



July 7, 2023

The Honorable Tom Carper
Chair, Senate Committee on Environment & Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Shelley Moore Capito
Ranking Member, Senate Committee on Environment & Public Works
172 Russell Senate Office Building
Washington, D.C. 20510

**RE: WUWC Comments on the Senate Environment and Public Works Committee's
Proposed Legislation to Address PFAS**

Dear Chairman Carper and Ranking Member Capito:

The Western Urban Water Coalition (WUWC)¹ appreciates the opportunity to comment on the Senate Environment and Public Works Committee's (Committee) draft legislation to address per- and polyfluoroalkyl substances (PFAS).² WUWC shares the fundamental goal of ensuring that western water agencies and their customers are assured a public water supply that is reliable, affordable, and safe from emerging contaminants like PFAS.

WUWC has participated actively in the ongoing development of federal legislative, regulatory, and policy efforts to address PFAS. WUWC submitted written comments in two pending federal rulemakings to promulgate national primary drinking water standards for certain PFAS under the Safe Drinking Water Act (SDWA) and to designate certain PFAS as hazardous substances under

¹ WUWC is a coalition of 20 of the largest western water utilities formed more than 30 years ago to address the unique water issues facing the western United States. Its members serve over 40 million water consumers in major metropolitan areas in seven western states. Members include: Arizona (Central Arizona Project, City of Phoenix and Salt River Project); California (Eastern Municipal Water District, City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, City and County of San Francisco Public Utilities Commission, and East Bay Municipal Utility District); Colorado (Aurora Water, Colorado Springs Utilities, and Denver Water); Nevada (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); New Mexico (Albuquerque Bernalillo County Water Utility Authority); Utah (Salt Lake City Public Utilities and Washington County Water Conservancy District); and Washington (Seattle Public Utilities).

² Available at https://www.epw.senate.gov/public/_cache/files/e/1/e198c8f6-be9c-4187-ba2a-6b54ba19aad5/F8428DFD5E4D5EC2DF0A0EA6C31827EE.maz23283.pdf.

the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). WUWC has also sent multiple letters to Congress advocating for a legislative solution to insulate water utilities and their customers from the costs of PFAS cleanup that they did not cause. Copies of these letters are enclosed.

As these public comments and letters reflect, responsibly addressing PFAS in the environment and public drinking water supplies is a top priority for WUWC. WUWC appreciates the Committee's proposed legislation, but recommends changes to promote federal coordination in addressing PFAS. In this spirit, WUWC offers the following comments to the Committee.

I. The Draft Legislation Sets Firm Deadlines for Action That May Undermine the Committee's Goals and Bypass the SDWA

A. Requiring MCLs by September 30, 2024 would bypass the SDWA and put final PFAS standards at risk

While WUWC appreciates the Committee's sense of urgency to address PFAS, EPA is already taking meaningful steps to regulate PFAS under well-established SDWA and CERCLA frameworks, and the proposed legislation could undermine these efforts. WUWC is concerned with the proposed September 30, 2024 deadline to finalize maximum contaminant levels (MCLs) under the SDWA for perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), and four additional PFAS subject to ongoing EPA rulemakings. Unlike its March 2021 final regulatory determination to regulate PFOA and PFOS, EPA has only issued a preliminary determination to regulate the four additional PFAS (perfluorononanoic acid (PFNA), perfluorohexane sulfonic acid (PFHxS), perfluorobutanesulfonic acid (PFBS), hexafluoropropylene oxide dimer acid (HFPO-DA), and the associated salts of those substances). EPA has not yet made a final determination to regulate these four PFAS, and it may ultimately find that occurrence and health effects data do not warrant regulation of these substances under SDWA. WUWC has previously expressed concern to EPA that it has not undergone the necessary technical and economic feasibility analysis to lawfully promulgate MCLs for these substances and should not bypass the well-established regulatory process under the SDWA.

Setting a September 30, 2024 deadline for completion would subvert the SDWA's scientific risk-based process for setting drinking water standards. The proposed legislation would also take away EPA's discretion to extend the deadline for up to nine months, which may be required for EPA to consider thoughtfully the best available science and voluminous public comments received in response to its proposed rule. If EPA does not weigh peer-reviewed science, conduct the feasibility analysis that must accompany SDWA regulations, the proposed legislation may result in premature regulatory decisions that lack scientific justification and that would make PFAS MCLs more susceptible to be overturned in litigation. To avoid this result, WUWC recommends taking out Section 3 of the proposed legislation.

B. The role of the national standards-setting organization should be clarified

To a lesser degree, WUWC also has concerns with Section 10(b) of the proposed legislation, which would set a one-year deadline for EPA to contract with a "national standards-setting organization" to develop uniform standards "with respect to the detection, reduction, destruction,

remediation, and verification” of PFAS. WUWC cannot discern what problem this portion of the proposed legislation intends to resolve. At a minimum, Section 10(b) is overbroad to the extent it purports to require EPA to delegate regulatory decision-making authority under CERCLA and the SDWA to a non-governmental, politically unaccountable third party. WUWC recommends that the Committee more precisely consider its objective motivating Section 10(b), and either eliminate the section entirely or more narrowly tailor it to an identified problem that EPA is not capable of resolving through its existing authorities under the SDWA and CERCLA.

II. WUWC Supports the Inclusion of Funding for Development of New Technologies and Mitigation of PFAS Impacts to Disadvantaged Communities and Ratepayers

WUWC appreciates provisions of the proposed legislation appear motivated to allocate State Revolving Fund (SRF) spending to defray the costs of PFAS treatment to water utilities. WUWC acknowledges the provisions of the proposed legislation that would allow allocation of up to one percent of SRF funds towards maintaining a registry of nonresidential industrial facilities that manufacture or use PFAS for dissemination to public water systems and owners and operators of treatment works. It is not immediately clear to WUWC, however, what public water systems and treatment works owners and operators would be expected to do with this information. Rather than using this SRF set aside to identify manufacturers and users of PFAS, a potentially more productive use of these funds would be for grants or loans to help public water systems install treatment systems capable of removing PFAS from public water supplies.

WUWC is supportive of the provisions in the proposed legislation that facilitate the provision of grants or other sources of funding for the benefit of disadvantaged communities impacted by PFAS. As WUWC has noted in prior comment letters to EPA, PFAS is likeliest to impact source waters in historically industrial areas. Without federal assistance, ratepayers living in these communities will bear an outsized cost burden for PFAS treatment and provision of safe drinking water reliant on water sources polluted by PFAS producers.

III. The Proposed Legislation Should Include CERCLA Liability Protections for Water Utilities and Ensure that Polluters Pay for PFAS Cleanup

WUWC believes new liability limitations under CERCLA are needed to protect water utilities and their ratepayers from bearing costs for remediation of PFAS impacted sites. The reasons why WUWC believes this risk is both meaningful and inequitable have been outlined in detail in WUWC’s letters to Congress and comments on open PFAS-related rulemakings.

WUWC appreciates that this proposed legislation may be directed towards less ambitious goals. Nevertheless, WUWC would support amending the proposed legislation to include heightened protections for water utilities and their ratepayers from costs of PFAS cleanup under CERCLA.

IV. The Proposed Definition of “PFAS” Should be More Expansive

WUWC suggests that the Committee revise the proposed legislation to align with the definition of PFAS found in the U.S. National Defense Authorization Act (NDAA) (116th Congress, 2019), which adopted a structural definition classifying PFAS as any compound with at least “one fully fluorinated carbon.” By using “at least 2 fully fluorinated carbon atoms” in the definition of “PFAS,” the draft bill limits the number of PFAS in the PFAS polymer group. The

Senators Carper and Capito
July 7, 2023

industry does not yet know if these excluded PFAS have toxicities that are of human health concern. Given this absence of data, WUWC supports a more expansive definition of PFAS to protect against currently unknown PFAS contaminants from entering the environment.

* * *

Our members are experienced partners with Congress, EPA, and the states in the implementation of the SDWA, CERCLA, and other related authorities. WUWC recognizes the importance of regulating PFAS in line with WUWC's mission to ensure that western water agencies and their customers are assured a public water supply that is reliable, affordable, and safe for consumption. WUWC wants to continue working alongside members of Congress to address this important issue.

Thank you for the opportunity to provide these comments. For more information, please contact me at (303) 739-7378 or mbrown@auroragov.org, or WUWC's national counsel, Ted Boling, at (202) 661-5872 or TedBoling@perkinscoie.com.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'MPB', with a horizontal line extending to the right.

Marshall P. Brown
Chairman

ATTACHMENTS



November 7, 2022

U.S. Environmental Protection Agency
EPA Docket Center, OLEM Docket, Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

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

Dear Sir or Madam:

The Western Urban Water Coalition (WUWC) appreciates the opportunity to comment on the Environmental Protection Agency's (EPA) proposal to designate two per- and polyfluoroalkyl substances (PFAS)—specifically PFOA and PFOS—as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (the “Proposed Rule”).¹ WUWC is a coalition of 18 of the largest western water utilities² formed more than 30 years ago to address the unique water issues facing the western United States. Its members serve over 40 million water consumers in major metropolitan areas in seven western states, including through operation of water and wastewater treatment facilities.

Regulation of PFOA and PFOS under CERCLA is appropriate and necessary in many cases to address human and environmental health impacts, but at the same time such action will have troubling consequences for water utilities unless the federal government takes all appropriate action—within this rulemaking and through legislative action by Congress—to dampen the foreseeable and inequitable burdens on water utilities and their customers. Unlike manufacturers, processors, and other producers in the PFAS supply chain, water utilities did not introduce PFAS into commerce or profit from their widespread use. Water utilities instead operate treatment facilities at substantial capital and operational cost to treat source waters so that they are safe for

¹ 87 Fed. Reg. 54415 (Sept. 6, 2022).

² WUWC was established in 1992 to address the West's unique water supply and water quality challenges, and consists of the following members: Arizona (Central Arizona Project, City of Phoenix and Salt River Project); California (Eastern Municipal Water District, City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); Colorado (Aurora Water, Colorado Springs Utilities, and Denver Water); Nevada (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); New Mexico (Albuquerque Bernalillo County Water Utility Authority); Utah (Salt Lake City Public Utilities); and Washington (Seattle Public Utilities).

human consumption and other uses. WUWC has previously expressed its concern in letters to Congress³ that the regulation of PFOA and PFOS under CERCLA will expose water utilities to additional liability and expense that will ultimately be borne by customers with zero responsibility for PFAS pollution.

While WUWC appreciates that the Proposed Rule entails only one piece of EPA's broader federal regulatory strategy for PFAS, WUWC is concerned that it misses opportunities to evaluate the significant cost burdens that would be imposed on water utilities, clarify water utilities' reporting requirements, and shield ratepayers from substantial financial burdens for PFAS cleanup that ought to be allocated to polluters. With these opportunities in mind, WUWC respectfully submits the following comments on the Proposed Rule:

I. EPA Should More Carefully Consider the Foreseeable Costs of the Proposed Rule to Water Utilities

WUWC is concerned that EPA has underestimated both the direct and indirect costs of the Proposed Rule to water utilities. EPA prepared and relies upon an Economic Assessment (EA) of the Proposed Rule⁴ that potentially undercounts PFAS reporting triggers, fails to analyze readily available quantitative and qualitative information that would inform EPA's analysis of indirect liability effects, and incentivizes water utilities to develop inefficient capital budgets.

To remedy these issues, WUWC requests minor modifications to the Proposed Rule to clarify water utilities' reporting obligations, and that the EA be revised to present a fuller picture of foreseeable costs. In direct response to this rulemaking, EPA should also promptly exercise its enforcement authority to adopt new guidance and enforcement tools needed to blunt the cost impact to water utilities if the Proposed Rule is adopted.

A. EPA Should Revise the Proposed Rule to Clarify Water Utilities' Reporting Obligations and Avoid Unnecessary Reporting Costs

EPA should revise its EA to consider the full scope of PFOA and PFOS release reporting costs that would be incurred by regulated entities, including water utilities. As EPA acknowledges, listing PFOA and PFOS as hazardous substances would trigger reporting obligations whenever there is a release of PFOA or PFOS in an amount above the proposed one-pound reportable quantity (RQ).⁵ EPA estimates based on its own data that the cost per reporting event to regulated facilities would be \$561, but EPA concedes that "the expected number of reportable releases of PFOA and PFOS is not known."⁶ EPA requests public comment upon the

³ Copies of these letters are enclosed with these comments.

⁴ U.S. EPA, Economic Assessment of the Potential Costs and Other Impacts of the Proposed Rulemaking to Designate Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as Hazardous Substances (Aug. 2022), EPA-HQ-OLEM-2019-0341-0035; 87 Fed. Reg. at 54423 (describing the EA as the basis for EPA's cost analysis and requesting comment on EPA's cost assessment methods).

⁵ 87 Fed. Reg. at 54416, 54419.

⁶ EA at 11, 40–41.

reasonableness of its estimates that the nationwide aggregate annual number of reportable releases of PFOA and PFOS would be between 0 and 660.⁷

EPA has underestimated both the lower and upper bounds of foreseeable reporting costs. The assumed lower bound of zero fails to consider that CERCLA section 102(a) requires reporting of continuous releases.⁸ The upper bound of 660 assumes without justification that reporting of PFOA and PFOS releases will not exceed observed annual reporting of ammonia and ammonium releases, without regard to: (1) whether such releases have been accurately reported, and (2) the relative prevalence or measurability of these substances that would influence a facility's decision to report. But it should be acknowledged that these lower and upper bound cost estimates assume that zero enforcement costs and fines would be incurred where EPA determines that a regulated entity has failed to report.⁹ Whatever the possibility is for these costs to arise should be discussed.

Additionally, the Proposed Rule fails to clarify the reporting trigger for water utilities whose ordinary and prudent operations require the use of conveyances, filtration media, and best available treatment technologies to process contaminated water for human consumption and/or non-potable reuse. Elements of normal water processing operations include pumping groundwater and surface water for storage in reservoirs; operation of pumped storage hydropower facilities; operation of aqueducts, pipes, and similar conveyances; operation of treatment plants designed with open-air aeration facilities; utilization of industry standard treatment technologies that generate waste effluent and biosolids; operation of treatment plant outfalls; and temporary storage of treatment biosolids prior to offsite disposal. Water utilities conduct these operations in compliance with existing federal, state, and local environmental laws governing air emissions, water quality, and waste disposal, and under the partial protection afforded under CERCLA's federally permitted release exemption.¹⁰ In the absence of clarifying language in the Proposed Rule, however, water utilities could be compelled to report their ordinary "pumping," "emptying," "discharging," and "disposing" of PFOA- and PFOS-contaminated source waters and treatment wastes out of an abundance of caution to avoid perceived enforcement risks.¹¹

WUWC therefore requests that EPA revise the Proposed Rule to clarify the release reporting trigger as applied to water utilities. EPA has the authority to adopt an administrative reporting exemption, as it has done in prior instances.¹² WUWC strongly supports the adoption of an

⁷ EA at 9, 41.

⁸ 40 C.F.R. § 302.8 (continuous release reporting requirements); EA at 41 (relying upon market phase-out of PFOA and PFOS from manufacturing, import, and processing in 2015 to justify a zero baseline).

⁹ 40 C.F.R. § 302.7.

¹⁰ 42 U.S.C. § 9601(10)(H).

¹¹ 40 C.F.R. §§ 302.3, 302.6 (defining a "release" that triggers notification requirements); *see also* 87 Fed. Reg. at 54427 (describing potential release pathways for PFAS to escape from wastewater treatment plants). S

¹² *See, e.g.*, 40 C.F.R. § 302.6(e)(1)-(2) (administrative reporting exemption for certain nitrogen oxide air emissions). EPA retains a administrative authority to reasonably interpret and clarify the meaning of a "release" "into the environment" as applied to intra-system operations of water utilities. *Cf. Waterkeeper Alliance v. EPA*, 853 F.3d 527, 537 (D.C. Cir. 2017).

express administrative reporting exemption for private and public water utilities covering all pumping, emptying, discharging, disposing, or other releases of PFOA and PFOS inherent to the lawful operation of water utility infrastructure, including but not limited to water and wastewater treatment plant operations.¹³

B. EPA Should Fully Consider the Indirect Costs that Water Utilities Would Incur to Defend Themselves from CERCLA Liability Claims

WUWC is concerned that EPA has not fully or reliably considered the foreseeable indirect costs of the Proposed Rule upon water utilities. EPA, state cleanup agencies, and private parties may bring cost recovery and contribution actions against other PRPs under CERCLA Sections 107 and 113 and under analogous state statutes.¹⁴ Thus, even if EPA itself does not intend to seek CERCLA remediation costs from water and wastewater agencies,¹⁵ other entities can – and often do – bring public agencies into protracted CERCLA litigation that should be fully considered in EPA’s indirect costs assessment.

As EPA appreciates, water utilities will face the threat of CERCLA liability even if they lawfully store, transport, and treat water containing PFAS, and lawfully dispose of PFAS retained in biosolids resulting from water treatment.¹⁶ An increase in cost recovery claims, contribution claims, and cleanup and abatement orders against water utilities arising from the investigation and cleanup of offsite disposal facilities and other facilities under federal or state oversight where a release of PFAS has allegedly occurred,¹⁷ even if such claims lack merit, would force water utilities to incur significant costs in the form of legal fees, expert consultant fees, insurance premiums, and employee time.

¹³ WUWC seeks this administrative reporting exemption in addition to a statutory exemption, a kin to existing municipal solid waste and recycling exemptions, as WUWC has previously advocated in its congressional letters included with this comment. *See* 42 U.S.C. §§ 9607(p)(1), 9627(a) (municipal solid waste and recycling exemptions to CERCLA liability).

¹⁴ CERCLA [Section 107](#) allows a party that has incurred cleanup costs to sue PRPs for any “necessary costs of response incurred . . . consistent with the national contingency plan.” CERCLA [Section 113\(f\)\(1\)](#) authorizes any person to seek contribution from other parties who are or may be liable “during or following any civil action” under Section 106 (which permits the government to order a cleanup) or Section 107. A party can seek contribution under CERCLA [Section 113\(f\)\(3\)\(b\)](#) if it has “resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement.”

¹⁵ *See* 87 Fed. Reg. at 54437 (emphasizing desire to reduce burden to taxpayers).

¹⁶ 42 U.S.C. § 9607(a)(3); 87 Fed. Reg. at 54427 (“[PFOA or PFOS] may concentrate in the WWTP biosolids . . . [that] can also be sent to a landfill . . . Biosolids from wastewater treatment plants and some industrial wastewater that is land applied are also potential sources of contamination”).

¹⁷ For example, EPA Region 2 Deputy Administrator Walter Mugdan recently admitted that “[t]here is no exemption in the law that would protect let’s say a wastewater treatment plant that has received PFAS in the sewage that gets . . . into surface water somewhere.” Webinar hosted by the American Association for the Advancement of Science (AAAS), *Listing PFAS under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (Oct. 25, 2022), <https://www.aaas.org/events/listing-pfas-under-CERCLA>.

WUWC is concerned that indirect costs to water utilities have been underappreciated regardless of whether EPA ultimately applies a quantitative or qualitative analysis.¹⁸ EPA determined it would be “impractical” and “not feasible” to quantify the indirect effects of the Proposed Rule, largely because EPA says it lacks “robust information” regarding the number of PFAS-impacted sites potentially affected, the cleanup standards that would be applied, and the development and availability of treatment and disposal technologies.¹⁹

Uncertainties around these topics could be reduced if the EA is updated to account for EPA’s available data sources. For example, the EA makes no reference to EPA’s large database of CERCLA cleanup enforcement history data that could provide useful quantitative benchmarking. A quantitative analysis could be informed by a review of cleanup costs incurred and recovered from PRPs at sites impacted by “emerging contaminants” before and after their eventual listing as CERCLA hazardous substances. The EA also fails to leverage available EPA and other public agency loan information that would reduce cost uncertainties. For example, in August 2021, EPA granted a \$131 million Water Infrastructure Finance and Innovation Act (WIFIA) loan to the Orange County Water District to fund approximately half of the anticipated \$267 million upfront project costs for its PFAS Facilities Treatment Project.²⁰ A more robust review of federal and state loan and grant program information may provide further insights.

EPA could also supplement a quantitative analysis with available and relevant public data. Recent studies and other resources regarding where PFAS have been and are expected to be found in the environment are publicly available and would help EPA assess the number of sites that could be impacted by the Proposed Rule.²¹ The EA could derive additional information about the number of potentially impacted sites from the large number of lawsuits that have already been filed stating common law claims relating to PFAS. For example, there are so many lawsuits regarding the use of aqueous film-forming foam (AFFF) and PFAS contamination (more than 1800 cases) that the Judicial Panel on Multi-District Litigation consolidated these cases and created Multidistrict Litigation (MDL) 2873 set in the United States District Court for the District of South Carolina.²²

¹⁸ WUWC offers no opinion as to the reasonableness of EPA’s conclusion that CERCLA section 102(a) prohibits the consideration of costs in this rulemaking. *See* 87 Fed. Reg. at 54421–22.

¹⁹ 87 Fed. Reg. at 54423; EA at 46–52.

²⁰ EPA, *EPA Announces \$131 Million WIFIA Loan for PFAS Treatment and Removal Systems in Orange County, California* (Aug. 25, 2021), <https://www.epa.gov/newsreleases/epa-announces-131-million-wifia-loan-pfas-treatment-and-removal-systems-orange-county>.

²¹ *See, e.g.*, (1) Waterkeeper Alliance’s recent study that found PFAS in 83 percent of waterways across the country (<https://waterkeeper.org/pfas/>), and (2) researchers recently developed a new method for government agencies and others to use to map presumed sites where PFAS contamination exists; their initial use of the approach found more than 57,000 locations of presumptive PFAS contamination in the United States. *See* Env’t Sci. Tech. Letter 2022, *Presumptive Contamination: A New Approach to PFAS Contamination Based on Likely Sources* (Oct. 2022), <https://pubs.acs.org/doi/10.1021/acs.estlett.2c00502>.

²² Plaintiffs seek damages for personal injury or property damages from PFAS producers, but several water utilities have been brought these suits as well. *See, e.g.*, U.S. District Court of South Carolina, Status Conference Transcript at 14 (Mar. 4, 2019), <https://www.scd.uscourts.gov/mdl-2873/transcript/19-02-25%20AFFF.pdf>.

Even if EPA limits itself to a qualitative analysis of indirect effects, that review could be improved. WUWC's members expect PFAS cleanup costs to be significant based upon instances where water utilities have incurred "arranger" liability under CERCLA and state equivalent laws at multiparty landfill cleanups where cleanup has been ongoing for decades.²³ The EA also fails to mention the potential for the Proposed Rule to exacerbate liabilities and litigation defense costs associated with toxic tort litigation.²⁴ For these reasons, WUWC therefore requests that EPA supplement its EA to more carefully consider the potential indirect costs of the Proposed Rule.

C. EPA Should Fully Consider Indirect Effects Upon Water Utilities' Capital Planning and Research & Development Budgeting

The Proposed Rule could cause many water utilities to adopt inefficient capital upgrades and accelerate research and development costs simply to preserve CERCLA liability defenses. The EA states that the "direct benefits" of the Proposed Rule include incentivizing "better waste management practices for facilities handling PFOA or PFOS in an effort to avoid releases of these substances into the environment."²⁵ The EA further suggests that the Proposed Rule "may also result in increased research and development (R&D) expenditures to ensure the effective removal of PFOA and PFOS" while further noting "it is uncertain how those wastewater treatment plants needing to treat high levels of PFOA and PFOS would remove them from wastewater treatment sludge."²⁶ EPA should equally recognize the drawbacks these incentives will create for water utilities by forcing inefficient allocation of water utilities' resources. As noted previously, ultimately ratepayers will feel the impact of these inefficient uses of resources.

Normally, water utilities plan capital upgrades to treatment facilities in response to regulatory actions adopting primary and secondary water quality standards under the federal and state Safe Drinking Water Acts (SDWAs). While EPA and some states have adopted health advisories, notification levels (NLs), and response levels (RLs) for PFOA and PFOS in drinking water, national primary drinking water standards (MCLs) have not yet been developed. Future adoption of MCLs for PFOA and PFOS would be expected to identify numeric treatment objectives and/or treatment techniques following normal SDWA rulemaking procedures that give due consideration to health risk assessment, exposure analysis, feasibility analysis that considers best available treatment technologies (BAT), and implementation experience.²⁷

²³ Examples of multiparty landfill cleanup sites where water utilities have been brought in as arranger group PRPs include the BKK and Omega landfills in southern California.

²⁴ See, e.g., U.S. District Court of South Carolina, Status Conference Transcript at 14 (Mar. 4, 2019), <https://www.scd.uscourts.gov/mdl-2873/transcript/19-02-25%20AFFF.pdf>.

²⁵ EA at 44.

²⁶ *Id.* at 46.

²⁷ See EPA, *Drinking Water Health Advisories for PFOA and PFOS*, [https://www.epa.gov/sdwa/drinking-water-health-advisories-pfoa-and-pfos#:~:text=On%20June%2015%2C%202022%2C%20EPA.and%20polyfluoroalkyl%20substances%20\(PFAS\)](https://www.epa.gov/sdwa/drinking-water-health-advisories-pfoa-and-pfos#:~:text=On%20June%2015%2C%202022%2C%20EPA.and%20polyfluoroalkyl%20substances%20(PFAS).). Allowing the SDWA standard setting process to mature is also warranted because, as the Proposed Rule notes, EPA's interim health advisory levels for PFOA and PFOS have been set "below the levels at which analytical methods can measure these PFAS in drinking water." 87 Fed. Reg. at 54430.

Water utilities' capital planning has already been challenged by EPA's decision earlier this year to release interim updated health advisories for PFOA and PFOS at 0.004 parts per trillion (ppt) and 0.02 ppt, respectively -- more than 10 to 100 times lower than the resolution of current analytical methods. The interim health advisories for PFOA and PFOS replace the 2016 health advisory set at 70 ppt either individually or collectively. As EPA acknowledges in the Proposed Rule, the interim updated health advisory levels of 0.004 ppt for PFOA and 0.02 ppt for PFOS "are below the levels at which analytical methods can measure these PFAS in drinking water."²⁸ Water and wastewater utilities are already facing significant uncertainty about how to determine when PFOA and PFOS are present in their water supplies when the health advisory levels are below the detection limit.²⁹ Listing under CERCLA will greatly add to these uncertainties, and WUWC would like to work directly with EPA to discuss ways to avoid or lessen this impact.

EPA would shortchange the SDWA standard-making process to the extent it seeks to use the Proposed Rule to accelerate water utilities' capital upgrades and R&D expenditures even further. Neither the Proposed Rule nor the EA acknowledges the risk that water utilities will need to accelerate capital upgrades to assert liability defenses in multiparty liability disputes. For example, water utilities may face cleanup liability claims under CERCLA sections 107 and 113 for which the "third party defense" would apply, but to assert the defense, water utilities would have to demonstrate they exercised "due care" with respect to the contamination.³⁰ WUWC is concerned to the extent the EA and Proposed Rule suggest water utilities fail to exercise due care by waiting for SDWA standard-setting processes to conduct R&D and authorize capital upgrades. Instead, water utilities exhibit due care through their compliance with applicable federal, state, and local laws governing the lawful pumping, storage, treatment, and disposal of water and treatment wastes containing PFOA and PFOS.

Accordingly, EPA should revise the EA to consider more carefully the indirect effects of the Proposed Rule with respect to the acceleration of capital upgrades and R&D expenditures. Beyond this rulemaking, EPA should also exercise its authority to adopt new enforcement guidance and clarify existing guidance³¹ such that, until EPA adopts national primary water quality standards for PFOA and PFOS, water utilities' compliance with applicable laws governing pumping, storage, treatment and disposal of PFOA and PFOS-containing water and treatment wastes is sufficient to establish the "due care" element of applicable liability defenses. Finally, EPA should take the added time necessary to fully consider and address the

²⁸ 87 Fed. Reg. at 54430.

²⁹ Furthermore, in the absence of other criteria, regulatory agencies may use these health advisories as *de facto* cleanup standards. *See* 87 Fed. Reg. at 54423 (noting future cleanup standards for PFOA and PFOS are a "significant uncertainty"); *id.* at 54430 ("Health advisories provide drinking water system operators, and state, Tribal, and local officials who have the primary responsibility for overseeing these systems, with information on the health risks of these chemicals, so they can take the appropriate actions to protect their residents").

³⁰ 42 U.S.C. § 9607(b).

³¹ EPA's Contaminated Aquifer Policy, which insulates landowners from CERCLA liability for passive migration of contaminated groundwater but excludes owners of groundwater wells, should be updated to provide that a well owner or operator is protected under the policy if its groundwater extraction activities comply with otherwise applicable laws. *See* EPA, *Final Policy Toward Owners of Property Containing Contaminated Aquifers* (May 1995), <https://www.epa.gov/enforcement/guidance-owners-property-containing-contaminated-aquifers>.

consequences of the Proposed Rule on water utilities. WUWC pledges its support to help EPA do so in a timely and efficient manner.

II. EPA Should Rectify Inequities That Would Arise Under the Proposed Rule

The Proposed Rule notes that future cleanups and associated cost recovery, whether by EPA and other federal agencies or private parties, will “allow a transfer of the cost-burden of response activities at privately owned sites from the taxpayers/fund to potentially responsible parties.”³² But to the extent that water utilities incur liability, transaction costs, capital costs, research and development costs, or other costs arising from the designation of PFOA and PFOS as hazardous substances, those costs will ultimately be borne by ratepayers.

EPA has previously acknowledged “there are several PFAS situations that present equity concerns, including significant concerns by some stakeholders, particularly public service entities like water utilities, municipal airports and entities using biosolids.”³³ EPA has said it is “preparing to address these type of concerns with various enforcement tools” including new policy documents, entry into settlement agreements, and resolution of concerns on a site-specific basis.³⁴ EPA says “these tools will seek to address potential liability, based on equitable considerations, to protect certain parties from potential litigation by those principally responsible for PFOA and PFOS contamination, and minimize transaction costs.”³⁵

Unfortunately, the Proposed Rule and EA do not similarly take account of the equitable distribution of cost impacts and instead repeat the oversimplified notion that the Proposed Rule will transfer cleanup cost obligations from taxpayers to polluters.³⁶ Water utilities that become subject to liability for PFOA and PFOS cleanup pass these liabilities on as increased rates for their ratepayers. Additionally, whereas private sector polluters frequently can avoid CERCLA liability through insolvency,³⁷ leaving behind “orphan shares” of liability that EPA then spreads among other financially viable parties, applicable law may restrict or even forbid water utilities from filing for bankruptcy.³⁸ Ratepayers’ utility charges that already include costs to treat contaminated water will only be further increased to fund remediation of PFAS-polluted sites and litigation costs arising from those sites while actual polluters may be shielded from liability entirely.

³² 87 Fed. Reg. at 54437.

³³ U.S. EPA, *Notice of Proposed Rulemaking: Designating PFOA and PFOS as CERCLA Hazardous Substances* at 6 (Aug. 2022), https://www.epa.gov/system/files/documents/2022-09/Overview%20Presentation_NPRM%20Designation%20of%20PFOA%20and%20PFOS%20as%20CERCLA%20Hazardous%20Substances.pdf.

³⁴ *Id.*

³⁵ *Id.*

³⁶ 87 Fed. Reg. at 54418, 54412, 54437; EA at 48–49.

³⁷ Includes both avoidance through bankruptcy and eligibility for “inability to pay” settlements.

³⁸ See, e.g., *In re County of Orange*, 183 B.R. 594, 604 (Bankr. C.D. Cal. 1995) (public entities are eligible for Chapter 9 bankruptcy only where authorized by state statute in terms that are “exact, plain, and direct with well-defined limits so that nothing is left to inference or implication”).

Moreover, because PFAS contamination is more likely to be found in water systems drawing from groundwater and surface water sources in proximity to industrial polluters,³⁹ the Proposed Rule will disproportionately affect ratepayers from environmentally disadvantaged communities. Shifting cleanup costs onto these most vulnerable ratepayers would establish regressive policy that directly contradicts EPA's stated priority to exercise its cleanup authorities to promote environmental justice.⁴⁰ EPA should therefore revise the EA to account for the distributive effects of the Proposed Rule.

If EPA ultimately adopts the Proposed Rule, EPA should rapidly accelerate its development of national PFAS cleanup guidance and other enforcement tools that it has promised to ensure its PFAS enforcement activities are equitable. At a minimum, WUWC would strongly support new EPA policy directing its regions and project managers to: (a) avoid allocating to water utilities and their ratepayers any "orphan shares" of PFAS cleanup costs, (b) prioritize early settlement with water utilities, including broad contribution claim protection and covenants not to sue, where a water utility's CERCLA liability is asserted on the basis of either lawful groundwater pumping activities or lawful offsite disposal of PFAS-containing treatment residuals, and (c) recognize the eligibility of water utilities to seek reduced administrative settlements under CERCLA section 122(g)(7) in proportion to ratepayers' "inability to pay."

* * *

Our members are experienced, on-the-ground partners with EPA and the states in ensuring the safety and reliability of public water supplies. Based on this experience, WUWC is prepared to assist EPA and other regulatory agencies in addressing the important issue of PFAS contamination in our water. The recommendations included with this comment letter are intended to increase the effectiveness of the EPA's Proposed Rule by keeping liability and expenses limited to those most responsible for PFAS pollution. By no means will the recommendations reduce the EPA's ability to regulate the cleanup of PFAS contaminants. We look forward to continued dialogue and collaboration on legislative and regulatory initiatives.

Thank you for the opportunity to provide these comments. For more information, please contact me at (303) 739-7378 or mbrown@auroragov.org or WUWC's national counsel, Don Baur, at (202) 654-6234 or dbaur@perkinscoie.com.

³⁹ See, e.g., Natural Resources Defense Council, *Dirty Water: Toxic "Forever" PFAS Chemicals are Prevalent in the Drinking Water of Environmental Justice Communities*, R: 21-07-C (Aug. 2021), <https://www.nrdc.org/sites/default/files/dirty-water-pfas-ej-communities-report.pdf>.

⁴⁰ U.S. EPA, *EJ Action Plan: Building Up Environmental Justice in EPA's Land Protection and Cleanup Programs*, EPA 502/P-21/0-01 (Sept. 2022) (touting the provision of funding to EPA regions "to address environmental justice concerns in PFAS projects at federal facility NPL sites"), https://www.epa.gov/system/files/documents/2022-09/OLEM-EJ-Action-Plan_9.2022_FINAL-508.pdf; see also U.S. EPA, *PFAS Strategic Roadmap: EPA's Commitments to Action 2021–2024*, EPA-100-K-21-002 (Oct. 2021) (referencing environmental justice concerns in discussion of EPA's holistic PFAS "roadmap"), https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf.

U.S. Environmental Protection Agency
November 7, 2022

Very truly yours,

A handwritten signature in blue ink, appearing to read 'MPB', with a stylized flourish extending to the right.

Marshall P. Brown
Chairman

ATTACHMENTS



July 16, 2021

The Honorable Chuck Schumer
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-232, U.S. Capitol
Washington, DC 20515

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
H-204, U.S. Capitol
Washington, DC 20515

The Honorable Frank Pallone
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable Cathy McMorris Rodgers
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable Peter A. DeFazio
Chairman
Committee on Transportation
and Infrastructure
U.S. House of Representatives
Washington, DC 20515

The Honorable Sam Graves
Ranking Member
Committee on Transportation
and Infrastructure
U.S. House of Representatives
Washington, DC 20515

RE: Concerns with H.R. 2467 and H.R. 3291

Dear Chairmen and Ranking Members:

The Western Urban Water Coalition (WUWC) respectfully submits this letter as you consider the PFAS Action Act of 2021 (H.R. 2467) and the Assistance, Quality and Affordability Act of 2021 (H.R. 3291). Our comments below concern provisions in these bills addressing per- and polyfluoralkyl substances (PFAS). WUWC appreciates your consideration of this request even though H.R. 3291 recently passed the House as part of the INVEST in America Act (H.R. 3684).

WUWC is a coalition of 18 of the largest western water utilities¹ formed more 30 years ago to address the unique water issues facing the western United States. Its members serve over 40 million water consumers in major metropolitan areas in seven western states. The issue of PFAS in drinking water supplies is an important matter that warrants Congressional attention, and we support the goal of establishing science-based regulatory mechanisms to address the problem and protect public health.

WUWC has two key concerns with these proposals, echoing issues raised by other major water organizations as well as WUWC's prior comments on proposed PFAS provisions of the FY 2020 National Defense Authorization Act:

Responsibility for PFAS contamination should rest with PFAS polluters, not water utilities.

The PFAS Action Act advanced by the House Energy and Commerce Committee would subject local drinking water and wastewater treatment utilities and their ratepayers to financial liability for environmental PFAS cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). While the legislation waives CERCLA liability for airports, the Committee rejected an amendment that would have provided a similar exemption to community water systems, including drinking water and wastewater treatment facilities. WUWC cannot support designating PFAS as a CERCLA hazardous substance without protection for community water systems.

As a general principle, federal regulation of PFAS should not hold community water systems liable for the contamination of water supplies by PFAS. Water utilities are the "receivers" of PFAS from upstream industrial and other sources and do not themselves create or produce PFAS. Water utilities must dispose of the residuals generated by the water and wastewater treatment processes, and PFAS from upstream sources are retained in these residuals. Liability should rest with those original PFAS sources. The PFAS Action Act would subject community water systems to financial liability even where they had followed all applicable laws and regulations related to PFAS disposal.

Congress should ensure that CERCLA does not become a tool to penalize water utilities that properly dispose of PFAS residuals. Ultimately, the costs associated with CERCLA liability would be borne by utilities' customers, requiring them to pay for the PFAS contamination problems created by manufacturers and other parties. Imposing PFAS liability on water utilities would thus interfere with our ability to serve customer needs efficiently and cost-effectively.

As explained below, legislative and regulatory requirements for PFAS should be based on the Safe Drinking Water Act and other environmental laws. In the event Congress does designate PFAS as hazardous substances under CERCLA, then it should create a clear and express

¹ WUWC was established in 1992 to address the West's unique water supply and water quality challenges, and consists of the following members: Arizona (Central Arizona Project, City of Phoenix and Salt River Project); California (Eastern Municipal Water District, City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); Colorado (Aurora Water, Colorado Springs Utilities, and Denver Water); Nevada (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); New Mexico (Albuquerque Bernalillo County Water Utility Authority); Utah (Salt Lake City Public Utilities); and Washington (Seattle Public Utilities).

exemption from CERCLA's liability scheme for water and wastewater systems and operations that do not cause, create or produce PFAS contamination.

Congress should not circumvent existing regulatory programs best suited to address this issue.

We appreciate the PFAS grant provisions included in the Assistance, Quality and Investment Act. Section II of that bill, however, contains a problematic provision that would diverge from the Environmental Protection Agency's (EPA) Safe Drinking Water Act (SDWA) regulatory process. The PFAS Action Act and Assistance, Quality and Affordability Act would similarly establish a unique and expedited regulatory process under the SDWA. The drinking water industry has long maintained that any regulatory standard must consider economic and technological feasibility, including analytical capabilities and treatment options, as well as provide opportunities for stakeholder involvement.

Any regulatory determination for PFAS should follow the standards and processes outlined in the SDWA. The SDWA applies a science-based, data-driven, peer-reviewed process to the development of drinking water regulations. Establishing an alternative approach for PFAS, as Section II does, could lead to premature regulatory determinations lacking in transparency and scientific validity.

EPA regulates more than 90 drinking water contaminants under the SDWA but does not currently have a maximum contaminant level for PFAS. Congress should ensure that EPA has adequate funding and other resources as it evaluates potential thresholds for PFAS under the established SDWA regulatory determination process and the PFAS Action Plan. This means adequate resources to fund research and reach science-based decisions, develop policy and associated public engagement, and be a partner in state implementation. Adherence to the SDWA process will maintain consistency in standard-setting and reduce the risk and delay of costly litigation while ensuring the public's confidence in their drinking water.

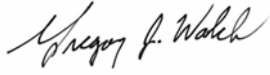
Source control must also be a key component of any program to address PFAS. While many companies are voluntarily phasing out certain PFAS in the United States, PFAS and products containing PFAS are still being manufactured internationally and imported to the country. Congress and regulatory agencies should rely on all applicable environmental laws to reduce and control the introduction of PFAS into the environment. For example, the Toxic Substances Control Act review process should be used to understand the risks posed by PFAS.

* * *

Our members are experienced, on-the-ground partners with EPA and the states in the implementation of the SDWA, Clean Water Act, and other authorities. Based on this experience, WUWC is prepared to assist the members of Congress, EPA, and other regulatory agencies in addressing this important issue. We look forward to continued dialogue and collaboration on legislative and regulatory initiatives.

Thank you for the opportunity to provide these comments. For more information, please contact me at (702) 258-7166 or greg.walch@lvvwd.com or WUWC's national counsel, Don Baur, at (202) 654-6234 or dbaur@perkinscoie.com.

Very truly yours,

A handwritten signature in cursive script that reads "Gregory J. Walch". The signature is written in black ink and is positioned above the printed name.

Gregory J. Walch
Chairman



June 1, 2022

The Honorable Tom Carper
Chair, Senate Committee on Environment and
Public Works
United States Senate
513 Hart Senate Office Building
Washington, DC 20510

The Honorable Shelley Moore Capito
Ranking Member, Senate Committee on
Environment and Public Works
United States Senate
172 Russell Senate Office Building
Washington, DC 20510

The Honorable Frank Pallone, Jr.
Chair, House Energy and Commerce
Committee
U.S. House of Representatives
2107 Rayburn House Office Building
Washington, DC 20515

The Honorable Peter A. DeFazio
Chair, House Transportation and
Infrastructure Committee
U.S. House of Representatives
2134 Rayburn House Office Building
Washington, DC 20515

The Honorable Sam Graves
Ranking Member, House Transportation and
Infrastructure Committee
U.S. House of Representatives
1135 Longworth House Office Building
Washington, DC 20515

The Honorable Cathy McMorris Rodgers
Ranking Member, House Energy and
Commerce Committee
U.S. House of Representatives
1035 Longworth House Office Building
Washington, DC 20515

RE: Critical Exemption from CERCLA Liability for Water Systems

Dear Chairmen and Ranking Members:

The Western Urban Water Coalition (WUWC) submits this letter to respectfully request that, should PFAS chemicals be designated as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Congress provide an explicit exemption from liability for water systems. WUWC has previously commented on this issue with letters to Congress regarding proposed PFAS provisions of the PFAS Action Act (*see* July 16, 2021 WUWC letter to Senators Schumer and McConnell, and Representatives Pelosi, McCarthy, Pallone, Rodgers, DeFazio and Graves) and of the FY 2020 National Defense Authorization Act (*see* September 10, 2019 WUWC letter to Senator Inhofe and Representative Smith).

The Honorable Tom Carper
The Honorable Peter A. DeFazio
The Honorable Shelley Moore Capito
The Honorable Sam Graves
The Honorable Frank Pallone, Jr.
The Honorable Cathy McMorris Rodgers
June 1, 2022
Page 2

WUWC is a coalition of 18 of the largest western water utilities¹ formed more than 30 years ago to address the unique water issues facing the western United States. Its members serve over 40 million water consumers in major metropolitan areas in seven western states. The issue of PFAS in drinking water supplies is an important matter that warrants Congressional attention, and we support the goal of establishing science-based regulatory mechanisms to address the problem and protect public health.

Whether the U.S. Environmental Protection Agency (EPA) moves ahead with designating PFAS as hazardous substances under CERCLA or Congress does so itself, it is imperative that federal regulation of PFAS not hold public water systems (including water, wastewater and reclaimed water agencies) liable for handling water supplies contaminated by PFAS. A hazardous substance designation under CERCLA will have far reaching implications and severe unintended consequences on water systems that have played no role in producing, using, or profiting from PFAS being placed into commerce. Liability should rest instead with those original PFAS sources.

If PFAS are designated as hazardous substances under CERCLA, public water systems could incur significant liability as potentially responsible parties (PRPs) simply due to routine and necessary water storage, transportation, and treatment activities. Water utilities receive PFAS in their water from upstream industrial and other sources and do not themselves create or produce PFAS. We now know that PFAS are present in the environment in quantities and frequencies higher than previously anticipated. Because of the ubiquity of PFAS, it is unavoidable that public water systems will continue to passively receive and then have to store, transport, and treat water containing PFAS that have been circulating in the environment for decades.

As standard practice, water utilities remove contaminants through filtration media to process water for human consumption or reuse. They then properly dispose of PFAS retained in solids resulting from water treatment and in media used in the treatment process in accordance with applicable law. However, under CERCLA's strict joint, several, and retroactive liability scheme, *any party* who disposes of hazardous substances, even in minute quantities, and even if the disposal was legal at the time, may be considered a PRP and could be held liable for the entire cleanup of a site (when the harm caused by multiple parties cannot be separated).² It is also not a defense to CERCLA liability that a PRP was not negligent or that it was operating according to

¹ WUWC was established in 1992 to address the West's unique water supply and water quality challenges, and consists of the following members: Arizona (Central Arizona Project, City of Phoenix and Salt River Project); California (Eastern Municipal Water District, City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); Colorado (Aurora Water, Colorado Springs Utilities, and Denver Water); Nevada (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); New Mexico (Albuquerque Bernalillo County Water Utility Authority); Utah (Salt Lake City Public Utilities); and Washington (Seattle Public Utilities).

² See <https://www.epa.gov/enforcement/superfund-liability>.

The Honorable Tom Carper
The Honorable Peter A. DeFazio
The Honorable Shelley Moore Capito
The Honorable Sam Graves
The Honorable Frank Pallone, Jr.
The Honorable Cathy McMorris Rodgers
June 1, 2022
Page 3

industry standards. Therefore, if a site designated as a facility subject to CERCLA contains trace amounts of PFAS-contaminated material from standard water processing practices, water systems and their ratepayers could incur significant liability, even if the majority of the site's pollution came from other sources.³ This pattern has the potential to repeat nationwide, unintentionally exposing water utilities—and therefore the public, who must pay higher rates as a result—to significant potential liability and cleanup costs.

Congress should ensure that CERCLA does not become a tool to penalize water utilities who treat water containing PFAS that have been manufactured by third-party sources and over which water utilities have no control. Ultimately, the costs associated with CERCLA liability would be borne by utilities' customers, requiring them to pay for the PFAS contamination problems created by manufacturers and other parties. Imposing PFAS liability on water utilities would thus interfere with our ability to serve customer needs efficiently and cost-effectively.

In the event EPA or Congress does designate PFAS as hazardous substances under CERCLA, then Congress should create a clear and express exemption from CERCLA's liability scheme for water and wastewater systems and operations that do not cause, create or produce PFAS contamination. Congress has provided similar protections as necessary in the past⁴—and should do so again.

* * *

Our members are experienced, on-the-ground partners with EPA and the states in the implementation of the Safe Drinking Water Act, Clean Water Act, and other authorities. Based on this experience, WUWC is prepared to assist the members of Congress, EPA, and other regulatory agencies in addressing this important issue. We look forward to continued dialogue and collaboration on legislative and regulatory initiatives.

Thank you for the opportunity to provide these comments. For more information, please contact me at (303) 739-7378 or mbrown@auroragov.org, or WUWC's national counsel, Don Baur, at (202) 654-6234 or dbaur@perkinscoie.com.

Very truly yours,



Marshall P. Brown
Chairman

³ CERCLA liability is triggered if: (1) hazardous substances are present at a facility; (2) there is a release (or a possibility of a release) of these hazardous substances; (3) response costs have been or will be incurred; and (4) the defendant is a liable party. See <https://www.epa.gov/enforcement/superfund-liability>.

⁴ See e.g., 42 U.S.C. §§ 9607(p)(1), 9627(a) (municipal solid waste and recycling exemptions to CERCLA liability).



May 30, 2023

U.S. Environmental Protection Agency
EPA Docket Center
Office of Ground Water and Drinking Water Docket
Mail Code 2822IT
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: PFAS National Primary Drinking Water Regulation Rulemaking; Docket ID No. EPA-HQ-OW-2022-0114

Dear Administrator Regan:

The Western Urban Water Coalition (WUWC) appreciates the opportunity to comment on the Environmental Protection Agency's (EPA) proposed Per- and Polyfluoroalkyl Substances (PFAS) National Primary Drinking Water Regulation Rulemaking (the "Proposed Rule").¹ WUWC is a coalition of 19 of the largest western water utilities² formed more than 30 years ago to address the unique water issues facing the western United States. Its members serve over 40 million water consumers in major metropolitan areas in seven western states, including through operation of water treatment facilities that will become subject to the Proposed Rule.

WUWC appreciates that regulation of PFAS under the Safe Drinking Water Act (SDWA) is an appropriate and necessary step to address public safety concerns with the potential for service of PFAS-contaminated drinking water. WUWC also understands that the Proposed Rule represents just one piece of a broader federal regulatory priority that EPA is addressing through several ongoing rulemaking proceedings and concurrent policy setting. WUWC shares the fundamental goal to ensure that its western water agencies and their customers are assured a public water supply that is reliable, affordable, and safe.

¹ 88 Fed. Reg. 18638 (Mar. 29, 2023).

² WUWC was established in 1992 to address the West's unique water supply and water quality challenges, and consists of the following members: Arizona (Central Arizona Project, City of Phoenix and Salt River Project); California (Eastern Municipal Water District, City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); Colorado (Aurora Water, Colorado Springs Utilities, and Denver Water); Nevada (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); New Mexico (Albuquerque Bernalillo County Water Utility Authority); Utah (Salt Lake City Public Utilities and Washington County Water Conservancy District); and Washington (Seattle Public Utilities).

The proposal to adopt national primary drinking water standards for perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), perfluorohexane sulfonate (PFHxS), hexafluoropropylene oxide dimer acid (HFPO–DA), perfluorononanoic acid (PFNA), and perfluorobutane sulfonic acid (PFBS) is a historic milestone in the regulation of PFAS as emerging contaminants. EPA has not issued a primary drinking water standard for a new contaminant on its own volition for the past twenty-six years. The drinking water standards adopted through this rulemaking have the potential to set a new precedent for further regulation of additional PFAS.

Given the significance of this moment, WUWC urges EPA to adopt a rule only after assuring that the standards it selects are based on best available peer-reviewed science and are feasible, as required by the SDWA. WUWC offers the following comments to EPA that animate WUWC’s concern that EPA has not yet fully analyzed the legal, practical, or economic feasibility of the Proposed Rule.

I. EPA Has Not Evaluated the Proposed MCLs for Economic Feasibility

WUWC is concerned with the methods and standards used to evaluate the economic feasibility of the proposed Maximum Contaminant Levels (MCLs).³ The SDWA requires EPA to set primary drinking water standards as close to the MCL goals (MCLGs) as “feasible,” taking account of both technical feasibility and economic feasibility.⁴ Separately, the SDWA requires that EPA prepare a Health Risk Reduction and Cost Analysis (HRRCA) that considers the costs of compliance with a proposed MCL.⁵ Because the Proposed Rule is considered a significant regulatory action, EPA is required by Executive Order 12866 to prepare an Economic Analysis (EA) weighing the Proposed Rule’s reasonably foreseeable costs and benefits.

In light with these latter two requirements, EPA completed an EA⁶ and HRRCA that comparatively evaluate the costs and benefits of the proposed MCLs and other less stringent potential MCLs not chosen under the Proposed Rule. EPA relies on the EA and HRRCA throughout the Proposed Rule wherever it references cost considerations. In this respect, EPA treats the requirement for economic feasibility analysis as equivalent to cost-benefit analysis and essentially procedural.

Instead, the economic feasibility analysis needed is both procedural and substantive. Procedurally, EPA cannot lawfully ignore entire categories of costs that necessarily will result from promulgation of a new MCL. Michigan recently ran afoul of this principle when a state court overturned its proposed state MCL for PFOA and PFOS. *See 3M Company v. Mich. Dep’t. of Env’t, Great Lakes, and Energy*, No. 21-000078 (Mich. Ct. Claims) (Nov. 15, 2022). The

³ 88 Fed. Reg. at 18668–69, 18730 (requesting public comment on EPA’s evaluation of the economic feasibility of MCLs under the Proposed Rule).

⁴ SDWA § 1412(b)(4)(B); 42 U.S.C. § 300g-1(b)(4)(B); Congressional Research Service, *Regulating Contaminants under the Safe Drinking Water Act (SDWA)*, 2, 13 (Jan. 5, 2022).

⁵ SDWA § 1412(b)(3)(C); 42 U.S.C. § 300g-1(b)(3)(C).

⁶ U.S. EPA, *Economic Analysis for the Proposed Per- and Polyfluoroalkyl Substances National Primary Drinking Water Regulation* (Mar. 2023), EPA-822-P-23-001 (the “EA”).

court faulted Michigan for preparing a Regulatory Impact Statement⁷ that failed to evaluate cleanup costs arising from the proposed MCL because existing Michigan law would have required the MCL to be used as a groundwater cleanup standard for aquifers contaminated with PFOA or PFOS “as a matter of law.”

Substantively, the SDWA requires EPA to find that each proposed MCL is “technically possible and affordable.” *City of Portland v. EPA*, 507 F.3d 706, 712 (D.C. Cir. 2007). California violated this principle in 2017 when a state court overturned its then-proposed MCL for hexavalent chromium under the California SDWA. *See Cal. Mfrs. and Tech. Ass’n v. State Water Res. Control Bd.*, No. 34-2014-80001850 (Super. Ct. Cal.) (May 5, 2017). While acknowledging that the state’s “cost estimates themselves [were] quite thorough,” under the SDWA, the court found “simply coming up with cost estimates for seven MCLs and then selecting one of those MCLs is not equivalent to considering the economic feasibility of complying with the MCL.” In particular, the court focused on the agency’s failure to make findings concerning the affordability of the Proposed Rule to water utility customers.

The Proposed Rule commits both of these errors. The Proposed Rule nowhere accounts for the National Contingency Plan (NCP), adopted pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which will require these new MCLs to be used as cleanup standards by operation of law.⁸ WUWC has previously expressed its significant concerns to EPA and Congress that regulating PFAS could cause water utilities to incur cleanup liability at CERCLA sites, the costs of which would ultimately be borne by ratepayers. These additional costs to ratepayers of the Proposed Rule have not been considered.

Further, EPA substitutes its cost-benefit analysis for an evaluation of affordability. EPA says it interprets the applicable SDWA standard to require an evaluation of “reasonable cost based on large and metropolitan water systems,”⁹ but its reasonableness determination merely refers back to the cost-benefit analyses it prepared in the EA and HRRCA. The primary discussion of affordability contained in the Proposed Rule relates to its potential impacts on small water systems; no due consideration is given to the affordability of the Proposed Rule to ratepayers of larger, urban water systems.¹⁰

WUWC therefore recommends that EPA reconsider the proposed MCLs and determine if the proposed numeric MCLs of 4.0 ppt for PFOA and PFOS, and the HI of 1.0 for the other four covered PFAS, will be economically feasible. The analysis should consider affordability to ratepayers of water utilities of all sizes and take into account all categories of costs that will arise as a legal consequence of the Proposed Rule.

⁷ The Regulatory Impact Statement required under Michigan law is akin to the requirements for an EA and HRRCA under federal law.

⁸ 40 C.F.R. § 300.430(e)(2)(i)(B)-(C) (requiring attainment of MCLs where MCLGs have been set at zero and contaminated groundwater or surface water is designated as a current or potential source of drinking water).

⁹ 88 Fed. Reg. at 18668.

¹⁰ *Id.* at 18686–88.

II. Unavoidable Obstacles Threaten to Make Implementing the Proposed Rule Practically or Legally Infeasible

A. Treatment Options and Disposal of Residuals

WUWC has serious concerns with EPA's assumptions and conclusions regarding the feasibility of proposed treatment methods and the disposal of drinking water treatment residuals containing PFAS.¹¹ EPA states that treatment technologies using GAC and IX resin are the best available technologies for PFAS treatment based on several factors including efficiency and cost.¹² However, the Proposed Rule does not consider significant supply chain challenges that have impacted the availability of GAC and IX resin, or whether there is a sufficient supply of these materials to meet the increase in demand that would result from the Proposed Rule. EPA also fails to consider and weigh the costs of additional sampling that will need to be conducted to evaluate selected treatment media for contaminant breakthrough.

EPA also does not properly address the disposal of spent treatment media. Based upon its 2020 Interim Guidance,¹³ EPA states that "the most likely management option for spent material containing PFAS is reactivation for GAC and incineration for spent IX resin."¹⁴ EPA acknowledges that the "large volume of residuals is a well-known obstacle" and that "large volumes of spent GAC and ion exchange resin must be removed which does not lend itself to on-site storage over time."¹⁵ EPA further acknowledged the potential for PFAS-containing residuals to be characterized as hazardous waste subject to heightened disposal restrictions, and estimated the incremental costs of disposal to utilities. Nevertheless, EPA concluded that "costs are limited to the disposal of the PFAS contaminated residuals and wastes," and found that the "increase in [public water systems] costs are not significant enough to change the determination that the benefits of the rulemaking justify the costs."¹⁶

EPA has substituted its cost-benefit judgment for the feasibility determination required by SDWA. Nothing in existing law requires the owner or operator of a hazardous waste landfill to accept PFAS-containing residuals for disposal. The basis for EPA's assumption that at least some landfills will be available for disposal has not been supported.

By its own admission, EPA has also undercounted the costs if treatment residuals must be managed as hazardous. Under the Resource Conservation and Recovery Act (RCRA) and analogous state laws, water systems cannot lawfully accumulate and store hazardous waste without a permit.¹⁷ Neither the Proposed Rule nor the supporting EA appear to account for

¹¹ 88 Fed. Reg. at 18686 (discussing "management of treatment residuals"); 88 Fed. Reg. at 18731 (requesting comment on EPA's estimates for drinking water treatment residuals, regeneration, and capacity of disposal sites).

¹² *Id.* at 18684.

¹³ *Id.* at 18686 (citing EPA, *Interim Guidance on the Destruction and Disposal of Perfluoroalkyl and Polyfluoroalkyl Substances and Materials Containing Perfluoroalkyl and Polyfluoroalkyl Substances* (2020)).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The default maximum unpermitted accumulation period under RCRA is 180 days. 40 C.F.R. § 262.16(b).

RCRA permit processing and compliance burdens that would apply to the storage of treatment residuals prior to offsite disposal.

Last, to the extent that the Proposed Rule assumes incineration is an available disposal option, EPA has failed to account for significant risk of legal infeasibility. The U.S. Department of Defense has placed a temporary ban on the incineration of PFAS.¹⁸ The state of Illinois has also enacted an outright ban on PFAS incineration.¹⁹ EPA itself has raised concerns over the uncertainties associated with incineration.²⁰ If restrictions upon PFAS waste incineration become more widespread, the typical costs of cleanup of PFAS-impacted sites would also increase as a foreseeable consequence of the Proposed Rule.²¹ Nothing in the Proposed Rule explains how EPA has concluded the selected MCLs are feasible given existing or prospective future legal prohibitions on one of the two “most likely management options” that EPA identified. For the foregoing reasons, WUWC has significant concerns about the feasibility assessment supporting the Proposed Rule.

B. Laboratory Capacity

WUWC is also concerned that EPA has overestimated the availability of laboratories with capacity to evaluate water systems’ compliance with the Proposed Rule.²² Based on its experience certifying laboratories as part of the Fifth Unregulated Contaminant Monitoring Regulation (UCMR5) process, EPA assumes that “the commercial market for PFAS analysis is likely to remain strong and, in fact, grow as more laboratories develop the technical capacity.”²³ EPA also assumes that, by allowing existing PFAS monitoring data to meet initial monitoring requirements, the Proposed Rule mitigates the potential for a “sudden spike in laboratory demands.”²⁴

From WUWC members’ perspective, which is informed by decades of experience with drinking water sampling and analysis, the effects of new drinking water regulations on laboratory capacity are difficult to project. EPA has approved only 53 laboratories in the country to analyze UCMR5 samples by EPA Method 533 and/or EPA Method 537.1.²⁵ Of those laboratories, seven do not

¹⁸ Off. of the Assistant Sec’y of Def. for Energy, Installations, and Env’t, *Department of Defense Incineration Moratorium Report to Congress* (Feb. 2023).

¹⁹ 415 ILCS 5/22/62 (2022).

²⁰ See e.g., U.S. EPA, *Technical Support Document - Technologies and Cost for Removing Per- and Polyfluoroalkyl Substances (PFAS) from Drinking Water* 18-19, 39 (Feb. 2023); U.S. EPA, *Best Available Technologies and Small System Compliance Technologies for Per- and Polyfluoroalkyl Substances (PFAS) in Drinking Water* 15 (2023).

²¹ U.S. Chamber of Commerce, *PFOS and PFOA Private Cleanup Costs at Non-Federal Sites* 10 (June 2022) (finding that prohibiting thermal treatment of PFAS contaminated soil would raise costs at a single National Priorities List (NPL) site by up to \$1 million and that approximately 25 percent of existing NPL sites would find onsite incineration more cost effective than disposal at a Subtitle C landfill).

²² 88 Fed. Reg. at 18667–68 (requesting public comment on the underlying assumptions that sufficient laboratory capacity will be available with the proposed MCLs; that demand will be sufficiently distributed during rule implementation to allow for laboratory capacity; and on the cost estimates related to these assumptions).

²³ *Id.* at 18667.

²⁴ *Id.* at 18667–68.

²⁵ U.S. EPA, *Laboratories Approved by EPA to Support UCMR5* (Mar. 1, 2023), available at <https://www.epa.gov/dwucmr/list-laboratories-approved-epa-fifth-unregulated-contaminant-monitoring-rule-ucmr-5>.

offer commercial services.²⁶ Further, our members have reported a decrease in the number of accredited state labs in California of approximately 25 percent since 2020.²⁷ Our members also report that recent typical laboratory turnaround times for internal and UCMR5 sampling have ranged widely from two to eight weeks. That range is likely to grow, because the Proposed Rule would increase the number of water systems obligated to test for PFAS beyond those subject to the UCMR5. Additional proposed regulations of other emerging contaminants, such as perchlorate, may soon follow that would further stress available laboratories.²⁸ EPA should not assume that all water agencies in possession of existing UCMR5 data will elect to forego further sampling for the purpose of demonstrating compliance.

C. Alternative Water Supplies

EPA requested additional comments on whether there are additional technologies which are viable for PFAS removal to the proposed MCLs, as well as any additional costs which may be associated with “non-treatment options,” such as water rights procurement.²⁹ EPA selected an economic model to evaluate costs of certain non-treatment options as part of its EA, including the construction of replacement groundwater wells in an uncontaminated aquifer or purchasing replacement water from other public water systems.³⁰

WUWC is concerned that the selected modeling does not adjust for regional differences in alternative water supply costs and availability. In the arid western United States, where the majority of WUWC members reside, periods of prolonged drought, population growth, and other stressors have constrained water supplies to a greater degree than experienced in other areas of the country.

For example, in areas of the western United States that are reliant on groundwater for a significant portion of their water supply, our members report that the costs to produce and treat groundwater to potable quality are already rising. Aquifers stressed by drought and population growth in many areas of the West have experienced significant drawdown, meaning that new or replacement water supply wells must be drilled deeper, increasing water utilities’ drilling costs and energy expenditures to pump groundwater.³¹ One of our members has reported that, where an aquifer serving as a primary water supply became contaminated with PFAS, the infrastructure and incremental operational costs of replacing that supply totaled approximately six million dollars. That capital cost translated to an approximately \$300 per person increase (\$882 per tap) over a two-year period, the effect of which is ultimately borne by ratepayers.

²⁶ *Id.*

²⁷ The California State Water Resources Control Board confirmed a decrease in the number of accredited labs during a workshop on Environmental Laboratory Accreditation Program Fees held on March 10, 2023.

²⁸ *See, e.g., NRDC v. Regan*, No. 20-1335, 2023 WL 3312344 (D.C. Cir., May 9, 2023) (overturning EPA’s withdrawal of its prior determination not to regulate perchlorate in drinking water).

²⁹ 88 Fed. Reg. at 18731.

³⁰ EA at 5-9–5-40.

³¹ *See, e.g.,* U.S. Geological Service, *Groundwater Decline and Depletion* (June 6, 2018), available at <https://www.usgs.gov/special-topics/water-science-school/science/groundwater-decline-and-depletion#overview>.

Water utilities in the West have increasingly been looking to diversify water supplies through commissioning recycled water projects, including projects supported by EPA funding opportunities. Our members report that recycled water projects can be capital intensive and difficult to achieve due to significant hurdles with permitting, environmental review, and agency staffing limitations. The Proposed Rule will only make utilities' water supply diversification strategies more expensive. To the extent that EPA's financial modeling supporting the Proposed Rule has not considered these differences, WUWC believes EPA has not conducted sufficient analysis to draw conclusions about the economic feasibility of obtaining alternative water supplies.

III. EPA's Proposed MCLs and MCLGs for PFHxS, GenX Chemicals, PFNA, and PFBS are Premature and Subject to Challenge

WUWC is also concerned that the issuance of a preliminary determination concurrent with proposed MCLs and MCLGs for PFHxS, GenX Chemicals, PFNA, and PFBS conflicts with the SDWA's established process for regulating drinking water contaminants and is vulnerable to legal challenges. The SDWA provides a two-step process for the regulation of drinking water contaminants. First, "after notice of the preliminary determination [to regulate contaminants] and opportunity for public comment," EPA must "make determinations of whether or not to regulate such contaminants."³² Second, EPA must "publish maximum contaminant level goals and promulgate, by rule, national primary drinking water regulations" for each contaminant EPA determines to regulate.³³

In the Proposed Rule, EPA claims that the SDWA allows it to publish a proposed drinking water regulation concurrent with its preliminary determination to regulate.³⁴ However, the statute only allows EPA to "publish such proposed regulation concurrent with the determination to regulate," not the "preliminary determination to regulate."³⁵ EPA itself has published materials that document the normal SDWA regulatory process.³⁶ WUWC members appreciate EPA's sense of urgency to regulate PFAS under the SDWA, but EPA should follow the procedures set forth in the SDWA to reduce the Proposed Rule's vulnerability to legal challenges.

IV. Other Implementation, Monitoring, and Compliance Aspects of the Proposed Rule Warrant Additional Consideration

A. Below-PQL Samples Should be Counted as Zero

³² SDWA § 1412(b)(1)(B)(ii); 42 U.S.C. § 300g-1(b)(1)(B)(ii).

³³ SDWA § 1412(E); 42 U.S.C. § 300g-1(E).

³⁴ 88 Fed. Reg. at 18644 ("Section 1412(b)(1)(E) authorizes EPA to issue a preliminary determination to regulate a contaminant and a proposed NPDWR addressing that contaminant concurrently and request public comment at the same time.").

³⁵ SDWA § 1412(E); 42 U.S.C. § 300g-1(E); *see also Nat. Res. Def. Council v. Regan*, No. 20-1335, 2023 WL 3312344, at *1 (D.C. Cir. May 9, 2023) (stating that EPA must make a preliminary determination and then may make a final determination "[a]fter the comment period ends" for the preliminary determination).

³⁶ *See e.g.*, U.S. EPA, *SDWA Evaluation and Rulemaking Process*, <https://www.epa.gov/sdwa/sdwa-evaluation-and-rulemaking-process>.

Under the Proposed Rule's monitoring requirements, when a public water system detects a regulated PFAS at a concentration below the practical quantitation limit (PQL), the rule stipulates that the value is counted as zero when calculating the running annual average for compliance monitoring. This methodology is entirely appropriate and consistent with existing law governing compliance determinations with drinking water standards.³⁷

WUWC sees no reason to deviate from this standard practice. EPA requests comment on whether it should consider an alternative approach under which below-PQL detections would be counted at the proposed rule trigger levels (1.3 ppt for PFOA and PFOS and 0.33 of each of the HI PFAS PQLs (i.e., PFHxS=1.0, HFPO-DA=1.7, PFNA=1.3, and PFBS=1.0)).³⁸ The Proposed Rule itself is premised upon EPA's finding that the PQL is the lowest feasible quantitation level.³⁹ By contrast, the proposed trigger levels are based upon EPA's view of laboratories' calibration limits.⁴⁰ These trigger levels are in the J value range and should not be considered reliable for the purpose of calculating a running annual average for compliance, especially since the Proposed Rule already proposes to set MCLs at the lowest quantitation level.

B. The Option to Leverage Existing Monitoring Data Will Not Necessarily Accelerate Compliance or Increase Feasibility

WUWC supports EPA's proposal to allow the use of previously acquired monitoring data obtained during UCMR5 or similar state-led monitoring to satisfy initial monitoring requirements.⁴¹ WUWC partly agrees with EPA's assertion that allowing water utilities to utilize existing sampling results will result in a "significant burden reduction" and "sufficient timing to take necessary actions and ensure rule compliance."⁴²

However, EPA should not assume for the purpose of its economic feasibility evaluation that water utilities will choose to utilize existing data and forego additional sampling. Many public water systems should be expected to elect to perform additional sampling where UCMR5 or state data could result in a finding of noncompliance. As noted above, EPA's assumption that the existing data provision will result in reduced burdens for laboratories is not a foregone conclusion.

Allowing public water systems to forego one initial sampling round also will not ensure that water utilities have sufficient time to ensure compliance within the proposed three-year rollout. Our members report that treatment plant upgrades typically take longer than three years from planning to completion, partly because of water utilities' capital planning obligations to their ratepayers. WUWC members anticipate needing to gather baseline data, conduct alternatives analysis, complete preliminary and final designs, obtain permits and complete environmental

³⁷ Examples of rules adopted under SDWA that use zero when calculating locational running annual averages or running annual averages for results are less than the PQL include the Disinfectants and Disinfection Byproducts Rule, Synthetic Organic Compounds Rule, Volatile Organic Compounds Rule, and Radiological Rule.

³⁸ 88 Fed. Reg. at 18682.

³⁹ *Id.* at 18639.

⁴⁰ *Id.* at 18667.

⁴¹ *Id.* at 18683.

⁴² *Id.*

review where necessary, obtain budget approvals, and complete procurement processes before constructing and commencing operation of upgraded treatment plants capable of treating PFAS to proposed national drinking water standards. The three-year rollout also does not account for the potential cumulative effect of EPA's PFAS Strategic Action Plan and concurrent Advance Notice of Proposed Rulemaking, which envision future regulation of additional PFAS, their precursors, or groups of PFAS. The short timeline could force water utilities to invest large amounts of capital to quickly install treatment technologies to meet the standards in the Proposed Rule, only to find that additional treatment systems are required to remove additional types or precursors of PFAS. Accordingly, while allowing utilities to leverage existing data is helpful in the short-term, a longer implementation timeframe would be appropriate.

C. Less Restrictive Trigger Values are Warranted

WUWC supports setting rule triggers at more lenient values of 2.0 ppt for PFOA and PFOS and 0.50 for the HI PFAS, consistent with EPA's request for comments on alternative values.⁴³ In WUWC members' experience, trigger values of 2.0 ppt and 0.50 ppt would fall in line with laboratories' current calibration limits for measuring PFAS constituents. WUWC agrees that adopting these more lenient trigger values would potentially result in reduced burdens to water utilities in the form of less frequent reporting. Similar to other comments above, WUWC reiterates its view that partially mitigating the administrative burdens resulting from the Proposed Rule is insufficient to demonstrate that the Proposed Rule is economically feasible.

D. Monitoring Schedule Flexibility is Appropriate

WUWC also supports allowing water systems the flexibility to place entry points to the distribution system on divergent compliance monitoring schedules based on specific entry point sampling results rather than mandating that compliance monitoring frequency proceed on the same schedule for all sampling points.⁴⁴ In WUWC members' experience, individual monitoring schedules are preferable to large urban water utilities from a cost and administrability perspective. Large water utilities are likely to have to monitor compliance at several points of compliance at once. Forcing uniform monitoring schedules would deprive WUWC members of the ability to adjust to site-specific considerations and result in redundant labor expense compared to a more adjustable schedule. WUWC reiterates its general comment that partially mitigating administrative burdens resulting from the Proposed Rule is insufficient to demonstrate economic feasibility.

E. State Primacy Agencies Should Have the Authority to Grant Monitoring Waivers in Appropriate Circumstances

Last, WUWC supports an adjustment to the Proposed Rule to allow state primacy agencies to issue monitoring waivers under circumstances where a public water system observes covered PFAS for at least one year below the corresponding rule trigger level.⁴⁵ Traditional vulnerability

⁴³ *Id.* at 18730.

⁴⁴ *Id.*

⁴⁵ *Id.* at 18683.

assessments in line with existing SDWA regulations that evaluate the potential for a water system to be susceptible to PFAS contamination should be utilized to support such waivers.⁴⁶

The Proposed Rule does not currently contemplate state primacy agency waiver authority based on EPA's belief that "due to the ubiquity, environmental persistence, and transport abilities of PFAS, granting waivers based on these conditions would be challenging."⁴⁷ WUWC disagrees because the Proposed Rule would set MCLs for PFOA and PFOS at 4 ppt, the lowest feasible quantitation level according to EPA's own findings. Under the Proposed Rule, assuming it is even feasible to implement, there would be very low potential for monitoring to result in false negatives.

Moreover, while the covered PFAS are indeed ubiquitous and persistent in the environment, the mere existence of a state primacy agency waiver authority would not result in under-monitoring. State primacy agencies would share EPA's interest in protecting public health and would simply deny monitoring waiver requests under circumstances where public water systems have not demonstrated appropriate circumstances. In the unlikely event that a state primacy agency was found to consistently grant monitoring waivers in inappropriate circumstances, EPA would also have authority to revoke its grant of state primacy.⁴⁸ Therefore, WUWC does not agree with EPA that the ubiquity or pervasiveness of these PFAS substances presents a sound justification for depriving states of monitoring waiver authority that is common under the SDWA.

* * *

Our members are experienced, on-the-ground partners with EPA and the states in the implementation of the SDWA and other related authorities. WUWC recognizes the importance of regulating PFAS in line with WUWC's mission to ensure that western water agencies and their customers are assured a public water supply that is reliable, affordable, and safe for consumption. Based on this experience, WUWC wants to work with EPA, other federal and state regulatory agencies, and members of Congress to address this important issue. We look forward to continued dialogue and collaboration on legislative and regulatory initiatives affecting PFAS and water quality.

Thank you for the opportunity to provide these comments. For more information, please contact me at (303) 739-7378 or mbrown@auroragov.org, or WUWC's national counsel, Ted Boling, at (202) 661-5872 or TedBoling@perkinscoie.com.

Very truly yours,



Marshall P. Brown
Chairman

⁴⁶ Cf. 40 C.F.R. § 141.24.

⁴⁷ *Id.*

⁴⁸ See generally 40 C.F.R. § 142, Subpart B.