

Federal Update and National Stormwater Trends

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The National Association of Clean Water Agencies (NACWA)



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Southeast Stormwater Association

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NACWA 

WHO is NACWA?

- NACWA is a national trade association for public wastewater and stormwater utilities
- NACWA represents over 350 public utility members of all sizes nationwide
- NACWA is the recognized leader in legislative, regulatory, and legal advocacy on full spectrum of clean water issues





2023 – A “Building Year” for the Federal Government...

- EPA is moving full steam ahead with its (newly) aggressive agenda on PFAS, as well as key NPDES and affordability initiatives. Decisions the Agency is making now could have major impacts on clean water and stormwater utilities for years/decades to come.
- After passing major funding legislation, Congress is girding for a contentious year ahead. Government shut down likely.
- With the Supreme Court’s WOTUS decision, lower courts are grappling with a deluge of PFAS litigation in addition to looming questions about CSO permitting and stormwater fees.

Legislative Update



Clean Water State Revolving Fund

- \$1.639 billion appropriated in the FY23 Federal Funding Bill – a small \$35 million increase over FY22
 - This is in addition to mandatory \$2.2 billion FY23 CWSRF appropriations from Bipartisan Infrastructure Law (BIL). BIL’s supplemental appropriations continue through FY26.
- \$863 million – half of the \$1.639 appropriation! – was allocated by Congress to specific projects (“earmarks”)
 - This was nearly double the amount earmarked in FY22, a concerning trend.
- Supplemental funds: \$665.2 million to States or Territories in EPA Regions 2 and 4 for wastewater treatment works impacted by hurricanes

Additional Water Funding

- \$50 million for EPA's Sewer Overflow and Stormwater Reuse Municipal Grants program (far below \$280 million authorized in BIL)
- \$75.6 million for WIFIA
- \$3 million for EPA to conduct a national low-income water assistance needs assessment
 - But no money for low-income water customer assistance pilot and no additional funding for Low-Income Household Water Assistance Program (LIHWAP) created during COVID-19
- \$2 million to EPA to advance Integrated Planning (IP) activities, such as working with states
- \$6 million for EPA's Water Infrastructure Workforce Grants Program
- \$182 million for Sec. 319 Nonpoint Source Grants
- \$682 million for EPA's Geographic Programs
- *Note:* Significant American Rescue Plan Act dollars - \$350 billion nationwide – are also still flowing through communities; was a huge win that water/sewer were eligible uses.

Administration's Proposed FY24 Budget

- Released March 9th
- Lays out Biden Administration's priorities and funding asks beginning Oct. 1
- Proposes nearly 19% increase in current overall EPA funding (to \$12 billion)
 - Reflects spending on BIL implementation, environmental justice (EJ), and climate change
 - Includes \$170 million to fund PFAS Strategic Road Map efforts; nearly \$5 billion to address climate change; \$1.8 billion in cross-cutting EJ funding
- Proposed CWSRF - \$1.7 billion; DWSRF - \$1.12 billion
- USDA - \$1.2 billion to increase conservation adoption and farm income
- \$4.1 billion in Low-Income Home Energy Assistance Program (LIHEAP); proposes to give States option to use portion to provide water bill assistance.

Low-Income Water Assistance

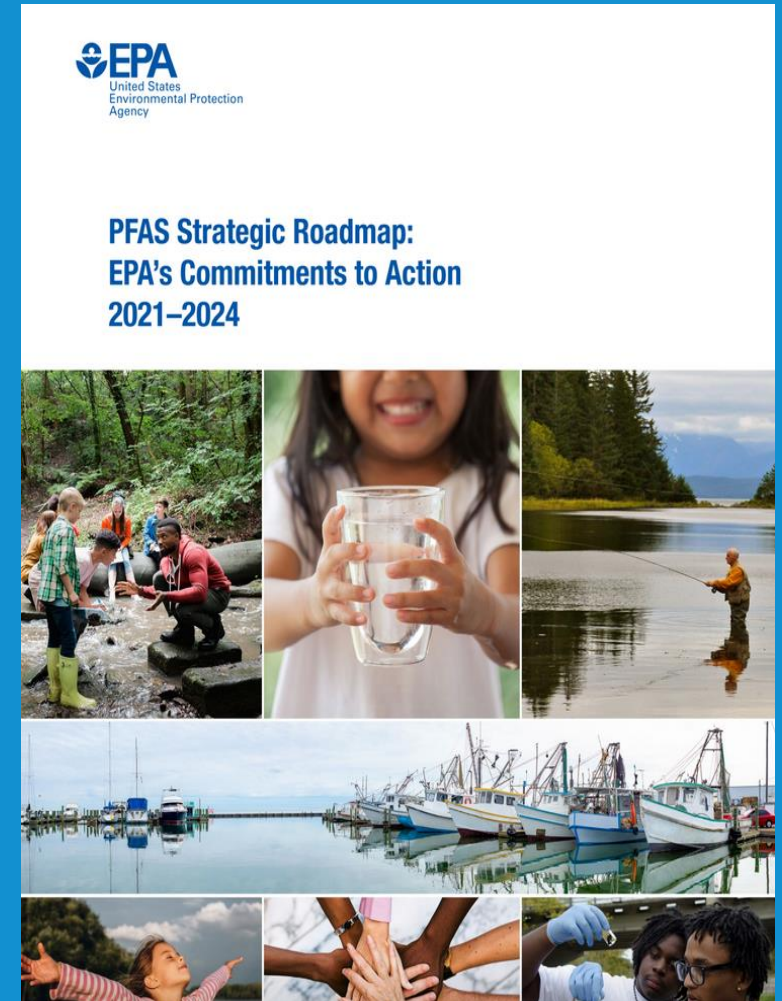
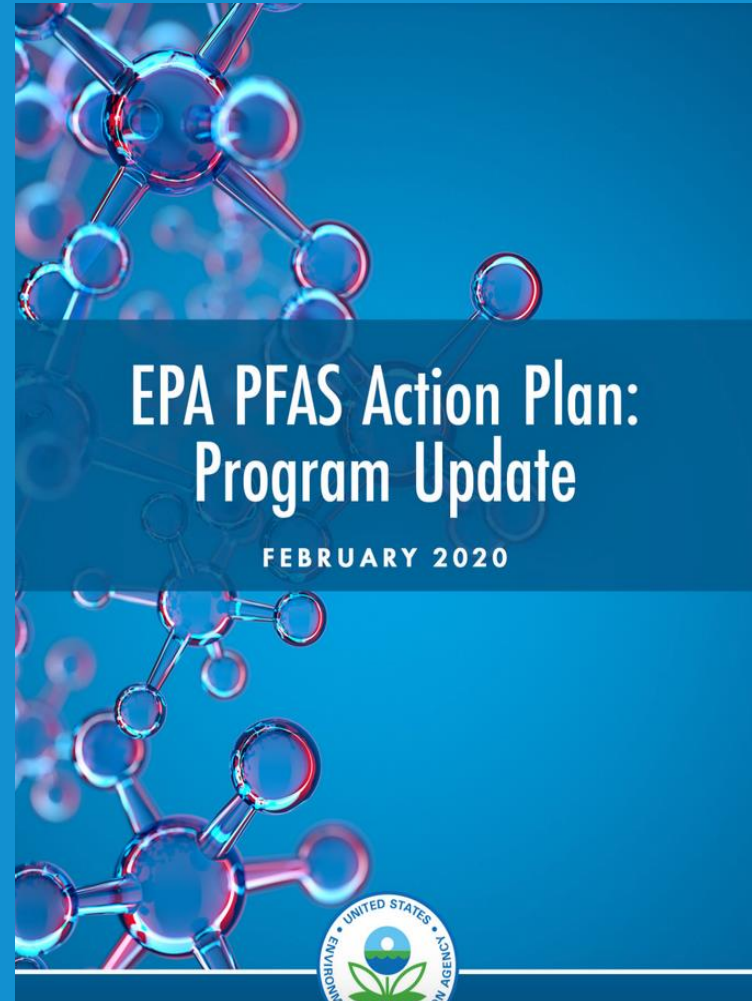
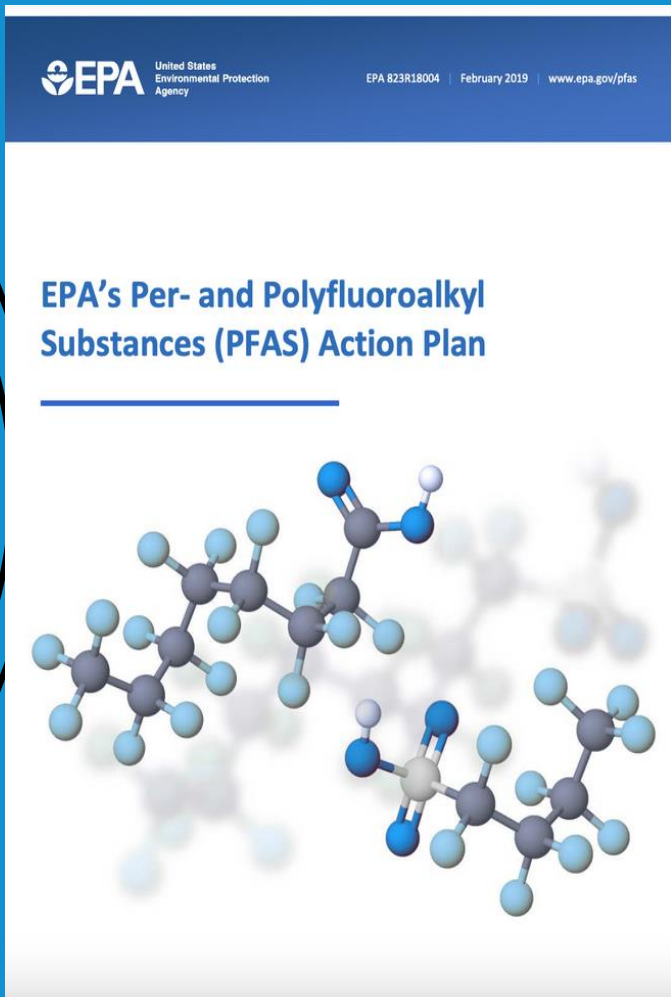
Low-Income Household Water Assistance Program (LIHWAP)

- Department of Health and Human Services (HHS) program created through COVID-19 relief
- **First ever federal funding specifically to assist low-income water and wastewater ratepayers, includes stormwater**
- \$1.138 billion available (\$638 million from Dec. 2020 Consolidated Appropriations Act and \$500 million from March 2021 American Rescue Plan Act) – authorized through Sept. 30, 2023
- Priorities: reconnections; prevention of disconnections; rate reductions
- Thus far:
 - **400,000 + households served in FY22**
 - 13,000 water vendor agreements
 - **45% of total funds have been drawn down**
- States primarily responsible for developing and administering programs
- All funds must be obligated by September 30, 2023 and expended by December 31, 2023

Water Sector Project

- Development of model permanent, reliable low-income customer program housed within HHS
- AWWA, AMWA, NACWA, NAWC, USWA, WEF

PFAS



CERCLA – A Major Concern

- **Sept. 2022** - EPA proposed for first time ever to use authority to designate two PFAS – PFOA and PFOS – as “hazardous substances” under Section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act.
- **April 2023** – Agency accepted comment on whether to also designate: (1) any of the following 7 PFAS – PFBS, PFHxS, PFNA, HFPO-DA (GenX), PFBA, PFHxA, or PFDA; (2) precursors to PFOA, PFOS, or any of the 7 proposed PFAS; and/or (3) categories of PFAS.
- **Final rule delayed until 2024**
- But CERCLA is a cleanup statute, not a regulatory one. How do you:
 - Have meaningful cleanups when PFAS constantly being introduced and reintroduced into environment?
 - Set cleanup standards before you know risk levels?
 - Meet cleanup standards when there’s no known treatment technology?
 - Deal with contaminated media?

“Responsibility” Under CERCLA

- Who is liable under CERCLA?
 - Parties responsible for “disposals” and “releases” of hazardous substances – current and past owners/operators of site, generators, and transporters.
 - “Disposal” and “release” broadly defined, so POTW and MS4 discharges (including CSOs/SSOs), biosolids management, reuse – basically all the public goods – potentially covered.
- What Kind of Liability Are We Talking About Here?
 - Retroactive. Joint and Several. Strict. Cleanups across the country costing billions.
- Ok, we’re Freaking Out, Why Isn’t EPA Freaking Out?
 - Claiming “statutorily precluded” from looking at the potential costs associated with proposed designations (spoiler alert – they’re not).
 - Also think can address the water sectors’ concerns by utilizing enforcement discretion. About that...

3rd Party Lawsuits

- Section 113 Contribution Claims
 - Other PRPs can bring any PRP into an EPA-ordered cleanup action regardless of culpability.
- Section 107 Cost Recovery Claims
 - Anyone performing a “voluntary” cleanup to certain standards can also sue any PRP for cost recovery.
- What is the sector pressing for?
 - From Congress: Clear statutory exemption; adoption of a true “polluter pays” model for PFAS cleanups
 - From EPA: Clarify scope of existing exclusions for “normal application of fertilizer” and “federally permitted releases;” source control; enforcement policy; treat public clean water sector as part of comprehensive solution to complex problem

Additional Regulatory Actions

National Primary Drinking Water Regulations /Proposed Maximum Contaminant Levels (MCLs)

- PFOA – 4 parts per trillion (ppt)
- PFOS – 4 ppt
- GenX, PFBS, PFNA, and PFHxS – Hazard Index (HI) considering combined toxicity in drinking water
- Public water systems must monitor for PFAS, notify public of levels of PFAS, and reduce levels of PFAS if exceed proposed standards
- Impacts to clean water utilities using reusing/reclaiming water

Draft Method 1633 – partial draft multi-lab validation complete; expected before 2024

- Considers 40 PFAS in wastewater and biosolids and other media
- Not yet promulgated under 40 CFR Part 136, so still cannot be used for CWA compliance

Proposed elimination of *de minimis* exemption under Toxic Release Inventory (TRI) for PFAS

- Exemption currently allows manufacturers and users of PFAS to escape reporting if concentrations below 1% in mixtures or products

Additional Regulatory Actions

Biosolids Risk Assessment - SAB just reviewed 3-step process EPA proposed to assess risk of chemicals (not just PFAS) in biosolids

- 1) prioritize risk assessment of chemical pollutants in biosolids (not limited to PFAS); 2) screening level risk assessment; 3) more refined risk assessment for chemicals that pose greatest risks

EPA separately developing risk assessments for PFOA and PFOS (end of 2024)

- If risk found, will develop limits and compliance requirements via Part 503 regs

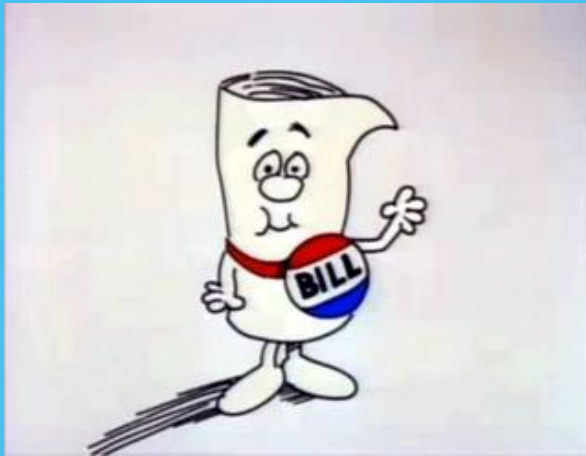
Dec. 2022 Memo on Addressing PFAS Discharges in NPDES Permits & Pretreatment and Monitoring Programs

- Encourages leveraging NPDES permitting program to restrict PFAS at sources, including identifying all IUs that may discharge PFAS and utilizing BMPs including local limits and product substitution
- Stringent BMPs for stormwater potentially impacted by AFFF
- Quarterly monitoring (influent, effluent, and biosolids) and reporting on DMRs suggested
- Draft Method 1633 (40 PFAS) and adsorbable organic fluorine (AOF) recommended

Recommended aquatic life criteria for PFOA and PFOS

- Proposed summer 2022; final coming anyday now
- Initially proposed reasonable acute and chronic freshwater criteria, updated with new scientific information

Federal Legislation



- Clean Water Standards for PFAS Act
 - Instructs EPA to develop PFAS human health water quality criteria, ELGs, and pretreatment standards for priority industries – essentially would hold EPA accountable for steps in its PFAS Action Plan and ELG Plans
 - Introduced last Congress by Rep. Pappas (D-NH) and Sen. Gillibrand (D-NY), who want to reintroduce soon
- \$10 billion in Bipartisan Infrastructure Law (BIL) grants for PFAS and emerging contaminants
 - \$1 billion in grants through the CWSRF
 - \$4 billion in grants through the DWSRF
 - \$5 billion for Small & Disadvantaged Drinking Water System Grants
- Wait for it....

118TH CONGRESS
1ST SESSION

S. _____

To exempt certain entities from liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 with respect to releases of perfluoroalkyl and polyfluoroalkyl substances, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Ms. LUMMIS introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To exempt certain entities from liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 with respect to releases of perfluoroalkyl and polyfluoroalkyl substances, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Water Systems PFAS
5 Liability Protection Act”.


Water Systems PFAS Liability Protection Act

- Senator Lummis (R-WY) and Sens. Wicker (R-MS), Boozman (R-AR), Cramer (R-ND), Ricketts (R-NE), Mullin (R-OK), Sullivan (R-AK) and Graham (R-SC) introduced bill on May 3
- Would provide clean water, drinking water and stormwater utilities a targeted exemption from liability under CERCLA
- Long road ahead, but it is a start!

Regulatory Update

U.S. Census + MS4 jurisdictions

- **“Urbanized Areas”**
 - U.S. Census Bureau discontinued its use of this term and definition in 2020 Census and future Censuses
 - Clean Water Act regulations rely on “urbanized areas” for defining boundaries of MS4s
- **EPA Issued final rule to clarify designation criteria**
 - Eliminated urbanized areas definition and retains the population threshold from the Phase II MS4 regulations that were promulgated in 1999.
 - Clarifies that a community is designated as an MS4 if it has 50,000 or more people
 - As new census data becomes available, EPA is offering technical assistance to state permitting authorities to help with implementation
 - MS4 mapping information is also coming...



Climate Change Considerations in NPDES Permits

- EPA Region 1 Proposed Permits for POTWs
 - Include onerous provisions concerning “major flood and storm event” planning for treatment plants and sewer systems
 - Requirements include iterative resiliency and implementation planning taking into account midterm (20-30 years), long-term (80-100 years), and extreme sea level change considerations
- Purported Authority
 - 40 CFR 122.41(d) and (e) – regulations concerning proper operations & maintenance and “a duty to mitigate” adverse impacts to human health or the environment
- Significant concerns – security, technical, legal, EJ, co-permittees
- And what does this mean for post-LTCP permitting? Cyber security?

Nutrients

- **EPA Frequently Asked Questions (FAQs) Document**
 - Published in Jan. 2023 to help states and tribes adopt 2021 Recommended Ambient Water Quality Criteria for Nutrients in Lakes and Reservoirs
 - Concern: misapplication of 2021 Nutrient Criteria model (e.g. – Euclid, Ohio’s proposed nearly unattainable 0.007 mg/L total phosphorus limit)
- **EPA Baseline/Water Quality Trading Policy Memo**
 - Proposed in 2019; not a rule but a “policy statement”
 - Modified approach to incremental baseline for nonpoint sources, factors that can be considered in compliance schedules, how water quality variances can address certain trading scenarios
 - Currently at OMB; EPA will release “expeditiously” once review is complete; likely to be more narrow in scope with guardrails

Financial Capability Assessment (FCA) Guidance

- Finalized Feb. 1
- Effectively a re-write of the carefully crafted guidance that had been negotiated for years
- Includes drinking water, wastewater, and stormwater
- Several major concerns:
 - Does not consider actual impacts on low-income customers
 - Reversion to use of arbitrary scheduling boundaries
 - Includes burdensome and costly new Financial Alternatives Analysis requirements
- One bright spot: maintains Alternative 2, allowing cash flow forecasting to better understand revenues necessary to cover costs over the life of a program and look at the impacts rate increases will have on individual bills
- **Used for LTCPs; consent decree negotiations; integrated planning; water quality standards; compliance schedules**

Legal Update



WOTUS

- **EPA and Army Corps issued rule in January 2023**
 - Defining WOTUS
- **U.S. Supreme Court decision on May 2023**
 - Limits scope of federal jurisdiction to “relatively permanent bodies of water” and wetlands with a “continuous surface connection” to such waters.
- **EPA and Army Corps issue revised rule September 2023**
 - Intended to align with SCOTUS decision
 - Removes longstanding “significant nexus” test
 - Revises test for “adjacent” wetlands to comport with “continuous surface connection” language from the Supreme Court
- **Take aways?**
 - Rule does not offer additional clarity on how Agencies plan to implement “relatively permanent” and “continuous” when issuing jurisdictional determination
 - Does not include expressed carve-outs for stormwater control features or water recycling structures – does include established exemption for waste treatment systems/lagoons

Stormwater Fees – You Gotta Pay to Play, Federal Government!

- ***City of Wilmington v. United States***

- U.S. Court of Appeals for the Federal Circuit considered whether City of Wilmington, DE can collect over \$5.8 million in unpaid stormwater management fees from Army Corps under CWA Sec. 1323 (requiring federal government to pay "reasonable service charges")
- Question: whether Wilmington's fee structure utilizing impervious surface area calculations to assess fees constituted a "fair approximation of the proportionate contribution to stormwater pollution" as required by Sec. 1323
 - U.S. Court of Federal Claims did not take issue with general approach, but held city had not identified with sufficient specificity measurable costs the Corps' disposal areas imposed on city's stormwater management system
- AquaLaw represented NACWA in its filing of an *amicus* brief in the litigation
- Court of Appeals for the Federal Circuit upheld lower court; City of Wilmington **may not recoup the \$5.8 million in unpaid stormwater fees stating the City failed to show how its fee calculations utilized fair approximations of the amount of runoff contributed by Corps facilities.**
- Take away? **Very limited holding to the facts and circumstances of the case.**



Thank you!



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