SUPPORT PFAS LIABILITY EXEMPTION FOR THE NATION'S MOST RECYCLED CRITICAL INFRASTRUCTURE MATERIAL

Introduction to NAPA. The National Asphalt Pavement Association (NAPA) is the only trade association nationally representing over 1,000 companies associated with the production and application of over 400 million tons of asphalt pavement mixtures annually. NAPA members operate pavement mix plants in virtually every Congressional district, coast to coast, border to border. More than 94 percent of America's roadways and over 80 percent of airfields are surfaced with asphalt. Asphalt pavements remain cost-effective with an extremely low carbon footprint by recycling older end-of-life pavements, which are milled and incorporated into new asphalt pavement mixtures. Almost 100 million tons of reclaimed asphalt pavement (RAP) were reused and recycled into new asphalt roadway pavement in 2022, making asphalt pavement the most recycled material in the nation, according to the U.S. Federal Highway Administration (FHWA).

Airfield Pavement Maintenance Sensitivities to PFAS-Containing Materials. The asphalt pavement industry ***does not use, manufacture, or intentionally add PFAS to asphalt pavements.*** However, recent published studies suggest that some airfield pavements may contain or be contaminated with PFAS from aqueous film forming foam (AFFF). The Federal Aviation Administration (FAA) requires the use of AFFF during firefighting training exercises at ~5,000 commercial passenger airports and countless Air Force bases across the nation. Due to the potential for airfield pavements to contain PFAS chemistries from remnant firefighting foams, NAPA is exploring technical and policy solutions that ensure the continued use and safe recycling of airfield asphalt pavements without threat of liability.

As part of airfield pavement rehabilitation programs, asphalt pavements are typically milled, removed, and processed before recycling into new pavement. However, due to current FAA specification requirements, on-site recycling of airfield asphalt pavements is prohibited. Given the increased scrutiny on PFAS-containing materials, contractors are now assessing how to properly dispose of airfield pavement millings, which may cost over $60 million for a small but typical $2 million airfield pavement maintenance project. Such disposal costs are unsustainable for critical airfield pavement maintenance – and disposal is completely unnecessary.

Recycling Asphalt Pavements May Provide a Safe, Permanent Storage Solution for PFAS-Containing Pavements. It is well documented that some solid or hazardous waste materials incorporated into asphalt mixtures can be rendered environmentally benign due to the inert and waterproof characteristics of the asphalt binder, avoiding the need to place such waste materials into a landfill. EPA has been a proponent of beneficially reusing materials like slag metals, tire rubber, and plastic – all of which are at different stages of research to ensure they can be safely recycled into asphalt pavements. For example, in 2007, EPA finalized the Criteria for the Safe and Environmentally Protective Use of Granular Mine Tailings Known as "Chat" (72 Fed Reg 39331), determining that the lead-based mining waste 'Chat', "can be used safely when its particles are encapsulated in asphalt or concrete." Formulated correctly, asphalt pavement mixtures can likely encapsulate similar materials and render them harmless in the environment, similar to the pavement matrix itself. This was the basis for the Chat Rule, supported by a number of research endeavors identified in the rule's preamble. Similarly, FAA is currently sponsoring research to investigate the environmental impacts of recycling PFAS-containing airfield pavements. Specifically, whether PFAS remnants from firefighting foams can be encapsulated and immobilized in recycled asphalt or concrete, similar to EPA's Chat Rule determination. Such efforts that encourage recycling and discourage landfill storage, should be promoted and supported.

CERCLA's Liability Exemption for Recycled Materials Should be Applicable to PFAS-Containing Pavements
Since NAPA learned that airfield pavements might contain or be contaminated with PFAS, we fully engaged our resources and efforts to articulate industry's concerns. We have commented to regulatory agencies and submitted letters to Congress, most recently on concerns that industry contractors who maintain airfield pavements are not identified as a 'covered party' under EPA's 'enforcement discretion' for limited passive receivers of PFAS-contaminated materials. Until all such enforcement conditions are statutorily and explicitly outlined, the ongoing uncertainty will do little to alleviate liability risk across the industry.

However, the Superfund Recycling Equity Act (SREA) and subsequent 2002 EPA memo, codified at 42 USC 9627, explicitly exempt certain recycling transactions and recyclable materials from CERCLA liability, e.g., "plastic, … glass, … textiles, … rubber (other than whole tires), … metal, or spent lead-acid, … nickel-cadmium, and other spent batteries", as long as the material contains minimal amounts of polychlorinated biphenyls (PCBs). PCBs are the only CERCLA 'hazardous substance' <40 CRF 302.4> identified in the recycled materials liability exemption. Now that certain PFAS chemistries (PFOA and PFOS) are similarly identified as CERCLA 'hazardous substances', recyclable materials containing certain PFAS (PFOA and PFOS) chemistries must similarly be exempted from CERCLA liability.

At the time SREA was enacted, EPA was unaware of the potential for PFAS-containing chemicals, from firefighting foams, to be deposited on and in airfield and other pavements. We urge Congress to explore expanding SREA by including additional recyclable materials, like reclaimed concrete and asphalt pavements that may contain trace amounts of PFAS remnants. The existing statutory exemption of CERCLA liability for certain recyclable materials should also be expanded and afforded to reclaimed and recyclable pavements that may contain PFAS.

Congress Must Also Protect Unintentional or Unknowing Passive Receivers of PFAS-Containing Materials from Unnecessary Liability. Regardless of the ability to recycle PFAS-containing materials, we also encourage Congress and the Administration to provide legislative relief in the form of a PFAS liability shield or exemption, for entities that unknowingly, unintentionally, or passively handle or receive PFAS-containing materials. Because it is impractical to generally analyze raw materials for PFAS content – test results take weeks – and both EPA methodology and sampling protocols for many materials are still being developed, it is unrealistic to think that entities receiving raw material streams will know, suspect, or distinguish PFAS-containing, from PFAS-free materials. Congress must provide a broad liability shield to ensure critical infrastructure pavements can continue to be deployed.

PFAS-Containing Recycled Materials, Like Reclaimed Pavements, Should Also be Exempt from CERCLA Liability, Similar to Other Recyclable Materials, and/or Afforded Passive Receiver Exemption.

NAPA looks forward to working with Congress to ensure airfield pavements, containing PFAS from firefighting foams, are repurposed environmentally responsibly and that liability relief is provided for passive receivers or recyclers of such materials. We also encourage Congress to fund additional pavement research to ensure that recycling and beneficially reusing PFAS-containing airfield pavements are protective and harmless to the environment. We look forward to incorporating such provisions in the 119th Congress and including them in the next potential surface transportation reauthorization.

NAPA Contacts: For more information, please contact NAPA's Vice President of Government Affairs, Nile Elam, or Vice President of EH&S, Howard Marks regarding these critical issues and NAPA presence in your communities.