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PFAS/CERCLA (Superfund) Liability: U.S. Senator John Boozman (Arkansas) Legislation Exempting Noncontributing Industries/Municipalities

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United States Senators John Boozman (Arkansas) and Cynthia Lummis (Wyoming) introduced five bills to ensure industries and municipalities are not subject to Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") liability if the United States Environmental Protection Agency ("EPA") designates per- and polyfluoroalkyl substances ("PFAS") compounds as hazardous substances.

The rationale for exempting such entities is that they either:

- Do not contribute to PFAS contamination; or
- Are required to use PFAS-containing substances through regulations

PFAS are a group of man-made chemicals that have been used in various industrial applications and consumer products for a number of years. Properties of these chemicals include resistance to heat, water, and oil. They have been described as persistent in the environment and resist degradation.

Potential human exposure to PFAS includes pathways through drinking water, air, or food.

EPA has proposed to designate Perfluorooctanoic Acid and Perfluorooctanesulfonic Acid (including their salts and structural isomers) as hazardous substances.

Designation of PFAS as a CERCLA hazardous substance would trigger corresponding requirements such as:

- Application of the potentially responsible liability categories (i.e., current owner or operator, former owner or operator [in certain circumstances], transporter [in certain circumstances], and generators).
- Hazardous substance release reporting requirements (if reportable quantities are released)

Concern has been expressed by various interest groups that they would be unfairly encompassed and subject to Superfund liability/reporting requirements. For example, public owned treatment works ("POTW") receive discharges that may contain PFAS from some commercial and industrial sources. Groups such as the National Association of Clean Water Agencies note that conventional POTW wastewater treatment does not effectively remove PFAS that it receives. Concern has been expressed that their passive receipt of such PFAS may affect the biosolids they generate through either the associated expense of handling this material or pose a liability issue.

Other groups expressing concern include those representing utilities involved in providing drinking water and water reuse services. Water, wastewater, stormwater, water reuse systems passively receive PFAS from various sources. They argue that without a water sector exemption, CERCLA liability could be imposed upon utilities protecting public health and safety but not on chemical and manufacturing companies who place the substances into commerce as useful products.

Similar concerns have been articulated by organizations such as the National Waste and Recycling Association and Solid Waste Association of North America which argue that landfills, solid waste management facilities, and recycling facilities neither manufacture nor use PFAS but instead receive discarded materials containing PFAS that are ubiquitous in residential and commercial waste streams.

Permitting authorities often require landfills to accept waste streams containing PFAS. The groups argue that in the absence of a CERCLA or Superfund exemption, manufacturers and heavy users of PFAS compounds could bring claims for contribution against landfills and other passive receivers. As a result, they may be forced to restrict inbound waste and/or increase disposal costs for media with elevated levels of PFAS.

The agricultural organization American Farm Bureau has requested a CERCLA exemption for PFAS. It is argued that these compounds have come on to agricultural land through no knowledge or fault of farmers or ranchers. Consequently, such a designation is noted to create liability risks for farmers or ranchers, does not compensate them for their economic losses, and threatens the long-used application of biosolids.

The following five bills contain CERCLA exemptions and are denominated as:

- Agriculture PFAS Liability Protection Act of 2023 – addressing a person engaged in the production or harvesting of agricultural products as defined in Section 207 of the Agricultural Marketing Act of 1946.
- Airports PFAS Liability Protection Act – utilizing the term “Sponsor” which is defined in Section 47102 of Title 49, United States Code.
- Fire Suppression PFAS Liability Protection Act – defined as any entity with a fire suppression system installed, or other in use in accordance with applicable federal, state, and local fire codes that uses an aqueous film forming foam that contains a covered perfluoroalkyl or polyfluoroalkyl substance.
- Resource Management PFAS Liability Protection Act of 2023 – defined as an owner or operator (as defined in Section 101 of CERCLA) and including:
 - (A.) A solid waste management facility (as defined in Section 1004 of the Solid Waste Disposal Act); or
 - (B.) A facility that processes compost for sale or distribution to the public.
- Water Systems PFAS Liability Protection Act – stated to include:
 - (A.) A public water system (as defined in Section 1401 of the Safe Drinking Water Act);
 - (B.) A public or privately owned or operated treatments works (as defined in Section 212 of the Federal Water Pollution Control Act);
 - (C.) A municipality to which a permit under Section 402 of the federal Water Pollution Control Act is issued for stormwater discharges;
 - (D.) A political subdivision of a state or a special district of a state acting as a wholesale water agency; and
 - (E.) A contractor performing the management or disposal activities described in Subsection C for an entity describes in any of the subparagraphs (A.) (D.).

The bills will presumably be referred to the United States Senate Environment and Public Works Committee.

A copy of Senator Boozman’s news release can be found [here](#) and the five bills below:

[Agriculture PFAS Liability Protection Act](#)

[Airports PFAS Liability Protection Act](#)

[Fire Suppression PFAs Liability Protection Act](#)

[Resource Management PFAS Liability Protection Act](#)

[Water Systems PFAS Liability Protection Act](#)