



American  
Petroleum  
Institute



Louisiana Mid-Continent  
Oil & Gas Association



NEW MEXICO OIL & GAS ASSOCIATION



WSPA

July 14, 2023

The Honorable Tom Carper  
Chairman, U.S. Senate Committee on Environment and Public Works

The Honorable Shelley Moore Capito  
Ranking Member, U.S. Senate Committee on Environment and Public Works

U.S. Senate Committee on Environment and Public Works  
410 Dirksen Senate Office Building  
Washington, D.C. 20510  
202-224-8832

Submitted electronically via <https://airtable.com/shr4aOK3wiNjQADO6>

**Re: Draft PFAS Legislation**

Dear Chairman Carper and Ranking Member Capito:

The American Petroleum Institute (“API”), the Louisiana Mid-Continent Oil and Gas Association, the Montana Petroleum Association, the New Mexico Oil & Gas Association, The Petroleum Alliance of Oklahoma, the Utah Petroleum Association, and the Western States Petroleum Association (together, the “Associations”) respectfully submit these comments in response to the U.S. Senate Committee on Environment and Public Works’ (“Committee’s”) request for stakeholder feedback on the draft per- and polyfluoroalkyl substances (“PFAS”) legislation released on June 22, 2023.<sup>1</sup> Our Associations represent members across the country that produce, process, and distribute most of the nation’s energy and we appreciate the Committee’s bipartisan efforts to address this complex issue and the opportunity to comment on this draft legislation.

As discussed in more detail below, aqueous film forming foam (“AFFF”), which may contain some form of PFAS, is a critical fire prevention and suppression tool used by many industrial facilities. Globally, diligent work is underway to develop and transition to reliable, effective, and proven PFAS-free fire-fighting foams. These efforts are being led by, to name a few, governments, academics, and the defense, aviation, firefighting, and energy sectors—including our members. While this important work is ongoing, the Associations and their members are concerned that recent U.S. federal regulatory

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<sup>1</sup> Available at [https://www.epw.senate.gov/public/\\_cache/files/e/1/e198c8f6-be9c-4187-ba2a-6b54ba19aad5/F8428DFD5E4D5EC2DF0A0EA6C31827EE.maz23283.pdf](https://www.epw.senate.gov/public/_cache/files/e/1/e198c8f6-be9c-4187-ba2a-6b54ba19aad5/F8428DFD5E4D5EC2DF0A0EA6C31827EE.maz23283.pdf).

efforts will have serious adverse ramifications for past, current, and future essential life-saving activities involving PFAS-containing AFFF without legislation clearly exempting such uses from liability. We urge the Committee to include in the proposed legislation a provision exempting the use of PFAS-containing AFFF from liability under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).

The joint and several CERCLA liability provision makes it impossible to acknowledge the lifesaving public service that use of PFAS-containing fire-fighting foams has provided. Under “mutual aid” arrangements and through coordination among local responders and within Local Emergency Planning Committees, municipal fire departments often rely on industry facilities, including our members, to respond to events involving petroleum chemical fires, and they regularly conduct joint fire and emergency response training. Because many—if not most—public fire-fighting entities do not have adequate AFFF or the necessary equipment to tackle petroleum or chemical fire events, our members have been called upon to assist public fire departments for events such as warehouse fires (where storage of computer equipment or even tires may require AFFF foams), recycling operations, and large highway collisions because local response agencies lacked the capability to handle the events. Thanks to decades of coordination and preparation with local responders, our members have been able to respond to life-threatening fires quickly and deploy AFFF efficiently, thus protecting the public, saving lives, and protecting critical energy infrastructure.

This extensive training and coordination has prepared our facilities for prompt, effective response to actual emergency incidents when PFAS-containing AFFF is absolutely necessary to protect public safety. Recognizing this important mutual aid aspect of the Associations’ member contributions to our surrounding community is essential for fair and equitable treatment under new CERCLA listings.

Specifically, we urge the Committee to include language in the draft legislation that would exempt facilities that use or have used PFAS-containing AFFF as part of their fire suppression system from liability under CERCLA. For example, Committee member Senator Cynthia Lummis (R-WY) has introduced S. 1432, the Fire Suppression PFAS Liability Protection Act<sup>2</sup>, which would exempt AFFF-related releases of certain PFAS from entities with a fire suppression system that conforms to applicable fire codes and is compliant with the most recently approved engineering standards at the time of the discharge. We urge the Committee to include in its bill similar language that exempts all facilities engaging in these life-saving activities—consistent with contemporary applicable fire codes and engineering standards—and that is not arbitrarily limited to certain types of facilities. The AFFF used by industrial facilities is chemically similar to, and often the same, as that used by airports, fire departments, and other facilities, and it is used for the same purpose—protecting life and critical infrastructure.

Fire-fighting foams are essential for effective firefighting and fire prevention activities, which in turn are critical to ensuring the continued and stable operation of the entire oil and gas industry. AFFF made with PFAS are highly effective for fighting flammable liquid fires, including large-diameter or deep-tank fires. While our members are significantly engaged in the process to develop, and support the use of, effective

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<sup>2</sup> The text of the S. 1432 is available at <https://www.congress.gov/118/bills/s1432/BILLS-118s1432is.pdf>.

replacements for legacy long-chain foams containing perfluorooctanoic acid (“PFOA”) and perfluorooctanesulfonic acid (“PFOS”), and they have largely moved away from using PFAS-containing foams in training and drills, the transition will take several years to complete until safe and reliable alternatives are widely available. In the meantime, facilities must still be able to quickly and effectively respond to fire emergencies.

We are concerned that, in light of recent regulatory proposals, such as EPA’s proposal to designate PFAS as hazardous substances under CERCLA<sup>3</sup>, facilities that have released certain PFAS via AFFF as a result of mandated fire-fighting training, insurance-mandated testing, or emergency situations will potentially be subject to litigation and enforcement actions. If finalized, the proposed rule would designate PFOA and PFOS as hazardous substances and, therefore, fully apply CERCLA’s liability and comprehensive cost recovery scheme to both substances, in addition to reporting requirements, without a clear exemption that prevents federal, state, and third-party actions against facilities for their past and present necessary, emergency foam uses. We previously submitted comments on, and requested withdrawal of, EPA’s proposed rulemaking designating PFOA and PFOS as CERCLA hazardous substances, due to numerous legal and equitable deficiencies in the proposed rulemaking that were documented throughout these comments.<sup>4</sup>

While we believe that CERCLA § 107(d)(1) exempts the use of AFFF as a safety measure and have urged EPA to invoke this exemption with respect to AFFF, we nonetheless urge the Committee to include an explicit exemption for these uses to ensure that facilities are not punished for taking measures to protect public safety. Such an exemption would be consistent with the existing text of CERCLA § 107(d)(1), which states that CERCLA liability should not be imposed on persons that render care or assistance in response to incidents—such as fires—that endanger public health, welfare or the environment.<sup>5</sup> This exemption also would eliminate regulatory uncertainty regarding the scope of future PFAS-related rulemakings and allow facilities to continue implementing the most effective safety measures available while alternative fire-fighting foam options are developed.<sup>6</sup> It is critical to public safety, as well as to the

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<sup>3</sup> Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415 (Sept. 6, 2022).

<sup>4</sup> American Petroleum Institute, American Fuel & Petrochemical Manufacturers, et al., Comments on Designation of PFOA and PFOS as CERCLA Hazardous Substances (Nov. 7, 2022) <https://www.regulations.gov/comment/EPA-HQ-OLEM-2019-0341-0419> (attached).

<sup>5</sup> See 42 U.S.C. § 9607(d)(1) (“Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan (“NCP”) or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.”).

<sup>6</sup> The Associations understand the Committee may be asked to consider amending CERCLA to define passive receivers using an activity-based approach and to extend CERCLA liability protection to these activity-based passive receivers. The Associations would support alternative statutory revisions, such as the passive receiver exemption, that exempt past and current use of PFAS-containing AFFF for training and emergency situations.

stability of the oil and gas industry and the nation's energy supply, that facilities are able to continue utilizing PFAS-containing AFFF until proven alternatives are widely available.

It is important to note that Federal legislation exempting AFFF from CERCLA liability does not necessarily foreclose on potential liability under analogous state CERCLA statutes. Indeed, states generally remain free to implement and oversee cleanup programs (including state CERCLA analogues) that are more stringent than the Federal counterpart. That said, Congress does have authority to preempt (either expressly or impliedly) state and local law. Express preemption<sup>7</sup> is the most straightforward and would likely be the most effective method of preemption with respect to AFFF. Because our members could potentially face liability under state CERCLA statutes, we would be interested in exploring Committee consideration of an express preemption clause in any Federal legislation on this issue, while acknowledging that such inclusion could be challenging provided potential significant state opposition.

Our members have a strong interest in this draft legislation and recognize their responsibility in protecting the health and safety of our employees and the public. We are actively engaged on issues related to PFAS and understand the complex public policy decisions lawmakers and regulators must make in addressing these chemicals' ubiquitous presence in the environment. Our members are committed to sound stewardship of our natural resources and balanced, effective environmental protection. Likewise, our members are committed to safety, and we urge the Committee to ensure that facilities are able to continue utilizing AFFF—a critical safety measure that provides swift and definitive extinguishing power to protect the lives of first responders, workers, and the public, as well as the environment.

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<sup>7</sup> An example of express preemption is where a statute includes the following language: “No state shall adopt or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to [\_\_\_\_\_].”

We appreciate the opportunity to submit these comments and look forward to discussing this issue with you in further detail. Please contact Keith Petka at [petkak@api.org](mailto:petkak@api.org) or 302-463-7992 if you have any questions or would like to discuss this matter.

Sincerely,

American Petroleum Institute

Louisiana Mid-Continent Oil and Gas Association

Montana Petroleum Association

New Mexico Oil & Gas Association

The Petroleum Alliance of Oklahoma

Utah Petroleum Association

Western States Petroleum Association