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"Examining the Impact of EPA's CERCLA Designation for Two PFAS Chemistries and Potential Policy Responses to Superfund Liability Concerns"

Testimony presented by
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Summary of Main Points

- Water utilities do not manufacture, use, or profit from PFAS, but a recent EPA rulemaking requires them to remove PFAS from drinking water and manage the residuals, exposing these utilities to financial and legal liability under CERCLA.
- Congress enacted CERCLA to ensure that polluters fund cleanup of contaminated sites, and federal legislators have provided various exemptions over time to preserve and strengthen that "polluter pays" principle.
- An exemption for water and wastewater utilities would further strengthen CERCLA's "polluter pays" principle by preventing PFAS manufacturers from shifting their cleanup costs onto utilities and the communities they serve.
- EPA's commitment to enforcement discretion, while helpful, does not fully protect water and wastewater utilities from contribution claims by major "potentially responsible parties" like PFAS manufacturers.

- When utilities are forced to spend limited resources on litigation or cleanup costs, ratepayer funds must be diverted from replacing aging infrastructure, complying with Safe Drinking Water Act requirements, and performing other essential functions, exacerbating affordability challenges to subsidize PFAS manufacturers.
- AWWA urges the Subcommittee to consider H.R. 1267, the Water Systems PFAS Liability Protection Act, which would provide a narrowly tailored exemption to water and wastewater utilities for PFAS liability.

Introduction

Good morning, Chairman Palmer, Ranking Member Tonko, and members of the Subcommittee. My name is Tracy Mehan, and I am Executive Director of Government Affairs for the American Water Works Association (AWWA), on whose behalf I am testifying today.

AWWA's membership includes more than 4,300 utilities that supply roughly 80% of North America's drinking water and treat almost half of North America's wastewater. Our 50,000 members represent the full spectrum of the water community: water and wastewater systems, environmental advocates, scientists, academics, and others who hold a genuine interest in water, our most vital resource.

Thank you for the invitation to testify today on the urgent need for congressional action to ensure that water and wastewater utilities, and the communities they serve, are not held financially liable for per- and polyfluoroalkyl substances (PFAS) contamination they did not create.

Water and wastewater utilities are “passive receivers” of PFAS. They do not manufacture, use, or profit from PFAS, nor do they control whether PFAS is present in their source water or the influent that arrives at treatment plants from homes and businesses. But new EPA regulations require utilities to treat for, manage, and dispose of PFAS – requirements that impose significant costs and expose utilities to legal and financial liability.

PFAS National Primary Drinking Water Regulations

EPA recently finalized PFAS National Primary Drinking Water Regulations (NPDWR) for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), establishing Maximum Contaminant Levels (MCLs) of 4 parts-per-trillion (ppt) for each compound. The NPDWR requires water utilities to complete initial monitoring by 2027 and install new treatment systems to meet the MCLs by 2029.

While Congress provided $10 billion to help water and wastewater systems address PFAS through the Infrastructure Investment and Jobs Act, AWWA estimates that utilities will need to make capital investments totaling between $37-48 billion by 2029 in order to fully comply with the NPDWR.

Paradoxically, these investments expose utilities to significant liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Water utilities’ role in PFAS treatment and disposal

When a utility removes PFAS using granular activated carbon, ion exchange, or reverse osmosis – all identified by EPA as “best available technologies” – it

generates residuals containing high concentrations of PFAS. Utilities must then manage and dispose of these residuals at a facility that accepts hazardous waste.

If the disposal site ever becomes subject to a Superfund cleanup, the utility – which removed PFAS from the community's drinking water and responsibly managed and disposed of the residuals – may then be treated as a "potentially responsible party" (PRP) under CERCLA. This can result in costly and lengthy litigation, and utilities could even be required to pay for cleanup of the site. In effect, CERCLA punishes utilities for doing exactly what EPA requires them to do: treat for and dispose of PFAS.

CERCLA casts a wide net when identifying PRPs, extending beyond those responsible for the contamination to entities like water utilities that passively receive PFAS and therefore must treat, manage, and dispose of it.

CERCLA Liability is Comprehensive and Far-Reaching

EPA's designation of PFOA and PFOS as hazardous substances under CERCLA, finalized in April 2024, imposes "strict, retroactive, joint and several" liability on four categories of PRPs: owners and operators, past owners and operators, arrangers, and transporters. Water and wastewater utilities may qualify as arrangers or transporters of PFAS due to their role in managing and disposing of residuals.

- "Strict" liability means that parties can be held responsible for contamination regardless of fault or intent.
- "Retroactive" means liability applies to actions that may have occurred decades ago, even if the entity complied with all applicable laws and regulations at the time.

- "Joint and several" means that any single entity can be held responsible for the full cost of cleanup, regardless of its relative contribution.

The prospect of retroactive liability is particularly concerning for water utilities that encountered PFOA and PFOS long before EPA designated the chemicals as hazardous substances. Manufacturers first introduced these chemicals in the 1950s, and they were widely used in consumer products and firefighting foam for more than 50 years.

While PFOA and PFOS have now been largely phased out of commerce, they are extremely persistent in the environment and therefore have likely been present in source water, spent treatment media, and residuals for decades without the knowledge of water utilities.

CERCLA simply was not designed for chemicals like PFOA and PFOS, which have been ubiquitous in the environment for more than half a century.

Preserving CERCLA's "Polluter Pays" Principle

Congress enacted CERCLA to ensure that polluters – those who created or benefited from contamination – fund cleanup. Over time, Congress has established various exemptions to close loopholes and preserve this "polluter pays" principle. These exemptions include:

- Generators of municipal solid waste
- Recyclers and service station dealers
- Cleanup contractors

- Landowners and purchasers
- Public and private lenders
- Pesticide users
- Those rendering care in accordance with the National Contingency Plan
- State and local governments when responding to a hazardous substance release

These exemptions, established between 1980 and 2002, reflect consistent congressional judgement that CERCLA's strict, retroactive, joint and several liability scheme should target manufacturers and polluters rather than passive receivers, emergency responders, and those managing hazardous substances to protect public health.

AWWA believes that an exemption for water and wastewater utilities from PFAS liability would strengthen the "polluter pays" principle by ensuring that PFAS manufacturers, not utilities and local communities, pay for CERCLA cleanup.

EPA Administrator Lee Zeldin recently called on Congress to act as well, stating in September that EPA "will need new statutory language from Congress to fully address our concerns with passive receiver liability."

Under the current CERCLA framework, a company that spent decades manufacturing, using, and profiting from PFAS can effectively reduce its financial liability by suing other entities – including water and wastewater utilities – for cost recovery.

CERCLA Liability Jeopardizes Affordable Water Service

Water utilities rely almost entirely on their ratepayers for revenue. When a utility is forced to spend limited resources on litigation or Superfund cleanup, those funds are diverted from replacing aging infrastructure, complying with the Safe Drinking Water Act, and performing other essential functions.

Utilities may need to raise water rates, exacerbating affordability challenges, or forego necessary infrastructure improvements altogether – all to subsidize the cleanup obligations of PFAS manufacturers. These impacts are particularly severe in small, rural, and underserved communities, which have limited ratepayer bases and even fewer available resources.

Water and wastewater utilities are already struggling to maintain water affordability as they face more than $1.3 trillion in necessary investment over the next 20 years to repair, replace, and expand existing infrastructure. As previously stated, utilities must also invest an additional $37-48 billion to implement PFAS treatment. PFAS manufacturers and polluters should not be allowed to further burden these communities through unnecessary litigation.

Limits of "Enforcement Discretion"

In April 2024, EPA issued a formal memo entitled "PFAS Enforcement Discretion and Settlement Policy Under CERCLA," outlining its approach to exercising enforcement discretion under CERCLA. The memo states EPA intends to pursue "major PRPs" – including PFAS manufacturers and users – while limiting enforcement actions against:

- Community water systems and publicly owned treatment works
- Municipal separate storm sewer systems

- Publicly owned/operated municipal solid waste landfills
- Publicly owned airports and local fire departments
- Farms where biosolids are applied to the land

AWWA appreciates EPA's determination that water and wastewater utilities deserve enforcement discretion. However, the memo is policy guidance and does not carry the force of law. Without congressional action, EPA can offer only limited protection.

EPA states that the agency will seek to obtain a waiver of rights when settling with major PRPs. These waivers would prevent the settling party from suing any non-settling party for contributions. However, these waivers must be negotiated and mutually agreed to by the settling parties. Negotiations are often lengthy and highly contested, with no guarantee of success.

Similarly, EPA notes that it may enter settlement agreements with water and wastewater utilities to quickly resolve liability when equitable factors do not support enforcement. While helpful, these settlements are not guaranteed protection. In fact, they are frequently challenged in court by non-settling parties who would prefer that the settling party contribute to the cost of cleanup.

While EPA's enforcement discretion memo offers as much protection as the agency has legal authority to provide, CERCLA provides PFAS manufacturers with the tools to pursue contribution claims and cost recovery actions against water and wastewater utilities outside of EPA's established discretion.

Recommendation to Congress

Congress can and should prevent water and wastewater utilities, and the communities they serve, from bearing the cost of cleaning up contamination they did not create.

AWWA urges the Subcommittee to consider H.R. 1267, the Water Systems PFAS Liability Protection Act. This bipartisan legislation would preserve CERCLA's "polluter pays" principle by providing water and wastewater utilities with a narrowly tailored exemption from PFAS liability except in cases of negligence or willful misconduct.

H.R. 1267 is supported by the Water Coalition Against PFAS, a group that includes AWWA, the National Rural Water Association, the Association of Metropolitan Water Agencies, the National Association of Clean Water Agencies, the Water Environment Federation, and the National Association of Water Companies.

Absent congressional action, water and wastewater utilities around the country face the cost of cleaning up contamination they did not create, diverting resources from essential functions and exacerbating affordability challenges in their communities.

Thank you again for the invitation to testify and I look forward to your questions.