



July 12, 2023

The Honorable Thomas 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) is an organization representing the nation’s largest publicly owned drinking water systems, and our members provide clean and safe drinking water to more than 160 million Americans each day. This task involves the dedicated work of thousands of professionals who source, convey, test, treat, and deliver water from coast to coast, while ensuring compliance with a host of state and federal water quality mandates. It is a responsibility we cherish.

The presence of emerging contaminants like Per- and Polyfluoroalkyl Substances (PFAS) in source water supplies represents a daunting new challenge. These contaminants were designed to resist degradation, but as a result they are persistent in the environment. Due to their documented public health risks AMWA agrees with EPA’s decision to promulgate national primary drinking water regulations for two of the most common PFAS: PFOA and PFOS. In March, EPA proposed a maximum contaminant level (MCL) for these substances of four parts-per-trillion (ppt), or the equivalent of one drop in five Olympic-sized swimming pools. EPA also proposed regulating four other PFAS as a mixture, with a maximum contaminant level represented by a unitless “hazard index” of 1.0.

When these regulations are finalized and take effect, public water systems from coast to coast will be required to conduct monitoring for these PFAS, and to take action to ensure their water does not exceed the MCLs. AMWA estimates the cost of compliance for drinking water systems nationwide could reach \$7.5 billion annually.¹

¹ AMWA comments on proposed PFAS National Primary Drinking Water Regulation, May 31, 2023.
<https://www.amwa.net/testimonycomments/amwa-comments-proposed-pfas-national-primary-drinking-water-regulation>.

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AMWA therefore appreciates your leadership in developing draft legislation to improve the mitigation and remediation of PFAS contamination, and for offering the opportunity for AMWA and other stakeholders to provide feedback.

General Comments: CERCLA Liability Protections for Passive Receivers

AMWA's detailed comments on the draft legislation are below, but we are most struck by the legislation's absence of any provision to ensure that drinking water systems and other passive receivers are shielded from paying environmental cleanup costs related to PFAS under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This legislation represents a perfect opportunity to address the PFAS problem from all angles, and that includes ensuring that the producers and users of PFAS – and not innocent parties like water system ratepayers – are held responsible for the cost of remediating environmental damage caused by these contaminants.

As you are aware, last year EPA proposed to designate PFOA and PFOS as hazardous substances under CERCLA. While EPA has stated that this action will help ensure that manufacturers and users of these chemicals are held responsible for the cost of remediating contaminated sites, without congressional action drinking water and clean water utility customers will also be at risk of incurring the significant cost of not only disposing of the material used to remove these compounds from drinking water, but also the subsequent cleanup of disposal sites that become tainted with these chemicals.

To comply with EPA's proposed drinking water standards, many public water systems will remove these substances through a granular activated carbon filtration treatment processes 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. Additionally, this filter media requires periodic cleaning to remove accumulated material and the public water system will send this material to an on-site drying location before hauling this PFAS containing material to a landfill. In either circumstance, the public water system would face liability under CERCLA as a "potentially responsible party" should that final disposal site ever become subject to a Superfund cleanup. This would cause water system ratepayers to pay perhaps billions of dollars more in cleanup costs, in addition to the billions of dollars they already spent to remove these contaminants from their source water supplies.

EPA has recognized that the original polluters and users of PFAS should face these cleanup costs, and has therefore announced plans to pursue an "enforcement discretion" policy that would concentrate the agency's CERCLA enforcement activities related to PFAS on the polluters responsible for the contamination these chemicals have caused.² While we appreciate EPA's effort, unfortunately this policy will not ensure that drinking water ratepayers will avoid potentially catastrophic CERCLA

² <https://www.epa.gov/system/files/documents/2023-03/cercla-pfas-enf-listen-session-march-2023.pdf>

legal defense costs and cleanup liability for PFAS. This is because the policy could easily be changed by future administrations and because entities being pursued for site cleanup costs by EPA could undertake a “private right of action” against other entities that may have also contributed PFAS to a given site. This gives polluters a clear avenue to attempt to circumvent their cleanup responsibility and pass costs onto water system ratepayers – or at minimum, force water systems to pay steep legal costs to defend themselves against these claims.

AMWA believes the clear solution is for Congress to 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.

In response to this scenario, in May, Sen. Cynthia Lummis introduced several 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 water system that properly disposes of PFAS removed from source waters will not face future liability related to the cleanup of the disposal site of those chemicals. However, the bill also holds water systems accountable 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 the series of other bills offered by Sen. Lummis 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. To help advance these considerations, below represents one avenue that could protect truly innocent passive receivers – including drinking water and wastewater systems – that only possessed PFAS in the context of their statutory duty to ensure the water they handle meets applicable state and federal public health and water quality standards. While this language only represents a rough outline of the concept, we hope it aids the discussion and AMWA urges the committee to consider this approach as it moves forward with developing comprehensive PFAS legislation:

- (a) Exemption – Subject to subsection (b), no person (including the United States, any State, or an Indian Tribe) may recover costs or damages from a passive receiver under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) for costs arising from a release to the environment of a perfluoroalkyl or polyfluoroalkyl substance.*
- (b) Requirement -- Subsection (a) shall only apply if a passive receiver does not act with gross negligence or willful misconduct in the use, discharge, disposal, management, conveyance, or storage of a perfluoroalkyl or polyfluoroalkyl substance.*

- (c) *Passive Receiver* – The term “passive receiver” means an entity that—
- (1) Does not use or manufacture a perfluoroalkyl or polyfluoroalkyl substance for a commercial purpose; and
 - (2) Transports, treats, disposes of, or arranges for the transport, treatment, or disposal of a perfluoroalkyl or polyfluoroalkyl substance in accordance with an applicable law.
- (d) *Commercial Purpose*— The term “commercial purpose” means an action or activity that—
- (1) Is undertaken deliberately to create an immediate or eventual profit or similar benefit;
 - (2) Results in the intentional placement of a perfluoroalkyl or polyfluoroalkyl substance in or as a product for sale for a particular purpose; and
 - (3) Is not undertaken solely for the purpose of achieving or maintaining compliance with an applicable law.
- (e) *Applicable Law*—the term “applicable law” means—
- (1) The Safe Drinking Water Act;
 - (2) A state law or regulation governing drinking water quality;
 - (3) The Federal Water Pollution Control Act;
 - (4) [other statutes as deemed appropriate]

While AMWA anticipates that this example needs refinement, the bottom line is that if a community water system acts responsibly in removing PFAS from drinking water and disposing of the treatment byproducts, its ratepayers should not face additional environmental cleanup costs years or decades in the future. AMWA believes it is essential that this principle protecting passive receivers be reflected in any PFAS legislation reported out of the Environment and Public Works Committee.

General Comments: Increasing Lab Capacity

AMWA also notes the bill’s lack of any provisions to address another major concern for drinking water systems related to PFAS and forthcoming drinking water regulations: the adequacy of national laboratory capacity to reliably conduct the testing necessary for water systems to determine the presence of PFAS at the maximum contaminant level proposed by EPA.

For example, in the proposed national primary drinking water regulation for PFAS, EPA estimates that public water systems serving over 3,300 people will, at most, sample quarterly for initial and long-term compliance. However, because a water system needs to know how often it must replace its filtration media, it will have to perform sampling throughout the column or bed to ensure PFAS is still being removed from the water and the media is still performing adequately. This will significantly increase the number of samples water systems have to take and, therefore, get analyzed by a lab. Some AMWA members have estimated needing to take 60 samples per month on average, equating to 720 samples a year. That is significantly more than the four per year per entry point required under the proposed rule; other water systems are projecting even higher sampling needs.

EPA's proposed national primary drinking water regulation notes that just 54 laboratories nationwide have submitted applications to analyze samples of drinking water for PFOA and PFOS under the fifth Unregulated Contaminant Monitoring Rule (UCMR)³. If 4,300 public water systems subject to UCMR monitoring were to each submit 60 samples per month for testing, each lab would have to handle 4,700 samples, or about 156 samples per day. This figure would increase dramatically if every public water system were to carry out the required monitoring under the proposal, and does not even account for wastewater or biosolids samples that would likely be competing for the limited lab analysis capacity.

AMWA therefore recommends that the legislation authorize funds to both support the development of additional laboratory capacity to meet this need and to help more public water systems put in place their own in-house labs. While several AMWA members are already looking into this option, it would be expensive. Mid- and large-sized drinking water systems have generally reported minimum equipment cost of about \$500,000 – about \$400,000 for analytical instruments and \$100,000 for an autosampler and extraction system. These costs do not include space procurement, labor, and maintenance, which would further add to the expense burden. Federal assistance to help public water systems and private labs meet this capacity challenge before new PFAS drinking water standards take effect would be extremely beneficial.

Aside from the lab capacity issues and the lack of liability protections under CERCLA, AMWA offers these additional comments and suggestions related to other aspects of the draft legislation.

Section 2: Definitions

Because the scope of all the bill's subsequent provisions related to studies, risk communication strategies, and scientific research and development are dependent on the legislation's definition of PFAS, AMWA believes this definition should be sufficiently broad to capture the wide range of PFAS that may pose risks to human health and the environment. This will ensure that EPA is directed to collect data for all such compounds to support future research and risk evaluation and communication efforts. AMWA understands that most scientific organizations consider PFAS to be those substances containing at least one carbon moiety, so the association is eager to work with the committee and other stakeholders to ensure the bill's definition of PFAS is consistent with this standard, can be evenly applied across all ongoing legislative and regulatory efforts, and focuses on the PFAS likely to represent the greatest risks to human health and the environment.

Section 3: Maximum Contaminant Level for Perfluoroalkyl or Polyfluoroalkyl Substances

EPA formally proposed MCLs for PFOA and PFOS on March 29, 2023. On the same date EPA also made a preliminary determination to regulate PFNA, PFHxS, GenX, and PFBS, concurrent with

³ <https://www.federalregister.gov/documents/2023/03/29/2023-05471/pfas-national-primary-drinking-water-regulation-rulemaking#addresses>

proposing an MCL for those substances as a mixture. Under Section 1412(b)(1)(E) of the Safe Drinking Water Act, EPA is therefore required to finalize the regulation no later than 18 months after this date, though the agency may extend this deadline by an additional nine months.

Given this existing statutory deadline, AMWA questions the necessity of Section 3's requirement that EPA establish MCLs for these six PFAS no later than September 30, 2024. Section 3 mirrors the existing Section 1412(b)(1)(E) mandate that the rule be finalized in 18 months, but the new Section 3 language also eliminates EPA's option to take up to another nine months, if necessary, to complete work on the rule. Given the complexity of both the proposal and the science related to PFAS (and in particular PFNA, PFHxS, GenX, and PFBS), AMWA believes EPA must be provided with the time and resources to finalize an effective rule.

AMWA further observes that EPA has limited occurrence data for the additional PFAS beyond PFOA and PFOS that it is proposing to regulate, and that the agency is in the process of developing a human health toxicity assessment for PFNA and PFHxS. AMWA believes the human health toxicity assessment should be completed before a final regulatory determination is made, but Section 3 would prevent EPA from reconsidering its preliminary determination for these substances.

Whether or not we expect EPA to finalize its proposed regulations for these PFAS, AMWA does not believe the committee is justified in legislating a deadline for EPA to do so. Not only does Section 3 prevent EPA from taking all time provided under SDWA to finalize a rule best informed by science, but it also suggests that it is appropriate for Congress to dictate how and when national primary drinking water standards are finalized for individual contaminants. While in this case Section 3 mostly (but not exactly) mirrors the existing deadline for EPA to complete the rule, it sets a precedent that may in the future lead lawmakers to demand the finalization of drinking water standards on more expedited timeframes, or with maximum contaminant levels that do not match what EPA can justify based on the transparent, science-based process outlined in the Safe Drinking Water Act.

In sum, AMWA believes that once EPA has determined whether to regulate a certain contaminant in drinking water, Congress should not attempt to overturn that decision, dictate a final standard, or impose an alternative timeline for completion of the rule. Section 3 opens the door to Congress inserting itself into this regulatory process in the future while preventing EPA today from using all the time provided in SDWA to finalize the most reasoned drinking water standards for PFAS. AMWA therefore requests that Section 3 be removed from the draft legislation.

Section 5: State Revolving Fund Usage

Section 5 of the draft legislation would authorize states to use up to one percent of their Drinking Water and Clean Water State Revolving Fund (SRF) allotments each year to establish and maintain "a list or registry of all nonresidential industrial facilities in the State that manufacture or use" PFAS. States would then be required to disseminate the resulting list to public water systems and treatment works within the state, presumably to help them identify potential sources of PFAS that may end up in sources of drinking water or effluent.

While AMWA appreciates the importance of water systems being aware of potential threats to drinking water sources, we are not certain that using limited SRF dollars to establish such a registry for PFAS facilities would represent the best use of these funds. In Fiscal Year 2023, Congress provided a total of \$2.765 billion in regular appropriations for the Clean Water and Drinking Water SRFs. If each state reserved one percent of its respective share of each program to fund the PFAS registry, it would result in more than \$27 million in funds being set aside. Given the significant capital investments that drinking water and wastewater systems are anticipated to make in the coming years to address PFAS and comply with state and federal water quality standards, AMWA believes these funds would be better used to help water systems affordably finance these projects.

AMWA also notes that some states like California already have their own initiatives in place to identify industrial PFAS users and producers, so this new program registry program would offer them very little added value. While we understand that the SRF set asides would be voluntary for each state, AMWA suggests that it may be more effective for Congress to direct EPA to circulate best practices to states on how to develop and publicize this information, while not diverting a portion of important SRF funds away from their potential to fund actual capital projects addressing PFAS.

Section 7: Risk Management and Communication Strategies

AMWA supports the inclusion of this provision to direct EPA to establish a clearinghouse of risk management strategies and best practices used by states, tribes, and territories to inform the public about potential hazards related to PFAS. We also support the proposed development of a risk management guide to help states, tribes, and territories educate the public regarding PFAS hazards, health impacts, and exposure pathways.

These requirements are consistent with EPA's PFAS Action Plan, which includes an action to work "collaboratively to develop a risk communication toolbox that includes multi-media materials and messaging for federal, state, tribal, and local partners to ... help ensure clear and consistent messages to the public." However, while the action plan specifically includes "local partners" (presumably such as water systems) in this effort, no reference to "local partners" or "water systems" exists in the draft Section 7 language.

AMWA believes the proposed clearinghouse could benefit by including examples of PFAS risk communications used by water systems across the country, and that the risk management guide could also be useful in helping local water systems educate their customers about PFAS risks and mitigation actions. AMWA therefore recommends that local partners such as water systems be specifically included in the clearinghouse and as direct recipients of the risk management guide. This will ensure the information provided is as effective as possible while reaching the appropriate audience.

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Section 9: PFAS Technology Development Prize

AMWA appreciates the proposed creation of a PFAS Technology Development Prize to support the development of technologies to detect, mitigate, and destroy PFAS. While AMWA's member water systems are unlikely to undertake efforts to develop these technologies on their own, they would certainly seek to utilize these technologies should they become available in the marketplace. Any steps the federal government can take to advance the development of these technologies, and make them available to water systems sooner, will represent an important step in the fight against PFAS. AMWA therefore supports the creation and funding of the PFAS Technology Development Prize, and we commend the committee for including it in the draft legislation.

Conclusion

AMWA very much appreciates the opportunity to provide input on this draft legislation. While we commend the leadership of the Environment and Public Works Committee for developing this bipartisan draft, we believe any PFAS legislation will be incomplete if it fails to address the serious CERCLA liability risks faced by public water systems that must dispose of PFAS removed from drinking water sources. AMWA is willing and eager to work with you to address this shortcoming and ensure the committee's final PFAS legislation will comprehensively address the challenge before us.

Thank you again, and we look forward to continuing to engage on this important subject.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas Dobbins". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Thomas Dobbins, CAE
Chief Executive Officer