Office of Superfund Remediation & Technology Innovation
U.S. Environmental Protection Agency
EPA Docket Center
OLEM Docket, Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Public Comment on Proposed Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances; Docket ID No. EPA-HQ-OLEM-2019-0341

The undersigned national water associations, together forming the "Water Coalition Against PFAS" (Coalition) respectfully submit the following comments on the "Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances" (Proposed Rule).

The Coalition recognizes the importance of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in cleaning up uncontrolled or abandoned hazardous-waste sites, spills, and other emergency releases of hazardous substances into the environment. But the "polluter pays" principle on which CERCLA was established is vital for ensuring passive receivers of hazardous substances such as drinking water and clean water systems (hereinafter water systems) are not held liable for excessive costs. While the "polluter pays" principle has not always proven effective, given the uniqueness of PFAS in the context of CERCLA's scheme, ensuring this principle is appropriately applied is more vital than ever. To the extent water systems are held liable for CERCLA PFAS response costs, those costs will be directly passed down to ratepayers, effectively shifting the "polluter pays" principle to the "public pays" principle and resulting in a direct adverse impact to the public health services these water systems provide. The Coalition's comments will articulate some of the significant gaps in EPA's Proposed Rule the Environmental Protection Agency's (EPA) rule, supporting the fact that the proposal should not be finalized as written.

I. EPA's decision to not extend the public comment period directly impacts the likelihood that the agency will have a robust and complete set of legal and scientific information from which a final rule could be established.

The Coalition is disappointed with EPA's decision to not extend the public comment period for the Proposed Rule. Given this is the first time EPA has undergone a rulemaking to directly designate any substance, let alone two very complex substances, as hazardous under CERCLA, the Coalition is confused as to why the agency would not want to provide additional time beyond the 60-day initial public comment period. Such additional time could result in supplemental information that could affect the veracity of the legal and scientific basis on which the agency's hazardous substance designation has been made in the Proposed Rule.

The agency's desire to move quickly contradicts this Administration's commitment to follow the science and to adhere to a fully transparent public process. If there is additional scientific information that could be helpful, such as a robust external analysis of the Scientific Advisory Board's findings and evaluation of how those findings are or are not incorporated into EPA's Proposed Rule, it is unclear why EPA would not want to allow the opportunity for that information to be provided. If the only hinderance is the timeline EPA set for itself to have outside parties and the public provide an external analysis, it is an unfortunate disservice for EPA to not provide the time for that information to be fully analyzed and addressed. Further, EPA's decision not to release a full Regulatory Impact Analysis with sufficient time to review and comment during the 60-day public comment period calls into serious question the agency's commitments to transparency and leads to serious questions about the accuracy and confidence the public will have of any final rule.

II. EPA's proposed rule, if finalized as written, will have a significant impact on water systems and the communities they serve.

There are a host of costs that water systems will incur if the Proposed Rule is finalized as drafted. These include costs associated with becoming a "potentially responsible party" (PRP) under CERCLA or defending the water system against these claims, as well as those additional management and operations costs associated with the CERCLA construct. Unfortunately, water systems are not able to absorb these potentially staggering costs increases, meaning they will be passed directly to the ratepayer. In the most dire of situations, these types of costs could result in a water system not being able to sustain the costs of operation and maintenance, resulting in communities struggling to balance competing vital public services or facing the prospect of potential system closures. These scenarios, which have not been contemplated by EPA in the Proposed Rule, have the potential to significantly impact public health and to leave the public holding the bag on paying for cleanups for which they are not culpable.

Some of the additional costs water systems will incur (separate from those arising from a PRP designation) include disposal of PFOA- and PFOS-laden filtration media or destruction of this media. Currently, there is no destruction technology identified by the federal government as fully sufficient available. Additionally, water systems may incur costs associated with switching from

disposal methods which are currently legal, regulated, and even encouraged by EPA and other federal agencies, such as land-application to agricultural fields, forest revegetation, or other repurposing techniques. Further, should the proposed designations be finalized as proposed, water systems could become PRPs for any EPA-led or private cleanups taking place at those land application sites or repurposing locations. EPA's proposed rule fails to even consider these costs, let alone to offer remedies or alternative scenarios. EPA has therefore not appropriately evaluated the significant unintended consequences of the Proposed Rule.

When considering the operation, management, and liability costs facing water systems, it is important to note that in many cases, smaller rural water systems and those water systems serving disadvantaged communities (where the two do not overlap) with reduced economies of scale combined with a lower-income customer base, will likely experience the largest financial impact. EPA's Proposed Rule also fails to consider this fact, providing little to no discussion or analysis of these impacts.

At a time where access to, and affordability of, services provided by water systems is a prominent concern by Democrats and Republicans alike, as well as by the public at large, EPA's proposal and the "public pays" principle it will foster will further drastically reduce affordability and access. This will in turn result in a disproportionate impact to disadvantaged communities. EPA must consider all of these impacts in any final rule, lest water systems find themselves grasping at straws to continue maintenance and operation without drowning the communities they serve in unattainable rate payments. In the event EPA does not provide an analysis of these impacts in the final rule, the agency must explain why no evaluation was necessary and how the public ultimately incurring remediation and liability costs is consistent with the "polluter pays" model EPA has committed itself to in its PFAS Action Plan and more recently PFAS Strategic Roadmap.

III. While the Coalition supports EPA's commitments to exercise enforcement discretion and to not seek response costs from water systems, such commitments do not abate the significant liability concerns for water systems caused by the Proposed Rule, particularly those stemming from private party and third-party suits.

While the concept can be useful, enforcement discretion does not provide any actual legal shield from the liability water systems will face if the Proposed Rule is finalized as written. Enforcement discretion is, at best, formulated and memorialized through EPA guidance, and can be changed from administration to administration. This guidance, while informative and sometimes helpful, is not legally binding or legally enforceable. Further, while enforcement discretion could provide relief for water systems from government-imposed liability, enforcement discretion does not extend to those privately-brought recovery cases where water systems are identified by third parties as PRPs. Accordingly, the actual relief from exercised enforcement discretion only extends so far and only in a limited set of scenarios.

Additionally, enforcement discretion for water systems related to CERCLA has not historically proven fully effective or fruitful. In fact, 650 utilities have been sued for recovery thus far under CERCLA.[1] This number will likely significantly increase if the proposed PFOA and PFOS

[1] Salzman and Thompson. 2019. Environmental Law and Policy, 5th Ed. West Academic, St. Paul, MN.

designations are finalized given their ubiquity in the environment and the myriad of industrial, commercial, and domestic sources from which they enter water systems. Nor in many cases will either EPA or water systems be able to recover CERCLA costs from the very entities that created and profited from the PFAS pollution. Absent engaging in direct disposal, such entities are typically not PRPs under CERCLA under the U.S. Supreme Court's "useful products" exemption. As such, water systems may at times be the only identifiable PRPs, further increasing their – and the public's – liability exposure.

EPA must be transparent with respect to the true impact of enforcement discretion in any final rule. Holding enforcement discretion out as a tool which will shield water systems simply fails to paint the entire picture, promoting a false sense of security that water systems will not ultimately be brought in as PRPs. In the event EPA does not provide this type of meticulous analysis in the final rule, EPA should explain why the agency is so robustly and publicly holding out protections for water systems through enforcement discretion as a panacea for the public potentially incurring PFAS cleanup costs given these uncertainties.

IV. The Economic Analysis in the Proposed Rule fails to accurately capture the proposal's true economic impacts on water systems and the disadvantaged communities or communities with environmental justice concerns they serve.

While EPA maintains the Proposed Rule is not "economically significant," this is solely because of EPA's grossly inadequate position that the costs stemming from the final rulemaking are limited to reporting. The reality is that the reporting costs, while themselves having the potential to become economically significant based on the cost of preparing a report as well as the frequency of doing so, will pale in comparison to the other quantitative impacts water systems, among others, will incur. These impacts will include new expectations for the disposal of PFOA- and PFOS-laden filtration media and biosolids.

Biosolids beneficial reuse programs are likely to be immediately impacted by the Proposed Rule, potentially spurring a shift toward greater landfilling, and increasing the cost of biosolids management by orders of magnitude. This also includes the economic impacts arising from implication as a PRP. Unfortunately, EPA's analysis in the Proposed Rule does nothing to even acknowledge these types of costs – costs that will ultimately be incurred by water systems and the public at large. This lack of analysis further demonstrates EPA's failure to ensure that the "polluter pays" principle will not be replaced with the "public pays" principle.

Importantly, EPA's analysis in the Proposed Rule seems to go directly against the agency's own guidance for providing an economic analysis, failing to even mention or consider the "social costs" which would occur to the extent a "public pays" model becomes the norm, an accounting of true "private sector and public sector costs," and "indirect costs," all of which have significant implications on the public and likely will "ripple through the rest of the economy, causing prices in other sectors to rise or fall and ultimately affecting the incomes of consumers."[2] Indeed, this is an exact scenario where, as EPA puts it, "the indirect costs of a regulation may be considerably

[2] "Guidelines for Preparing Economic Analyses: Analyzing Costs." 2010, *Guidelines for Preparing Economic Analyses*, Chapter 8, EPA, https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses.

greater than the direct costs."[3] These "indirect costs" must be accounted for in any final rule or EPA must explain why this scenario merits abdicating evaluations accounted for in the agency's own guidance.

While EPA asserts that it is unclear whether the Proposed Rule will have a significant impact on disadvantaged populations or communities with environmental justice concerns relative to other communities, this assessment is also grossly inadequate. To the extent water systems are subject to any additional costs from anything ranging from new disposal techniques to liability from remedial actions under CERCLA, as previously discussed, these costs will be passed onto the communities they serve. The majority of water systems nationwide are public entities which do not generate profits and must raise rates or seek federal or state financing to cover new costs.

Additionally, the fact that this is the first time EPA is undergoing a rulemaking to designate a substance as a hazardous substance is no excuse for providing a slim analysis of economic impacts, considering reporting as the only actual potential cost. CERCLA has been utilized, and therefore a matrix of associated costs has been available, since 1981, when 4,000 drums were removed from the "Valley of Drums" site in Kentucky.[4] Thus, there are over four decades of cost information available that EPA seemingly has chosen to ignore, apparently deciding that actual costs accrued – costs that have been well documented for almost half a century – do not merit incorporation or even recognition in the Proposed Rule. It is the case that EPA will have a very difficult time estimating the costs specific to potential cleanups associated with PFOA and PFOS given the fact that EPA does not yet know how to remediate PFAS substances or to what levels they need to be remediated to protect public health and the environment. But that fact does not remove EPA's responsibility to assess the true impacts of its action; rather, it speaks to the potential rashness of the current proposal.

EPA must consider more than reporting costs in determining whether any final rule is economically significant and should be transparent in the costs that will result if the rule is finalized as proposed. In the event EPA does not analyze these costs in determining economic significance in the final rule, EPA must explain why these costs are not necessary for evaluation, given the functional certainty of their occurrence.

V. EPA should focus on actions that will reduce the amount of PFOA and PFOS entering the environment prior to designating them has hazardous substances under CERCLA.

Prior to, or consistent with, taking remedial actions pursuant to the authority CERCLA affords, EPA should be focusing on instituting those actions that will reduce the amount of PFOA and PFOS entering the environment before turning to cleanup. These actions should include, but are not limited to, those related to the elimination of non-essential uses of PFAS, greater source control of PFAS constituents already in commerce, and development of a viable, sustainable and cost-efficient destruction technology.

Because of the ubiquity and persistence of PFAS in everyday commercial products, without first ensuring that PFOA and PFOS are no longer entering the environment there is a significant

[3] Id.
[4] "Superfund History." *Superfund*, EPA, https://www.epa.gov/superfund/superfund-history#8.

backsliding risk with any remedial activity performed. In other words, ongoing and unmitigated releases could result in a contaminated site having to be cleaned up multiple times. EPA should at least account for this potential and speak to how the agency will avoid this outcome in a final rule or face a situation where any environmental remedial progress afforded by the CERCLA statutory and regulatory matrix is negated and must be undertaken again. In the event EPA does not account for this in the final rule, EPA must at least account for the potential additional costs from multiple rounds of remedial activity in the agency's evaluation of economic significance.

VI. EPA should clearly identify whether the agency has relied on any science, scientific process, or scientific findings for which the Science Advisory Board has previously provided a review and recommendations, and if the agency has, should also address those comments, concerns, and recommendations provided by the Science Advisory Board in a final rule.

It is not clear whether or to what extent EPA relied on the science, scientific process, or scientific findings of the five documents the Science Advisory Board (SAB) reviewed in issuing its final report titled "Review of EPA's Analyses to Support EPA's National Primary Drinking Water Rulemaking for PFAS," issued August 22, 2022, in determining that PFOA and PFOS "may present substantial danger . . . to the public health or welfare or the environment," or if they did, to what extent.[5] EPA should be fully transparent about whether and to what extent this reliance occurred. Further, to the extent EPA relied on the contents of those five documents, EPA should make publicly available the information demonstrating how the agency addressed the SAB's comments and recommendations (or why the comments and recommendations did not merit modification) prior to issuing the final rule.

Failure to provide this information seriously calls into question EPA's basis for proposing the hazardous substance designation given the many questions swirling around the science related to PFAS. EPA should be transparent about the use of this information in making a "substantial danger" finding. In the event EPA does not provide this information in the final rule, EPA must provide an explanation about why that type of transparent analysis is not necessary.

VII. Conclusion.

The Coalition again appreciates the opportunity to submit public comments on the Proposed Rule, even though EPA's denial of the requests for an extension of the public comment period raise serious concerns about how the Proposed Rule will be finalized and truncated the Coalition's ability to provide a robust set of public comments on such an impactful action.

EPA must address a series of shortcomings prior to finalizing the proposal. First, with respect to economic impacts, EPA must fully evaluate all of the economic impacts the water sector will be

[5] The documents are: (1) Analysis of Cardiovascular Disease Risk Reduction as a Result of Reduced PFOA and PFOS Exposure in Drinking Water; (2) Proposed Approaches to the Derivation of a Draft Maximum Contaminant Level Goal for Perfluorooctanoic Acid (PFOA) (CASRN 335-67-1) in Drinking Water; (3) Draft Framework for Estimating Noncancer Health Risks Associated with Mixtures of Per- and Polyfluoroalkyl Substances (PFAS); (4) Proposed Approaches to the Derivation of a Draft Maximum Contaminant Level Goal for Perfluorooctanoic Sulfonic Acid (PFOS) (CASRN 1763-23-1) in Drinking Water; and (5) Appendices for Analysis of Cardiovascular Diseases Risk Reduction as a Result of Reduced PFOA and PFOS Exposure in Drinking Water.

faced with, not simply reporting. There are over four decades of costs associated with CERCLA implementation available for evaluation, which it appears EPA has chosen to ignore, leaving a significant gap in those true costs that will be incurred from any final rule. Nor does a lack of understanding of the science behind PFAS excuse EPA's basic rulemaking requirements. In the case of the water sector, these are costs that will land squarely on the shoulders of the public, so it is critical that the agency undergo a robust analysis of all economic impacts that a final rule will bring, both directly and indirectly.

EPA must also be fully open and transparent with respect to the true impact its exercise of enforcement discretion could have on water systems should the proposed designations be finalized. In particular, EPA must analyze what, if any, ability the agency has to impact liability associated with the substantial number of private cleanup actions the designations would likely lead to.

Additionally, EPA should either take measures to ensure that PFOA and PFOS are no longer entering the environment prior to any final rulemaking, or it should at the very least account for the potential of significant remedial backsliding in the final rule and speak to how the agency will ensure backsliding does not occur. In the event EPA does not provide either of these analysis, potential economic impacts must have a multiplier applied, accounting for redundant, perpetual remedial activities as PFOA and PFOS potentially continue to enter the environment or move from one environmental media to another after remedial actions are taken.

It is vital EPA addresses these substantial shortcomings in the Proposed Rule. Without doing so, the "polluter pays" principle will undoubtably be shifted to the "public pays" principle and will result in significant issues related to the availability and affordability of drinking water and clean water services across the country.

Finally, given the significant concerns raised in these comments, the Coalition will continue to urge Congress to provide water systems with a tailored legislative exemption from CERCLA liability for PFAS-related cleanups. The Coalition respectfully requests the Administration, in whatever ways possible and appropriate but not limited to within a Statement of Administrative Position, support the Coalition's efforts to pursue this exemption from liability. Doing so would clearly and unambiguously demonstrate the Administration's professed commitment to ensuring water systems, as passive receivers, are not held liable for contamination they in no way contributed to.

Sincerely,

Water Coalition Against PFAS

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