

PFAS UPDATE: PROPOSED NEW LEGISLATION INTENDED TO EXEMPT CERTAIN INDUSTRIES FROM PFAS LIABILITY

May 22, 2023

On May 3, 2023, Cynthia Lummis (R-WY) introduced five bills in the U.S. Senate proposing several PFAS liability exemptions to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”). Specifically, the bills (“Proposed Legislation”) propose exemptions for the following industries:

1. Agricultural operations;
2. Airports;
3. Entities that use fire-suppression systems which dispense an aqueous film forming foam (“AFFF”);
4. Solid waste facilities; and
5. Public and private drinking water systems and water treatment systems.

These bills were submitted in response to EPA’s recent proposed rule to designate perfluorooctanoic acid (“PFOA”) and perfluorooctanesulfonic acid (“PFOS”) as “Hazardous Substances” under CERCLA, which is expected to be completed later in 2023. EPA also recently released an Advanced Notice of Proposed Rulemaking (“ANPRM”) which proposed listing seven additional PFAS compounds, precursors to listed PFAS compounds, or possibly entire categories of PFAS compounds as hazardous substances under CERCLA. For additional information on the CERCLA listing for PFOA and PFOS, please refer to [BCLP’s client alert](#) discussing this topic, and our [subsequent client alert](#) discussing the ANPRM.

I. Specific Provisions in the Proposed Legislation

The bills are designed to reduce or eliminate CERCLA liability for inadvertent users of any PFAS compounds which become listed CERCLA “Hazardous Substances” such as farmers, solid waste facilities, and water treatment systems, or users that dispensed materials such as AFFF for fire extinguishing activities. [Senator Lummis stated](#): “There is no doubt we need to consider the environmental impacts of PFAS chemicals but suing entities who did not contribute to the

contamination is overkill, especially considering some of these entities, such as ranches and water facilities, are just downstream receivers.”

The proposed legislation would provide liability protection to these inadvertent users as follows:

- **Agriculture.** No person may recover costs or damages from a “protected entity” under CERCLA “for costs arising from a release to the environment of a covered perfluoroalkyl or polyfluoroalkyl substance.”
 - A protected entity is defined as “a person engaged in the production or harvesting of agricultural products.”

- **Airports.** No person may recover costs or damages under CERCLA from a “sponsor” “for costs arising from a release to the environment of a covered perfluoroalkyl or polyfluoroalkyl substance.”
 - A sponsor is defined in 49 CFR §47102 as a public or private entity that applies to the Secretary of Transportation for funding to support a civilian portion of a joint-use airport or a shared-use airport.
 - These protections would only apply if a sponsor used AFFF that was required by a regulation pursuant to the Federal Aviation Administration.

- **Fire-suppression Systems.** No person may recover costs or damages from a “protected entity” under CERCLA “for costs arising from a release to the environment of a covered perfluoroalkyl or polyfluoroalkyl substance.”
 - A protected entity means an “entity with a fire suppression system installed, or otherwise in use, in accordance with applicable Federal, State, and local fire codes” that uses AFFF.
 - These protections would only apply if the release of the PFAS substance resulted from the lawful discharge of AFFF in connection with a fire suppression system that:
 - (1) conforms to applicable Federal, State, and local fire codes; and
 - (2) complies with the most recently approved engineering standards at the time of the discharge.

- **Solid Waste Facilities.** No person may recover costs or damages from a “protected entity” under CERCLA “for costs arising from a release to the environment of a covered perfluoroalkyl or polyfluoroalkyl substance.”

- A protected entity is defined as “an owner or operator ... of a solid waste management facility or a facility that processes compost for sale or distribution to the public.”
- These protections would only apply if the release resulted from:
 - (1) the disposal or management of any residuals or byproduct of municipal solid waste in accordance with a valid permit;
 - (2) the disposal or management of biosolids consistent with 33 U.S.C. §1345; or
 - (3) the application or processing of compost in accordance with State law.
- **Water Systems.** No person may recover costs or damages from a “protected entity” under CERCLA “for costs arising from a release to the environment of a covered perfluoroalkyl or polyfluoroalkyl substance.”
 - A protected entity would include:
 - a public water system;
 - a publicly or privately owned or operated treatment works;
 - a municipality to which a permit under the Federal Water Pollution Control Act is issued for stormwater discharges;
 - a political subdivision of a State acting as a wholesale water agency; and
 - A contractor hired by the water system to properly manage and dispose of biosolids, water treatment residuals, or other byproducts of the water treatment process.
 - These protections would only apply if a protected entity transports, treats, arranges, or disposes of PFAS substances in a manner consistent with all applicable laws at the time the activity is carried out, including through:
 - the management or disposal of biosolids consistent with 33 U.S.C. §1345;
 - the discharge of effluent in accordance with a permit issued under 33 U.S.C. §1342;
 - the release or disposal of water treatment residuals or any other byproduct of drinking water or wastewater treatment activities; or

- the conveyance or storage of water for the purpose of conserving or reclaiming the water for water supply.

II. How Do These Bills Affect My Business?

Whether these bills ultimately will be enacted into law is unclear. That said, there are some important themes in the proposal and supporting statements from legislators and industry groups that are likely to be repeated over the coming years. First, there is an effort to distinguish between passive receivers of the PFAS substances – in this case, farmers, landfills, and water treatment systems – and entities that actively used or benefited from use of the chemicals. That distinction is not directly addressed under CERCLA, as it imposes joint and several, retroactive liability for potential responsible parties (“PRPs”) with respect to an impacted property. However, environmental advocacy groups will likely argue that the proposed legislative protections are too broad. For example, they may take the position that the farmer exemption will cleave off any liability for an important group of PRPs, or that the proposed exemption for water treatment systems could arguably apply to private water treatment systems.

Second, if enacted, the Proposed Legislation does not consider who should be responsible for the investigation and remediation of PFAS impacts from these types of facilities if the owners and operators are exempt. CERCLA’s intentionally broad liability structure is designed to ensure that one or more responsible parties are available to perform or fund the site cleanup, and those responsible parties are then allowed to seek contribution from other PRPs. The proposed laws would remove key PRPs from that equation and would require EPA to expend significant resources to try to track down responsible parties beyond the property owners and operators. We anticipate that environmental groups will argue that functionally speaking, the proposed bills have the potential to result in significant delays in site investigation and remediation.

III. Conclusion

The anticipated listing of PFOA and PFOS as “Hazardous Substances” under CERCLA – and any subsequent listings of additional PFAS compounds – will have enormous impacts on a wide range of industries, as well as the current and past owners and operators of real property. We expect to see EPA take an active approach to require investigation and remediation of PFAS-impacted properties, including even the possibility of reopening closed sites. In turn, any such EPA activity has the potential to result in a wave of contribution litigation as responsible parties seek to allocate responsibility and recover for liabilities incurred. The newly Proposed Legislation is an attempt to provide a legislative solution to the allocation of those responsibilities, but it may do so in a way that would inhibit or slow EPA’s and private parties’ ability to fully address environmental impacts.

For more information on PFAS compounds and related matters, please visit our [PFAS webpage](#). If you have a question about these proposed bills, contact Tom Lee, Erin Brooks, Bryan Keyt, John Kindschuh, or any other member of our PFAS team at Bryan Cave Leighton Paisner LLP.

MEET THE TEAM



Thomas S. Lee

San Francisco

tom.lee@bcplaw.com

[+1 415 675 3447](tel:+14156753447)



Bryan E. Key

Chicago

 Cookiebot session tracker icon loaded
bryan.keyt@bcplaw.com

[+1 312 602 5036](tel:+13126025036)



Erin L. Brooks

Chicago / St. Louis

erin.brooks@bcplaw.com

[+1 312 602 5093](tel:+13126025093)



John R. Kindschuh

St. Louis

john.kindschuh@bclplaw.com

+1 314 259 2313

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