

Superfund Tax Would Boost Cleanups At Polluted Sites

By Juan Carlos Rodriguez

Law360 (September 22, 2021, 7:00 PM EDT) -- Underfunded cleanups at Superfund sites that have sat neglected for years would get a major shot in the arm from a congressional plan to revive a decades-dormant tax on chemicals and possibly on crude oil.

The U.S. Environmental Protection Agency's resources to clean up pollution under the Comprehensive Environmental Response, Compensation and Liability Act, also known as the Superfund law, have failed to match its needs. When the law was passed in 1980, a trust fund for cleanups was funded partly by taxes on chemicals and crude oil, but lawmakers let the authority for that tax lapse in 1995.

The Senate's bipartisan infrastructure bill, which passed Aug. 10, contains a provision that would bring back an excise tax on a host of chemicals, including benzene, arsenic and mercury. When it expired in 1995, the tax also covered crude oil, and House Democrats say they want to reinstate that part as well, as part of the separate, ongoing budget reconciliation process.

The bipartisan support for the chemicals tax shows that lawmakers recognize companies stand to gain significantly from the infrastructure package and that the time is right to ask them to pay again for Superfund cleanups, said Duke McCall, a partner at Morgan Lewis & Bockius LLP.

McCall noted that U.S. Sen. Bill Cassidy, D-La., whose state is home to a huge petrochemical industry, publicly supported the chemicals tax component of the infrastructure bill.

"Senator Cassidy has been quoted as saying that the infrastructure legislation is going to be a boon to the chemical industry, that they are going to make more than enough money off of the legislation to offset the tax," McCall said. "So he sees it as a net benefit to his constituencies."

The proposal doesn't have universal support, with powerful trade groups, the American Chemistry Council and American Petroleum Institute, opposing the taxes.

API spokesperson Scott Laueremann said the group recognizes the "critical importance" of site restoration projects, but believes the existing funding mechanisms "appropriately ensure responsible parties pay for cleaning up the sites for which they are responsible."

"Reinstating Superfund taxes would not guarantee a cleaner environment, but would shift the burden of cleaning up these sites away from those directly responsible," Laueremann said.

And the ACC has said the taxes will simply be passed on to consumers in the form of higher prices.

But Brian Ferrasci-O'Malley, an associate at Nossaman LLP, said there is also a recognition among lawmakers that they must find ways to fund their priorities.

"There's a lot of funding going out in this bill, and this is pretty palatable for Democrats and Republicans who say, 'How are we going to pay for some of this?'" he said. "You have a program that existed for a while, and has been in the shadows ... and there are definitely some members of Congress who have been working for years and years to reinstate this."

One of them is U.S. Rep. Earl Blumenauer, D-Ore., who pushed to revive the crude oil tax as part of Congress' budget reconciliation. While the chemicals tax made it into the infrastructure bill and therefore had some Republican support, the crude oil provision will need only Democrats to support it since the reconciliation bill can't be filibustered and needs only a simple majority to pass.

When Blumenauer announced his legislation in April, he called it a "polluter pays" tax, meaning that industries that manufacture or import the specified chemicals and oil products should help pay for the cleanup of contaminated sites nationwide.

But Steven Jawetz, a principal at Beveridge & Diamond PC, said that to the extent any individual chemical company or producer has sent hazardous substances or waste materials to any site, it could already be paying for cleanups.

"A lot of this money is going to be spent on sites where nobody is connected," Jawetz said. "So to call it a 'polluter pays' tax is really inappropriate because the entities paying the tax have no connection to the sites where a lot of the money will be spent."

Every year, the EPA picks new Superfund cleanup projects based on which sites pose the greatest risk to human health and the environment. But the agency can't fund everything it wants to and instead prioritizes projects based on several factors, including whether a cleanup has already been started in some fashion.

"Unfunded construction projects result when a potentially responsible party is not found or cannot pay, and no other funding sources, including appropriated funds, are available," the agency says on its website.

If the Superfund tax passes in Congress, that won't be the only funding going to cleanups. The House has already approved \$1.5 billion in appropriations for the Superfund program in its 2022 fiscal year budget.

McCall of Morgan Lewis said the Superfund program in general is likely to see more activity, not just at the so-called orphan sites where there is no private entity that can be pursued for cleanup funding.

"If EPA has more funding, it very well could result in more activity with respect to nonorphan sites," he said. "I think it's likely to have a broader effect on the overall level of activity and spending within the grant program writ large."

The EPA told Law360 that since 2000, with the exception of three years, the EPA's Superfund appropriation has not supported the initiation of all Superfund site construction projects ready to begin work.

"In fiscal year 2020, EPA was unable to fund new construction projects at 38 National Priorities List sites that would have otherwise been ready for construction," EPA spokesperson Tim Carroll said in a statement.

He said any additional money for the Superfund program would be used to eliminate the backlog of remedial projects awaiting funding; accelerate or complete work at ongoing cleanup projects; begin cleanup of additional Superfund projects that are currently in various phases of preconstruction and planning; and ensure those most directly affected by contamination are involved in the cleanup process.

Both the Senate and House legislation would impose the taxes until the end of 2031, and under the Senate language, more chemical manufacturers and importers could be affected than when the tax was in effect during the 1980s and 1990s.

"The bill expands the reach of the chemical excise tax by applying it to any imported substance in which the taxable chemicals constitute more than 20% of the weight or more than 20% of the value of the imported substance," said Jawetz of Beveridge & Diamond. "The original tax had a 50% threshold, so by dropping the threshold, they increase the scope of the tax — the number of imported products on which it will apply."

Despite the pushback from some companies that would face taxes under the proposal, attorneys say it's a logical way to achieve more remediation at polluted sites.

Because so many of the sites in the country are contaminated with pollution that dates back decades or even a century or more, Nossaman's Ferrasci-O'Malley said, reviving the Superfund taxes make sense.

"From a public policy perspective, it makes more sense to share that broadly, as opposed to having a small site with five parties where two parties are insolvent," he said. "It's not fair, in my mind, to make the other three parties bear the brunt of that cleanup cost that could be spread out much more."

--Editing by Jill Coffey.