



N A R U C
National Association of Regulatory Utility Commissioners

March 14, 2024

Senator Tom Carper (D-DE)
Chairman
Committee on Environment & Public Works
Works
US Senate
410 Dirksen Senate Office Building
Washington, DC 20510

Senator Shelley Moore Capito (R-WV)
Ranking Member
Committee on Environment & Public
Works
US Senate
172 Russell Senate Office Building
Washington, DC 20510

RE: The Need for CERCLA PFAS Liability Protections for Water and Wastewater Utilities

Chairman Carper and Ranking Member Capito:

We commend your committee for holding an important hearing next week on March 20, 2024, captioned “Examining PFAS as a Hazardous Substance” to discuss the EPA’s proposed regulation of PFAS under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The National Association of Regulatory Utility Commissioners (NARUC) represents the public service commissioners in all U.S. states and territories overseeing the operations of investor-owned water and wastewater utilities. Our members share your commitment to protect your constituents from the consequences of PFAS pollution.

Given the timing of the EPA’s CERCLA Rulemaking, it is vital the Committee act quickly to enact specific liability exemptions for PFAS releases for water utilities.

Water companies are passive receivers of PFAS. They provide services to the public but neither manufacture nor use PFAS in their operations. Without Congressional action to protect water and wastewater customers from CERCLA liability, hundreds of millions of Americans, including your constituents, will be forced to pay additional costs to clean up a problem they did not create.

Water and wastewater utilities are already committed to protecting public health and the environment by proactively testing and treating for PFAS at a significant expense. Because these public services are funded by the families who use them, the brunt of these clean-up costs are borne by your constituents. Neither your constituents nor water companies had a hand in creating this PFAS problem.

CERCLA is based on the principle that parties responsible for contamination should be responsible for and pay for its remediation. The producers, manufacturers and parties that used PFAS chemicals in their operations are all responsible parties. Water utilities and their customers are not.

The EPA's proposed maximum contaminant levels for certain PFAS already means that the only entities with a legal requirement to remove PFAS would be water systems (with the bulk of those costs borne by customers). It is wrong to direct water utilities to clean up a problem they did not create while at the same time exposing their customers to billions of dollars of liability when the filters used to remove PFAS are disposed of. Congress must take action to protect these innocent parties by enacting an exemption from CERCLA liability for the disposal of PFAS filters by water and wastewater systems.

NARUC passed a resolution in February 2021 urging Congress to exempt water and wastewater providers that follow all applicable laws in the disposal of water treatment byproducts containing PFAS from liability related to the designation of PFAS chemicals as hazardous substances under CERCLA.^[1]

A copy of that resolution is attached to this letter.

If you have any questions about NARUC's position, please do not hesitate to contact either of the undersigned or Brad Ramsay, NARUC's General Counsel at 202.257.0568 or jramsay@naruc.org.

Sincerely

Julie Fedorchak
NARUC President

Jeffrey Hughes
Chair, NARUC Committee on Water

cc Members of the Senate Committee on Environment and Public Works

^[1] See. February 11, 2021 [Resolution on Exempting Water and Wastewater Utilities that Follow all Applicable Laws in the Removal and Disposal of Per- and Polyfluoroalkyl Substances from America's Drinking Water Supply from Liability under the Comprehensive Environmental Response, Compensation, and Liability Act Stemming from the Designation of Per- and Polyfluoroalkyl Substances as Hazardous Substances.](#)

APPENDIX

Resolution on Exempting Water and Wastewater Utilities that Follow all Applicable Laws in the Removal and Disposal of Per- and Polyfluoroalkyl Substances from America's Drinking Water Supply from Liability under the Comprehensive Environmental Response, Compensation, and Liability Act Stemming from the Designation of Per- and Polyfluoroalkyl Substances as Hazardous Substances

Whereas the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), commonly known as the “Superfund,” provides the federal government with authority to clean up uncontrolled or abandoned hazardous-waste sites, as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Through CERCLA, Congress gave the U.S. Environmental Protection Agency (“EPA”) the power to seek out parties responsible for the release of hazardous substances and assure their cooperation in the cleanup;

Whereas once a chemical is classified as a “hazardous substance” under CERCLA, the EPA can require polluters to either cleanup the contaminated site or reimburse the EPA for the full remediation of the polluted site;

Whereas per- and poly-fluoroalkyl substances (“PFAS”) are a class of more than 5,000 manmade compounds that include Perfluorooctanoic Acid (“PFOA”), Perfluorooctane Sulfonate (“PFOS”), and many other chemicals. PFAS have been manufactured and used in a variety of industries around the globe since the 1940s, including food packaging, stain and water repellent-fabrics, nonstick products, and firefighting chemicals;

Whereas while a thorough examination of the health effects of these substances is ongoing, the EPA has found evidence that exposure to PFAS can lead to adverse health outcomes in humans. If humans ingest PFAS by eating food or drinking water containing the chemicals, PFAS are absorbed and can accumulate in the body. PFAS stay in the human body for long periods of time, thus to the reason for the nickname “forever chemicals.” As people are exposed to PFAS from different sources over time, the level of PFAS in their bodies may increase to the point where they suffer from adverse health effects;

Whereas none of the PFAS chemicals are currently listed as hazardous substances pursuant to CERCLA;

Whereas in recent years, there has been an increased focus on PFAS chemicals by state regulators, the EPA, and the United States Congress;

Whereas the EPA has implemented several agency actions in the past year to address PFAS, including: (1) PFAS Action Plan on February 14, 2019; (2) PFAS Action Plan Update on February 26, 2020; (3) Interim Strategy for PFAS Substances in Federally Issued National Pollutant Discharge Elimination System Permits on November 22, 2020; (4) Interim Guidance on Destroying and Disposing of Certain PFAS and PFAS-Containing Materials That Are Not Consumer Products on December 18, 2020; (5) Advance Notice of Proposed Rulemaking Addressing PFOA and PFOS in the Environment on January 14, 2021; (6) Toxicity Assessment for perfluorobutane sulfonic acid on January 15, 2021;

Whereas on July 22, 2020, at the Summer Policy Summit, the NARUC Board of Directors adopted a Resolution on PFAS Chemicals Calling For Federal Guidance and State Planning to Address Potential Contamination (Resolution);

Whereas, in the Resolution, the NARUC Board (1) urged the EPA to expedite establishing a maximum contaminant level for PFAS based on the risk to the public's health; (2) stated that in the absence of an EPA

standard for PFAS, states and their respective regulatory agencies should consider establishing a PFAS Task Force to develop mitigation plans for contaminations at military installations, and develop reporting requirements, formalized guidance on the destruction and disposal of PFAS in wastes, and standardized metrics for testing; and (3) encouraged regulated water utilities to actively address the eminent risk of PFAS by establishing internal standards, testing, and reporting PFAS contaminant levels in their service territories to their appropriate state agencies;

Whereas on January 10, 2020, the U.S. House of Representatives passed H.R. 535, the “PFAS Action Act,” with bipartisan support. The PFAS Action Act included a provision that designated PFOA and PFOS as hazardous substances under CERCLA, along with a host of other PFAS provisions. The U.S. Senate did not take up this legislation, and therefore, the PFAS Action Act did not become law.

Whereas in its February 26, 2020, PFAS Action Plan, the EPA stated that it is beginning the necessary steps to propose designating PFOA and PFOS as “hazardous substances” through one of the available statutory mechanisms, including potentially CERCLA Section 102.1

Whereas President Biden has indicated his Administration’s priority to designate PFOS and PFOA as hazardous substances;²

Whereas water and wastewater utilities are not the producers of PFAS and did not cause the PFAS contamination that exists in portions of our nation’s water supply. However, when these chemicals are found, water and wastewater utilities are on the front lines of cleaning up the contamination;

Whereas once a water utility removes PFAS from the supply, it must dispose of the water and wastewater treatment byproducts that contain traces of the chemicals;

Whereas if PFAS are designated “hazardous substances” under CERCLA without an exemption for water and wastewater utilities, these utilities may be held liable under CERCLA for future costs associated with PFAS cleanup;

Whereas making water and wastewater utilities liable for PFAS cleanup under CERCLA – rather than ascribing those costs and cleanup responsibilities to the original manufacturers and polluters – will increase the cost of supplying clean water and result in higher rates for water and wastewater customers;

Whereas in prior bills addressing PFAS, Congress has failed to make a distinction between the entities that introduced PFAS into the environment, and the water and wastewater systems that are leading the effort to remove PFAS from the water supply;

Whereas prior bills addressing PFAS have provided for certain exemptions from liability under CERCLA, such as for airports that are required to use firefighting foam containing PFAS. However, these same bills have failed to exempt the nation’s community water and wastewater systems that are endeavoring to protect the public health and environment by removing PFAS from treated water;

Whereas failing to exempt water and wastewater utilities that follow all applicable laws, regulations and official guidance in the Removal and Disposal of Per- and Polyfluoroalkyl Substances from America’s drinking water supply from a hazardous substance designation for PFAS leaves water and wastewater systems – and their customers – subject to financial liability for PFAS cleanup, even in cases where the utility followed all applicable laws and regulations related to PFAS disposal;

Whereas the financial burden of holding water and wastewater utilities liable for the future costs associated with PFAS cleanup will be detrimental to utilities’ ability to provide safe and affordable service at a time

when water is essential to combat the COVID-19 pandemic and many customers are already struggling to pay their bills; now, therefore be it

Resolved that the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2021 Winter Policy Summit, supports efforts by state regulators, the U.S. EPA, and Congress to prevent PFAS chemicals from entering our nation's water supply and to hold accountable those entities that are responsible for environmental contamination; and be it further

Resolved that water and wastewater systems that follow all applicable laws in the disposal of water treatment byproducts containing PFAS should not be held liable under CERCLA for any further environmental cleanup costs related to these chemicals; and be it further

Resolved that Congress should exempt water and wastewater providers that follow all applicable laws in the disposal of water treatment byproducts containing PFAS from liability related to the designation of PFAS chemicals as hazardous substances under CERCLA.

Sponsored by the Committee on Water

Adopted by the Board of Directors, February 11, 2021