Designation of PFAS as CERCLA Hazardous Substances/Wastewater - Drinking Water Utility Exemption: American Water Works Association Proposed Amendment

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The American Water Works Association ("AWWA") sent a July 19th letter to the Chairman and Ranking Member of the United States House of Representatives Committee on Rules urging support for an amendment ("Amendment 18") to the proposed PFAS Action Act ("H.R. 2467").

Amendment 18 would address the potential liability of drinking water and wastewater utilities if PFAS are designated as a Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") hazardous substance.

H.R. 2467 would require that the United States Environmental Protection Agency ("EPA") immediately list PFAS, PFOS, and PFOA (collectively "PFAS") as hazardous substances under CERCLA. It would also mandate that these chemicals be listed as hazardous air pollutants under the Clean Air Act.

PFAS have been used in various industrial applications in consumer products such as:

- Fabrics for furniture
- Paper packaging for food and other materials resistant to water, grease or stains
- Firefighting airfields
- Utilization in several industrial processes

They have been described as persistent in the environment and resist degradation.

Designation of PFAS as a CERCLA hazardous substance would trigger certain corresponding requirements such as:

- Application of the potentially responsible party liability categories (i.e., current owner or operator, former owner or operator [in certain circumstances], transporter [in certain circumstances], and generators)
- Hazardous substance release reporting requirements (if reportable quantities are released)

Amendment 18 would exempt drinking water and wastewater utilities from PFAS liability except when such utilities have released the chemicals as a result of gross negligence or willful misconduct.

The July 19th letter states in part:

If any PFAS compounds are to be designated hazardous substances under CERCLA, we urge Congress to keep liability for PFAS cleanup with PFAS manufacturers and formulators. Congress should not hold community drinking water and wastewater facilities liable for PFAS contamination caused by PFAS products that the country now realizes should not have been allowed into commerce in the United States.

In the case of water utilities, AWWA notes that once the PFAS is removed from water it must be disposed of. The letter argues that a water utility properly disposing of residuals containing PFAS (in a manner consistent with applicable laws) should not be held liable under CERCLA for future costs associated with PFAS cleanup.

As to wastewater utilities, it is noted that they receive and treat water from a range of sources. Such water may contain PFAS compounds. Concern is expressed that despite the fact that the utility is not the source of PFAS, it could be held responsible for addressing these substances. Similar concern is expressed about biosolids generated from a wastewater treatment plant that are applied to land as fertilizer.

A copy of the July 19th letter can be downloaded here.