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March 10, 2025

The Honorable Shelley Moore Capito
Chairman
Committee on Environment & Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Ranking Member
Committee on Environment & Public Works
U.S. Senate
Washington, D.C. 20510

RE: AGC Statement for the Record for Hearing Entitled, “Improving the Federal Environmental Review and Permitting Processes,” on February 19, 2025.

Dear Chairman Capito and Ranking Member Whitehouse:

Thank you for this committee’s long-standing bipartisan work to address regulatory barriers to infrastructure modernization and development. AGC is a national trade association whose members build all manner of public and private construction projects, from buildings to bridges. We write to you today to raise awareness of the unintentional negative impacts that federal policy addressing per- and polyfluoroalkyl substances (PFAS) has on infrastructure projects and the construction industry. To be clear, AGC is not wading into the debate about the science or safety of PFAS but is asking for protections for contractors who encounter (or have encountered) PFAS on projects and assist with PFAS cleanup efforts on public and private projects.

EPA’s rule disincentivized owners from testing for PFAS

The U.S. Environmental Protection Agency’s (EPA) April 2024 designation of perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) exposes contractors to significant legal and financial risk without providing a clear compliance path. Since EPA did not provide guidance on managing PFAS, owners are choosing not to test materials for PFAS. As a result, contractors performing routine site work could be handling PFAS and could be liable for clean-up costs and personal injury/property damage suits for contamination they did not create and cannot reasonably detect.

The rule creates uncertainty in contract negotiations, insurance coverage, and lender requirements. It also puts AGC members at risk who may have unknowingly interacted with PFAS at some point in their companies’ project portfolios throughout the decades. This uncertainty limits competition because contractors are concerned about the risk of liability with handling PFAS. As a result, it decreases the pool of qualified bidders for public and large infrastructure projects (such as airports and bases) and increases the cost of such projects. AGC urges Congress to help reduce liability for contractors engaged in modernizing our Nation’s infrastructure and acting in good faith compliance with site remediation plans.

AGC has consistently advocated for a measured approach to environmental challenges such as PFOA and PFOS—or other emerging chemicals of concern. PFAS is commonly referred to as ubiquitous; and as such, its regulation under CERCLA raises equally ubiquitous liability concerns for public and private entities. Given the decades of historic uses of PFAS, as well as current uses, AGC has repeatedly shared

concerns that taking the right regulatory approach to the PFAS challenge is critical. The “direct-to-Superfund” approach taken by EPA drastically increases construction costs and risk and could overwhelm cleanup efforts. Not only will contractors encounter PFAS on everyday projects, AGC members will be at the front lines of any remediation efforts. Yet EPA refuses to acknowledge the significant impact its action has on the construction industry. The construction industry is poised to be part of the solution, but its response will be hampered if no one acknowledges there is a problem with risk.¹

Contractors can encounter PFAS in soil, concrete or other paving materials, in beneficial use or recycling of materials, in some new materials, and in the demolition of structures, as well as in dewatering effluent (e.g., when removing groundwater to lay a foundation). While testing may be required in the future, owners have not been required to test for PFAS, and it is unlikely that any past testing as part of environmental site assessments would have included PFAS. Furthermore, owners may refuse to test for PFAS, putting contractors in a precarious position on projects.

Contractors face liability for handling PFAS

Strict, retroactive liability under CERCLA means a contractor could be held responsible for cleanup costs even if they did not cause the contamination. EPA’s enforcement discretion will not protect contractors from third-party lawsuits (e.g., cost contribution actions or under common law for negligence, nuisance). For example, if a contractor arranges transport of clean fill to a landfill for daily cover (or as fill on other public, commercial, or residential construction projects) that decades later is determined to contribute to PFAS contamination. Contractors could even be at risk if the soil is moved to another area of the project site even if it does not leave the property.

It is important to understand that EPA has not provided meaningful guidance on background levels, management or disposal practices, or PFAS remediation standards—protective of human health and the environment—making it impossible for contractors to comply with the law. Contractors engaged in excavation, soil movement, or dewatering face enormous liability risks for unknowingly disturbing PFAS contamination. The uncertainty around disposal requirements forces contractors to choose between stopping work, taking on massive liability, or disposing of soil and water at hazardous waste facilities as a default—even when it may not be necessary—dramatically increasing costs for public and private projects. Excluding delay cost, encountering PFAS during construction could result in a 5,000 percent increase in soil management costs to dispose of the waste in a specialized (i.e., hazardous waste) landfill or an incinerator. Contractors, public and private owners will not have the funds to absorb the higher disposal costs. Furthermore, hazardous waste disposal capacity is inadequate to accommodate the millions of tons of impacted soil and other material that will be generated. None of this is sustainable.

In addition to higher disposal costs for public and private owners and limited space at hazardous waste landfills (which are few and far between), AGC is hearing from its contractor members a range of impacts to work on infrastructure projects.

- A delay in negotiating airport and federal Department of Defense (DoD) work due to liability concerns.
- Long-term liability risk from demolishing, restoring, and constructing airport hangers.
- Past remediation activity at a Superfund site could expose a contractor to future liability if/when those sites are reopened for PFAS.

¹ While most contracts that are explicitly for the removal of PFAS from things like drinking water and wastewater exempt “response action contractors” from liability, there are limits to this liability. Furthermore, this work makes up a small percentage of the overall construction market. PFAS removal as part of a larger construction project does not include these same protections.

- Reduced viability of markets for recycling and beneficial use, for example, reclaimed asphalt pavement (RAP).
- Increased consulting, transportation, and disposal costs for typical operations.
- Ten-fold increase in landfill costs.
- Increased trucking costs to transport materials to other facilities.
- Additional compliance and training costs under the Hazardous Materials Transportation Act.
- Increases risk for even minor property acquisitions to support projects (e.g., laydown yards and storage).
- Increased sampling fees and wait times.
- Lack of insurance coverage.

Owners shift PFAS liability to contractors

Another pressing concern that AGC is hearing from its members centers on the practice of shifting risks on a project to the contractor. Owners are increasingly transferring to the contractor all “risk” for “unknown” contamination, defined as any contamination not disclosed by owner or reasonably ascertainable by contractor due diligence (no provisions allowing contractor schedule and cost relief for managing site contamination).

1. Contamination risk is often unquantifiable (inadequate site investigation/testing data; testing inadequate to characterize contamination; disposal costs vary).
2. Agreements typically require the contractor to manage, treat, handle, store, remediate, remove, transport, and dispose of site contamination as required by law, creating exposure to long-term CERCLA liability.
3. Practice of assigning the contractor the risk for managing site contamination while providing no contractual relief forces contractors to add cost contingencies, often well exceeding actual costs, is driving up construction costs
4. The term hazardous waste in construction contracts is typically defined as any site contamination that requires special handling.

How can Congress help?

Contractors are encountering PFAS on everyday projects (public and private) across the country and need a clear path forward that protects them from assuming undue risk and costs.

- **Support a Commonsense Approach to Managing PFAS Contamination.** Contractors need clear disposal and handling requirements for PFAS-containing materials and waste to avoid exposure to legal and regulatory uncertainty. There is no clear federal law or guidance on what levels of PFAS in soil or surface/groundwater are safe or will trigger management or disposal requirements, leaving contractors in legal limbo. Given the ubiquity of PFAS, EPA must establish a background level for PFAS that is protective of human health and the environment.
- **Recognize Contractors as Passive Receivers and Protect Contractors from Frivolous Lawsuits.** Innocent contractors need “Passive Receiver” protections to ensure liability protections from CERCLA and third-party actions such as cost contribution actions and civil suits. Contractors can unknowingly encounter PFAS on project sites and may have done so for decades. Similar to farmers and the waste management industry, the construction industry does not produce or sell PFAS; it should not have to pay for cleanup.

Shifting the risk to the contractor is a significant concern, especially on public projects. Where the public owner is unwilling to compensate the contractor for encountering “unknown” hazardous materials, negative consequences follow: a limited universe of competitive bidders (because some will walk away from such extreme risk scenarios), the shut out of highly-qualified, environmentally-sophisticated firms, and inflated contract prices (because bidders are pricing risk into the contract that is going back to the owner and ultimately being borne by the taxpayer).

Government owners are in the best position to bear the following risks on federally-funded projects:

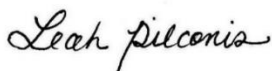
1. Environmental risk associated with “unknown” hazardous material that was not disclosed pre-bid.
2. Environmental risk associated with finding out after the contract has been awarded that a part of the project site, or any property or waterbody to which the project site drains runoff or disposes of construction materials, is a newly listed “Superfund” site.

On all federally funded projects, Congress should:

- 1) Prohibit transfer of CERCLA liability for pre-existing contamination to the contractor by requiring public owners to retain generator and arranger status.
- 2) Require public owners to provide contractual relief through cost-sharing mechanisms such as allowances and schedule relief through delay clauses that compensate the contractor for responding to known and unknown site contamination.
- 3) Require that prior to bidding for construction the public owner conducts the necessary testing to identify the presence and areal extent of PFAS contamination. The planning phase is more appropriate for detecting, avoiding, and minimizing impacts of PFAS. Detection during the construction phase increases unacceptable risk and costs associated with delay, potential redesign, and disposal.
- 4) Require the public owner of project sites with confirmed PFAS contamination to either store excess material on site or dispose of it at a facility designated by the owner that is permitted to accept it or designate a transporter and disposal facility.

Contractors stand ready to advance critical infrastructure and will be on the front lines of PFAS cleanup efforts. Yet under current CERCLA designations, contractors can be found liable and on the hook for the cleanup of contamination they did not cause. As such, liability protections should be considered to ensure contractors bid on projects and undertake important projects. Congress must consider a commonsense approach to PFAS contamination management that designates contractors as passive receivers and protects construction from expensive fees. If you have any questions, please reach out to us at leah.pilconis@agc.org or alex.etchen@agc.org.

Sincerely,



Leah Pilconis
General Counsel



Alex Etchen
Vice President, Government Relations

CC: L. Zeldin, U.S. Environmental Protection Agency
Committee on Energy and Commerce, U.S. House of Representatives
Committee on Transportation and Infrastructure, U.S. House of Representatives

Attachments:

Protect Construction from PFAS Liability (Handout)
Increased Risk for Contractors Working with State Departments of Transportation on PFAS-Impacted Projects: Survey Summary (Handout)

Protect Construction from PFAS Liability

Per- and polyfluoroalkyl substances known commonly as PFAS, are long lasting chemicals that break down very slowly over time. There are over 5,000 types of PFAS found in common everyday products, such as cosmetics, apparel, carpeting, and fire retardants.



Contractors are on the front lines of mitigating PFAS pollution in all types of construction projects including drinking water, airport construction, and military base construction. In order to not hinder remediation efforts, PFAS policy needs a commonsense approach.

Superfund liability for construction companies

In April 2024, the U.S. Environmental Protection Agency (EPA) issued a final rule to regulate two types of PFAS, PFOA and PFOS, as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund as it is more commonly known).

- Superfund liability is triggered regardless of intent or fault. Liable parties could be on the hook for the entire cost of cleanup.
- Since there is retroactive and strict liability under the Superfund law, a contractor who interacted with contaminated construction media during a project could be held liable for cleanup, even if they had no knowledge that there was PFAS present, and it happened years ago.

Impacts to construction projects beyond liability

Although the construction industry does not manufacture PFAS, and PFOA and PFOS may already be present on project sites, contractors could be found liable, even when working to safely remove them. Specifically, this hazardous substance designation will:

- **Increase Trucking Costs** – Construction companies hauling away debris containing PFOA and PFOS will eventually need truck drivers that have a Commercial Driver's License (CDL) AND a Hazardous Materials Endorsement on their CDL. Since this requires more testing and training for CDL drivers it means the cost to haul away debris will increase significantly.
- **Create Longer Trips to Dispose of Materials** – Landfills are refusing waste, so construction companies may be forced to dispose of the PFAS containing debris at specially designated hazardous materials landfills which are limited and often further distances away than traditional landfills. Due to the stigma of CERCLA designation, some landfills are refusing waste, forcing some contractors to haul waste longer distances to specialty landfills, which are limited and often further distances than traditional landfills.
- **Limit the Use of Recycled Construction Materials** – Recycling of construction materials is a common practice in the construction industry that reduces construction costs and is environmentally friendly. For example, Reclaimed Asphalt Pavement (RAP) is when existing asphalt is removed through milling and recoated with new asphalt binder. However, with the increased PFAS liability, contractors will be limited in which asphalt they can recycle, including asphalt from airport runways and taxiways, military bases, and certain roadways.

PFAS remediation projects

While testing may be required in the future, contractors have not been required to test for PFAS and it is unlikely that any past testing as part of environmental site assessments would be included. While most contracts that are explicitly for the removal of PFAS from things like drinking water and wastewater exempt contractors from PFAS liability, this makes up a small percentage of the overall construction market. In addition, PFAS removal as part of a larger construction project does not include these same protections.

AGC wants legal protections for contractors

Contractors will be on the front lines of PFAS cleanup efforts and need protections to ensure they bid the work. Should PFAS be discovered on a worksite, any contractor performing work on the site could be held liable. Should PFAS be found in a landfill, any and all contractors who disposed of construction materials could be held liable for the cleanup.

Congress should pass “innocent contractor” or “passive receiver” protections to ensure that contractors who unknowingly encounter PFAS are not legally liable.

Increased Risk for Contractors Working with State DOTs on PFAS-Impacted Projects

Survey Summary

[Iowa State University 2024](#)



AGC
THE CONSTRUCTION
ASSOCIATION

The survey results highlight several areas where contractors working on highway construction and maintenance projects for state DOTs may face **increased risk and liability** due to **PFAS contamination**. *All percentages based on respondent states, representing an 86% response rate overall. Responses to individual questions may be less.*

1. Lack of Uniform Policies and Guidance on PFAS

- Only **39% of state DOTs** (17 states) have **formal or informal procedures, policies, or guidance** for identifying or mitigating PFAS contamination.
- **77% of state DOTs** (34 states) lack internal PFAS-specific policies.
- Without clear policies, contractors may face **uncertainty in project requirements** and **inconsistent enforcement** of environmental and disposal regulations.

2. PFAS-Contaminated Project Sites

- **Nine state DOTs** reported knowingly encountering PFAS on a project or within a right-of-way.
- **Three states (Alaska, Illinois, Maine)** indicated that the encounter **set a precedent** for handling future cases.
- Contractors working in these jurisdictions could be **held responsible for identifying and managing PFAS contamination**, increasing compliance costs and potential liability.

3. Special Handling and Disposal Requirements

- **Seven state DOTs** require special considerations for the **management and disposal of PFAS-contaminated soil or water** from construction and maintenance projects.
- **8 to 10 state DOTs** impose **restrictions** on environmental discharge, land application, or landfilling of PFAS-contaminated materials.
- Contractors could face **higher disposal costs**, delays in finding suitable disposal sites, and potential liability for improper handling.

4. Legal Liability for PFAS Contamination

- **35% of DOTs** (13 states) consider **liability** for PFAS contamination when acquiring, selling, maintaining, or disturbing rights-of-way.
- **30% of DOTs** (11 states) consider liability when **managing materials** that could contain PFAS.
- **30% of DOTs** (11 states) actively consider **remediation or removal of PFAS-containing materials**, potentially requiring contractors to implement costly remediation measures or face legal exposure.

5. Limited Screening and Testing Practices

- Only **4 state DOTs (11%)** (Alaska, Illinois, Minnesota, and New Hampshire) conduct PFAS testing on construction or maintenance project sites.
- **Lack of standardized testing requirements** increases the **risk of unexpected PFAS discovery**, which could lead to project delays, change orders, or unanticipated remediation costs for contractors.

Key Takeaways for Contractors

- **Unclear Regulations:** Many DOTs lack formal PFAS policies, meaning contractors must **navigate regulatory uncertainty** and anticipate evolving compliance requirements.
- **Higher Costs & Delays:** Contractors may face **increased costs** for waste disposal, remediation, and specialized testing if PFAS contamination is discovered.
- **Legal and Financial Risks:** State DOTs in some jurisdictions are already **considering contractor liability** for PFAS impacts, increasing potential legal exposure.
- **Project Disruptions:** If PFAS contamination is detected mid-project, contractors may face **unexpected site shutdowns, regulatory scrutiny, and financial penalties**.

Conclusion

Contractors working on **state DOT projects** must be aware of **PFAS-related risks**, including **regulatory uncertainty, liability for contamination, and increased costs for remediation and disposal**. Proactive **risk management strategies**, such as **contract provisions, insurance coverage, and pre-project environmental assessments**, will be critical to mitigating potential exposure.