

PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS)

Protect Contractors from PFAS Superfund Liability

Action Needed:

Congress must ensure:

- (1) that contractors are not paying the price for using everyday building products specified on projects or for work performed on sites previously deemed uncontaminated; and
- (2) that federal agencies take a measured and legally sound approach to identifying and regulating PFAS that does not overwhelm or hinder cleanup efforts or punish innocent parties.

Background:

We have seen unprecedented regulatory and legislative initiatives related to emerging concerns with per- and polyfluoroalkyl substances (PFAS). There are 5,000+ PFAS used in common commercial products like cosmetics, apparel, carpeting, and fire retardants. The U.S. Environmental Protection Agency (EPA) seeks to regulate two types of PFAS as hazardous substances under Superfund laws, and PFAS are featured among EPA's enforcement initiatives.

The Superfund law uses strict liability to draw anyone who has encountered a contaminant, regardless of intent or fault, into litigation to pay for potentially the entire cost of cleanup. PFAS from commercial applications or products could be present in soil or groundwater in trace or even undetectable amounts unbeknownst to the contractor working on a given project, including greenfield sites. PFAS would not likely have been included in the very site assessments that increase awareness of possible site contamination—meaning a contractor could be blind to their liability threats. EPA's proposed approach means that innocent contractors could be liable across their entire project portfolio.

However, PFAS removal can also present opportunities for contractors. Contractors will be on the front line of remediation efforts. Programs like the state revolving funds run by the EPA for drinking water projects have eligibilities and funding dedicated to the removal of PFAS.

AGC Message:

- **Support a Measured Approach to Managing PFAS Contamination.** Congress should ensure that clean-up efforts are not overwhelmed by resisting pressure to enact a one-size-fits-all approach to PFAS. EPA should rely on the science and focus on those chemicals within the PFAS family that have known concerns.
- **Support Adding “Innocent Contractor” Provisions to Existing Law.** If federal agencies want to remove PFAS they will need contractors to do it. 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 the cleanup. If Congress wants contractors to bid on this work, it should enact innocent contractor provisions, limiting the legal liability of a contractor who encounters PFAS. These contractors didn't produce the PFAS and only discovered it in carrying out their contractual commitments with the project owner.
- **Protect the Construction Industry from Frivolous Lawsuits.** Congress should extend “passive receiver” protections (protections for those who did not contribute to the contamination) to construction companies that unwittingly encountered PFAS on project sites—contributing to contamination by disposing of soil or groundwater effluent. This exemption would protect contractors who may have interacted with PFAS-contaminated materials over the course of decades and on potentially hundreds or thousands of projects. The construction industry does not produce or sell PFAS; it should not have to pay.