NACWA

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The Honorable Shelley Moore Capito
Chair
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Ranking Member
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chair Capito, Ranking Member Whitehouse, and Members of the Committee,

On behalf of the National Association of Clean Water Agencies (NACWA) and the nation's publicly owned clean water utilities, thank you for your leadership in examining the nation's PFAS contamination, disposal, and cleanup challenges. Your November 19th hearing of the Senate Environment and Public Works Committee (EPW) examining PFAS cleanup and disposal policy highlighted the critical need for science-based national guidance and durable statutory protections for the communities and water systems now forced to manage PFAS every day.

Public clean water utilities are passive receivers of PFAS. They do not manufacture or profit from PFAS chemicals. Instead, they receive PFAS through the raw influent entering their treatment plants from domestic, commercial, and industrial sources—reflecting decades of widespread consumer and industrial PFAS use. Although utilities treat this influent under the Clean Water Act, municipal wastewater treatment facilities were not designed with PFAS removal in mind. Unfortunately, there are not currently any technically feasible, not to mention cost-effective, technologies that are able to effectively remove PFAS from the volumes of wastewater and stormwater received by municipal wastewater systems.

Given these realities, NACWA continues to advocate for stronger upstream controls, policies that empower public clean water utilities to address PFAS through the Clean Water Act, protections that prevent unintended CERCLA

liability for utilities and their ratepayers, and increased research to support sound regulatory decision-making as well as improved PFAS destruction.

A growing body of evidence shows that the financial burden of PFAS management on wastewater systems could be enormous. A landmark study by the Minnesota Pollution Control Agency found that the cost for wastewater treatment systems to remove and destroy PFAS in Minnesota alone will range from $14–$28 billion over the next 20 years. Extrapolated nationally, this means tens of billions of dollars per year in additional costs will be borne almost entirely by utilities that did not create the contamination and their public ratepayers.

These costs *do not* include the expansive CERCLA remediation and litigation burdens created by EPA's PFAS hazardous substance designations. Under CERCLA's retroactive, strict, and joint-and-several liability scheme, any entity that "releases" PFAS—including water utilities, farmers, airports, firefighters, and solid waste agencies—could be pulled into years of costly litigation even before remediation begins, and then ultimately burdened with extensive cleanup costs and demands. This legal exposure comes in addition to the massive costs of treating drinking water and wastewater utilities will bear to fulfill their responsibilities under the Clean Water Act and Safe Drinking Water Act. Without congressional action, CERCLA's "polluter pays" framework risks devolving into a "public pays" model, forcing American families to absorb rate increases for the cleanup of contamination they did not cause or benefit from. This would be the epitome of economic and environmental injustice.

Existing CERCLA exemptions demonstrate that liability protections for passive receivers are not novel.

Since CERCLA's enactment in 1980, Congress has amended the statute numerous times to ensure liability is assigned more fairly and consistently with the law's core "polluter pays" principle. Examples include:

- The *Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996*, exempting certain fiduciaries and lenders;
- The *Superfund Recycling Equity Act of 1999*, protecting those who sent recyclable materials later mismanaged by others; and
- Several additional provisions shielding parties, including generators of municipal solid waste, handlers of recyclable scrap, petroleum releases, workplace-contained releases, vehicle engine emissions, proper pesticide applications, normal fertilizer applications, and specific defense-related and nuclear materials.

It is important to note that the petroleum exclusion was originally established in part because petroleum was considered so ubiquitous in the environment that imposing CERCLA liability across the board would have been unworkable. PFAS are even more pervasive today. Given this reality, a narrowly tailored exemption is necessary to ensure that the public—including ratepayers, farmers, and

other passive receivers—is appropriately shielded from unwarranted CERCLA liability for PFAS cleanups.

In total, Congress has amended CERCLA at least eight times to protect parties not responsible for contamination. Providing a statutory shield from PFAS liability for water and wastewater utilities—entities that merely receive PFAS through normal operations and which are unable to fully prevent PFAS flow, given its unique ubiquity in the environment—would be wholly consistent with these precedents.

Why Existing CERCLA Exclusions Do *Not* Adequately Protect Clean Water Utilities

CERCLA contains several statutory exclusions and defenses that can help shield water utilities from unwarranted liability. However, neither of the two most relevant exclusions—the "federally permitted release" exclusion and the "normal application of fertilizer" exclusion—offers reliable or comprehensive protection to clean water utilities for the newly established PFAS designations.

Federally Permitted Releases – Too Narrow, Unclear, and Unreliable for PFAS

CERCLA excludes from liability certain "federally permitted releases," including discharges made pursuant to a Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit. In principle, this exemption should protect utilities operating fully within their permits. However:

While EPA has provided almost no guidance on the scope of this exclusion, and in fact went out of its way to say that the Agency was taking no position on it in the final PFAS designations, a 1988 proposed rule that was never finalized suggested that, to qualify for the exclusion, discharges must expressly be either limited by the permit or identified in the permit application process..

- Critically, PFAS discharges made under permits that did not expressly evaluate PFOA and PFOS would therefore still trigger CERCLA liability. This means that past discharges made pursuant to NPDES permits that did not expressly evaluate PFOA and PFOS – which, until recently, was all of them – would not be shielded from CERCLA liability. The longevity of PFAS in the environment combined with CERCLA's retroactive liability will therefore, absent Congressional intervention, lead to utilities across the country remaining liable under CERCLA for PFAS cleanups.

- And even now, as PFAS limits are being developed and implemented under the Clean Water Act, the years-long nature of the permitting process means that utilities which are fully complying with their Clean Water Act obligations would nevertheless not be protected from CERCLA liability by their existing permit.

In short, utilities operating under federally issued permits will still face CERCLA liability for PFAS discharges even when in full compliance with their NPDES permits. This exclusion therefore does not provide a meaningful shield in the context of PFAS.

Normal Application of Fertilizer – Increasingly Narrow, Ambiguous, and At Risk

CERCLA also excludes from liability the "normal application of fertilizer," which EPA historically argued includes the beneficial land application of biosolids in accordance with EPA's Clean Water Act Part 503 regulations. This in theory should help protect clean water utilities.

However:

- Breaking from previous statements about the scope of the exclusion, when finalizing the PFAS designations EPA expressly stated that the fertilizer exclusion requires a site-specific analysis, and that a categorical exclusion for beneficial land-application of biosolids in accordance with the Clean Water Act would "risk exceeding" what Congress intended.

- Courts have provided scant and inconsistent guidance, with some concluding that the mere presence of hazardous substances in fertilizer indicates that its application is not "normal" and therefore does not qualify for the exemption.

Thus, the fertilizer exclusion—previously relied upon by utilities and the agricultural community—has become highly uncertain with respect to how much protection it will afford utilities and farmers managing PFAS-containing biosolids. Land application of biosolids is one of the only safe, feasible alternatives for biosolids management, but biosolids programs across the country that are fully compliant with all federal laws could nevertheless face extraordinary liability risks due to the designations without Congressional action.

EPA's National Pretreatment Program, while essential, cannot solve the PFAS problem.

The pretreatment program plays a vital role in reducing *industrial* discharges into publicly owned treatment works (POTWs), and NACWA supports EPA's ongoing work to establish PFAS pretreatment standards for significant industrial users. Clean water agencies will play a key role in implementing any new standards.

However, pretreatment alone is insufficient, for three major reasons:

- **PFAS enter wastewater systems through numerous non-industrial pathways.** Everyday consumer goods—non-stick cookware, stain-resistant fabrics, personal care products, food packaging—release PFAS during routine use. PFAS also enters POTWs through atmospheric deposition. Many utilities with *no industrial users* still find PFAS in their influent, and are therefore exposed to CERCLA liability.

- **Legacy PFAS contamination cannot be controlled through pretreatment.** PFOA and PFOS are no longer widely used in new manufacturing, but most PFOA and PFAS entering today's wastewater systems reflect decades-old environmental accumulation—well outside the reach of any pretreatment program.

- **Pretreatment addresses "flowing discharges," not historic contamination.** While effective for current industrial releases, pretreatment cannot eliminate PFAS that have already entered the environment and continue to cycle through air, water, soils, and consumer waste streams.

While the pretreatment program is a critical tool for reducing ongoing and future industrial releases, it cannot address the broad and diffuse PFAS contamination already present nationwide, nor the myriad domestic and commercial PFAS discharges being made into POTWs every day. Comprehensive strategies—centered on upstream controls coupled with targeted statutory liability protections—are essential.

The need for congressional clarity is urgent and was underscored at the EPW hearing.

NACWA appreciates the Senate EPW Committee's call for clear, national PFAS disposal thresholds and guidance. Clean water utilities and local governments currently lack consistent criteria to guide them in managing PFAS-impacted materials, which creates uncertainty, potentially higher costs, and potential environmental harm.

As a critical step in providing clarity and certainty for communities, we strongly urge the Committee to address the urgent need to protect passive receivers—including water utilities, farmers, airports, firefighters, and landfills—from unfair CERCLA liability. EPA's enforcement discretion, which is already under attack in the courts, is inherently limited, temporary, and insufficient to shield municipalities from costly third-party litigation. A clear directive from Congress reinforcing the "polluter pays" principle in the context of PFAS cleanups is needed.

EPA has now formally acknowledged that Congress must act.

In a recent filing with the U.S. Court of Appeals for the D.C. Circuit, and in public statements by Administrator Lee Zeldin, EPA has clearly stated that ensuring passive receivers are protected from CERCLA PFAS liability requires new statutory language from Congress. EPA affirmed that while it will do what it can under existing authority, only Congress can provide the durable protections needed to uphold CERCLA's "polluter pays" principle.

EPA's enforcement discretion policy, while well-intentioned, cannot ensure that third parties—including polluters themselves—do not sue utilities and other passive receivers in an effort to shift their own cleanup costs and ensnare the public in protracted litigation. And in fact, chemical companies in non-PFAS-related CERCLA litigation are currently challenging EPA's authority to provide even the type of limited protections discussed in the PFAS enforcement discretion policy.

Administrator Zeldin has confirmed that EPA lacks the authority to provide a comprehensive legal shield for passive receivers, leaving water systems with only a nonbinding enforcement discretion memorandum that cannot fully protect them from PFAS-related litigation initiated by PFAS manufacturers and other polluters. To fully address the concerns of passive receivers, Congress must enact new statutory language.

NACWA urges the Committee to advance bipartisan CERCLA liability protections for water and wastewater systems.

Without congressional action, PFAS cleanup costs will fall on the public, forcing communities to pay for the consequences of decades of PFAS manufacture and use that made billions of dollars in profits for corporations while leaving legacy pollution in neighborhoods across the country. Providing a legal shield for PFAS passive receivers is consistent with prior CERCLA amendments, essential to ensuring equitable, science-based PFAS cleanups nationwide, and responsive to EPA's own recent calls to Congress.

NACWA stands ready to work with you to advance balanced, bipartisan legislation that protects communities, strengthens environmental stewardship, and ensures that polluters—not the public—pay for addressing PFAS contamination.

Thank you for your leadership and your continued commitment to addressing these urgent issues.

Sincerely,

Adam Krantz
CEO
National Association of Clean Water Agencies