



TO: Rebecca Long
FROM: Eric Sapirstein
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SUBJECT: Washington Update

Congress succeeded in reaching agreement on the outstanding Fiscal Year 2024 appropriations bills, putting in place budgets for all federal agencies, eliminating a partial government shutdown, six months into the fiscal year. Given the delay in finalizing spending bills, Congress now has less than five months to develop and pass Fiscal Year 2025 spending bills. Prospects for final passage by September 30 seem remote. If agreements prove elusive, another Continuing Resolution will be required to avoid a government shutdown in the weeks leading up to the congressional and presidential elections. The following summarizes issues of interest to OC San that arose during the past month.

- ***Fiscal Year 2025 Appropriations***

On March 11, the Administration transmitted its budget request to Congress for fiscal year 2025 that begins on October 1, 2024. The budget, which is traditionally dead on arrival, is notable for a general status quo request. Where reductions in programs were requested, the justification of the request is premised on the fact that the supplemental funding through the Bipartisan Infrastructure Law (BIL) would compensate for the cuts. Where increases in spending were requested, the requests were targeted toward the Administration's climate, enforcement, and environmental justice programs. For example, the U.S. Environmental Protection Agency's (EPA) State Revolving Loan Fund program would be cut by almost \$500 million. The BIL funding of approximately \$1 billion would help to offset the cut. At the same time, EPA's enforcement budget would be boosted to support more robust effort to address impacts to disadvantaged communities. With regard to the regulation of per- and polyfluoroalkyl substances (PFAS), the agency continues to request funding for its PFAS Roadmap priorities including the development of effluent limitation guidelines to support source control efforts and monitoring of wastewater and biosolids for PFAS presence.

Budget Request Impact to OC San

The Administration budget request would not immediately impact OC San because Congress is unlikely to act on a final spending bill before the November elections. This means that the election outcomes will more likely than not dictate how any final budget might be developed. To this end, the most likely impact to OC San might involve funding of programs that would result in the development of new requirements for biosolids management and treatment of PFAS.

- ***Senate PFAS Liability Hearing***

The Senate Committee on Environment and Public Works held a hearing into PFAS Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) liability and the need for liability protections for the wastewater/water sector and other passive receivers. The hearing heard from the Environmental Working Group (EWG), New Mexico's Secretary of Environment, two attorneys representing the wastewater/water and solid waste sectors, and a CERCLA liability expert from the Congressional Research Service (CRS). Of special note, the committee received more than 280 letters from stakeholders, including OC San, calling for a liability exemption for the wastewater/sector and other passive receivers. The hearing was notable for several reasons.

- Claims that United States Environmental Protection Agency (USEPA's) willingness to rely upon its enforcement discretion were demonstrated to be inadequate because such an approach would not protect a passive receiver from third party litigation. Additionally, witnesses documented the legal costs associated with working with USEPA to be provided a shield that fails in the final analysis to protect an agency. The CRS witness concurred with the view that discretionary enforcement essentially failed to provided protections.
- A powerful point was made by the wastewater/water and solid waste sectors witnesses that even if an entity were to seek protection (shield) under USEPA's discretionary approach, it would require becoming part of any settlement agreement. This would ironically define a party as a PRP and allow an entity not party to the agreement to pursue litigation against a utility.
- Claims that the wastewater/water and solid waste sectors were responsible for polluting water and soils and that these entities did nothing to address the threats over decades were effectively proven without merit when the points were made that there are no treatment standards by which to control for PFAS.
- On the process that USEPA relied upon to propose PFAS designation under CERCLA, witnesses, other than EWG, noted that the agency action is unprecedented and that it should have relied on the Resource Conservation and Recovery Act to address clean-ups as the foundation of any response. They further noted that the appropriate process should

have first listed PFAS as a hazardous constituent and then proceed to determine if it is a hazardous waste and then determine if it should be a hazardous substance under CERCLA.

- Committee was also put on notice that should PFAS designation be finalized, it would likely limit management options for disposal as the potential liability in accepting waste such as residuals would become too risky and ultimately lead to disposal of residuals in hazardous waste sites, increasing costs and creating a capacity issue.
- Congressional Research Service validated the concerns from the wastewater/water sector that USEPA had taken a novel approach to listing PFAS under CERCLA, and this seemed to buttress committee members' concerns about how USEPA could justify the listing approach.
- Committee members on a bipartisan basis emphasized that a bipartisan agreement must be reached on the issue before the committee could consider legislation.

Impact of Hearing on OC San Interests

OC San has advocated for liability protections from any PFAS hazardous substance designation under CERCLA, including letters to the committee on the importance of protecting passive receivers like OC San . The hearing vividly illustrate and refuted the assertions of the NGO community that EPA's use of its enforcement authority on a discretionary basis is not a viable solution to avoid innocent parties like OC San from becoming ensnared in the CERCLA liability net. OC San's concerns that CERCLA PFAS designation would lead to the loss of approved biosolids management techniques simply because of potential liability exposure was also forcefully demonstrated. Last, Senators' statements on the need to invest in new destruction technologies through federal assistance would appear to support OC San's commitment to identify and demonstrate such technologies.

In the final analysis, the hearing witnesses delivered a cogent argument that Congress must address the liability protection needs of the wastewater and water sectors.

- ***USEPA Preparing to Issue Final PFAS Rule***

USEPA's finalization of rules establishing drinking water standards and designating PFAS chemicals as hazardous substances under CERCLA continue. It appears that on or about April 15, the drinking water standard (Maximum Contaminant Level) will be published in final. We anticipate litigation from the water sector challenging the science relied upon by EPA to set the 4PPT level of the standard.

The designation of PFAS as a hazardous substance under CERCLA remains under development. However, the EPA is expected to publish a final rule in April unless Congress signals a desire to delay the rule while it works on a legislative fix to passive receivers' concerns.

Last, EPA has issued a request for public comments on a proposal to identify PFAS as hazardous constituents. This effort could lead to EPA formally identifying PFAS as a hazardous waste and subsequently a possible hazardous substance under CERCLA. The logic of this rulemaking lies in the fact that if the current PFAS designation under CERCLA is successfully litigated, due to EPA's failure to first identify PFAS as hazardous constituents and wastes, then a second approach would be in process that could lead to designation.

- ***PFAS Technology Guidance***

EPA is expected to publish new guidance on PFAS destruction technology priorities. Instead of dictating technologies, the agency is anticipated to allow industry to design and develop treatment and destruction technologies that could advance the management of PFAS chemicals.