T&I Stakeholder Portal Submission

ENCOURAGE THE BENEFICIAL REUSE AND RECYCLING OF RECLAIMED MATERIALS INTO RECYCLED CRITICAL INFRASTRUCTURE PAVEMENTS – EXPAND EXISTING CERCLA RECYCLABLE MATERIALS EXEMPTIONS TO INCLUDE PFAS-CONTAINING RECYCLED PAVEMENTS

The above trade organizations encompass and represent our nation's roadway pavement and infrastructure material suppliers. Our unified voice is consistent – ensure critical construction materials suppliers are not held liable for passively receiving recycled materials potentially containing PFAS. Our legislative requests and recommendations for the surface transportation reauthorization are straightforward:

- *Expand the Existing CERCLA Recyclable Materials Exemption to Include PFAS-Containing Recycled Pavements.*
- *Provide a passive receiver liability exemption for entities that unknowingly, unintentionally, or passively handle or receive PFAS-containing pavement materials.*

BOTTOM LINE. Expand the existing CERCLA Recyclable Materials Exemption to include PFAS-containing recycled pavements. Specifically, amend 42 USC 9627 as follows:

Beneficial Reuse and Recycling of Reclaimed Pavement Materials. – Section 127 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC 9627) is amended –

1) In subsection (b), immediately following "scrap textiles" by inserting "reclaimed and reprocessed road. highway and other surface pavement materials"
2) In subsection (b) (2), immediately following "polychlorinated biphenyls" by inserting "or per- and polyfluoroalkyl substances"
3) In subsection (c), immediately following "textiles" in the title, by inserting "reclaimed and reprocessed pavements", and immediately following "scrap textiles" by inserting "reclaimed and reprocessed road. highway and other surface pavement materials"

Note: Amending various environmental statutes through Surface Transportation Reauthorization legislation is not new. For example, Title IV (Sec 70402 (c) Federal Procurement) of the Infrastructure Investment and Jobs Act amended Sec 6002 of the Solid Waste Disposal Act to provide additional clarification on recycling practices.

Revising the CERCLA Recyclable Materials Exemption to include PFAS-containing recycled pavements is the proper statutory vehicle, consistent with the Act's purposes below:

> Superfund Recycling Equity Act | (Pub. L. 106–113, div. B, § 1000(a)(9) [title VI, § 6001(a)], Nov. 29, 1999, 113 Stat. 1536, 1501A–598):
>
> > The purposes of this section [enacting this section] are—
> >
> > (1) to promote the reuse and recycling of … in furtherance of the goals of waste minimization and natural resource conservation while protecting human health and the environment;
> >
> > (2) to create greater equity in the statutory treatment of recycled versus virgin materials; and
> >
> > (3) to remove the disincentives and impediments to recycling created as an unintended consequence of the 1980 Superfund liability provisions.

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 – saving State DOT agencies over $3 billion in road construction costs (annually) – and making asphalt pavement the most recycled material in the nation, according to the Federal Highway Administration (FHWA).

Introduction ACPA

Founded in 1963, The American Concrete Pavement Association (ACPA) is the world's largest trade association that exclusively represents the interests of those involved with the design, construction, and preservation of concrete pavements. Concrete Roads, Highways, Bridges, and Industrial Site pavements create a durable pavement system that can last more than 50 years. Most heavy-duty major hub airfield pavements and many interstate highways with significant heavy truck traffic are surfaced with concrete pavements. By nature, concrete pavements are strong and recover quickly from disasters such that these roads and airfields help deliver critical supplies to those in need without needing to wait for repairs. Concrete is produced locally across the United States, and concrete paving contractors hire local labor to build critical infrastructure, supporting local communities, which is great for the economy. Concrete is fully recyclable, and more than 140 million tons of concrete are recycled and reused every year.

Introduction to NRMCA

Founded in 1930, the National Ready Mixed Concrete Association (NRMCA) is the leading industry advocate. Our mission is to create opportunities for our members and the industry to prosper through leadership in safety, environmental & operational excellence, promotion, advocacy, workforce development, and concrete technology advancements.

NRMCA works in partnership with state associations on issues such as promotion and regulatory concerns and extend what they can do to the national level. Our commitment to our members is second to none and we strive for constant communication on the latest information, products, services and programs to help our members expand their markets, improve their operations and amplify their voice in Washington.

Background. In May of 2024, U.S. EPA finalized its rule designating certain per- and polyfluoroalkyl substances (PFAS) as CERCLA (Superfund) hazardous substances. While the asphalt and other roadway pavement industries do not use, manufacture, nor intentionally add PFAS into pavements, we are increasingly aware that pavements may contain or be contaminated with PFAS from firefighting foams, especially at airfields or on roadways where firefighting foams are used to extinguish vehicular and tanker truck fires. Compounded by atmospheric source deposition, we also know that pavements may contain PFAS from vehicle wear particles like brake pads, tires, plastics, and interior fabrics. PFAS is ubiquitous and can be found virtually everywhere - but despite its pervasiveness, the pavement construction industry does not depend upon, nor deliberately facilitate, PFAS in its manufacturing processes. Unfortunately, EPA's rule assigns joint and several liability to any entity that transports or stores PFAS-containing materials, even if unknowingly, unintentionally, or simply passively receiving such material during normal commerce.

Because recycling pavements is an integral part of the road construction industry and keeps pavement material costs low, we are concerned about the impact these regulations could and currently have on roadway maintenance and construction projects that remove, recycle, or reuse existing pavement materials. For example, a typical pavement maintenance project - normally costing approximately $2 million - may now cost in excess of $60 million due to disposal requirements. This type of material cost escalation, for disposal of PFAS-containing pavements, is untenable and unsustainable for critical roadway pavement maintenance, and is completely unnecessary.

Existing Exemptions for Beneficial Reuse in Pavements. The ability of pavements to encapsulate otherwise deleterious materials and render them safe for the environment has been studied for decades. For example, after requisite leachate studies were conducted, EPA now allows the beneficial reuse of (Chat) lead mine tailings in pavements, even though lead concentrations were as high as mid thousands of ppm. The beneficial reuse of otherwise deleterious or discarded materials is not new. In fact, recognizing one prominent barrier to safe

reuse of such materials, EPA, through the Superfund Recycling Equity Act (SREA) and subsequent 2002 EPA memo (codified at 42 USC 9627), **explicitly exempts 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> currently identified in the recycled materials liability exemption.

Pavement Maintenance Sensitivities to PFAS-Containing Materials. The pavement industry ***does not use, manufacture, or intentionally add per- and polyfluoroalkyl substances (PFAS) to asphalt pavements.*** However, recent published studies suggest that some airfield pavements may be contaminated with PFAS from aqueous film forming foam (AFFF) since 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. Similarly, it is likely that PFAS remnants may remain on typical roadway pavements from firefighting foam and other vehicle-wear particles. Our immediate concern is future environmental liability associated with the reuse and recycling of such PFAS-containing pavements.

For example, as part of highway or airfield pavement rehabilitation programs, pavements are typically milled, crushed, removed, and/or processed before recycling into new pavement. Unfortunately, due to current FAA specification requirements, use or introduction of such recycled or reclaimed materials for airfield 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 and roadway pavement maintenance – and disposal is completely unnecessary.

Recycling Pavements May Provide a Safe, Permanent Storage Solution for PFAS-Containing Pavements. It is well documented that some discarded, solid or hazardous waste materials incorporated into pavement mixtures can be rendered environmentally benign due to the inert and waterproof characteristics of the binders encapsulating the pavement matrix, avoiding the need to place such waste materials into a landfill. EPA has been a proponent of beneficially reusing materials like certain ashes, slag metals, tire rubber, and plastics – all of which are at different stages of research to ensure they can be safely recycled into pavements. And identified above, EPA's Chat Rule recognizes that the lead-based mining waste 'Chat', "can be used safely when its particles are encapsulated in asphalt or concrete." Formulated correctly, pavement mixtures can likely encapsulate other deleterious 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 pavement. Based on experience with other

byproduct-derived aggregates, there is a general expectation that pavement remnants exposed to historic use of firefighting foams can be encapsulation and largely immobilized in recycled pavement. FAA-sponsored research is underway at the University of Florida to validate this is the case

CERCLA's Liability Exemption for Recycled Materials Should be Applicable to PFAS-Containing Pavements. Since NAPA learned that airfield and even roadway pavements might contain 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.

At the time SREA (discussed above) was enacted, EPA was unaware of the potential for PFAS-containing chemicals, from firefighting foams, to be deposited on and in airfield and roadway pavements. However, we know CERCLA explicitly exempts certain recycling transactions and PCB-containing recyclable materials from CERCLA liability. At the time SREA was enacted, PCBs were the only CERCLA 'hazardous substance' identified in the recycled materials liability exemption. However, given EPA's recent (and current) designation of PFAS as CERCLA 'hazardous substances', **the existing CERCLA liability exemption for the recycling of PFAS-containing pavements, should similarly be allowed**, consistent with that already afforded to PCB-containing recycled material.

We urge Congress to explore expanding SREA by including additional recyclable materials, like reclaimed pavements that may contain trace amounts of PFAS, consistent with existing and codified examples. All such efforts that encourage recycling and discourage (hazardous) landfill storage, should be promoted and supported.

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.

The Recycling of 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.

Our legislative requests and recommendations are to: 1) amend the current existing CERCLA Recyclable Materials Exemption to include PFAS-containing recycled *pavements, and 2) provide a passive receiver liability exemption for entities that unknowingly, unintentionally, or passively handle or receive PFAS-containing materials*.

NAPA, ACPA, and NRMCA look forward to working with Congress to ensure pavements, containing PFAS from firefighting foams or other depositions, are repurposed environmentally responsibly. Such reclaimed pavement materials must be exempt from CERCLA liability, similar to other recyclable materials; and recyclers of such materials should also be afforded passive receiver liability exemption.

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.

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