May 2, 2023

The Honorable Cynthia Lummis
United States Senate
Washington, DC 20510

Dear Senator Lummis,

The Water Coalition Against PFAS writes to express our strong support for the "Water Systems PFAS Liability Protection Act," legislation that will preserve the important "polluter pays" principle for cleanups of Per- and Polyfluoroalkyl Substances (PFAS) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Last year, EPA formally announced plans to designate two of the most common PFAS – Perfluorooctanoic acid (PFOA) and Perfluorooctanesulfonic acid (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 – the same American public that was unwittingly exposed to these chemicals now contaminating their water supplies – will also be at risk of incurring the significant cost of cleaning up sites that are tainted with these chemicals.

This is because drinking water and clean water systems are innocent receivers of PFAS contamination from upstream polluting industries and PFAS-laden products. This causes the water system to possess residuals that contain those PFAS, which are disposed of in accordance with applicable law. However, should disposal be to a landfill or other facility that ever became a Superfund site, then the water system could be treated as a PFAS polluter – and be responsible for a portion or even all the cleanup costs – forcing local ratepayers to cover the cleanup bill after they already paid to remove the contaminants from their source water. This challenge will become even more acute as EPA has proposed a National Primary Drinking Water Regulation for six different PFAS – which if finalized will require communities to remove these substances through treatment processes that will capture and concentrate PFAS in filtration media.

Wastewater and stormwater utilities would face similar liability through no fault of their own because they either receive PFAS chemicals through the raw influent that arrives at the treatment plant or through the municipal stormwater runoff that they manage. These flows can come from domestic, industrial, and commercial sources and may contain PFAS constituents ranging from trace to higher concentrations, depending on the nature of the dischargers to the sewer or stormwater system. These flows are not generated by the utility; rather, the utility provides the critical human health and environmental service of managing and treating this influent to meet all the requirements of the Clean Water Act. Congressional action is necessary to distinguish these utilities from the entities responsible for introducing PFAS into the environment.

We appreciate that EPA is pursuing an "enforcement discretion" policy that intends to concentrate the Agency's CERCLA enforcement activities related to PFAS on the polluters that have long profited from PFAS and are responsible for the contamination these chemicals have caused. However, any such policy will be wholly insufficient to ensure that drinking water and clean water utility customers will not be faced with potentially catastrophic CERCLA legal defense costs and cleanup liability for PFAS.

Not only could such a policy easily be changed by future administrations, but, more pressingly, industry has already publicly indicated that it will use every legal means available to it to require public agencies to pay for PFAS cleanups. As they have done countless times in the past, corporate polluters will use the extensive means provided to them by CERCLA to defray the costs of the pollution they created directly onto the backs of the communities they have harmed by dragging public agencies into CERCLA litigation. And, unfortunately, these communities are often those that have been the most overburdened with pollution and are therefore the least able to afford such costs. As well-intentioned as EPA is, the Agency simply cannot legally stop this from happening.

Passage of the "Water Systems PFAS Liability Protection Act" is therefore necessary to guarantee drinking water, wastewater and stormwater system ratepayers are entirely protected from incurring the likely billions of dollars of costs of cleaning up environmental PFAS pollution caused by others.

As the Senate debates this issue in the coming months, we will be eager to work with you on any necessary revisions to the scope of the bill, such as to ensure that the bill's definition of covered PFAS fully captures all PFAS that EPA may choose to designate as hazardous substances under CERCLA.

Removing harmful chemicals like PFAS from drinking water, wastewater and stormwater is central to the public health and environmental protection mission of our members. The "Water Systems PFAS Liability Protection Act" will support this mission of supporting clean and safe water while ensuring that water system ratepayers are not burdened by unwarranted liability through a misapplication of CERCLA's "polluter pays" principle. We support this legislation, and we thank you for your leadership on this important issue.

Sincerely,

American Water Works Association
Association of Metropolitan Water Agencies
National Association of Clean Water Agencies
National Rural Water Association
Water Environment Federation