ASSOCIATION OF METROPOLITAN WATER AGENCIES

LEADERS IN WATER

1620 I Street, NW, Suite 500
Washington, DC 20006

P 202.331.2820
amwa.net

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Michael S. Regan
Administrator
US Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Via electronic submission

Re: EPA-HQ-OLEM-2019-0341-0001; Designation of PFOA and PFOS as CERCLA hazardous substances

Dear Administrator Regan,

The Association of Metropolitan Water Agencies (AMWA) appreciates the opportunity to provide comment on EPA's proposal to designate perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). AMWA is an organization of the largest publicly owned drinking water systems in the United States. Our member utilities collectively provide clean drinking water to over 160 million people. The association has serious concerns that this proposal will have significant financial implications on drinking water utilities and, by extension, their ratepayers, and urges EPA to consider these costs and be transparent in its efforts to alleviate them.

AMWA strongly supports CERLCA's core principle of "polluter pays," which is intended to hold entities financially responsible for the cleanup of sites they contaminated. AMWA has also expressed support for EPA's regulatory determination to establish a National Primary Drinking Water Regulation (NPDWR) for PFOA and PFOS, due to the significant risks of severe health effects associated with high levels of both substances in drinking water. However, given that drinking water utilities have played no role in generating, using, or profiting from PFAS that were placed into commerce, but will be required, at significant cost, to remove these substances from drinking water sources when the NPDWR is finalized, it would be patently unfair for water systems and their customers to face additional cost liability related to the cleanup of the ultimate disposal site of these substances.

Unfortunately, if PFOA and PFOS are designated as hazardous substances under CERLCA, then our members and their ratepayers will permanently face a "community pays" outcome that unfairly shifts the clean-up and liability costs onto municipalities and the public they serve—people who are already facing affordability challenges. This will be a very problematic outcome unless Congress first enacts a clear, narrowly tailored exemption for drinking water systems that legally dispose of PFOA and PFOS removed pursuant to compliance with any future NPDWR. When acting in accordance with all applicable laws, drinking water systems should not be held liable for the cost of cleaning up PFAS contamination that escaped into the environment after it was properly disposed of following its removal during the water treatment process.

In its current form, EPA's proposed designation of PFOA and PFOS as hazardous substances allows for drinking water utilities to face unwarranted liability and legal defense costs at Superfund sites, such as landfills or agricultural sites, which would divert vital resources from their primary responsibilities of protecting public health and the environment. Under CERCLA, any party who has contributed in any part to disposing of hazardous substances, even trace amounts, may be held liable for remediation. Therefore, a drinking water system that disposes of water treatment byproducts containing PFAS could be held liable under CERCLA years or decades later if the disposal location becomes a Superfund site due to PFAS contamination.

EPA recently indicated it would use "enforcement discretion" when considering potential CERCLA liability for drinking water systems in relation to PFOA and PFOS. While AMWA appreciates the acknowledgement from EPA that this designation, if finalized, would require additional measures by EPA to avoid putting unwarranted burdens on the water sector, this step does little to reassure water utilities that they will not incur large costs associated with CERCLA liability. Drinking water utilities are not even cited in any of the five broad categories EPA has listed as potentially affected parties, so it is important EPA acknowledge the potential burdens it will be imposing on drinking water systems and their customers.

EPA should quickly release its plan for enforcement discretion for the water sector, one which guarantees that the legal disposal of water treatment byproducts containing PFOA or PFOS by a drinking water system cannot trigger a CERCLA enforcement action by EPA or any other party. The agency should also establish a mechanism to ensure that this guarantee will be honored by different administrations in the future. If such a step is beyond EPA's ability or authority, then the proposed hazardous substance designation should not be finalized.

AMWA has significant concerns that other potentially responsible parties will continue the common practice of bringing other parties into legal actions to try and reduce their overall share of the cost of clean-up. In this situation, we again see the shift of burdens from the entity responsible for the pollution to the community affected by the pollution. EPA has recognized this as an issue and must do more to support the water sector in its efforts to avoid cleanup liability and reduce burdens on ratepayers.

Many states have already implemented their own regulations to limit the amount of PFAS in drinking water, meaning some utilities are already required to remove it from source waters, and subsequently dispose of it. As EPA prepares to propose its own NPDWR for PFOA and PFOA, EPA should recognize the difficult situation this will put drinking water utilities in. The water sector will be legally required to remove PFAS from drinking water and dispose of media in a hazardous waste site - thereby forcing local ratepayers to cover the cleanup bill after they already paid to remove the PFAS from their source water. EPA should consider how these two rulemakings affect each other and work to prevent costs of removal, disposal, and potential liabilities, from falling to ratepayers.

The proposed designation of PFOA and PFOS as hazardous substances also runs in direct opposition to the agency's commitment to environmental justice, as the impacts of the proposed rule could require vulnerable communities to bear the brunt of remediation costs for environmental contamination they did not create. For example, in the case of a community adjacent to a facility producing PFOS and PFOA released into the environment, the most vulnerable community members would be most susceptible to the negative health effects of the contamination. Requiring this community's water utility – and by extension, its ratepayers – to then pay for costs of the PFOS and PFOS removed from drinking water would cause further strain to vulnerable households and individuals struggling to pay their water bills. EPA should quickly release its plans for preventing this "double jeopardy" like situation.

While the association is gravely concerned with the potential outcomes of this rulemaking, it is generally supportive of efforts to reduce the burdens of PFAS contamination. AMWA strongly supports further scientific research into disposal and destruction of PFAS to find better solutions to this complex problem. AMWA recommends EPA focus its efforts on finding sustainable and reliable methods for destruction to prevent build up in hazardous landfills.

AMWA appreciates the opportunity to provide this feedback to EPA on its proposal to designate PFOA and PFOS as hazardous substances under CERCLA. The association is also in agreement with and supportive of comments submitted by the Water Coalition Against PFAS expressing concerns with this proposal. If you have any questions about these comments, please contact Brian Redder, AMWA's Manager of Regulatory and Scientific Affairs, at Redder@amwa.net.

Sincerely,

Thomas Dobbins
Chief Executive Officer

cc: Jennifer McLain, OGWDW
Michelle Schutz, OLEM
Barry Breen, OLEM