



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

Congressional activities remained limited over the past month as Congress and the White House debated foreign aid and border policies. Given this focus, legislative activities of interest to OC San centered on a number of bills introduced and that are detailed in the accompanying updated legislative matrix. The Executive Branch made important decisions related to Per- and polyfluoroalkyl substances (PFAS) that OC San has tracked and advocated. The following summarizes these activities.

- ***CERCLA PFAS Designation as Hazardous Substance and Enforcement Guidance***

On April 19, U.S. Environmental Protection Agency (USEPA) finalized its rule to designate PFAS chemicals as hazardous substances under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The rule and related background information was transmitted to OC San staff earlier. As issued, the rule becomes effective sixty days after it is published in the Federal Register. Once effective, USEPA will have the authority to leverage CERCLA's liability provisions to pursue "potentially responsible" parties (PRP) to clean-up a site and pay any natural resources damages.

USEPA also issued its long-awaited policy on enforcement discretion as it implements the designation rule that would enable CERCLA enforcement. Under the policy, USEPA states it would not pursue specifically identified entities for clean-up contributions. The policy is based upon the fact that such entities did not manufacture or use PFAS, but simply received the chemicals in course of carrying out responsibilities to deliver a service. The policy identifies public wastewater agencies among others. The guidance is not binding, and the agency notes it could change subject to new information. To this point, the agency's initiative to conduct a nationwide survey of influent, effluent and biosolids' PFAS presence and concentration will likely inform the agency on any modifications.

The agency guidance clarifies two important points with the implementation of its discretionary authority. First, and most important, the agency agrees with the decision not to pursue an entity would not insulate the entity from liability assertions from a PRP not party to a settlement agreement. Second, the agency acknowledges that an entity, like a wastewater agency, might need to enter into a settlement agreement with USEPA to ensure an unquestionable shield from liability exists. The agency notes that by entering into an agreement, the agency would effectively become a PRP. This could expose an agency to liability from any group that is not part of a settlement agreement.

Impact to OC San

With regard to liability impacts, there are two perspectives. First, USEPA's guidance on enforcement discretion should eliminate concern that the agency might attempt to pursue an agency like OC San. At the same time, because the enforcement guidance is not binding, it could lead to increased disposal costs for biosolids and other residuals, for example, as disposal operations either increase the costs of disposal or reject acceptance of such materials due to prospective liability concerns.

PFAS Passive Receivers Liability Exemption

Congressional efforts to develop a legislative exemption for PFAS passive receivers continued in both the House and the Senate. This effort has become increasingly important due the designation of PFAS as a hazardous substance. In the Senate, Democrat Committee on Environment and Public Works staff continue to work on an exemption from CERCLA liability. Meanwhile, Committee Republicans continue to insist that any PFAS legislation must provide for passive receivers liability protections if the committee is to address research and technology development funding needs and other PFAS research priorities.

In the House, legislation was introduced that mirrors Senator Cynthia Lummis' (R-WY) PFAS liability protection legislation for the wastewater sector and contractors that carry out services for the sector. The bill, H.R. 7944, was introduced on a bi-partisan basis by Representatives John Curtis (R-UT) and Maria Perez Glusenkamp (D-WA). The legislation marks the first time, during this Congress, that a House PFAS liability protection bill has been introduced.

Importance to OC San

The ongoing efforts to address passive receivers liability may have increased with USEPA's decision to designate the chemical under CERCLA. For OC San, this circumstance could enhance prospects of a compromise bill in the Senate with a passive receivers provision. USEPA's acknowledgement, in its enforcement guidance, that the water sector would not be subject to enforcement might signal to both the Senate and House that passage of a passive receivers liability exemption would be consistent with the agency's interpretations of potential liability. With a House bill introduced, OC San's priority for liability protections now enjoys a vehicle to advocate on behalf of in the coming months. This is especially important should the Senate approve an exemption that would require House action.