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FROM: Eric Sapirstein  
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After ten weeks of uninterrupted congressional business, the House succeeded in anointing a Speaker, Mike Johnson (R-LA). Quickly after his election, Johnson successfully met his first significant policy test when the House approved a continuing resolution and avoided a shutdown days before Thanksgiving. The passage was only possible with the near unanimous support of House Democrats. The ninety-three “no” votes cast by Republicans illustrated the continuation of budget and spending disagreements within the Republican Conference. These differences must be resolved by January 2024 to avoid a government shutdown when the first of two deadlines are triggered.

In the Senate, key activities surrounded the ongoing effort to design Per- and Polyfluorinated Substances (PFAS) legislation that would protect public agencies like OC San from liability under the nation’s hazardous waste site clean-up law; the Comprehensive Emergency Response Cleanup and Liability Act (otherwise known as Superfund). The following summarizes congressional activities of interest to OC San.

- ***Fiscal Year 2024 Appropriations Remain to be Finalized in 2024***  
The new Speaker of the House designed a “ladder” continuing resolution that maintained governmental operations into the first two months of 2024. The first deadline is January 19 with the second deadline February 2. For purposes of OC San, the second tranche of spending bills includes the U.S. Environmental Protection (USEPA) Agency’s budget. Congress has additional time to finalize an agreement. The logic of providing two deadlines is considered a means to provide the House and Senate with ample time to finalize compromise spending bills and avoid voting on a massive omnibus spending bill that cobbles together all twelve individual spending bills. The Speaker has publicly stated that he opposes omnibus spending bills and further emphasized that he is “done” passing continuing resolutions.

The Senate on a bipartisan basis approved the “ladder” legislation as a means to avoid a governmental shutdown. At the same time, the Senate leadership issued a clear message to the House leadership that any final Fiscal Year 2024 spending bills will need to follow the contours of the Fiscal Responsibility Act (FRA) that increased the debt ceiling for two years and established overall spending levels for Fiscal Year 2024 effectively at current year spending levels. This position sets up a potential who blinks first after the Christmas Recess as the House Republicans, notably the House Freedom Caucus, have demanded significant spending cuts below the FRA levels that in some cases approach spending levels last seen in the 1990’s. The USEPA is one example where program funding levels would be dramatically reduced under the House funding priorities by billions of dollars.

### **Why the “Ladder” Continuing Resolution is Important to OC San**

As we have reported in past updates, the funding debate does not directly impact OC San since its program funding needs like Super Critical Oxidation were funded as part of the fiscal year 2023 spending bill. Also, if OC San decides that it would be fiscally valuable to pursue State Revolving Loan Fund assistance to support capital projects, the Fund has been provided billions of dollars in capitalization assistance over the next two years under the Bipartisan Infrastructure Law that would not be impacted by budget cuts in any fiscal year 2024 spending agreement that the House and Senate fashion in February 2024.

As is standard practice, Congress often includes “policy riders” in final spending agreements that direct federal agency actions. One area where policy directives might be debated is PFAS and requirements that USEPA maintain its focus on biosolids management and treatment standards, including federal assistance to demonstrate destruction technologies.

### ***USEPA Clarifies Build America Buy America (BABA) Waiver Rule***

After months of study, USEPA on November 16 published its decision to extend the State Revolving Loan Fund BABA waiver to water and wastewater projects that received funding through Community Projects assistance and other non-State Revolving Loan Fund assistance. Under the rule, any project sponsor that initiated design work, issued bonds or other financing, issued approval of the project, or took other actions related to the project’s approval would be eligible to be exempt from the BABA mandate, provided such work or decisions took place prior to May 14, 2022.

### **Why the BABA Rule is Important to OC San**

USEPA’s action means that OC San’s Supercritical Oxidation technology demonstration can proceed without being jeopardized by the imposition of BABA mandates that could have required redesign of the project and imposed costly delays on the demonstration. OC San will still need to work with USEPA officials to provide documentation on its eligibility for the waiver, but this should be a pro forma effort.

- ***Senate PFAS Legislation Remains A Work in Progress***

On November 6, we participated in an off-the-record discussion the with Senate Committee on Environment and Public Works staff. The meeting was with environmental nongovernmental organizations (e-NGO), including the Environmental Working Group, Natural Resources Defense Council and Environmental Justice. The National Association of Clean Water Agencies, Association of Metropolitan Water Agencies, WaterReuse Association and other public agency and city organizations also participated. The purpose of the meeting was to identify the need (or lack thereof) for water sector Superfund liability protection under any PFAS legislation the Senate committee might consider. The e-NGO representatives predictably opposed any liability protections for the wastewater sector. Their opposition is grounded in the belief that wastewater operators knew about PFAS in the wastewater stream. This position was strongly rejected by all water sector stakeholders. It was cogently presented that the reality is that PFAS has been in the chain of commerce since the 1950's and there were no standards or treatment approaches since PFAS were not known to be an issue by the water sector. It was also highlighted that Superfund is designed to impose liability on the polluter; the industry that produced the hazardous substance. The e-NGO stakeholders also suggested that the prospect of Superfund liability exposure is not a real threat for the water sector. They asserted that since USEPA and/or the courts would use the authority to allocate financial liability based on contribution there is no substantive reason for liability protection. This position was rejected by the water sector with examples of just the opposite outcome of substantial legal costs or clean-up liability incurred by wastewater agencies to protect their ratepayers from unknown future liabilities were provided that resonated with the committee staff.

### **Why the Senate PFAS Meeting is Important**

The meeting represented the first time that key stakeholders met collectively with the Senate committee staff to explore the need for Superfund liability protections for the wastewater and water sectors. The discussion clearly identified the wastewater sector's concerns. It also served to vividly demonstrate that the e-NGO's perspectives were inaccurate as to the legal and financial risks that the water sector and its ratepayers would incur absent protections. The meeting discussion validated the need for a policymaking resolution that would preserve the foundational principle of polluter pays under Superfund. With conclusion of the discussion, the committee staff are expected to develop a revised legislative proposal to address the issue of PFAS liability under Superfund; as well as PFAS clean-ups and treatment and destruction technology demonstrations.