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FROM: Eric Sapirstein  
DATE: April 4, 2023  
SUBJECT: Washington Update

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Over the past month, congressional activities continued to focus on fiscal year 2024 budget matters, review of infrastructure investments, Waters of the United States (WOTUS) implementation, and Per- and polyfluoroalkyl substances (PFAS) rulemaking. Regulatory developments of interest at United States Environmental Protection Agency (USEPA) focused primarily upon PFAS and Superfund liability. The following summarizes issues of interest to OC San.

- ***Fiscal Year 2024 Budget Request***

The Administration formally transmitted the fiscal year 2024 budget request to Congress. House and Senate appropriations and authorization committees began the process of reviewing the budget request. Overall, the request for federal agencies continues the Administration's priority to increase spending for most programs. The exception is found at USEPA and USBR where water related infrastructure programs essentially remain at current levels. The requested funding levels are a function of the billions of dollars in funding that programs, like the State Revolving Fund (SRF), Water Infrastructure Finance and Innovation Act (WIFIA) and western drought, received through the Infrastructure Investment and Jobs Act and the Inflation Reduction Act over the past two years.

USEPA Administrator Michael Regan faced skepticism on elements of the USEPA request, including the 19 percent increase over the current budget year. Responding to questions on the need to increase the agency's staffing by 2,000 positions, Regan stated that this represents the priority to restore the agency's staffing to historic levels, he stated staffing increases would help to implement the priority for expedited infrastructure project funding and manage the new \$27 billion clean energy program provided under the Inflation Reduction Act.

Regan also emphasized that the budget request will support the agency's effort to maintain progress to advance environmental justice initiatives. PFAS received special attention as Members sought to elicit answers to how the agency intended to move forward on the designation of the chemicals as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Acknowledging concerns that the designation could increase water treatment costs and foreclose biosolids management options, Regan noted the budget would support ongoing research into the management and treatment of PFAS chemicals. Notably, during the United States Department of Agriculture's (USDA's) budget hearing before the Senate Committee on Appropriations, Secretary Tom Vilsack stated that it is vital to leverage the Department's programs to support increased research into the impacts of PFAS on soils and crops and ways to remediate any public health threats.

- ***Waters of the U.S.***

The Senate followed earlier House action and passed H.J. Res. 27, a resolution to veto USEPA's recent rulemaking to define which waters are subject to Clean Water Act regulation. Using the Congressional Review Act, the Senate voted 53-43 to overturn the new definition that would have extended the Clean Water Act's reach and require permits for ditches and stormwater facilities currently not captured by the existing rule. The Senate vote means the resolution will go to the president for veto or enactment. It will be vetoed and the votes to override do not appear to be in place. The Supreme Court will issue a decision on USEPA's definition of a water of the U.S. (navigable waters) in late spring or early summer and this action will ultimately decide how the agency must revise the WOTUS rulemaking. For the current time, the USEPA rule maintains the regulatory provisions that exempt wastewater treatment facilities from further regulation and is in effect in California.

***Importance to OC San:*** While the WOTUS rulemaking has generated significant opposition, its importance to OC San can be found in the fact that it could impact OC San cities and the County that manage stormwater flows. For OC San the fact that the rule maintains the existing exemption for wastewater facilities, the rule should not adversely impact OC San at this time.

- ***USEPA Issues PFAS MCL***

USEPA's Office of Water proposed a 4 parts per trillion (PPT) drinking water standard (MCL) for PFOS and PFOA. The MCL Goal is set at zero. The proposed rule is under a public comment period until May 30. It is anticipated that upon conclusion of the public comment period, the office will issue the final rule with little change and an effective date consistent with its PFAS Roadmap of late 2023 or early 2024. It is notable that the MCL is set at current technology detection capability. The office also set a standard for four other PFAS chemicals, including HFPO dimer acid (GenX) that would be based upon a hazard index determination. This approach would rely upon an analysis of the combined presence and level of these chemicals and whether the threat to human health exists. Presumably as more data is collected, an MCL would be issued for these members of the PFAS family.

Stakeholders, most notably the American Water Works Association, have noted that the rulemaking will cost water agencies \$3.4 billion in annual O&M costs and \$70 billion in capital investments in order for water agencies to comply with the MCL. It is assumed that wastewater agencies could face similar cost challenges as source control, pretreatment, monitoring and additional treatment of effluent discharges and biosolids are considered by the agency.

**Importance to OC San:** The issuance of the MCL is important because it will likely serve as a baseline for USEPA as it seeks to determine how to address source control mandates on industrial discharges into POTWs. It will also be important as USEPA reviews influent and effluent flows monitoring to determine the nature of PFAS in the wastewater stream. Last, the agency could consider the MCL standard to determine how to address PFAS in biosolids and risks to public health and the environment in the coming year.

- **USEPA Maintains Position to Designate PFAS as Hazardous Substance**  
Despite significant pushback from a broad array of public and private water, wastewater, and solid waste stakeholders, who are passive receivers of PFAS, USEPA continues the regulatory effort to classify PFAS as hazardous substances under CERCLA. The action, if finalized, carries the potential of exposing water agencies to liability associated with the disposal of PFAS contaminated treatment residuals, for example. USEPA officials have stated that the agency intends to use its “discretionary authority” not to enforce against water agencies. However, this position fails to recognize that with a CERCLA designation of PFAS chemicals, it would allow industrial stakeholders to attempt to make public water agencies contributors to the contamination due to the disposal of PFAS contaminated treatment residuals, for example. As a result of this possible scenario, water, wastewater, and solid waste stakeholders are working to secure an exemption, or an affirmative defense, against such litigation and preserve the CERCLA Polluter Pays Principle as part of any PFAS legislation Congress could consider.

**Importance to OC San:** The designation of PFAS as a hazardous substance under CERCLA is important to OC San for two reasons. First, the immediate impact could mean an increase in the cost of residual disposal contaminated with PFAS as the use of hazardous waste management facilities might be required. Second, CERCLA’s liability regime allows potentially responsible parties (PRP) that are subject to site clean-up orders to seek contributions from other contributors. This means if a wastewater agency disposed of biosolids contaminated with PFASs at a site, it could be forced to commit resources to defend against such litigation, regardless of the merit of the PRP’s litigation.