

Minnesota Environmental Science and Economic Review Board (MESERB)

On behalf of the Minnesota Environmental Science and Economic Review Board (MESERB), please see the attached comments on the MPCA's PFAS Guidance document.

Thank you for your consideration.



MESERB

Minnesota Environmental Science
and Economic Review Board

Using science and economics to improve environmental regulations

October 5, 2023

VIA ONLINE AND EMAIL

Tim Grape, Supervisor, Superfund Unit 1
Yodit Sheido, Project Manager, Superfund Unit 1
Minnesota Pollution Control Agency
520 Lafayette Rd
St Paul, MN 55155

Re: MESERB comments on MPCA Remediation Division PFAS Guidance

As a representative of the Minnesota Environmental Science and Economic Review Board (MESERB), I am writing to express our position regarding the Minnesota Pollution Control Agency ("MPCA") draft Remediation Division PFAS Guidance ("Remediation Guidance"). MESERB is a municipal joint powers organization comprised of 60 publicly owned wastewater treatment plants ("POTWs") in Greater Minnesota. MESERB is a leader in working with the MPCA to identify and minimize sources of per- and poly-fluoroalkyl substances (PFAS) to POTWs, and our goal is to ensure the development and implementation of a PFAS remediation strategy. This strategy should protect human health and the environment, be cost-effective, and not lead to significant negative unintended consequences for public utilities.

We support the ongoing state and federal efforts to minimize and eliminate PFAS sources from entering the waste stream and efforts to study and take actions to mitigate human health risks associated with PFAS contamination. However, as discussed in our comments below, MESERB is concerned that the MPCA Remediation Division may not be in alignment with the MPCA's Wastewater Division, which includes the biosolids program, about how to best ensure that POTWs and the biosolids program are not unfairly impacted by the implementation of the Minnesota Environmental Response and Liability Act ("MERLA") to address PFAS.

To address this concern, the MPCA should develop a sound enforcement policy, or if necessary, legislation, that provides local governments with liability protection. Such protection should ensure that MPCA's enforcement efforts under MERLA remain focused on holding the true sources of PFAS contamination liable for investigation and cleanup costs. Additionally, the MPCA should exempt municipal wastewater treatment facilities and the biosolids program from coverage under the Remediation Guidance. The MPCA should also take affirmative steps towards working collaboratively with the Wastewater Division, the Remediation Division, and POTWs to develop a separate strategy for addressing PFAS investigation and remediation efforts related to wastewater treatment facilities and the land application of biosolids.

We are concerned that without these requested changes, the Remediation Guidance and the MPCA's implementation of MERLA could unfairly impose cleanup costs on public utilities and their ratepayers for contamination that they did not cause and lead to a host of costly united

negative consequences, such as unnecessary bans or restrictions on the clean and safe beneficial reuse of biosolids.

POTWs do not produce or use PFAS, and the MPCA should provide local governments with clear liability protection for the investigation and remediation of PFAS.

First, as recognized by the MPCA's Wastewater Division, municipal POTWs do not generate or use PFAS and are not sources of PFAS to the environment. POTWs are receivers of PFAS from upstream industrial and domestic sources that flow to POTWs.¹ Unfortunately, conventional wastewater treatment technologies do not remove PFAS from the waste stream, and treatment for PFAS at POTWs is currently not technologically or economically feasible.² Not only are municipal POTWs not sources of PFAS, but both their wastewater discharges and their reuse and land application of biosolids are conducted in compliance with state and federal law, including MPCA-administered NPDES/SDS permit requirements, the federal Clean Water Act and Federal 40 CFR Part 503 requirements.

For these reasons, the MPCA's monitoring plan for municipal wastewater treatment facilities, which was developed with input from both the Wastewater Division and the Remediation Division, draws a clear distinction between sources of PFAS pollution and mere conduits, like POTWs. The monitoring plan states the following:

In considering how to prevent and manage PFAS pollution, the MPCA finds it useful to differentiate between industrial facilities that may be *sources* of PFAS pollution and facilities that are likely *conduits* for PFAS releases into the environment (usually waste management, recycling, or treatment facilities).³

The distinction drawn above between a PFAS source and a PFAS receiver or conduit is critical to developing and implementing a fair and effective strategy for addressing wastewater and biosolids. However, in the draft remediation guidance, the MPCA's Remediation Division appears to ignore this distinction and improperly and contrary to early statements made by the MPCA, lumps municipal POTWs in the category of "waste facilities" that are potential sources and potentially responsible parties (PRPs) for PFAS contamination under MERLA.⁴ It is unreasonable

¹ See e.g., *Memorandum of Understanding* (MOU) regarding the MPCA's Statewide Monitoring of PFAS and MOU summary document (stating the MPCA recognizes that municipal wastewater treatment facilities are a "receiver[s] of PFAS" from industrial and domestic sources that flow to wastewater treatment facilities and merely serve as "conduit[s] for the discharge of PFAS to the environment). See also *Evaluation of Current Alternative and Estimated Cost Curves for PFAS Removal and Destruction from Municipal Wastewater, Biosolids, Landfill Leachate, and Compost Contact Water* (May 2023) at p. 6, available at <https://www.pca.state.mn.us/sites/default/files/c-pfc1-26.pdf>.

² See generally *Evaluation of Current Alternative and Estimated Cost Curves for PFAS Removal and Destruction from Municipal Wastewater, Biosolids, Landfill Leachate, and Compost Contact Water* (May 2023) at p. 6, available at <https://www.pca.state.mn.us/sites/default/files/c-pfc1-26.pdf>.

³ *PFAS Monitoring Plan* at p. 3, available at <https://www.pca.state.mn.us/air-water-land-climate/monitoring-pfas>

⁴ See e.g., *Remediation Guidance* at p. 6, paragraph 1. The language in the section, and elsewhere, suggests that the MPCA considers permitted wastewater discharges and the application of biosolids conducted in compliance with

for POTWS to be subjected to significant potential liability under MERLA because they are not sources of PFAS contamination and perform a public service in compliance with all applicable state and federal laws.

These are significant concerns that if not thoughtfully addressed, could upend the traditional “polluter pays” principle that undergirds State and Federal Superfund law and policy. Furthermore, a strict application of MERLA in this context could lead to significant additional negative unintended consequences, such as unreasonable and expensive prohibitions on the land application of biosolids where there is no demonstrable risk to human health and the environment.

As a result of the above, it is critical that the MPCA develop clear liability protection for municipal POTWs under MERLA—especially because those same POTWs are actively doing everything in their power to collaborate with the MPCA to identify PFAS sources to the environment and use their pretreatment authority to minimize and eliminate upstream sources of PFAS to their facilities. MESERB and other municipal organizations have been advocating for this liability protection at the state and federal level for years, and now is time that the MPCA acts to provide clarity on this issue for POTWs.⁵

The MPCA’s Wastewater and Remediation Divisions should work collaboratively with municipal POTWs to develop a specific PFAS remediation strategy applicable to POTWs.

For the reasons stated above, the proposed Remediation Guidance does not reflect the MPCA’s comprehensive understanding of the unique challenges and circumstances related to POTWs and PFAS investigation and remediation. Because PFAS-related issues impacting municipal POTWs are unique, complex, and have such widespread impact on the public, the MPCA should revise the draft Remediation Guidance to explicitly state that it does not apply to municipal POTWs and the land application of biosolids. In addition, the MPCA’s Wastewater and Remediation Divisions should work with municipal POTWs to develop a POTW-specific strategy for approaching all PFAS prevention, investigation, and remediation issues. Similar collaborative approaches have been used by the MPCA in the past to great success (i.e., the Chloride stakeholder group and the development of the PFAS Monitoring Plan).

state and federal law and all NPDES/SDS permit requirements to be regulated by MERLA, thus treating POTWs as PRP’s for purposes of cost recovery and other investigation and remediation liability.

⁵ One approach that the MPCA could explore is an enforcement discretion policy like that being proposed by the U.S. EPA under CERCLA. The MPCA should draft an exemption for regulated entities that will direct enforcement under the proposed guidance, like the EPA’s draft enforcement discretion policy for CERCLA. If adopted, the EPA’s draft enforcement discretion policy will focus federal enforcement efforts under CERCLA exclusively on PFAS manufacturers, federal facilities, and other regulated entities who presently or historically caused or contributed to significant levels of PFAS contamination in the environment. The EPA has announced in the draft policy several categories of regulated entities that it does not intend to pursue under the proposed enforcement policy, including publicly owned and operated water utilities, publicly owned and operated municipal solid waste landfills, farmers who apply biosolids to their land, and state, tribal or municipal airports and fire departments.

In conclusion, this guidance, as drafted, will place an enormously outsized burden on wastewater utilities and their ratepayers. MESERB strongly supports a true “polluter pays” model; Minnesota’s public should not—and cannot—bear this cost in their water bills. As proposed, this guidance will accomplish just the opposite. The draft guidance must also be savvy in addressing the land application of biosolids.

To this end, MESERB urges the MPCA to convene its Wastewater and Remediation Divisions alongside MESERB, the Coalition of Greater Minnesota Cities, and the League of Minnesota Cities to discuss a more targeted, balanced and ultimately more successful PFAS remediation strategy for POTWs and the land application of biosolids. POTWs should not be burdened with outsized responsibility for PFAS contamination—especially when they act in accordance with all applicable laws. It is time for the MPCA to act decisively to ensure that municipal POTWs are not unfairly burdened with the costs of cleaning up PFAS contamination.

Thank you for considering these comments on the draft guidance. If you have any questions, please reach out to me or our attorney, Daniel Marx, at dmmarx@flaherty-hood.com. We look forward to collaborating on a successful solution to these issues.

Sincerely,

MINNESOTA ENVIRONMENTAL SCIENCE AND ECONOMIC REVIEW BOARD



Joshua Gad
MESERB President
WRRF Superintendent, City of Mankato
jgad@mankato.gov

CC:
Commissioner Katrina Kessler
Assistant Commissioner Dana Vanderbosch
Assistant Commissioner Kirk Koudelka
Nicole Blasing, Municipal Division Director
Suzanne Baumann, Municipal Wastewater Manager
Tom Higgins, Superfund Section Manager