



EPA CERCLA PFAS Enforcement Listening Session
AGC of America Extended Remarks
Submitted via Online Form: March 30, 2023

Thank you for providing the opportunity to weigh in on EPA's enforcement discretion and settlement policies related to PFAS under CERCLA. My name is Melinda Tomaino with the Associated General Contractors of America. AGC is the leading association for the construction industry. AGC members are engaged in the construction of the nation's commercial buildings and industrial facilities, highway and public transportation infrastructure, water and wastewater systems, flood control and navigation structures, defense installations, multi-family housing, and more.

AGC supports a measured approach to environmental challenges such as PFOA and PFOS. Given the decades of historic uses of PFAS, as well as current uses, AGC has shared concerns with Congress and EPA that how they approach the PFAS challenge could quickly overwhelm cleanup efforts as well as drastically increase construction costs as well as risk and liability.

There are approximately 5,000 PFAS in use in a wide variety of common commercial products such as carpets, coatings, paints, varnishes, and textiles. PFOA and PFOS have been in use for several decades and can even be found on properties without prior development. What's more, PFAS could be present in soil or groundwater in trace or even undetectable amounts wholly unbeknownst to the contractor working on a given project.

Contractors are not currently required to test for PFAS under federal law. EPA has not set maximum concentration or cleanup levels for any PFAS constituents or detection limits.

That means a contractor could unknowingly encounter PFAS on everyday types of projects or during routine earthmoving, dewatering, dredging, and fill activities. Furthermore, a contractor may have discharged PFAS-containing wastewater during dewatering or disposed of PFAS-containing soil and construction debris in a landfill without knowing it.

Historically, it is unlikely that any PFAS would have been included in the environmental site assessments commonly used by industry to identify on-site and off-site sources of potential site contamination—meaning contractors are completely blind to this liability threat. The American Society for Testing and Materials only just recently revised its standard for Phase I environmental site assessments to address emerging contaminants.

An innocent contractor may be ensnared in Superfund liability as a potentially responsible party. Under CERCLA's strict, retroactive, joint and several liability, EPA requires Potentially Responsible Parties to clean up sites contaminated by hazardous substances regardless of fault. CERCLA makes no distinction when assigning responsibility to the source of a substance designated as hazardous -- or to the quantity of the substance introduced by the party.

Courts have uniformly held that CERCLA imposes strict liability, regardless of fault. Should hazardous waste be discovered on a site, any contractor performing work on that site could be

drawn into a legal battle over who is financially responsible for cleanup of the hazardous waste at the site.

Innocent contractors need protection against legal liability for contamination associated with the active sites on which they currently work as well as completed projects. “Enforcement discretion” is not a guarantee. Contractors need safe harbor protections. Contractors are on the front lines when it comes to unknown environmental hazards on the job site. Innocent contractors will still be exposed to citizen suits and may be directly liable to third parties for cleanup costs.

Contractors also may face an increased risk of CERCLA liability due to the language in the construction contract that outlines their scope of work and the contractor’s role and responsibilities on the jobsite. These contractual agreements transfer liability and allocate risk for hazardous materials and cleanup costs to contractors.

For example, if a contractor used fill material from a quarry and did due diligence at the time to determine the fill was “clean,” yet later tests show PFOA or PFOS contamination, then the property owner will seek legal action against the contractor—who would then need to seek compensation from the quarry.

Likewise, contract specifications that tell the contractor to select disposal sites or to identify an outside source of a material will pose a huge risk to the contractor for liability.

Members are starting to report seeing new requirements for contractors to conduct extensive tests on all material added to the site (e.g., aggregates, soil, etc.) related to PFAS. Whereas this will help identify some contamination and perhaps avert compounding liability in the future, it will not safeguard against undetectable amounts or past actions. Finer-tuned testing technologies are still in development.

PFAS is commonly referred to as ubiquitous; and as such, its regulation under CERCLA raises equally ubiquitous liability concerns for public and private entities. CERCLA prevents the agency from limiting liability for non-responsible parties. Enforcement discretion and intentions are not reliable protections, which is why AGC has urged the agency to use other regulatory avenues.

Please see AGC’s comments on the proposal in the docket at <https://www.regulations.gov/comment/EPA-HQ-OLEM-2019-0341-0418>.

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