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August 11, 2023

The Honorable Michael S. Regan, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Advance Notice of Proposed Rulemaking Addressing PFAS in the Environment, Docket ID: EPA–HQ–OLEM–2022–0922

Dear Administrator Regan:

On behalf of the WateReuse Association (WateReuse), I am pleased to submit our comments regarding the U.S. Environmental Protection Agency's (EPA) Advance Notice of Proposed Rulemaking (ANPRM) seeking public input on the potential development of future regulations pertaining to the potential future hazardous substance designation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of: Seven PFAS, besides perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), and their salts and structural isomers, or some subset thereof; precursors to PFOA, PFOS, and seven other PFAS; and/or categories of PFAS.

The WateReuse Association is a not-for-profit trade association for water utilities, businesses, non-profit organizations, and research entities that advocate for policies and programs to advance water recycling. WateReuse and its state and regional sections represent nearly 250 water utilities serving over 60 million customers, and over 200 businesses and organizations across the country.

As we communicated in previous comments submitted to the Agency (comment ID: EPA-HQ-OLEM-2019-0341-0511), WateReuse strongly urges EPA to take a "polluter pays" approach to controlling PFAS contamination. We remain concerned that the designation of various PFAS as CERCLA hazardous substances will unfairly place liability burdens on passive receivers of PFAS rather than on producers of the substances, unless a liability exemption is enacted for passive water utilities. Water, wastewater, and water recycling utilities (water utilities) stand ready to help tackle the PFAS crisis; however, putting the liability and cost of remediation on utilities ultimately burdens the local ratepayer, and therefore, the American taxpayer, rather than the polluter. PFAS manufacturers must cover the costs of remediating PFAS pollution.

The WateReuse Association therefore urges EPA to adopt the following recommendations to ensure that the final rule is effective and fair.

Recommendation #1: WateReuse strongly urges EPA to shield water, wastewater, and water recycling facilities from PFAS CERCLA liability, so long as water utilities are acting in accordance with all applicable laws.

Water utilities provide essential public services and are not manufacturers or primary sources of PFAS. Water recycling facilities meet additional public interest needs by generating alternative water supplies, supporting communities' climate resiliency, and adaptation to the impacts of climate change. If EPA moves forward with a CERLCA hazardous designation for additional PFAS, without shielding water utilities from liability, these essential public services may be undermined as water utilities are forced to divert scarce public dollars to defend against litigation from other parties seeking to make local agencies financially responsible for cleanup costs.

The federal government must protect the public from bearing the brunt of PFAS cleanup liability. EPA should therefore support a clear, narrowly tailored PFAS exemption under CERLCA for water, wastewater, and water recycling utilities and agencies. If the Agency believes it does not already have the authority to include an exemption in a rulemaking, we strongly urge the Administration to support Congressional action to enact a liability exemption, and we also urge the Agency to proactively implement a liability shield to the extent it is legally feasible through its enforcement discretion policy and within settlement agreements with third party polluters.

Some water recycling facilities employ technologies such as nanofiltration (NF), reverse osmosis (RO), granulated activated carbon removal (GAC), ion exchange (IX), and PFAS-selective novel adsorbents to ensure a high-quality alternative supply of water. These technologies are also some of the most effective removal technologies for a range of PFAS. However, these treatment processes generate residuals, such as spent media, NF, RO concentrate (reject) streams that can include PFAS. Under CERCLA, water recycling facilities' management of the generated spent media and residuals may fall under "releases" and "disposals," exposing utilities to liability, and their ratepayers to the associated clean-up costs.

Similarly, wastewater utilities face this liability question and exposure when considering the management of biosolids. Wastewater treatment facilities produce biosolids as an integral part of the treatment process, which are managed through use as a soil amendment through direct land application or after composting, or disposed via incineration, or landfill disposal. As managers of this material, water utilities could be considered a potentially responsible party (PRP) under CERCLA, making them liable for the costs of cleanup.

Recommendation #2: If EPA chooses to move forward with a proposed rulemaking, the Agency should conduct a comprehensive assessment of the potential costs of the proposal, including direct and indirect cleanup costs.

EPA's previously proposed rule (87 FR 54415) designating PFOA and PFOS as CERCLA hazardous substances failed to account for the ramifications of the designation on the water community, as evidenced by the absence of a full cost analysis. In our comments on the proposed rule, we urged EPA to correct this oversight before the rule was finalized. We reiterate this request here and urge the Agency to conduct a comprehensive analysis of the potential costs to water utilities of the designation being considered in this ANPRM.

Placing the liability and cost on public utilities, ratepayers, and taxpayers undermines CERCLA's "polluters pay" model and will impact water utilities' ability to make essential capital investments to modernize infrastructure and combat climate change. Imposing CERCLA liability on water and wastewater utilities will lead to untenable cost increases and delays, significantly hampering the implementation of essential water projects needed to meet the challenge of establishing a reliable and sustainable water supply. It is essential to consider the cost that additional CERCLA designations would place on local water utilities and districts.

Recommendation #3: If EPA chooses to move forward with a rulemaking, the proposed rule should clarify how water utilities will monitor, track, and report potential releases.

EPA's previously proposed rule (87 FR 54415) designating PFOA and PFOS as CERCLA hazardous failed to consider how water utilities will be impacted by the decision to utilize the CERCLA default reportable quantity (RQ) for a hazardous substance of one or more pounds per 24-hour period. The CERCLA default RQ is not designed to be a metric monitored or tracked by water utilities, and utilizing it fails to consider how water utilities can monitor effluent and biosolids concentrations to determine an RQ without validated test methods and sufficient lab capacities. The proposed rule failed to clarify how the default RQ applies to the ongoing and ubiquitous nature of PFAS in water. If EPA chooses to move forward with the proposed rule being considered in this ANPRM, it should clarify if, as well as how, the reporting structure would apply to water utilities.

Recommendation #4: WateReuse urges the federal government to invest in research and development for PFAS control and destruction technologies.

If EPA chooses to move forward with the proposed rule being considered in this ANPRM, the Agency must suggest a plan to manage or destroy PFAS-laden biosolids or residual streams (e.g. RO concentrate, spent GAC media). Without a plan of action for remediation or a prohibition on all uses of CERCLA-hazardous PFAS to prevent PFAS from continuing to enter water and wastewater utilities, the CERCLA designation becomes an ineffective tool for handling PFAS in water systems and simply transfers the burden to local governments, and

ultimately, ratepayers and taxpayers. The federal government needs to invest in conducting science-based research for PFAS control and destruction technologies to provide utilities with clear guidance moving forward.

Recommendation #5: WateReuse urges the federal government to pursue aggressive action to prohibit or phase out all uses of PFAS, beginning with those targeted for designation as hazardous substances under CERCLA.

In order to avoid simply shifting PFAS from products to users to water utilities and waste management service providers to the environment in a cycle that can result in spreading environmental contamination, EPA and other federal agencies with jurisdiction over product content such as the Food and Drug Administration must immediately shift the focus from the "back end" (i.e. cleanup of sites contaminated with PFAS) to the "front end," and move forward with prohibitions on PFAS in products as quickly as possible. That is ultimately the only way to ensure that the public is not exposed to health hazards that may be associated with PFAS and that water utilities and other essential public service providers are not left with the responsibility to cleanup PFAS contamination.

In conclusion, as EPA seeks to protect public health and the environment from harmful PFAS contamination, WateReuse urges the agency to ensure that manufacturers and polluters are held accountable and that the societal cost of clean-up and remediation is not transferred from manufacturers and polluters to essential public service providers. We thank EPA for the continued engagement with the water stakeholder community and urge EPA to evaluate and consider potential adverse consequences of new rules, including implications for existing and planned water recycling projects.

Sincerely,

Patricia L. Sinicropi, J.D.
Executive Director