



PRESIDENT

Thomas W. Sigmund

Executive Director
NEW Water
Green Bay, WI

VICE PRESIDENT

Oluwole A. "OJ" McFoy

General Manager
Buffalo Sewer Authority
Buffalo, NY

TREASURER

Diane S. Taniguchi-Dennis

Chief Executive Officer
Clean Water Services
Hillsboro, OR

SECRETARY

William J. "Mickey" Conway

Chief Executive Officer
Metro Water Recovery
Denver, CO

CHIEF EXECUTIVE OFFICER

Adam Krantz

1130 Connecticut Ave NW
Suite 1050
Washington DC 20036

T (202) 833-2672
F (888) 267-9505

www.nacwa.org

July 11, 2023

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

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

***RE: NACWA Comments on Senate Environment and Public Works
Committee Draft PFAS Legislation***

Dear Chairman Carper and Ranking Member Capito:

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the Committee's draft PFAS legislation. NACWA represents the interests of more than 350 publicly owned wastewater and stormwater utilities across the country. These public clean water agencies—large and small, urban and rural—provide the essential service of protecting public health and the environment by managing and treating billions of gallons of our nation's wastewater and stormwater, as well as the millions of tons of biosolids generated daily as a byproduct of the wastewater treatment process.

Per- and polyfluoroalkyl (PFAS) substances are a growing concern among many public clean water agencies and the communities they serve. NACWA is encouraged to see the Committee working to thoughtfully advance our nation's PFAS response, including through the draft bill's focus on addressing gaps in PFAS research and mitigation. The degree of public concern over PFAS risks, the inherent challenges with addressing these ubiquitous "forever chemicals" once they are in the environment, and the potential costs associated with PFAS control all call for thoughtful, bipartisan solutions to advance our understanding of PFAS risks and science-based solutions.

Below, we provide comments on specific provisions included in the Committee's draft bill. **But we must also emphasize what's missing from the draft; protection from liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for entities like public clean water utilities that passively receive PFAS by**

virtue of providing vital public services. These utilities do not produce or profit from PFAS and the communities they serve should not bear the costs imposed under CERCLA for their cleanup. Congress can provide a targeted PFAS exemption for passive receivers to help realize CERCLA's "polluter pays" promise and protect American households from subsidizing the private companies that have profited from these chemicals for decades by paying for cleanups through their water bills.

NACWA Comments on Provisions Included in the Draft Bill

Section 2 - Definitions

How to define PFAS is a subject of continuing debate, with numerous definitions in use across state and federal policy, the scientific community, and industry. NACWA appreciates the Committee's intent to create a standardized federal definition for PFAS and urges the Committee to use a broad definition that captures the chemicals in commercial use and is supported by the scientific community.

Section 4 - National Academies Study on the Uses of PFAS

NACWA supports this provision for a comprehensive national study on PFAS costs and benefits, potential substitutions, and ways to reduce nonessential PFAS use in commerce. This work will lead to greater PFAS source control, which is essential to meaningfully addressing PFAS in the environment. Even if the technology were available to allow clean water utilities to economically remove PFAS from the wastewater streams reaching the utility after passing through homes and business, such an approach would be largely futile if our national policies continue to allow largely unchecked use of PFAS in commerce. NACWA further recommends that the Committee include a deadline not only to initiate the National Academies study, but for its final publication as well.

Section 5 - State Revolving Fund Usage

While NACWA would prefer a new funding source separate from infrastructure investment dollars for this work, NACWA strongly supports providing states with the option to use up to 1 percent of their annual State Revolving Funds (SRF) capitalization grants to establish and maintain a list or registry of all nonresidential industrial facilities in the State that manufacture or use PFAS. States would disseminate that information to publicly owned treatment works, stormwater management agencies and public water systems, which could help public clean water utilities better identify potential PFAS users within their service area. This past December, EPA issued a memo recommending that state permit writers begin requiring clean water utilities to identify all industrial users in their service areas that may discharge PFAS and evaluate best management practices and pretreatment controls. Some utilities are already working under state efforts or proactively on their own to identify key sources of PFAS. Utilities would benefit from more comprehensive information on industrial PFAS users to inform this significant undertaking, which these state inventories could help provide.

Section 7 - Risk Management and Communication Strategies

This draft bill recognizes the clear need for enhanced public information around PFAS exposures and risks from various common pathways. The risk management guide proposed could provide valuable health information to the public about the different exposure pathways they face as well as relative and cumulative risks, which should include information on PFAS exposure from consumer products, household environments, water sources, and the ambient environment. This work could be updated over time in accordance with the findings of the National Academy Study proposed in Section 4. Communication and outreach must be built into this work thoughtfully from the outset and is a critical part of this work which NACWA supports.

This work is important to the water sector as water has become a key point of focus on PFAS risk from the public and from federal and state regulatory agencies, but the water sector is just one PFAS exposure pathway, and is potentially far from the greatest exposure pathway for millions of Americans. A better understanding of consumer product PFAS concentrations, and background levels in our homes and natural environment, is needed to help inform the public on how to best protect themselves and to help focus regulatory actions on efforts including source control that will have the greatest public health benefit.

Section 8 – PFAS Research and Development

The provisions for voluntary certification and labeling of PFAS detection or destruction technologies could provide clarity to utilities in the future. But unfortunately, there are currently no available technologies that effectively destroy PFAS in drinking water, clean water, or biosolids at the scale managed by public clean and drinking water utilities. Pyrolysis appears to be one promising technology that public utilities could leverage for PFAS destruction in clean water and residuals, though it is highly energy intensive and still largely in the pilot stage at this time, NACWA urges the Committee to include PFAS destruction in water and treatment residuals specifically as a focus within the proposed research and technology program.

The voluntary PFAS technology labeling provisions could ultimately be a helpful step in providing clarity and assurances to entities like public utilities that may be required to detect or destroy PFAS. But the focus on labeling and certification also highlights the lack of labeling requirements for PFAS-containing consumer goods. We encourage the Committee to consider including PFAS labeling for consumer goods and products in this legislative package.

Section 11 - Emergency Assistance for PFAS Remediation for Covered Communities

The provision of federal assistance to communities facing PFAS contamination which they cannot afford to remediate is a critical component of this legislation. However, as drafted, it is unclear how a community would go about demonstrating that required remediation is “beyond their financial capability.” Additionally, in light of the ubiquitous nature of these persistent chemicals, the unfortunate reality is that nearly all communities throughout the country have had some amount of exposure to them.

To help ensure that funds are provided to the communities that have been the most impacted by PFAS pollution but are the least able to afford the necessary remediation measures to address it, NACWA suggests that Congress establish a prioritization of the types and threshold screening levels of PFAS pollution that would qualify communities for this assistance. NACWA has also worked with other organizations in the water sector in recent years to develop metrics that more accurately identify when communities – and especially low-income and environmental justice households – are facing unaffordable costs related to clean water obligations, and we would be happy to work further with the Committee to incorporate some of these concepts in the legislation.

Essential Provisions that Must be Included as the Package Advances

Protection for Public Clean Water Utilities from CERCLA PFAS Liability

In August of 2022, the U.S. Environmental Protection Agency's (EPA) proposed designations of two of the most common PFAS chemicals, Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS), as hazardous substances under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

While CERCLA has been hailed as providing a “polluter pays” approach to remediation activities, in the context of PFAS, it will unfortunately be anything but. CERCLA's broad categories of “potentially responsible parties” (PRPs) include PFAS passive receivers, such as clean water utilities that only come into contact with PFAS through the public services they provide. When combined with CERCLA's strict, joint and several liability scheme, the ubiquity of PFAS throughout the country, and the ability of all PRPs – including the very entities most culpable for causing PFAS pollution – to bring claims against any other PRP, it is clear that CERCLA will expose public utilities and the communities they serve to the threat of unprecedented PFAS cleanup costs. A Congressional exemption from CERCLA liability for PFAS can resolve this issue.

It is important to note that EPA has recognized that public clean water utilities did not cause PFAS pollution and indicated that it does not intend to seek CERCLA remediation costs from them. Instead, the Agency intends to use its CERCLA enforcement discretion to help shield utilities from certain potential CERCLA liability in the context of PFAS. Although such actions are welcome, they cannot protect public utilities from the types of suits CERCLA provides third parties – including those culpable for PFAS pollution – with the statutory right to bring which could subject utilities to significant legal costs and cleanup liability. In fact, in a recent letter to the U.S. Department of Justice and EPA, the U.S. Chamber of Commerce directly indicated that, should EPA attempt to limit companies' rights to bring these types of CERCLA claims against public utilities, such actions may well be met with legal challenges.

And while some advocates argue that utility concerns are overblown, to date, more than 650 municipalities and counties have been sued as PRPs under CERCLA unrelated to PFAS. The number of these contribution actions will undoubtedly significantly increase if PFAS chemicals are listed as hazardous substances. The costs that public utilities must incur to defend themselves against these claims from other parties looking to spread cleanup liability, and the eventual cleanup contributions

utilities may need to pay, will by necessity be passed directly down to American households in the form of higher water bills, as the vast majority of clean water utilities are not-for-profit public entities.

As the Committee knows, many households cannot afford increased water costs. And it is simply unfair that water customers should float the costs of remediating PFAS pollution for the very private parties that exposed them to such pollution to make a profit in the first place.

That is why it is imperative that Congress clearly exempt “passive receivers” like public clean water utilities from PFAS-related CERCLA liability for their well-regulated wastewater treatment, effluent and biosolids management, and stormwater management activities. As the Committee works to advance this draft PFAS legislation, NACWA strongly urges that a narrowly tailored CERCLA PFAS exemption covering public clean water utilities must be included to ensure that Congressional and Agency efforts to control PFAS hold polluters accountable.

NACWA supports the Committee adding a succinct definition of passive receivers, protective of all the activities involved in conveying and treating water and managing or disposing of residuals of public clean and drinking water treatment and management. The definition should be carefully crafted to ensure that PFAS manufacturers and industries involved in the manufacture, sale, or use of PFAS for profit are not able to claim eligibility.

Prioritizing Federal PFAS Resources for Clean Water

NACWA appreciates the \$1 billion in mandatory funding that Congress provided in the *Infrastructure Investment and Jobs Act* (IIJA), through the Clean Water SRF, to address PFAS and emerging contaminants. However, with these dollars flowing through the SRF, clean water agencies have found misalignment between the types of efforts that they are currently undertaking to address PFAS – such as monitoring, assessments, and pretreatment efforts with industrial users they serve – and the capital investments supported by the SRFs.

NACWA requests inclusion of a legislative fix to allow clean water utilities more flexible access to this IIJA funding to do critical PFAS monitoring and assessment work. Alternatively, NACWA would encourage additional funding to support public clean water agencies in undertaking PFAS monitoring and assessment activities. This work is an important step for communities to understand the key sources of PFAS loading to their water systems, identify opportunities for controls, and prioritize opportunities for investment to reduce PFAS. With both EPA and states increasingly encouraging or requiring these types of efforts, and other utilities seeking to do it proactively, NACWA believes this type of sewershed PFAS assessment is a strategic area for additional federal investment.

Conclusion

As front-line environmental stewards, public clean water utilities are extremely concerned about the potential health and environmental risks associated with PFAS exposure and what these substances may mean for the future of utility operations. We urge a logical, workable federal regulatory approach that prioritizes source control, holds the original creators of PFAS accountable through a true “polluter

pays” model, and ensures that investment made will achieve clear public health and environmental improvement.

The legislative package proposed by the Committee takes several important steps toward those ends, as noted above in our comments in support of specific provisions. However, protection for public clean water agencies from CERCLA liability, increased progress on source control efforts, and support for understanding PFAS risks to our water systems are critical pieces that NACWA sees missing from this current draft.

Through the Clean Water Act, public clean water agencies will be instrumental in helping to control industrial discharges and will work to meet PFAS-related water quality standards necessary to ensure the protection of human health and the environment. But if coupled with the undue costs that communities may incur from PFAS CERCLA liability, this burden will place excessive and unjust costs on local communities. CERCLA protections will ensure utility resources and ratepayer dollars are used for PFAS mitigation efforts instead of costly and unwarranted lawsuits.

NACWA appreciates the Committee’s attention to these comments and for its ongoing engagement on this critical issue. Please contact Kristina Surfus, NACWA’s Managing Director of Government Affairs, at ksurfus@nacwa.org or 202-833-4655 with any questions or to discuss these comments further.

Sincerely,

A handwritten signature in black ink that reads "Adam Krantz". The signature is written in a cursive style with a long, sweeping underline.

Adam Krantz
CEO
NACWA