



April 8, 2024

Submitted via <https://www.regulations.gov/>

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

RE: Listing of Specific PFAS as RCRA Hazardous Constituents; Docket ID No. EPA-HQ-OLEM-2023-0278

Dear Administrator Regan:

The Western Urban Water Coalition (WUWC) appreciates the opportunity to comment on the United States Environmental Protection Agency's (EPA) advance notice of proposed rulemaking on the Listing of Specific PFAS as Hazardous Constituents under the Resource Conservation and Recovery Act (RCRA).¹ WUWC is a coalition of 20 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 represent approximately 40 million water consumers in major metropolitan areas in seven western states whose operations and treatment facilities are affected by federal per- and polyfluoroalkyl substances (PFAS) regulations.

WUWC appreciates that regulation of PFAS is appropriate and necessary in many cases to address their potential human health and environmental impacts, but at the same time such action could have significant and troubling consequences for water utilities unless the federal government takes all appropriate action—within and outside of this rulemaking—to dampen the inequitable burdens on water utilities and their ratepayers. Unlike manufacturers, distributors, and other entities in the PFAS production and supply chain, water utilities did not introduce PFAS into commerce or profit from their widespread use. Instead, water utilities operate

¹ 89 Fed. Reg. 8598 (Feb. 8, 2024).

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, East Bay Municipal Utility 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).

treatment facilities at substantial capital, operational, and maintenance costs to treat source waters so that they are safe for human consumption and other uses.

WUWC expressed its concern in its March 26, 2024 letter that the regulation of emerging contaminants, including PFAS, under RCRA will expose water utilities to additional liability and expense that will ultimately be borne by customers who have zero responsibility for PFAS pollution.³ WUWC attaches and incorporates by reference each of the comments contained in its prior comment letter. Additionally, WUWC respectfully submits the following comments in response to EPA's proposed rulemaking to list nine PFAS substances as "hazardous constituents" in RCRA's Appendix VIII, 40 C.F.R. Part 261 (Proposed Rule).

I. EPA's decision to regulate the nine PFAS under RCRA should be informed by the best available science.

Designations of PFAS as RCRA hazardous constituents should be based upon the best available science as listing nine PFAS substances as hazardous constituents represents a step towards listing these substances as hazardous waste.

It appears that EPA selected these nine PFAS for inclusion based upon toxicity and adverse human health effects.⁴ These nine PFAS are perfluorooctanoic acid (PFOA), perfluorooctanesulfonic acid (PFOS), perfluorobutanesulfonic acid (PFBS), hexafluoropropylene oxide-dimer acid (HFPO-DA or GenX), perfluorononanoic acid (PFNA), perfluorohexanesulfonic acid (PFHxS), perfluorodecanoic acid (PFDA), perfluorohexanoic acid (PFHxA), and perfluorobutanoic acid (PFBA).

EPA should ensure that it considers nationwide fate and transport, mobility, persistence, and occurrence data. EPA should also consider occurrence data from the Fifth Unregulated Contaminant Monitoring Rule (UCMR 5) in connection with any regulatory determination for the nine PFAS. UCMR 5 requires water agencies throughout the United States to monitor for 29 PFAS between 2023 and 2025. Consistent with EPA's PFAS Strategic Roadmap, "UCMR 5 will provide new data that is critically needed to improve EPA's understanding of the frequency that 29 PFAS (and lithium) are found in the nation's drinking water systems and at what levels. This data will ensure science-based decision-making and help prioritize protection of disadvantaged communities."⁵

Since EPA proposes to regulate these nine PFAS under RCRA, it should assure that available nationwide occurrence data demonstrate a substantial threat to human health or the environment to justify designating these substances as hazardous constituents.

³ See WUWC's March 26, 2024 comment letter, Document ID No. EPA-HQ-OLEM-2023-0085, attached at Tab 1.

⁴ 89 Fed. Reg. at 8613.

⁵ EPA, Fifth Unregulated Contaminant Monitoring Rule (July 2023), available at <https://www.epa.gov/dwucmr/fifth-unregulated-contaminant-monitoring-rule>.

II. EPA should not regulate PFAS precursors until standard testing methodologies are available.

The Proposed Rule applies to PFAS “whether they exist as chemical substances on their own or result from degradation of precursors.”⁶ WUWC urges EPA not to regulate any PFAS precursors under RCRA until standard analytical methods are available. As EPA recognizes: “Available standard analytical methods, such as SW-846 Method 8327 or Method 533, may not include all precursors to PFOA, PFOS, PFBS, PFHxS, PFNA, HFPO-DA, PFBA, PFHxA, and/or PFDA.”⁷ The availability of reliable and standard analytical methods is essential to western water utilities that would be faced with determining compliance with RCRA’s release reporting obligations associated with normal water processing operations. Without reliable methods, it could be challenging for any entity to comply with RCRA’s requirements. In addition, using non-standardized methods for testing could result in unreliable results and potentially lead to unfounded liability and unnecessary cleanup and/or treatment costs. EPA should reconsider its inclusion of PFAS precursors in the Proposed Rule, which cannot be reliably measured using current testing methods.

Additionally, EPA does not address treatment technologies for treatment of the nine PFAS generally, the disposal of spent media, or the cost of treatment residuals prior to offsite disposal. EPA has also not considered the availability of laboratories to evaluate water systems’ compliance.⁸ EPA should evaluate these important issues before it decides whether to designate PFAS precursors as hazardous constituents under RCRA.

III. EPA should rectify the inequities that would arise under the Proposed Rule.

As previously discussed in WUWC’s March 26, 2024 comment letter, listing these nine PFAS will result in increased costs and significant cleanup liability and litigation costs. Western water utilities and their ratepayers will feel the brunt of these increased costs and liabilities.

EPA declines to consider costs to identify hazardous constituents.⁹ But WUWC is requesting that EPA consider these costs and liabilities impacts to water utilities and their ratepayers before finalizing the Proposed Rule, or at least amend the Proposed Rule or adopt formal RCRA enforcement guidance to include protections for water utilities and their ratepayers from costs of PFAS cleanup.

WUWC urges EPA to address inequities to ratepayers. PFAS contamination is more likely to be found in water systems drawing from groundwater and surface water in proximity to industrial polluters.¹⁰ The Proposed Rule will disproportionately affect ratepayers from environmentally disadvantaged communities. The ratepayers in these same communities are more likely to bear

⁶ 89 Fed. Reg. at 8606.

⁷ 88 Fed. Reg. 22399 at 22402 (Apr. 13, 2023).

⁸ See WUWC’s May 30, 2023 comment letter, Document ID EPA-HQ-OW-2022-0114-1768, attached at Tab 2.

⁹ 89 Fed. Reg. at 8606.

¹⁰ 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>.

the financial burden of passed-through costs, contradicting EPA's priority to exercise its cleanup authorities to promote environmental justice.¹¹

The Proposed Rule will encourage RCRA citizen suit claims against water utilities, even if they lawfully treat, store, or dispose of these nine PFAS.¹² As discussed in the March 26, 2024 letter, even if such claims lack merit, an increase in these suits would force water utilities to incur significant costs.

Cleanups at RCRA treatment, storage, and disposal facilities can also be required or conducted pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). As previously discussed in WUWC's comment letter on March 26, 2024, 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.¹³ But this Proposed Rule takes the potential threat of CERCLA liability even further. Listing these nine PFAS is the first step to EPA potentially designating these chemicals as hazardous wastes, in which case each chemical would automatically become a hazardous substance under CERCLA, 42 U.S.C. § 9601(14), and potentially encumber water utilities with retroactive, joint and several, and strict CERCLA liability. An increase in cost recovery claims, contribution claims, and cleanup and abatement orders against water utilities where a release of PFAS has allegedly occurred, would force water utilities to incur significant costs which would be passed on to their ratepayers.

EPA should consider all these impacts and potential liabilities when deciding whether to finalize the Proposed Rule or, at a minimum, provide formal enforcement guidance.

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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 EPA's Proposed Rule by keeping liability and expenses limited to those most responsible for PFAS pollution. By no means will the recommendations reduce EPA's ability to regulate the cleanup of PFAS contaminants. We look forward to continued dialogue and collaboration on legislative and regulatory initiatives.

¹¹ 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.

¹² See 42 U.S.C. § 6972(a)(1).

¹³ See also WUWC's November 7, 2022 comment letter, Document ID EPA-HQ-OLEM-2019-0341-0561, attached at Tab 3.

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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