationwide. While these costs may vary from community to community, EPA's proposed NPDWR for PFOA and PFOS will carry significant compliance costs for water systems and their ratepayers across the country. And these costs will come as many water systems are already struggling to maintain water affordability in the face of other regulatory and infrastructure renewal challenges.

Even beyond the anticipated costs of compliance, water systems that do not already have capital projects underway to add treatment technologies to their facilities capable of meeting EPA's proposed standard – such as granular activated carbon filtration – will be extremely challenged to meet the proposal's three-year compliance deadline. This is due to a combination of increased demand for the technology leading to supply chain challenges, the technical complexity of designing, constructing, and operating these systems, and a lack of funding availability. Though the Bipartisan Infrastructure Law is providing $9 billion over five years to help public water systems address emerging contaminants like PFAS, given the anticipated compliance costs this level of funds is not adequate to aid every public water system nationwide that will require action.

To help drinking water systems nationwide better focus resources to meet the new standards, while also maintaining strong public health protections, AMWA's comments to EPA on the proposed NPDWR[2] included several recommendations, such as:

- An initial compliance timeline of at least five years, which would provide public water systems with a more realistic opportunity to complete the complex approval, procurement, construction, and implementation process necessary to make new water treatment infrastructure operational.

- A phased enforcement schedule that prioritizes initial compliance for public water systems with the highest concentrations of PFAS, and which pose the most significant public health risks. Once these systems are brought into compliance, enforcement should turn to remaining public water systems. This phased approach would help alleviate potential supply chain challenges for PFAS treatment technologies while ensuring that ratepayers do not face a cost burden that threatens financial hardship while paying their water bill.

[1] https://www.amwa.net/testimonycomments/amwa-comments-proposed-pfas-national-primary-drinking-water-regulation
[2] *ibid*

- Allowing for monitoring waivers, or reduced monitoring requirements, for public water systems that can demonstrate reduced risks based on watershed characteristics or other factors. This monitoring flexibility would reduce compliance costs and lessen the strain on available laboratory capacity to screen for PFAS at the level proposed by EPA.

Again, AMWA supports reasonable federal drinking water regulations for PFOA, PFOS, and other PFAS that carry demonstrated public health risks, and the association recognizes that public water systems play an important role in protecting public health through the removal of contaminants from drinking water. But the association believes it is essential that the final NPDWR recognize the notable technical and budgetary challenges that will face water systems seeking to comply, and that EPA ensures they have adequate time and resources to implement the technology to effectively remove PFAS from their drinking water before the regulation takes effect.

Additionally, because of the significant costs that complying with the NPDWR will carry for water system ratepayers, it is critical that EPA and Congress utilize other regulatory and statutory mechanisms to reduce other costs and liability exposures in other areas – such as by ensuring that polluters are prevented from passing on costs associated with CERCLA-mandated environmental PFAS cleanups to water system ratepayers.

Proposed Hazardous Substance Designation for PFAS

In 2022 EPA proposed to designate PFOA and PFOS as hazardous substances under CERCLA. According to EPA, this action was intended to "increase transparency around releases of these harmful chemicals and help to hold polluters accountable for cleaning up their contamination."[3] However, if the proposal were to be finalized without any changes, drinking water utility customers would also be exposed to untold amounts of liability related to the cleanup of PFOA and PFOS from landfill sites where they were disposed of, years or even decades earlier.

Ironically, public water systems' compliance with EPA's proposed NPDWR is precisely what may put them at risk of incurring liability and environmental cleanup costs under CERCLA. This is because many public water systems will remove PFOA and PFOS from drinking water supplies through a granular activated carbon filtration treatment process that will capture and concentrate the PFAS in filtration media. Eventually, this filtration media reaches the end of its useful life, and the spent media – concentrated with PFAS – must be either regenerated, incinerated, or disposed of at a facility that will accept material containing hazardous waste. This filter media also requires periodic cleaning to remove accumulated material and the public water system will typically send this PFAS-containing material to an on-site drying location before hauling it to a landfill. In either circumstance, because the public water system had possession of PFAS after its removal from its water supplies, it would face liability as a "potentially responsible party" under CERCLA. This would expose water system ratepayers nationwide to perhaps

[3] https://www.epa.gov/superfund/proposed-designation-perfluorooctanoic-acid-pfoa-and-perfluorooctanesulfonic-acid-pfos

billions of dollars more in cleanup costs, in addition to the billions of dollars they already collectively spent to remove these contaminants from their source water supplies.

In recognition of the fact that the original polluters and users of PFAS should bear these cleanup costs, EPA has announced plans to pursue an "enforcement discretion" policy that would concentrate the agency's CERCLA enforcement activities related to PFAS on the entities responsible for the contamination these chemicals have caused. While AMWA appreciates EPA's intent, this policy alone will not ensure that drinking water ratepayers will avoid potentially catastrophic CERCLA legal defense costs and cleanup liability for PFAS.

First, it is impractical to believe that the promise of a voluntary enforcement discretion policy by EPA will be enough to give water and wastewater systems nationwide the comfort to know the agency will never pursue them for PFAS remediation costs under CERCLA. This certainty could only be provided by EPA settling with each of the 50,000 community water systems and 16,000 treatment works nationwide – a cumbersome exercise that would represent a massive waste of resources for both EPA and local water systems alike. And drafting and finalizing these settlements would saddle water systems with significant legal costs – all of which would be passed on to ratepayers.

However, even if we assume that EPA's enforcement discretion policy would adequately prevent the agency from pursuing claims against individual water systems, this would still be insufficient to shield water system ratepayers from incurring liability for PFAS cleanups under CERCLA. This is because the polluters that EPA does pursue for site cleanup costs could undertake a "private right of action" under section 107 of CERCLA, or a "contribution claim" under section 113, to attempt to recover costs from other entities that meet CERCLA's definition of "potentially responsible parties" for a given site.

In practice, these provisions will serve as loopholes through which polluters can circumvent their cleanup responsibilities and pass costs onto water system ratepayers – or at minimum, force water systems to pay steep legal costs to defend themselves against these claims.

Congressional Action Needed to Solidify Passive Receiver Protections

There is one clear solution to prevent polluters from abusing CERCLA to avoid their clear responsibilities, and to prevent the administrative nightmare of requiring EPA to reach individual settlements with thousands of water systems nationwide: Congress must make a narrow, targeted addition to CERCLA to clearly and explicitly ensure that passive receivers that never produced or used PFAS chemicals in commerce are not forced to clean up the PFAS mess made by corporate polluters. In the case of drinking water systems, the absence of such protections could force ratepayers to pay twice to clean up the pollution of others: once when PFAS is filtered out of source waters, and again potentially years later should the ultimate disposal site of the PFAS contamination become subject to a cleanup under CERCLA.

Fortunately, there is a model for moving forward. Last year Sen. Cynthia Lummis introduced a series of bills to preserve CERCLA's "polluter pays" principle when it comes to PFAS. Among these was S. 1430,

the Water Systems PFAS Liability Protection Act, which would guarantee that a drinking water or wastewater system that properly disposes of PFAS will not face future liability related to the cleanup of the disposal site of those chemicals. However, the bill also ensures accountability on the part of water systems by conditioning these liability protections on the utility following all applicable rules related to PFAS disposal, and not acting with gross negligence or willful misconduct during this process.

While S. 1430 and Sen. Lummis' other proposals have put an important focus on the need to protect innocent passive receivers from CERCLA liability related to PFAS, AMWA understands and appreciates that the Committee may wish to explore other approaches to addressing this issue. We are therefore willing and eager to discuss the path forward with the Committee and are committed to working cooperatively to attain our common goal of ensuring that those responsible for fouling our environment with PFAS are the ones paying the bill for cleaning it up. Water systems and ratepayers should not face liability exposure under CERCLA simply because they made required investments in their infrastructure to meet state and federal drinking water standards for PFOA and PFOS, and then followed all applicable laws in the disposal of the residuals.

Conclusion

Again, AMWA appreciates the opportunity to submit this statement for the record of today's hearing. I am confident that members of the Committee would agree that our bedrock environmental laws should hold polluters responsible for the damage they cause, and should not include loopholes that allow those same polluters to pass off these costs to the public. Unfortunately, that is the risk we face today if CERCLA is not tightened to provide very narrow and targeted protections for passive receivers like water systems that only temporary possess PFAS due to their responsibility to comply with other enforceable public health laws.

Drinking water ratepayers across the country are already facing billions of dollars in costs to remove PFAS from their drinking water. They should not have to pay billions more to allow polluters to avoid responsibility for their fair share. We urge the Committee to act on legislation to protect drinking water and wastewater systems from CERLCA liability related to environmental PFAS cleanups.

Thank you again, and AMWA and its member utilities are eager to continue working with you on this important topic.

Sincerely,

Tom Dobbins
Chief Executive Officer