ASSOCIATION OF METROPOLITAN WATER AGENCIES

Senate Environment and Public Works Committee
Full Committee Hearing
Examining PFAS as Hazardous Substances
March 20, 2024

WHAT YOU NEED TO KNOW:

- Members from both sides of the aisle expressed concern about increased costs on ratepayers to pay for CERCLA liability.
- It is unprecedented that EPA chose to regulate PFOA and PFOS as hazardous substances under CERCLA before regulating PFAS under the Resource Conservation and Recovery Act (RCRA), Safe Drinking Water Act (SDWA), and the Clean Water Act (CWA).
- Regarding CERCLA contribution protection, utilities cannot get a settlement from EPA under CERCLA unless EPA designates utilities as a potentially responsible party. Thus, utilities need to be brought into the case, and once utilities are in as a potentially responsible party, liability is joint, and several utilities could be responsible for the entire cleanup cost.
- Read AMWA's statement for the hearing here.
- Watch the full hearing here.

KEY POLICY ISSUES:

- Water Systems PFAS Liability Protection Act or S.1430: The bill would shield drinking water and wastewater systems from CERCLA liability related to the proper disposal of water treatment byproducts containing PFAS.
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): CERCLA's major emphasis is on the cleanup of inactive hazardous waste sites and the liability for cleanup costs on arrangers and transporters of hazardous substances and on current and former owners of facilities where hazardous substances were disposed.
- PFAS Designation as a Hazardous Substance under CERCLA: EPA is proposing to designate two PFOA and PFOS, including their salts and structural isomers -- as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This proposed rulemaking would increase transparency around releases of these harmful chemicals and help to hold polluters accountable for cleaning up their contamination.
- Resource Conservation and Recovery Act (RCRA): RCRA gives EPA and states the authority to control hazardous waste from the "cradletograve." This includes the generation, transportation, treatment, storage, and disposal of hazardous waste.
- Freedom of Information Act (FOIA): The Freedom of Information Act (5 U.S.C. § 552) provides a right of access to the public of government records.

WITNESSES:

- The Honorable James Kenney, Secretary of New Mexico Department of Environment
- Ms. Kate R. Bowers, Legislative Attorney at American Law Division, Congressional Research Service
- Mr. Scott Faber, Senior Vice President of Government Affairs at Environmental Working Group
- Mr. Michael D. Witt, General Counsel at Passaic Valley Sewerage Commission on behalf of the Water Coalition Against PFAS
- Mr. Robert Fox, Partner, Manko Gold Katcher Fox LLP, on behalf of the National Waste and Recycling Association and the Solid Waste Association of North America

WITNESS TESTIMONY:

- The Honorable James Kenney stated he is the Cabinet Secretary at the New Mexico Environment Department. He has worked for 20+ years looking at chemical plants and defense facilities at the center of PFAS discussions. PFAS are ultimately ending up in the environment, and they bioaccumulate in bodies, land, water, and food. In 2001, he testified that RCRA should be used to address PFAS contamination FIRST, before CERCLA. He continues to advocate that PFAS is best addressed under RCRA as starting point either through direct congressional action or continued EPA rulemaking. RCRA is implemented largely by the states, whereas CERCLA is primarily implemented by multiple federal agencies with less involvement from EPA and states. Under CERCLA, implementation of rules allows the Department of Defense to police itself, which has produced inconsistent results. His fifth day on the job, New Mexico was slapped with a lawsuit to undermine RCRA authority for cleanup of PFAS by the Federal government, and they are now in their fifth year of that lawsuit costing $8 million dollars in defensive litigation. Given his experience with RCRA and CERCLA, Congress should take immediate action to list PFAS as hazardous waste under RCRA and should modify CERCLA to ensure EPA is the sole implementing agency, not the Department of Defense. This will give states the ability to address the polluter and ensure states are able to implement rules with discretion. Read his full testimony here.

- Ms. Kate Bowers stated she is a Legislative Attorney at Congressional Research Service. CERCLA authorizes EPA to clean up contaminated sites and to compel polluters who contaminated sites to perform or pay for clean up activities. Private parties that incur cleanup costs may seek to recoup costs from other parties or from the Superfund trust fund. This dynamic is created to ensure that there will be parties who can bear the cost of cleaning up contamination and that all responsible parties who are able can be required to share those costs. For a party to be liable for clean-up costs under CERCLA, several requirements must be met. There must be a release or threatened release of a hazardous substance in the environment, there must also be a response action or cleanup or response costs at the site. Only certain parties with a connection to the contamination must be held liable, and those parties are often called potentially responsible parties (PRPs), include current operators or owners of a site, past owners and operators, arrangers, and transporters. CERCLA allows any person, including EPA, states, local governments, tribes, and private parties, to sue a PRP to recover response costs that they have incurred. It also allows a party that has been required to pay response costs to assert a contribution claim to compel other PRPs to bear an equitable share of those costs. Parties that have resolved their CERCLA liability to the US or a state cannot then be held liable for contribution claims by other PRPs regarding matters addressed in that settlement. Liability under CERCLA is only associated with releases or threatened releases of hazardous substances, and a substance may be considered hazardous based on either designation under another statute or a direct designation pursuant to CERCLA itself. The proposed PFAS designations would represent the first use of EPA's direct designation authority under CERCLA. Designation of one or more PFAS as a hazardous substance would subject releases of PFAS to

the statues reporting requirements and liability framework. Designation would not trigger a public or private cleanup, alter the CERCLA response process or applicable cleanup standards or determine the liability of any party. If the preconditions of liability are met, and no defenses or exemptions apply, entities that are associated with facilities or sites where PFAS were produced, used, or disposed could be held liable in the event of a PFAS hazardous substance designation. Since CERCLA liability extends to the federal government, this also includes federal agencies that released PFAS. The determination of a party's liability is site specific; therefore, it is not possible to determine liability in the abstract given its site-specific nature. CERCLA also provides an exemption to CERCLA liability for response costs designated to a federally permitted release. EPA has also stated they will be pursuing enforcement discretion against passive receivers, but enforcement discretion does not alter the scope of liability nor does its bar states, local governments, states, or private parties from taking action against a PRP. If a party has not resolved its liability by settling with EPA or a state, it won't receive protection from future contribution claims. Read her full testimony here.

- Mr. Scott Faber said the manufacturers of PFAS hid their harms from the public and Congress. As a result, PFOA and PFOS were not added to the list of hazardous substances decades ago because of this. Instead of taking action to reduce PFAS contamination, industry leaders are trying to convince Congress to create more loopholes. Environmental Working Group states legal loopholes are the problem, not the solution. Responsible stewardship of hazardous substances is nothing new to water utilities and waste managers. Sixty-six hazardous substances are found in drinking water systems. If water utilities are already addressing these other hazardous substances, what is different about PFOA and PFOS. The law allows EPA to use their discretion to assign responsibility to polluters, which is what EPA has always done. In a recent letter, EPA wrote that the agency will focus its enforcement efforts on manufacturers and does not intend to pursue passive receivers. The superfund law is also designed to ensure public and private companies are good stewards of hazardous substances, and an exemption would remove a powerful incentive for utilities to be good stewards of toxic chemicals. Congress has never created a superfund exemption for a specific chemical, not even for notorious pollutants such as PCBs. Read his full testimony here.

- Mr. Michael Witt is the General Counsel at Passaic Valley Sewage Commission (PVSC) in Newark, New Jersey. PVSC is one of the oldest environmental agencies in the United States, operating the fifth largest wastewater plant in the nation, serving 1.5 million people. He is testifying on behalf of the Water Coalition Against PFAS, a coalition comprised of water sector associations. Water utilities were created to protect public health and the environment, and ironically, it is the act of doing that that exposes utilities to liability under CERCLA. Utilities do not manufacture or profit from PFAS, but industry did for decades. Utilities passively receive PFAS through drinking water supplies and influent, exposing each and every utility to potential liability under CERCLA, thus exposing ratepayers to pay for the problem of funding PFAS cleanups, which is simply wrong. The coalition is asking congress to provide water systems with liability protections under CERCLA for PFAS to help ensure polluters, not the public, pays for cleanups. As EPA and state agencies develop PFAS standards for water, utilities will be implementing these standards through costly treatment upgrades and will be working hard to do this and keep rates affordable. Liability will come on top of that despite investments. Some express the opinion that if utilities just comply with federal permits, they won't face CERCLA liability, but that is not the case. The existing CERCLA exemptions tied to federal permits generally require that PFAS be directly included in permits before it can provide any liability shield, but agencies are still trying to address PFAS in permits. CERCLA is also retroactive and can look-back and keep utilities on the hook for remediating decades

worth of PFAS that chemical companies have pumped into water, air, and land. He is also aware that EPA has proposed to exercise enforcement discretion. PVSC welcomes that policy, but it is not enough and does not carry the force of law and could change tomorrow. The enforcement cleanup only applies to EPA cleanup, not by private parties. PVSC has been involved in the largest superfund case to date for the last 28 years. From 1951- 1969, the Diamond Alkali manufactured agent orange on the banks of the Passaic River, resulting in TCDD as a byproduct, one of the most toxic synthetic chemicals humans know how to make. TCDD is persistent in the environment, and PVSC does not manufacture, use, or profit from TCDD. Diamond Alkali intentionally dumped TCDD into the Passaic River, causing billions of dollars in remediation damages. Diamond Alkali has been able to drag hundreds of PRPs into clean up. It is insulting to say that utilities need CERCLA to be good stewards of hazardous substances; it is also unmoored from reality, and it does not take into account that utilities are already under permits under CWA and SDWA to provide standards for utilities, including modifying treatment systems, not into lawsuits. Read his full testimony here.

- Mr. Robert Fox has practiced environmental law for 38 years and has taught superfund law for 27 years. His clients include all different municipalities, including the City of New York. EPA has proposed listing PFOA and PFOS as hazardous substances under CERCLA. PFAS are ubiquitous and are disposed of in landfills, making them a passive receiver of the proposed hazardous substance. There is no practical way for landfills to identify or segregate household waste, including PFAS from general waste. Listing PFAS compounds directly as hazardous substances under CERCLA is unprecedented. CERCLA defines hazardous substances by including any substance already regulated pursuant to federal and environmental statutes like RCRA, SDWA, and CWA. EPA is instead proposing to regulate PFAS as hazardous substance before finalizing regulatory standards under current authorities. There are no current standards for PFAS compounds in permits for landfill leachate. The liquid found in landfills that is either managed through permits to a publicly owned treatment works (POTW) or discharged directly pursuant to an NPDES permit. CERCLA designation would produce retroactive and prospective liability on landfills that currently do not have any PFAS requirements in their permits. Landfills, POTWs, and water treatment plants are interdependent public services. POTWs managing leachate from landfills and discharges from other sources generate biosolids, while POTWs routinely and increasingly handle biosolids by disposal of landfills is a practical matter that CERCLA designation, in the absence of congressional relief, would compel landfills to restrict inbound waste with elevated levels of PFAS compounds including spent water filtration systems, biosolids, and contaminated soils from CERCLA sites including DOD sites. As a result, EPA's goal of remediating PFAS contamination will be delayed and frustrating. CERCLA liability will completely disrupt the well-established municipal waste infrastructure in this country. Certain waste will have no place to go, and increased disposal costs will turn CERCLAs objectives from a polluter pays policy to a community pays reality. The solid waste sector is not looking for relief where the groundwater in landfills have been impacted by PFAS compounds due to disposal. They are looking for a tailored CERCLA liability shield in a permitted or contained discharge. Landfills would only be exempt if they meet discharge requirements and uphold federally permitted release from CERCLA liability. Landfills are proactively piloting treatment technologies for PFAS and leachate. This type of exemption for CERCLA is nothing new, including eleven CERCLA exemptions over forty years. EPA has stated they will exercise enforcement discretion for certain passive receivers renders a necessary need for a statutory exemption given the enforcement discretion is insufficient. If EPA chooses to take no action, the passive receiver will have no protection from a suit brought by any other PRP. Even if EPA settles with the passive receivers, prevailing case law shows that settlement will not protect passive

receivers against suits brought by other PRPs that have not settled with EPA or other contribution claims. Read his full testimony here.

FOCUS OF KEY MEMBERS:

- Chairman Tom Carper (D-Del.) stated that Americans use PFAS in many forms, including nonstick pans, carpet and fabric, and raincoats. PFAS are likely in our bodies and the food we eat. More than 9,000 PFAS chemicals have been manufactured and used around the world. PFAS chemicals have also made life easier, but it has come at a significant cost, given its inability to break down in the environment, putting lives at risk. Many of these chemicals are toxic, and the lasting effect of PFAS contamination has had a major impact on livelihoods. He salutes utilities that are bearing the brunt of this contamination and doing everything they can to remediate it while providing safe and clean water services. Congress included more than $10 billion to respond to PFAS. EPA proposed to designate two PFAS as hazardous substances under CERCLA, providing the government with the authority to hold polluters accountable for clean up of hazardous sites. The designation could have potential unintended impacts on water utilities and could be responsible for downstream contamination because they are filtering it out of water. Water utilities do not use PFAS at all but could be held responsible for downstream contamination. EPA has never enforced an action against a passive recipient of contamination under the superfund law, but entities are concerned they could be saddled with expensive lawsuits that could take years to rectify. Communities around America are scrambling to protect people from PFAS, but utilities are understandably worried about legal costs that polluters should be paying to rectify PFAS contamination, not passive receivers. According to the Minnesota Pollution Control Agency it costs anywhere from $3 million to $18 million to remove PFAS from wastewater. We need strategic national policies to determine the spread of PFAS contamination, identify health threats, and explore best methods to destroy PFAS and find a path forward to make polluters pay, not innocent entities.

  Chairman Carper questioned what consensus the witnesses have on this issue. Secretary Kenney stated that the Clean Air Act, RCRA, and CWA are foundational statues that should be built upon and adding CERCLA on top of that provides another layer of protection, but that is a time dependent approach. Ms. Bowers stated they agree that parties could be held liable under CERCLA, and if the committee chooses to explore additional exemptions in the form of a liability protection, it would be necessary to go beyond the enforcement discretion EPA intends to apply. Mr. Faber said millions of people are drinking too much PFAS in their tap water and that we should quickly finalize the drinking water standard and avoid making this problem bigger by allowing manufactures to continue discharging chemicals with no limits at all. Mr. Witt says he is encouraged, and there is not much disagreement among the panel. The issue he sees is how to get there, and the water sector wants to be a part of the solution to this problem. Liability needs to be put on manufacturers and producers of PFAS, and hope is not a good plan. Mr. Fox stated listing PFOA and PFOS before its regulated under other statutes is out of sequence, and it has never been done before. The guiding principle under superfund is polluter pays, and the sector doesn't want to create a situation where the public is paying rather than polluters.

  Chairman Carper said when determining responsibility for chemical contamination when cleanup is required, the EPA first tries to identify the parties responsible for contamination. The PRP is found for anyone who touched the contaminant in some way. Chairman Carper asked if there are already legal mechanisms to solve the utility liability question, what is different about PFAS contamination, and why should EPA treat PFAS contamination differently than other contaminants. Mr. Witt said there are not many effective ways for water sector utilities to avoid liability

in this case. Further, permits discussed only go forward; they don't go back, and CERCLA liability goes backward. Mr. Witt said water utilities can list PFAS in their permits, and many utilities do; however, the problem is that there are no set limits for anything yet, so utilities are disclosing discharge, but nobody is telling them what to do with the waste yet. Mr. Witt said New Jersey has been very proactive on PFAS and proactive with the regulated community to set limits and understand industrial discharges. Mr. Fox agreed and said PFAS are ubiquitous, it is the most common chemical in usage, and it is in everyday products. Additionally, there are no standards for utilities to comply with the federally permitting release exemption, given that no standard has been set yet. EPA Is proposing to hold utilities jointly and severally liable for handling PFAS as hazardous substances. However, utilities have not had the chance to meet a standard they were supposed to adhere to, as it hasn't been established yet, which is inequitable.

Finally, Chairman Carper asked if there are any lessons learned from other countries regarding PFAS. Secretary Kenney said utility operator training in the US is not on the front lines of our education systems, and other countries prioritizing public service from a STEM perspective is something the US could invest more in. When moving something like PFAS from the waste ledger to another commodity like the tech market, PFAS will be managed appropriately. Ms. Bowers said she does not have information currently but can investigate it. Mr. Faber said other countries are racing to eliminate needless uses of PFAS in consumer products. The burden should be on industry to prove that PFAS are necessary to commerce rather than leaving the burden of proof on federal agencies. Mr. Witt stated when technical issues arise in Europe, they focus resources better than the U.S., and that is a lesson to be learned on PFAS. There was a PFAS working group in EPA around developing technologies, and a collaboration effort needs to exist to get on the same page. Mr. Fox emphasized that when addressing environmental issues in Europe, there is a significant interdependence. Hence, rather than focusing solely on individual components, it's crucial to consider the interconnectedness among municipal waste agencies.

- Ranking Member Shelley Moore Capito (R-W.V.) said addressing the challenges of PFAS is one of her highest environmental policy priorities. PFAS have been used in almost every industrial application since the 1940s, and therefore, the committee must remediate past contamination and limit future uses of the chemical. She firmly believes that the most effective means to tackle PFAS is bipartisan collaboration. Last year, EPA announced two PFAS will be designated as hazardous substances under CERCLA. CERCLA was created after foundational environmental statues and puts forth joint, several, and retroactive liability to clean up particular contaminated sites, instating polluter pays. Congress established CERCLA as a last stop in deeming a substance as hazardous only after it was first regulated by other statues. Despite having years to evaluate and regulate PFAS, EPA is considering designating PFAS as hazardous substances under CERCLA before designating them under any other federal environmental statute. A CERCLA first approach does not allow EPA the flexibility to exempt certain entities from liability. Although she does appreciate enforcement discretion, a statutory fix is needed to protect passive receivers like water systems and waste management utilities. Congress must step in to address the overly broad sweep of CERCLA liability as congress has done in the past eleven times previously. The CERCLA listing will put water utilities in an untenable position where they must treat the water for PFAS, and therefore, concentrating PFAS in filters that landfills will not take due to liability concerns. Without congressional action, a wave of lawsuits could potentially raise taxes and utility rates on millions of Americans to enrich trial lawyers. To effectively address PFAS, the committee must provide liability protections for passive receivers in their PFAS package.

  EPA says enforcement discretion has the intent to focus on polluter pays. She questioned Mr. Witt's experience with enforcement discretion to protect the utility. Mr. Witt said it has not worked because even if EPA does not sue you, everyone else involved in superfund can sue you. PVSC has spent over $4.6 million in legal fees over the last eight years to clean up the Diamond Alkali site. Sen. Capito questioned if a utility has a certain level they can't pass through and utilities have the technology to purchase filters, and they catch PFAS in their filters, what

disproportionate problems would they have at a small system, and how are PFAS destroyed, including once its caught, what do you do with it. Mr. Fox stated municipal solid waste landfills will not take that material unless they have passive receiver exemptions. The material will have to go to hazardous waste landfills or incinerators if they will accept the material. The hazardous waste treatment is much more expensive, up to 8 times more expensive excluding transportation costs, given that they will have no place to send the waste.

Finally, Sen. Capito asked about the safety of PFAS and what the Safe Drinking Water Standard will mean in this discussion for CERCLA. Secretary Kenney said it will set a north star for anyone treating drinking water since they will have to meet that standard, requiring technology investments. Ms. Bowers said the SDWA standard could be incorporated for clean up under CERCLA, but that decision is site-specific. Mr. Faber said even if the SDWA standard is approved today, utilities will have 3-5 years to get into compliance. While utilities should not be sending their carbon filters to subtitle D landfills, they can and should send them to subtitle C hazardous waste landfills. Mr. Witt said the SDWA designation is an important step forward and it is about putting the right standard before others. Mr. Fox said it is a sequencing issue that PFAS need to be regulated under other standards first before CERCLA.

Sen. Capito said the hearing is a public forum to get into the core of the PFAS CERCLA issue. She believes there is agreement that passive receivers are not the focus of the law. Third parties under CERCLA do not feel that EPA writing a letter of enforcement discretion provides the bright line needed for passive receivers.

- Sen. Debbie Stabenow (D-Mich.) stated Michigan certainly has challenges with PFAS. She questioned if CERCLA liability will change anything about DOD's cleanup responsibilities, site prioritization, or the speed of remediation. Ms. Bowers said that is likely correct that DOD is required to respond to pollutants and contaminants, so PFAS designation as a hazardous substance would not change this. Senator Stabenow questioned what congress can do to ensure more expeditious clean-up of DOD sites. Secretary Kenney said with 715 bases nationally, DOD is only cleaning up to 70 ppt, well above the proposed drinking water standard. Therefore, the cleanup is not adequate or protective of the science EPA is using that CERCLA is perpetuating, further proving why regulating PFAS in bedrock environmental laws before CERCLA is important. Mr. Faber said one of the benefits of designating releases of PFOA and PFOS as hazardous substances is that releases will now have to be disclosed. When DOD transfers a property to a citizen, they will now have to disclose the presence of PFOS and PFOA on sites. While DOD is treating PFAS as hazardous substances, the designation will create further disclosure and transparency.

- Sen. Pete Ricketts (R-Neb.) stated the Environmental Working Group's current lobbying is against the polluter pays model, given their opposition of passive receiver exemptions. He questioned the change that Environmental Working Group made in their lobbying. Mr. Faber said it is a mistake to refer to entities as passive receivers, given that they can elect to refuse certain waste and require customers to pretreat waste and provide records for what is included in waste. Not all water utilities are as responsible as PVSC, including Newark, Jackson, and Flint, along with other utilities that are not responsibly managing hazardous waste. Mr. Faber said Congress amended CERCLA to address the contribution rides and shield parties from being subject to additional litigation for matters addressed in a settlement, providing a powerful incentive for utilities to settle with EPA, so the agency can focus on real polluters. Senator Ricketts asked why PVSC is still in litigation, given what Mr. Faber just said. Mr. Witt responded that nothing is as simple as communities would like it to be, especially under CERCLA, given it is one of the most confusing federal laws in existence. There are still avenues for liability that private actors can use to keep public actors involved in lawsuits. Public entities are ratepayers, and PVSC has $4.6 million spent that is not going into ensuring the sustainability of the utility or providing rate assistance. It takes a lot of time for EPA to settle,

resulting in public actors incurring all these legal costs. Sen. Ricketts questioned Mr. Fox's view on the agriculture industry's desire for a liability shield. Mr. Fox said the exemption would not protect the agriculture industry for land applications of sewer sludge, causing retroactive liability along with meeting standards that have not been applied yet. Mr. Fox said if a private party has not been sued, they do not have contribution protection, even if they do get contribution protection, it does not protect them from another PRP who has not been sued or settled to make an action against the settling passive receiver, providing no contribution protection against the passive receiver.

- Senator Ben Cardin (D-M.D.) questioned what Congress can do to bring PFAS destruction technology to the market faster and provide resources so water treatment plants can make necessary improvements. Mr. Faber said congress has already provided $10 billion in the Bipartisan Infrastructure Law to help utilities, but there is now $13 billion in counting that utilities have recovered through PFAS litigation. Therefore, more resources are coming through private recovery on a state level and will be paying more. Congress will likely need to provide more money, but it will be costly; however, people's health is more important. Sen. Cardin asked specifically about small water utilities bearing the brunt of this cost. Mr. Faber said EPA found that only a few thousand systems out of many thousands are out of compliance with the drinking water standard. Mr. Fox said that landfills are solution providers, and once there are liability shields for landfills and PFAS standards for leachate to have liability relief, you need to meet those standards. Thus, creating technological incentives to create technology to treat PFAS properly. Landfills, however, are not waiting for that; in anticipation they have pilot studies testing out different technologies to destroy PFAS contamination. Establishing a drinking water standard will provide incentives for passive receivers to produce technology. Municipal industries are interdependent.

- Sen. Alex Padilla (D-Calif.) said addressing PFAS pollution is a priority. Further, that morning, he spoke to several water agencies at the Association of Metropolitan Water Agencies, where this was a key topic of conversation. Sen. Padilla is also focusing on affordability through his chairmanship of the Fisheries, Water, and Wildlife subcommittee. He asked how EPA has historically used its enforcement discretion to protect passive receivers. Mr. Faber said EPA has indicated that they do not plan to go after water utilities, which is nothing new. Mr. Faber said EPA has not yet released their enforcement discretion policy that will accompany this final rule; therefore, Congress should ask to see that before determining to amend CERCLA. Mr. Faber said the Environmental Working Group filed a FOIA request this morning to get all of the settlements that EPA has completed with passive receivers to show Congress the receipts of quick settlement under CERCLA. Senator Padilla asked to walk the committee through the options available for water utilities, where a liable party brought them into a third-party contribution claim. Ms. Bowers stated if EPA has not entered a settlement, resolving the utilities liability under CERCLA. Then, that utility could still be liable under CERCLA assuming no other exemptions apply. If another entity has incurred cleanup costs or have resolved its liability that entity would have the opportunity to file a third-party contribution claim under an existing lawsuit or a new lawsuit as a PRP, and if those parties have not resolved their liability to EPA or a state under CERCLA then they could still be liable for a lawsuit.

- Sen. Jeff Merkley (D-Ore.) said the final regulation for PFAS is expected the first week of April, along with a follow up memo about enforcement strategy. He questioned if Congress should read this before exempting certain passive receivers under CERCLA. Mr. Faber said when EPA issues a hazardous substance designation, they will also issue an enforcement discretion memo that will memorialize how EPA plans to address liability of passive receivers. Sen. Merkley asked if Congress does pass a liability shield for utilities, given the court cost can be so significant, would that relieve the utility from testing for certain chemicals and to inform the public of those tests. Mr. Faber said utilities are currently testing tap water for PFAS, once PFAS are regulated under SDWA, utilities will have a duty to test for PFAS and share results with the public. Sen. Merkley said the PFAS chemical family has

hundreds of elements and asked if that affects the ability to test or if one test can identify all different types of PFAS. Mr. Faber said EPA developed a drinking water standard that includes a mixture of long chain and short chain PFAS so that the treatment technology implemented will reduce many of the PFAS chemicals. Further Mr. Faber said adopting stringent treatment technology will remove other co-contaminates from water. Sen. Merkley asked how the risk of PFAS in drinking water compares to the risk of PFAS in commerce. Mr. Faber said the most effective way to reduce the amount of PFAS in blood is to finalize the drinking water standard. Mr. Faber also said Congress needs to close the loophole that allows companies to use PFAS in unnecessary ways.

- Sen. Cynthia Lummis (R-Wyo.) asked why a nationwide enforcement policy does not adequately address liability concerns for passive receivers. Mr. Fox said if there is no settlement with the passive receiver, they are completely open to any lawsuit by a third party, even if the passive receiver has settled with the government and obtained contribution protection. If the third party has not settled or obtained contribution protection, then they can sue already settled utilities, so it does not provide that protection. Further, he said that in the past, there was an EPA policy around enforcement discretion not to go against prospective purchasers who wanted to redevelop brownfield sites. It was a cumbersome policy, resulting in Congress's decision to amend CERCLA to create an exemption under specific circumstances. Sen. Lummis questioned if it's true that Congress has amended CERCLA liability in response to the increase of inefficiencies and administrative costs associated with implementing a nationwide enforcement discretion policy and he said absolutely. Sen. Lummis said there are volumes of case law attached to designating a contaminant under RCRA, CWA, and SDWA, but there is no precedent to establish a hazardous substance under CERCLA, is that correct? Mr. Fox said there is no precedent in 44 years of CERCLA for EPA to ever designate anything directly without it first being designated under other bedrock environmental statutes. Sen. Lummis asked if using a tailored approach under RCRA to address some liability concerns of passive receivers, is it a problem that EPA has dedicated minimal resources into using RCRA to regulate PFAS. Mr. Fox said there are two proposed regulations under RCRA that would solve part of this problem: one is to list nine separate PFAS compounds as hazardous constituents under RCRA, and another to say that those compounds could be subject to RCRA corrective action so, EPA could use their authority at RCRA corrective action sites to clean up sites. Many DOD sites are RCRA corrective action sites. Sen. Lummis questioned if loopholes and exemptions accurately portray the role of PVSC in relation to PFAS contamination. Mr. Witt said he absolutely disagrees with that characterization that water systems are polluters of PFAS. Mr. Witt said utilities cannot tell people they can't take their sewage anymore when it is coming directly from people's homes. Water systems can't tell landfills they won't take leachate, and landfills will have to find some other way to dump it somewhere. If wastewater treatment facilities can't take this material, which is their job, where is the waste going to go, and who will be treating it? Congress wants wastewater systems to treat it, given this is what their job is, and they want to be a part of the solution to PFAS; but when utilities must fight long lasting CERCLA cases, they can't do their job of being good environmental stewards. Mr. Witt also said regarding contribution protection that utilities cannot get a settlement from EPA under CERCLA unless EPA designates utilities as a PRP, so it doesn't just exist. Utilities need to be brought into the case, and once utilities are in as a PRP, liability is joint and several, utilities could be responsible for the entire cleanup cost.

  Sen. Lummis said CERCLA establishes liability on those who dispose of hazardous substances, so the court created a useful products exclusion, is that correct? Ms. Bowers said this doctrine refers to the potential liability of a manufacturer under CERCLA, but it does not determine a manufacturer as potentially liable merely because it manufactured a product. Sen. Lummis asked if this exclusion could be used by a manufacturer to potentially escape liability under CERCLA. Ms. Bowers said the way the doctrine works is that if a manufacturer produces a useful product, sells the product, distributes it, and disposes it downstream in the environment by another user or purchaser, unless there is evidence the manufacturer sold the product as waste specifically with the intent to

dispose of the product, then the manufacturer would not be held liable for downstream release. Sen. Lummis followed up and asked if no manufacturer is liable under CERCLA for PFAS, then who would be held liable. Ms. Bowers said it is not necessarily the case that no manufacturer would be liable, and if a release occurred as part of the manufacturing process, then the manufacturer could be held liable under CERCLA as an owner or operator under that category. So, it is not that no manufacturer is liable but rather that if a manufacturer created a product and it was eventually released downstream by a different manufacturer or user, then they are not liable for CERCLA liability unless the party sold the product with the intent of it being disposed. Sen. Lummis asked if the witness could envision the useful products exclusion to escape liability of manufacturers of PFAS. Ms. Bowers said it is difficult to answer the question given it has more to do with what happens to a product after it is manufactured in the way that it is used, which is not something the courts have characterized as a loophole but more as a characterization of CERCLA given that was not the original intent of the law.

Finally, Sen. Lummis asked Mr. Fox and Mr. Witt to share what they would like to leave with the committee that has not been asked yet. Mr. Fox said landfills are solution providers, and thus, the narrowly tailored exemption avoids the law of unintended consequences regarding leachate discharges and need an exemption to not be retroactively liable for a release that does not currently have standards. However, once those standards are in place, they will only meet the exemption if they meet the discharge requirements, providing proper incentives for landfills to create technology that meets discharge limits. Mr. Witt is optimistic about what he has heard from the witnesses and stated that if utilities want to hope that EPA will not go after them through enforcement discretion, then that's well and fine, but it can change. Utilities want to protect themselves so they can focus their resources and customer resources on putting treatment systems in place to begin resolving the PFAS problem and not face litigation on the backend.

- Sen. Sheldon Whitehouse (D-R.I.) questioned if there are steps passive receivers can take to preemptively protect themselves or reduce exposure to third party liability under CERCLA. Ms. Bowers said utilities can get a federally permitted release exemption. Which provides that if a release is in accordance with permits, then there is no liability under CERCLA to be associated under that release. Specific types of permits are enumerated under CERCLA, including CWA permits, however, it is very site specific. Sen. Whitehouse questioned whether there are other chemicals, ubiquitous in the environment like PFAS, and potential lessons learned. Mr. Faber said there are more than 800 hazardous substances, more than 600 are being produced, and over 300 are still being produced in high volume. Hundreds are already found in landfills, and 66 are found in drinking water systems. Specifically, water utilities can certainly require customers to pretreat their waste, which would help reduce liability. Water utilities could have gone to state regulators to modify NPDES to include PFAS. Water utilities could have amended permits to address liability for PFAS.