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New Clean Water Initiatives Welcome but Highlight Need for More Oversight and Enforcement

August is National Water Quality Month, and efforts to clean and protect water resources have never been more important. The U.S. Environmental Protection Agency (EPA) recently announced new initiatives to reduce water pollution and modernize existing clean water programs. In addition, the agency expects to propose improved drinking water standards within the year, according to the latest [Unified Regulatory Agenda](#). Still, EPA has yet to address a number of serious health and safety risks related to water quality.

Recent Actions and New Tools for Clean Water

The EPA announced several promising initiatives and regulatory improvements this summer. At the end of July, the agency proposed a [rule](#) that would modernize Clean Water Act (CWA) reporting by requiring companies to electronically provide information on the pollutants they discharge. This will provide agencies and the public with more timely, complete, and accurate information about potential

sources of water pollution. Currently, facilities must obtain permits under the National Pollutant Discharge Elimination System (NPDES) and submit paper reports to regulatory authorities who then manually enter the information.

EPA assistant administrator Cynthia Giles [said](#), "The e-reporting rule will substantially expand transparency by making it easier for everyone to quickly access critical data on pollution that may be affecting communities." When fully implemented, the rule is expected to save states approximately \$29 million annually. The agency will accept public comments on the proposed rule until Oct. 28. (Click [here](#) to view the rulemaking information on regulations.gov and submit comments to EPA.)

As part of President Obama's Climate Action Plan, EPA also released a new application to help manage stormwater runoff pollution. Stormwater, contaminated with sewage, trash, and hazardous chemicals, flows into the water supply and can make it unsafe for use. The [National Stormwater Calculator](#) estimates the annual amount of rainwater and frequency of runoff from any location in the U.S. Intended for use by anyone interested in reducing runoff from a property, the calculator estimates the annual amount of stormwater runoff from a selected area and shows users how specific green infrastructure practices, including rain gardens, green roofs, and street planters, can help reduce pollution.

While this individual citizen engagement is useful, environmental groups are urging the EPA to take stronger action to prevent runoff pollution. Last month, the Natural Resources Defense Council (NRDC) [filed petitions](#) with three EPA regional offices, asking the agency to require stormwater management for commercial, industrial, and institutional sites in areas impaired by copper, lead, phosphorus, nitrogen, and other pollutants. Groups were frustrated that EPA [failed](#) to issue proposed regulatory requirements for stormwater runoff in June as promised.

More Water Safety Standards on the Way

The EPA's latest agenda indicates it will propose new drinking water regulations by the end of 2013. In 2011, the EPA [determined](#) that perchlorate – a chemical often found in rocket fuel, fireworks, and fertilizers that may disrupt the thyroid's ability to produce hormones critical to fetuses and infants – presents a public health threat and announced it would develop a first-ever national standard under the Safe Drinking Water Act (SDWA). The announcement reversed a Bush administration decision and was [praised](#) by the public health and environmental communities. By statute, EPA was supposed to have issued a proposed rule in February, but it now projects that won't happen until December.

The EPA is also set to issue a proposed rule that will clarify which water bodies are protected under the Clean Water Act (CWA). The CWA covers "waters of the United States," but an ambiguous U.S. Supreme Court decision and guidance issued by the Bush administration have created uncertainty about the agency's regulatory jurisdiction over wetlands, ponds, and streams. This has [hindered](#) EPA's ability to enforce the CWA. An EPA guidance document intended to clarify the scope of waters protected under the CWA has been under review at the White House Office of Information and Regulatory Affairs (OIRA) for over a year. Although the regulatory agenda suggests a rulemaking is planned, EPA has not issued a timeline for the proposal.

These new water quality protections are certainly welcome, but they also highlight the need for more oversight and enforcement of existing laws. Agencies like the EPA need to be nimble and responsive to emerging hazards, including potential water contamination from fracking, increased urban and suburban runoff, and more, and they should not be stymied by unreasonable delay during the rule review process. We've made significant progress cleaning up the nation's waters since the Clean Water Act was signed in 1972, and we must continue to build on that success to protect the health of all Americans.

Court Orders California to Limit 'Erin Brockovich' Chemical in Drinking Water by End of August

On July 18, a California court [ordered](#) the state's Department of Public Health to propose a standard on the maximum level of hexavalent chromium (also called chromium-6) permitted in drinking water by the end of August. The court order stems from a lawsuit filed in August 2012 by the Natural Resources Defense Council (NRDC) and Environmental Working Group (EWG) against the California Department of Public Health for failing to adopt a standard by Jan. 1, 2004, as required by state law. The department is now nine years past due in developing a standard and is still in the early stages of rulemaking, yet California will be the first state to set a drinking water standard for hexavalent chromium and will have one before the federal government.

What is Hexavalent Chromium?

[Hexavalent chromium](#) is an odorless and tasteless heavy metal predominantly used in industrial processes, such as making chrome plating, developing dyes and pigments, treating wood, and producing steel and other alloys. It is a [known human carcinogen](#) and can cause severe health problems when it is inhaled, ingested, or if it touches the skin. Moreover, improper disposal of products containing chromium, waste from industry, and coal ash from electric utilities, either directly onto the ground or into nearby lakes and streams, has caused drinking water contamination.

Chromium-6 is perhaps best known as the [Erin Brockovich](#) chemical. The film depicted the struggles of residents in Hinkley, CA, who sued Pacific Gas & Electric for contaminating the town's drinking water with hexavalent chromium and making many residents ill. PG&E had allowed the contaminated water to drain into unlined ponds, which then leached into the town's water aquifer. Although the class-action suit against PG&E was settled in 1993, the residents of Hinkley and nearby towns are [still fighting](#) to force PG&E to clean up the contamination.

The U.S. Environmental Protection Agency (EPA) set a drinking water standard for chromium in 1977, which California adopted, but there is no separate national or state standard for hexavalent chromium. The existing standard was established to address the non-cancer effects of both trivalent and hexavalent chromium, although hexavalent chromium is much more toxic than the trivalent form.

Since then, EPA has relaxed the standard to allow for more chromium in drinking water, but California has kept the more stringent standard. According to the [World Health Organization's Guidelines for Drinking-water Quality](#), "Because the health effects are determined largely by the oxidation state,

different guidelines for chromium(III) and chromium(VI) should be derived." A separate standard could address the health risks, including cancer, associated specifically with exposure to the hexavalent form of chromium.

In 2001, in response to heightened public concern about the health risks of ingesting hexavalent chromium, California enacted a law requiring the Department of Public Health to adopt a maximum contaminant level for hexavalent chromium in drinking water no later than Jan. 1, 2004.

Nine-Year Delay in Violation of State Law

Under California law, as a prerequisite for proposing a new drinking water standard, the Office of Environmental Health Hazard Assessment (OEHHA) must first set a public health goal identifying a level at which there is no significant health risk to humans. In July 2011 – seven years after the statutory deadline – the office set the goal for hexavalent chromium at 0.02 micrograms per liter ($\mu\text{g}/\text{l}$). This left the Department of Public Health with the responsibility to set an acceptable level for hexavalent chromium. When it had failed to do so by August 2012, NRDC and EWG filed suit asking the court to order the [department](#) to adopt a standard. The two environmental groups [argued](#) that the department's lengthy and unjustified delay in setting the standard puts the health of millions of Californians at risk.

In February 2013, the department submitted a proposed standard to the Secretary of Health and Human Services for review. Although this stage, along with a public hearing and a 45-day public comment period, was supposed to be completed by July 2013, the department missed the deadline.

The court agreed with NRDC and EWG that these delays were unreasonable and ordered the department to publish the proposed standard for public comment by the end of August and to hold the public hearing before Oct. 28. The court noted that "the Department has taken two years to publish its *proposed* Standard – an amount of time equivalent to the Legislature's total allotted time for both the Office and the Department collectively to complete all required work to publish the PHG, the proposed Standard, and the final Standard."

But No Final Deadline Set

However, before the rule can become final, the department must send it to the state Office of Administrative Law for a second review. The office has 30 days to decide whether to adopt or reject the standard. If the department does not finalize the standard within one year of publishing the notice of the proposed rule, it must restart the entire process. Since it has already taken the department nine years to publish a proposed rule, NRDC and EWG asked the court to set a deadline for finalizing the standard of 115 days from the date of the court order.

The court declined to do so, writing that that "it lacks sufficient information to set, without undue speculation, an appropriate deadline." While it said one year is the "maximum time the APA allows an agency in routine circumstances to finalize a regulation before its Notice of Proposed Action becomes ineffective...", the court also implied that a full year may be too long to finalize the standard.

Conclusion

The court order was released just days before the start of [National Water Quality Month](#). This underscores the fact that although water quality has greatly improved in the decades since Congress enacted the Clean Water Act and Safe Drinking Water Act, more work remains. One step would be for the EPA to issue a national drinking water standard for hexavalent chromium.

Until EPA does put a national standard in place, states will be left with the task of protecting Americans from unnecessary exposure to hexavalent chromium in drinking water. As it often is, California is on track to be the leader on this public health issue. We hope it starts a trend.

Fixing Chemical Security after West, Texas

In the aftermath of the West Fertilizer explosion in April, Congress and the Obama administration are looking for ways they can better address chemical plant security and safety. A congressional [hearing](#) on Aug. 1 focused on how the Department of Homeland Security's (DHS) chemical security program missed problems at the West Fertilizer plant. On the same day, President Obama issued a new executive order instructing federal agencies to form a working group to identify and fix any regulatory or informational loopholes.

West Fertilizer Disaster

A fire broke out at the fertilizer plant in the early evening of April 17, and first responders quickly arrived. As firefighters battled the blaze, an explosion powerful enough to be felt 50 miles away and measured at the equivalent of a 2.1-magnitude earthquake tore through the plant. The explosion demolished up to 80 homes in West, TX, and damaged other buildings nearby, including an apartment complex, a middle school, and a nursing home. The 133 nursing home residents, many of whom had been injured, were evacuated and taken to hospitals.

House Hearing

On Aug. 1, the House Committee on Homeland Security's Subcommittee on Cyber Security, Infrastructure Protection, and Security Technologies [held a hearing](#) on the threat of unidentified chemical facilities in light of the West, TX, tragedy. The hearing focused on lax oversight, in particular the DHS's Chemical Facility Anti-Terrorism Standards (CFATS) program's lack of knowledge about the facility and other outlier facilities. "There are literally thousands of facilities across the country that store or handle threshold quantities of high risk chemicals that have gone under the radar of the DHS," Subcommittee Chairman Patrick Meehan (R-PA) said in his opening statement.

Although the West Fertilizer explosion is not considered an act of terrorism, Meehan argued that had the CFATS program known about the facility, more interagency collaboration might have prevented the tragic accident. Ranking Member Yvette D. Clarke (D-NY) further questioned how DHS accessed chemical information that is routinely gathered by other agencies and explained that data sharing should be an established norm: "This is a basic, 101 DHS mission, which is to coordinate and

collaborate with other agencies to keep the homeland secure... We're constantly talking about information sharing and if we're not doing this it's really flying in the face of the mission of this agency."

Sean Moulton, Director of Open Government for the Center for Effective Government, was one of those invited to [testify](#). During his testimony, Moulton stressed four main points:

- First, the incident at West Fertilizer revealed disturbing loopholes in the regulatory system and a fundamental problem with the way we manage chemical security and safety information. The CFATS program was unaware of the facility or its storage of ammonium nitrate. The U.S. Environmental Protection Agency (EPA) knew about the facility but not the ammonium nitrate. State emergency officials knew about the facility and its ammonium nitrate, but they didn't know the facility was missing from CFATS. The excessive secrecy and information restrictions at these agencies contribute to gaps, oversights, and inefficiencies in chemical security efforts, including the CFATS program specifically.
- Second, better collaboration among federal agencies and state authorities is needed to address these gaps. The most effective way for agencies to share information is to narrow the amount of protected information – and make the rest public in open data formats. If a list of CFATS facilities was public, perhaps an official in Texas or a plant employee would have noticed that West Fertilizer was not on that list.
- Third, engaging and informing the public is essential to protecting communities from chemical facility risks. Citizens, first responders, plant workers, and local officials all need to be better informed to prepare for chemical emergencies. The flip-side of the coin is that excessive secrecy can cost lives in a chemical emergency, and the tragedy at West Fertilizer may be an example of this. The West firefighters, apparently unaware of the ammonium nitrate, may not have been able to properly judge the situation and adopt the recommended tactics for ammonium nitrate fires – evacuation and containing the fire from a distance.
- Finally, increased transparency for CFATS can improve its effectiveness and accountability. When programs operate behind closed doors with little public oversight, they often suffer from delays, wasted resources, and management problems. The DHS Inspector General and the Government Accountability Office recently found delays and significant management problems in the CFATS program. We need transparency to know if reform efforts are working.

Meehan requested that DHS follow up with him regarding timelines and metrics on efforts to engage with other agencies, since similar, previous efforts had failed.

Executive Order

While the congressional hearing was underway, the White House issued an executive order on Improving Chemical Facility Safety and Security, which addresses many of the issues raised at the hearing. The order forms a Chemical Facility Safety and Security Working Group, led by three agencies

– DHS, EPA, and the Department of Labor. The new working group is charged with several specific tasks along three main goals.

Improving Coordination with State, Local, and Tribal Partners

- Within 90 days, assess the possibility of sharing CFATS data and other information on explosive materials with state and local emergency officials.
- Within 135 days, develop a plan to improve coordination with state, local, and tribal officials – including opportunities to improve public access to information.

Enhanced Federal Coordination

- Within 45 days, deploy a pilot project to test best practices for interagency collaboration around chemical facility safety and security.
- Within 270 days, create standard procedures for unified federal action concerning chemical facilities, including inspections, enforcement, reporting, and use of information.
- Within 90 days, develop an analysis of information collection and sharing between agencies along with recommendations for improvements.
- Within 180 days, propose a coordinated data sharing process to track chemical facility information submitted to agencies.

Modernizing Policy, Regulation, and Standards

- Within 90 days, develop a list of potential regulatory and legislative proposals to improve the safety and security of ammonium nitrate.
- Within 90 days, identify options to improve existing programs for chemical facility safety and security.
- Within 180 days, engage stakeholders to discuss options for improved safety and security.
- Within 270 days, develop a plan to implement improvements to chemical risk management.

Conclusion

The increased congressional oversight and executive action are important steps in the right direction to address regulatory loopholes and information gaps that some chemical facilities seem to fall into. As the deadlines for deliverables from the new working group come due, it will become clearer how much progress is being made on the problems.

However, it is also critical that citizens increase their [awareness of the facilities near their communities](#) and the risks associated with those facilities. Citizen engagement with local officials, first responders, and facility representatives is a critical component of emergency planning that can sometimes result in ways to reduce risks and better protect communities.

Means-Testing Would Undermine the Medicare Program

President Obama has proposed increasing "[means-testing](#)" within the Medicare program as a way to reduce the federal budget deficit; in other words, higher-income seniors would pay more for their health care under the program. This is one of the worst [ways to achieve savings](#) through cuts to Medicare and could impose significant costs on middle-income seniors, reduce health care coverage, and undermine political support for [the effective program](#).

What's Wrong with Asking Higher-Income Seniors to Pay More?

There are two ways this approach could impact seniors. Both would reduce Medicare's public funding. First, eligibility requirements could be changed so that fewer seniors are eligible to participate, making the program more like Medicaid. Second, a larger proportion of seniors could be asked to pay even more for their health care services than they do now. In either case, means-testing Medicare would be damaging for at least two reasons:

- ***It would undermine political support for Medicare:*** When Medicare was signed into law in [1965](#), costs and benefits were kept equal for all seniors, regardless of their income levels or assets. Signing the bill, [President Lyndon Johnson](#) said, "Charity is indignity when you have to have it." Johnson believed that a universal program that benefited all Americans would be more politically sustainable than one that was seen as a welfare program for the poor. Programs that provide equal benefits to citizens regardless of income are more likely to retain much broader popular support over time than means-tested programs.
- ***It could produce gaps in health care coverage and increase per-capita costs:*** If program participants are required to pay a larger proportion of the costs of Medicare, some middle-income participants could be forced to drop medical or prescription drug coverage. As participation declines, the per-capita costs for those who remain in the Medicare program may increase, particularly if those who opt out are [younger and healthier](#) than those who stay in the program.

President Obama's Proposals

Medicare is divided into four parts: Part A covers hospital insurance, Part B covers medical insurance for doctors, Part C is a market plan referred to as Medicare Advantage, and Part D covers prescription drugs.

Parts A, B, and D already have modest means-testing, but this is a recent development. Medicare premiums were not tied to income until [2007](#). Currently, Medicare Part B participants who can afford it are asked to pay a modestly higher monthly premium, but this affects [less than five percent](#) of participants, generally the wealthiest retirees. In [2010](#), income-related premiums were extended to prescription drug coverage under Medicare Part D.

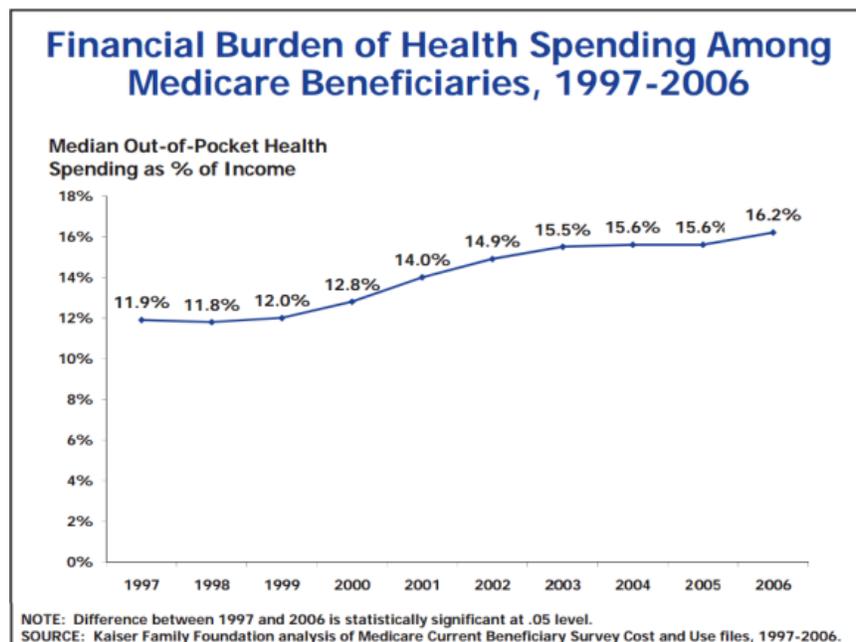
In his latest budget request, President Obama proposed extending means-testing within Medicare significantly. Specifically, he recommended:

- Asking [25 percent of Medicare beneficiaries](#) to pay higher Part B deductibles (up from just five percent today);
- Introducing a [higher deductible](#) for prescription drugs (Part D of the program) starting in 2017, leaving seniors to pay more for drugs out of pocket before reimbursements kick in;
- Introducing co-payments for [home health care](#), which could discourage seniors from requesting needed medical attention or force them to inefficiently over-utilize hospital care; and
- Penalizing seniors for using [supplementary \(Medigap\) insurance policies](#), which help beneficiaries afford co-payments, deductibles, and other out-of-pocket costs.

Supporters argue that increasing means-testing within Medicare is a necessary evil, but the president's proposal would affect [working-class seniors](#) as well as the affluent. Seniors with incomes as low as [\\$40,000](#) (in today's dollars) would be forced to pay extra premiums.

During their working years, higher-income beneficiaries paid higher payroll taxes. Increasing the taxes they pay once they are retired – and reliant on a fixed income – is unfair and punishes Americans who saved responsibly for their retirement. For this reason, [Paul Krugman](#) has called means-testing of Medicare "a badly designed, unfair form of taxation."

Adding additional costs through means-testing would exacerbate a disturbing trend. As the chart below shows, out-of-pocket health costs for seniors as a percentage of income increased by over a third between 1997 and 2006.



Source: [Kaiser Family Foundation](#)

Further burdening Medicare beneficiaries will make it more difficult for seniors, even affluent seniors, to afford health care. And by increasing the cost of health insurance, seniors may be discouraged from seeking needed treatment early, leading to more serious and costly health interventions later on.

"The problem is that with seniors already using [20 to 40 percent](#) of their income on health care and you're just going to pile on these additional costs, you know they're going to have to be choosing and picking between what they can afford to buy and what they can't," explained [Dan Adcock](#) of the National Committee to Preserve Social Security and Medicare.

In some cases, wealthier beneficiaries may decide that income-based premiums for medical care (Part B) and prescriptions (Part D) within Medicare [outweigh the program's benefits](#) completely. Beneficiaries with the ability to rely on private insurance programs may drop parts of their Medicare coverage, and beneficiaries without alternative insurance options may forgo coverage, risking paying for physician visits and prescriptions [without insurance](#).

The Proposed Changes Garner Only Modest Savings

Altogether, the president's proposals for mean-testing within Medicare would reduce the federal deficit by approximately [\\$50 billion](#) over 10 years. This represents [less than 12 percent](#) of the approximately [\\$400 billion](#) in Medicare, Medicaid, and other health care savings the president has proposed over the next decade.

Other proposals put forward by the president do not increase the burden on seniors and provide more savings. These include:

- Lowering subsidies for pharmaceutical companies within Medicare Part D for low-income seniors ([\\$123 billion](#) over 10 years);
- Adjusting payments for certain health care providers ([\\$50 billion](#) over 10 years); and
- Scaling down Medicare's commitments to reimburse hospitals for bad debt ([\\$25 billion](#) over 10 years).

Together, these three proposals would save almost four times more than means-testing. Pharmaceutical companies, health care providers, and hospitals are more able to make adjustments to these changes than middle-income seniors.

As Lyndon Johnson noted, Medicare was passed to ensure that illness during old age in America would not reduce elderly Americans to paupers and undermine their dignity. Most of America's elderly live on fixed incomes. Forcing middle-class seniors to pay more for health care could leave more of them struggling to make ends meet at the end of their lives. It is a sad commentary on the state of our politics that this way of reducing the deficit is viewed as more "realistic" than imposing a Wall Street sales tax, returning inheritance tax rates to those of earlier eras, or taxing overseas profits.



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