Written Statement of
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On behalf of

The Associated General Contractors of America

to the

United States Senate

Committee on Environment & Public Works

For a hearing on

Examining the Future of PFAS Cleanup and Disposal Policy

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The Associated General Contractors of America (AGC) is the leading association in the construction industry, representing more than 28,000 firms, including America's leading general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, levees, locks, dams, water conservation projects, defense facilities, multi-family housing projects, and more.

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Chairman Capito, Ranking Member Whitehouse, and members of the Environment and Public Works Committee, thank you for the opportunity to testify before you today. My name is Leah Pilconis, and I serve as General Counsel for the Associated General Contractors of America (AGC). AGC is the leading association in the construction industry, representing more than 28,000 firms. This includes America's leading general contractors and specialty-contracting firms, many of which are small businesses. Many of the nation's service providers and suppliers are also associated with AGC through a nationwide network of 87 state and local chapters. AGC contractors are both union and open shop and are engaged in the construction of the nation's highways, bridges, tunnels, airports, transit systems, waterworks facilities, waste treatment facilities, levees, locks, dams, multi-family housing projects, commercial buildings, and more.

In my role as general counsel for AGC, I lead the association's legal, regulatory, and risk management work to support contractors across all sectors of the construction industry. I focus on contract administration, environmental and safety compliance, insurance coverage, and the operational risks facing construction firms nationwide. I work closely with AGC's advocacy and legal teams—along with outside counsel—on federal regulatory and judicial matters affecting the industry, including litigation in federal and state courts. I was invited to testify in front of this venerable committee to explain the challenges contractors face under EPA's current approach to per- and polyfluoroalkyl substances (PFAS) regulation.

Contractors are on the front lines of constructing, maintaining, and improving the nation's infrastructure and routinely encounter emerging contaminants and pollutants in the field, including PFAS. The construction industry does not manufacture or intentionally use PFAS, but contractors build and repair projects in every community across the country and can encounter PFAS wherever they work and in some products. Some of the most common occurrences arise during infrastructure work, including the construction of roads, water infrastructure, airports, and projects on or near military facilities.

AGC supports congressional efforts to modernize environmental liability laws. Doing so allows the construction of our nation's infrastructure to continue without unfairly penalizing those who did not cause the PFAS pollution problem. To be clear, AGC is not wading into the debate about the science or safety of PFAS. Our message is straightforward: <u>contractors need reasonable liability protections and a meaningful path to compliance when they encounter PFAS</u>.

In 2024, the EPA designated two types of PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERLCA). As this Committee knows, liability under CERCLA is strict, retroactive, and joint and several.[1] It is triggered regardless of fault or intent. This approach exposes contractors to liability for any interaction with PFAS – even in situations where the work was completed decades ago, and the contractor had no way of knowing what they were dealing with. It's an untenable status quo and one we felt compelled to challenge in court.[2]

[1] Under CERCLA, cleanup liability is strict, retroactive, and joint and several, which means a contractor can be held responsible for the *entire* cost of cleanup, even if they did not know about or cause the contamination and even if others contributed more.

[2] *Chamber of Commerce of the United States of America, et al. v. U.S. Environmental Protection Agency, et al.*, No. 24-1193 (D.C. Cir. 2024).

PFAS is creating significant costs now, even without federal cleanup orders under CERCLA. Looking at what is happening on the ground today, AGC members say the uncertainty and potential liabilities associated with PFAS are discouraging bidders, shrinking the pool of qualified contractors, and increasing overall project costs. (*See* Appendix for AGC member examples.) These increased costs, as explained in more detail throughout this statement, include:

- **Increased Trucking and Handling Costs –** Hauling away contaminated debris requires more testing and training for drivers and special protocols. This increases costs significantly.[3]
- **Increased Disposal Costs –**Some landfills are refusing waste with trace levels of PFAS, forcing contractors to haul waste longer distances to specially designated hazardous waste landfills, which are limited, more expensive, and often further away than traditional landfills. This drives up construction costs and causes delays while contractors stop work, test and store materials, locate alternative disposal sites, and renegotiate with owners for compensation.
- **Increased Consulting, Testing, and Insurance Costs –** Site investigations, testing, and engaging qualified environmental legal professionals are costly, coupled with diminished insurance coverage.
- **Reduced Use of Recycled Construction Materials –** The construction industry relies heavily on recycling to reduce costs and environmental impacts. However, with the increased PFAS liability, contractors will be limited in the material (reclaimed aggregate, soil, asphalt) they can recycle. This reduces recycling options and increases reliance on costlier virgin materials.

The EPA's "direct-to-Superfund" designation of PFOA and PFOS as hazardous substances under CERCLA exposes contractors to significant legal and financial risk without providing a clear compliance path for the construction industry. EPA has not set background levels or soil or groundwater thresholds (concentration limits) that would indicate when materials have restricted or unrestricted uses. Nor has EPA issued clear standards for the management or disposal of PFAS-impacted soil or water encountered during routine work.[4] In this vacuum, project owners are choosing not to test materials for PFAS. As a result, contractors performing excavation, trenching, and dewatering activities are stuck with the risk of unknowingly handling PFAS and face cleanup liability or private-party litigation for contamination they did not create, could not reasonably detect, and have received no federal direction on how to manage. EPA would ask our contractors to ignore the specter of that liability and to trust in EPA's discretion. We cannot do so.

In addition to a lack of guidance, EPA's PFAS rule creates substantial uncertainty in contract negotiations – sometimes pushing contractors to absorb increased transportation, testing, and disposal costs without a contractual avenue for recovery. At the same time, the industry is seeing more insurers carve out PFAS exclusions and limitations from environmental and general liability policies. These policies are either excluding PFAS outright or undergoing heightened levels of underwriting scrutiny, often leading to very tight conditions, high deductibles, and low sublimits for PFAS. Faced with these

[3] CERCLA mandates that the Secretary of Transportation must regulate all listed "hazardous substances" as hazardous materials under federal transportation law; the Hazardous Materials Transportation Act (42 USC §9656). Even though the U.S. Department of Transportation (DOT) has not yet issued PFAS-specific hazardous-materials rules, construction companies hauling away debris containing PFAS will eventually need specialized truck drivers who have a Commercial Driver's License (CDL) and a Hazardous Materials Endorsement on their CDL.

[4] EPA's Interim Guidance on the Destruction and Disposal of Perfluoroalkyl and Polyfluoroalkyl Substances and Materials Containing Perfluoroalkyl and Polyfluoroalkyl Substances--2024 states: "It does *not* establish what concentrations of PFAS in wastes, spent products, or other materials or media would necessitate destruction or disposal.

uncertainties, many contractors are forced to price potential PFAS risks into their bids—driving up the cost of public infrastructure projects and ultimately increasing costs for taxpayers.

All of this uncertainty and the inability to fairly allocate and/or transfer PFAS risk limit competition. Contractors are increasingly hesitant to bid on PFAS-suspect projects, decreasing the pool of qualified bidders for public and large infrastructure projects (such as airports and military bases) and increasing the cost of such projects.

In EPA's statement from September 17 announcing that PFOA and PFOS will remain classified as hazardous substances under CERCLA, Administrator Lee Zeldin acknowledged that new statutory language from Congress is needed to fully address the Agency's concern with passive receiver liability. AGC of America agrees. We urge Congress to use its authority to establish protections for contractors who incidentally encounter PFAS during construction infrastructure activities.

AGC has consistently advocated for a measured approach to environmental challenges such as PFOA and PFOS. 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. Yet EPA has not acknowledged or addressed the significant impact of its CERCLA action on the construction industry. The construction industry is poised to be part of the solution, but the industry cannot play that role effectively unless Congress and the Administration recognize and mitigate the unprecedented liability risks created by this rule.[5]

My testimony will outline AGC's concerns on PFAS liabilities and issue AGC's Call to Action, which asks the Committee to do the following:

1. **Ensure CERCLA liability is not transferred to contractors who do not manufacture or knowingly encounter PFAS.**
2. **Direct EPA to establish clear PFAS waste disposal/reuse standards to provide the clarity industry needs to manage this waste stream.**
3. **Reduce risk around cost estimates and schedules due to the discovery of PFAS.**
4. **Take actions to ensure PFAS enforcement does not drive up the costs of road, bridge, and other infrastructure construction.**

A. CERCLA Creates Unique and Disproportionate Liability Risks for Contractors

Strict, retroactive liability under CERCLA means a contractor could be held responsible for PFAS cleanup costs even if the contractor did not know about the contamination. EPA's enforcement discretion[6] does not protect contractors from third-party lawsuits (e.g., cost contribution claims or

[5] As discussed in this statement, CERCLA §119 protects contractors from cleanup liability only when they are performing an EPA- or state-directed **response action**. It does *not* protect contractors doing ordinary construction work where PFAS is encountered incidentally. 42 U.S.C. § 9619.

[6] EPA's current enforcement discretion policy is a *policy choice*, not a legal exemption. EPA or a future administration may withdraw that discretion. Available online at: https://www.epa.gov/enforcement/pfas-enforcement-discretion-and-settlement-policy-under-cercla.

actions under common law for negligence). For example, if a contractor disposes of construction debris at a landfill, the contractor could still face liability if, decades later, that debris was found to contribute to PFAS contamination. Contractors could even face liability for moving material from one part of the job site to another – a daily occurrence in construction – if they unknowingly spread contamination.[7]

Unlike a fixed facility with a known waste stream, a construction firm's work spans hundreds of sites, stretching over decades of operations that may involve moving dirt, dewatering, demolishing older structures, and placing recycled fill materials. The work does not involve just one landfill, offsite property, or active site, but countless numbers of sites—not a singular facility. While testing may be required in the future, environmental site assessments and clean-fill tests have not historically included PFAS, generally leaving contractors with no way to know whether their past projects involved PFAS-impacted materials.

When EPA finalized the hazardous substance designation, it threw the entire construction industry into immeasurable liability for past projects and left them without a means or compliance path to manage PFAS risk on future projects. PFAS has become the "hot potato" of our childhood games with real-world consequences on who gets stuck with the risk and pays the "PFAS premium" on public and private projects. AGC maintains that it should not be the contractor who pays.

Under current law, only those performing *EPA- or state-directed cleanups* qualify as Response Action Contractors (RACs) under CERCLA §119 and receive liability protection. A construction firm that incidentally disturbs PFAS-contaminated soil during normal work does not. This leaves well-intentioned contractors vulnerable to potential CERCLA liability as "operators" or "arrangers" or "transporters." The protection offered to response action contractors,[8] or those who are retained specifically for hazardous substance clean-up work,[9] does not apply to the overwhelming majority of contractors that encounter PFAS in the ordinary course of their business.

Lastly, contractors face exposure to future CERCLA liability when historic Superfund sites are reopened for PFAS. For example, if a contractor was brought in as a de minimis contributor to a landfill cleanup, that site could be reopened now for PFAS.

Congress can help by clarifying that contractors performing construction are not potentially responsible parties (PRPs) under CERCLA and extending Response Action Contractor (§119)–type liability protections.

B. PFAS Magnifies Contractual Risk and Is Disrupting Insurance Markets

Because EPA has not set background levels or soil or groundwater thresholds (concentration limits) for PFAS—nor provided disposal or management standards for PFAS-impacted materials—there is no clear framework for how construction firms should comply. In the absence of federal direction, many owners are opting not to test, which pushes the liability and financial exposure onto

[7] If PFAS contamination is released, spread, or transported offsite during the work, that contractor could technically meet CERCLA's broad definition of a potentially responsible party (PRP) even though the contractor had no knowledge of the contamination and no ability to prevent encountering it.

[8] 42 U.S.C. § 9619.

[9] 42 USC § 9619(e)(2).

contractors who may unknowingly encounter PFAS during routine excavation or dewatering, for example. The lack of a federal directive and the lack of innocent contractor and passive receiver protections are complicating contract negotiations and disrupting insurance markets.

PFAS risk is increasingly being pushed onto contractors through contract language that holds them responsible for managing and disposing of waste. Even with due diligence ahead of bidding for a project, the contractor will likely not have the opportunity (or permission) to test in advance to know whether PFAS is present. This is exacerbated by the fact that PFAS is not identifiable via a sheen like oil or an odor like other types of contamination. Without testing, it is unlikely the contractor will know it is present. This means a contractor can encounter PFAS in water, soil, concrete, or other paving materials on a project without forewarning.

Owners themselves often avoid PFAS discussions, which enables them to shift risks on a project to the contractor. Many contracts assign contractors all "risk" for "unknown" contamination, defined as any contamination not disclosed by the owner or reasonably ascertainable by the contractor's due diligence, often while providing the contractor no schedule or cost relief for managing site contamination. This trend leaves contractors with unbounded liability risks when PFAS is present. (*See* Appendix for AGC member examples.)

In order to help its member companies plan for PFAS risk, AGC has released a "questions and considerations" document that looks at potential pitfalls before and after work starts on a project.[10] The document by necessity addresses contractual risks, noting key site documentation to consider, siting, testing, and whether the contract states who is responsible for what and any compensation to the contractor for differing site conditions. Other factors a contractor must consider are hazardous materials restrictions and liabilities governed by insurance and indemnity clauses.

Given this environment, AGC urges Congress to require public owners to:

- ✓ Retain CERCLA liability (CERCLA Section 107);
- ✓ Test for the presence of PFAS prior to project construction;
- ✓ Develop cost-sharing mechanisms to compensate for known and unknown contamination; and
- ✓ Allow PFAS storage on site or designate disposal facilities that knowingly permit the material.

Insurance Coverage Is Collapsing Under PFAS Pressure

PFAS-related liability risk cannot simply be transferred through insurance. Many insurers are now imposing PFAS exclusions, restrictions, or heightened underwriting requirements across environmental and general liability policies. AGC members and news sources report:

- **PFAS exclusions** added to commercial general liability (CGL) and contractor's pollution liability (CPL) policies;
- **Coverage denials or nonrenewals** for contractors working near PFAS-suspect sites;
- **Special PFAS riders, high deductibles, and low sublimits** where coverage is offered at all;

[10] AGC of America, *General Contractors: Questions and Considerations Related to PFAS*, October 2025 (available online at: https://news.agc.org/wp-content/uploads/2025/10/PFAS-Questions-and-Considerations-Final.pdf).

- **Exclusions for "emerging contaminants"** now being used to capture PFAS; and
- **PFAS exclusions increasingly added** at renewal, even if not present in prior years.[11]

Some larger insurers may continue offering limited PFAS-related coverage, but contractors—especially small and mid-sized firms—purchase a wide range of policies across the insurance market, and many do not carry all coverage types. Whether past work is covered depends entirely on the historic policy period, and even then, the dollar limits reflect outdated market prices and are inadequate for PFAS cleanup.

This insurance uncertainty mirrors the regulatory uncertainty. Without clear federal guidance on how PFAS must be handled, transported, or disposed of, insurers cannot reliably underwrite the risk, and contractors cannot know whether their normal operations could trigger future liability.

Critical to the solution moving forward is for EPA to expedite the issuance of clear PFAS waste disposal and reuse standards, along with PFAS concentration thresholds that distinguish between restricted and unrestricted reuse. This would provide the certainty to justify testing and to plan for the added costs of managing PFAS-impacted materials.

> Congress can help by directing EPA to establish disposal/reuse standards to provide the clarity industry needs to manage this waste stream. This would reduce risk around cost estimates and schedules due to the discovery of PFAS.
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> But EPA action alone is not enough. As explained above, AGC urges Congress to enact innocent contractor and passive receiver protections and to require public owners to test for PFAS during the project planning stage for federally funded projects. Early testing ensures contaminated sites are identified before bidding, allowing contractors to price the work accurately and avoid unexpected liability going forward.

C. PFAS Liability Is a Direct Threat to Infrastructure Affordability

While contractors are accustomed to handling hazardous materials such as asbestos or lead, those substances come with established standards: clear exposure thresholds, procedures for removal, and designated disposal facilities. **None of this exists for PFAS.** The absence of EPA standards leaves contractors with no clear path to compliance. As explained above, when PFAS is discovered during excavation, soil movement, or dewatering, contractors face significant risk of unknowingly disturbing contamination and triggering liability.

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[11] "Many carriers seek to exclude PFAS exposures … we are seeing this on both Pollution placements as well as General Liability and Excess placements." https://www.rpsins.com/learn/2025/mar/pfas-forever-chemicals-and-construction-pollution-liability-risks/. "PFAS exclusions continue to be added by more markets, while some exclude PFAS for only certain classes of business." https://rtspecialty.com/wp-content/uploads/2025/02/2025-Market-Update.pdf. "New ISO PFAS exclusion available; many carriers adopting … environmental policies can be scheduled or sub-limited for PFAS …" https://inszoneinsurance.com/blog/pfas-exclusions-in-insurance. "A drawback to modern-day CGL policies is that they almost always contain some form of pollution exclusion … [and] standard forms may not respond to PFAS …" https://www.pillsburylaw.com/a/web/168966/Insurance-Coverage-for-PFAS-Liability-Lexis-Practical-Guidance-d.pdf.

This uncertainty is already affecting the marketplace. Some contractors are walking away from high-risk projects, narrowing the bidding pool for public infrastructure work. The risk also leaves few "liability-proof" options for disposal, other than limited hazardous waste facilities. At the same time, PFAS concerns are disrupting recycling markets and beneficial-reuse practices that traditionally reduce project costs.

AGC members report a range of cost and delay impacts, including:

- Delays in negotiating contracts due to liability concerns;
- Long-term liability risk from work on high-risk sites;
- Increased consulting costs;
- Increased sampling fees and wait times;
- Higher landfill and transportation fees;
- Additional compliance and training costs under hazardous materials rules;
- Increased risk for acquiring laydown yards and other temporary property; and
- Loss of beneficial-use markets for soil, aggregate, and reclaimed asphalt pavement (RAP).

The High Cost of Disposal

One AGC member example shows a potential **5,000% increase in soil management costs** when PFAS-suspect materials had to be shipped to specialized hazardous-waste landfills rather than local facilities. Moreover, hazardous waste capacity is insufficient to handle the volumes of soil associated with infrastructure work. Several AGC members report being forced to ship soil hundreds of miles, sometimes across state lines, increasing transportation costs, project delays, fuel consumption, and emissions. (*See* Appendix for more examples.)

The Cost of Materials – Implications for Recycling and Reuse

Higher disposal costs are compounded by the **loss of recycling and reuse options** that help keep infrastructure affordable. Contractors routinely reuse soil, aggregate, and asphalt to manage costs, particularly in low-bid environments. When PFAS uncertainty prevents material from being recycled, contractors must purchase more expensive virgin materials—costs ultimately borne by project owners and taxpayers.

AGC members report that EPA's CERCLA designation already affects the viability of reclaimed asphalt pavement (RAP). RAP sourced from airports, military bases, and certain highways may contain PFAS, eliminating a revenue stream for contractors and raising material costs.

Contractors also face liability when **importing** soil to a project. Without PFAS soil standards, contractors cannot know whether imported fill is clean or whether today's conditions will meet future regulatory thresholds. Soil sourced from agricultural land where biosolids were applied presents another new liability risk. With increasing concerns over PFAS contamination at very low thresholds, the cost of earthwork goes up. If contractors cannot use the soil onsite or offsite locally due to the potential for spreading contamination, and the landfills will not take the soil, then a licensed facility is the only option. However, there is not enough hazardous landfill space to accommodate large amounts of soil.

Public Owners Need to Plan for PFAS Costs

The implications for infrastructure projects become clear when you consider that public owners are not prepared to manage PFAS on their projects. A 2024 Iowa State University study on PFAS policies across state Departments of Transportation (DOT) found that only 39% of state DOTs have policies for identifying PFAS; only three states have established procedures for handling PFAS on construction projects; only seven states require special management or disposal protocols; and only four states currently test for PFAS on construction and maintenance projects. The study notes that this lack of standardized testing and disposal guidance increases the likelihood of unexpected PFAS discovery, delays, cost overruns, and liability exposure for contractors.[12]

D. PFAS Enforcement Discretion, Settlements and Cost Recovery

EPA's current enforcement discretion policy focuses on chemical manufacturers and large industrial users. But like any policy, that discretion is temporary and does not shield contractors from third-party cost recovery suits. At the same time, major PFAS manufacturers are entering into large settlement agreements with EPA and states that could take away downstream cost-recovery rights, shifting future liability to contractors.

More specifically, the problem is that EPA's settlement approach may remove the primary sources of PFAS contamination from the legal chain of cost allocation, exposing downstream parties, such as contractors, to retroactive, joint, and several liability.[13] Broad settlement language can bar contribution claims industry-wide, even for sites beyond those captured by the settlement. PFAS regulation is about pathways, and EPA's approach would foreclose future enforcement against what EPA concedes is the primary path to exposure.

As a result, contractors could face disproportionate cleanup costs for PFAS contamination tied to legacy products and historic uses, with no clear mechanism to recover those costs. This outcome undermines CERCLA's "polluter pays" principle and discourages investment in infrastructure development, including redevelopment and public-works projects.

One approach Congress could take to protect innocent contractors is to expand the use of de micromis and de minimis settlements.[14] Unfortunately, this exemption is available only for work done on National Priority List sites prior to April 2001 and is subject to Presidential approval that cannot be challenged in court.[15]

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[12] J. Charbonnet and R. Sturgill, Jr., Iowa State University, *Practices to Identify and Mitigate PFAS Impacts on Highway Construction Projects and Maintenance Operations*, National Cooperative Highway Research Program, 2024. Available online at the National Academies Press: https://nap.nationalacademies.org/read/27843/chapter/5.

[13] 42 U.S.C. § 9613 makes clear that "A person who has resolved its liability to the United States or a state in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide."

[14] CERCLA provides an exemption for non-owners/operators whose actions caused a relatively small amount of exposure and did not contribute towards response costs in a meaningful way. *See* 42 U.S.C. § 107(o).

[15] *Id.*

If Congress and EPA are serious about protecting passive receivers and innocent contractors, you should consider expanding this exemption to work done at any site, during any year, and allowing judicial review of any Presidential veto.

The other lever EPA might pull to protect contractors is the expansion of de minimis settlements under CERCLA 122(g). Under this provision, EPA can settle with parties who don't qualify for the de micromis exemption but, for case specific reasons, still warrant a settlement.[16] For example, situations where a party's contribution is still a minute percentage of the total waste volume sent to the site, despite exceeding the thresholds in 107(o).

This provision could be used to protect contractors, but certainly there is no guarantee of protection. And like the de micromis exemption, this provision is subject to ambiguous Presidential determinations that can often cut either way. To allow contractors to rely on de minimis settlements, Congress should establish, or direct EPA to establish, an objective standard for determining whether a contribution is "minimal in comparison to other hazardous substances at the facility."[17]

Congress can take actions to ensure PFAS enforcement does not negatively impact critical infrastructure construction, such as:

- ✓ Requiring EPA to narrowly define "matters addressed" in PFAS settlements so they resolve only specific site liabilities and do not eliminate the ability of downstream parties to recover PFAS cleanup costs from manufacturers or other responsible parties.
- ✓ Clarifying that non-manufacturing PRPs retain cost-recovery rights under CERCLA §107(a) when they incur PFAS cleanup costs unrelated to manufacturing or intentional use.
- ✓ Expanding use of the de micromis exemption and de minimis settlements.

E. Conclusion

PFAS presents a real environmental challenge—but without clear statutory and regulatory guardrails, the current CERCLA framework exposes contractors to unlimited, retroactive liability, which is increasingly becoming uninsurable, for contamination they did not create and cannot reasonably detect. This is already driving up bid prices, reducing competition, slowing federal projects, and ultimately increasing costs for taxpayers.

AGC respectfully urges Congress to act. Addressing PFAS must not unintentionally undermine the very infrastructure programs Congress has invested in so heavily. Contractors want to be part of the solution, but they cannot take on open-ended liability for historic PFAS pollution.

We look forward to working with the Committee to modernize CERCLA, establish clear standards for PFAS disposal and reuse, protect innocent contractors and passive receivers, and ensure that PFAS enforcement does not jeopardize the delivery of critical infrastructure.

Thank you for the opportunity to testify. I welcome your questions.

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[16] 42 U.S.C. § 9622(g).

[17] In the past, the Department of Justice used .002% of total volume as a threshold for enforcement. Congress should direct EPA to conduct a rulemaking to develop a legally sufficient standard. That figure was found at the bottom of page three of DOJ's November 2002 CERCLA policy memo.

APPENDIX

AGC Member Examples – Increased Contract Risk

An example shared by an AGC member relates to another chemical yet demonstrates the problem of risk shifting. On a public project, the owner told the contractor that the soil was not contaminated and was safe for disposal. The contractor tested, and the levels of the chemical in question required remediation. The contractor pursued a change order because of the change in conditions. However, the public owner resisted taking on the additional costs, leading to a delay in the project of over 500 days. As the PFAS issue develops, some states may require testing on sites where there was a known use or manufacturing of PFAS containing materials. These types of requirements will vary by state, and members have shared an overall resistance on the part of project owners to test.

One member mentioned experience with sending waste to qualified landfills that later went out of business – three different times with three different landfills. They had done due diligence to check or verify the landfills' qualifications in advance. Each of the landfills wound up requiring remediation. The member was brought into negotiations as a de minimus contributor on each – paying into the settlement agreements. In each case, insurance did not provide coverage. There is a concern that PFAS will exacerbate existing risks associated with landfill cleanups.

AGC Member Examples - Increased Disposal and Transport Costs

Contractors are already seeing specific instances where the potential for PFAS has increased costs and transport times. For example:

- **In California**, an AGC member was turned away from a landfill that previously accepted Department of Defense (DoD) waste, as the landfill now refuses to accept waste from DoD facilities due to the risk of PFAS. This forced the AGC member to pay significantly more to haul the waste to other facilities, with some being located out of state. This member anticipates that, as a direct result of this rule, disposal options for the soil and effluent waste from the above-referenced projects will be limited to hazardous landfill.
    - On another project in **California**, a member company that is dealing with the export of 10,000 to 20,000 yards of soil waste believes that under this same scenario, their disposal costs increased from $40 per yard to $200-$300 per yard.

- **In New England**, an AGC member was turned away from disposing of materials in landfills multiple times due to trace amounts of PFOA and PFOS. Depending on the project location, disposal options will be very limited, meaning soil may need to be hauled 100 miles or more.
    - **A study in New England** found that trace amounts of PFOA and POFS exist in areas well removed from any development, making removal and disposal more difficult due to the wide range of potentially impacted sites. A member company has shared that disposal costs per ton in Massachusetts were between $15 and $60, not including shipping, for landfilling or a soil reclamation facility. For a hazardous waste landfill, tipping costs increase to $300-$400, not including shipping.

- **In Texas**, a member company shared their estimate from a jobsite to the nearest disposal option as compared to the nearest hazardous waste landfill. The round-trip miles for the local disposal site were 20 miles, multiplied by 750 loads of soil. For a hazardous landfill, the round-trip was 800 miles. Even if just a small fraction of the 750 loads of soil needed to be transported to the hazardous landfill, the cost of transport, including fuel, would quickly add up. This example does not consider the increased disposal fees and tipping fees when switching to a hazardous waste landfill, which, as we see from the examples above, can be steep.

Other AGC members have reported experiences with demolishing, restoring, and constructing airport hangars equipped with Aqueous Film Forming Foam (AFFF) fire suppression systems, which are known to have PFAS. Many existing hangars, built in the past 70 years, have "charged" systems that require testing (the AFFF is discharged through devices such as sprinklers, nozzles, hoses, and chambers), cleaning, dismantling, and disposal. When demolishing or renovating an existing hangar, the contractor must address the existing AFFF system (drain the system before work and test/charge the new fire suppression system components) as well as the surrounding areas. In general, the construction process requires demolishing asphalt/concrete pavement, digging soil out two to ten feet below the surface, and disposing of the asphalt/concrete and soil waste in a landfill.

Numerous AGC members also report that the PFAS rule has led to increased consulting, transportation, and disposal costs for contractors handling PFOA- and PFOS-containing hazardous substances. A member shared an example of how the presence of these chemicals in pooled stormwater on a normal project turned an otherwise simple cleanup of a minor spill of hydraulic fluids into a lengthy remediation process, adding at least $88,300 in disposal and consultant fees to the price tag.

In another instance, landfill costs for an AGC member increased tenfold, causing months-long project delays and adding to operational expenses.

AGC Member Examples - Bidding Impacts and Walking Away from Projects

Due to the increased liability related to PFAS, AGC members have experienced delays and/or declines in business and/or an increase in operating expenses. To comply with the rule and avoid liability, AGC members now face delays in contract negotiations for airport and federal DoD work to assess potential contamination risks, sometimes resulting in a decision not to bid on projects due to liability concerns. In the Northeastern United States, a wetland remediation project downstream from a firefighting academy is removing contaminated soil at a cost to taxpayers.

This is not limited to projects with a history of AFFF use onsite. Other AGC members are seeing similar situations arise throughout the country. For example:

- **In the Western United States**, one AGC member company was interested in pursuing a 99-year lease project to develop and construct on county-owned property. When the member company undertook due diligence on the subject property, they discovered a record of PFAS contamination at relatively high levels and believed that the site could have had groundwater discharge into a nearby body of water. The project owner indicated that the developer and contractor would be responsible for the handling and disposing of PFAS

impacted materials, and after asking about ongoing obligations associated with this PFAS impact, the owner did not have enough information to respond, causing the member company to believe they would be held responsible for the cleanup of PFAS both on the property and potentially off property if the release had spread. The member company ended its pursuit of this project. No other construction companies or contractors responded to the owner's RFP. And despite the owner issuing a new one in the intervening months, intended to clarify uncertainty around RFP, no companies have responded to the updated guidance.

- **In the Southwestern United States,** a separate AGC member declined to bid on a project to conduct maintenance work downstream of an airport due to a documented spill of PFAS materials six months prior. While the contractor asked about the spill and PFAS testing during the project bid process, the project owner indicated that the spill did not contain known PFAS, and they did not conduct any testing, putting the soil disposal risk directly onto the contractor.

In addition to the above examples, contractors and AGC members are also voicing concerns about conducting PFAS-related cleanup projects within waterworks systems. AGC members often replace contaminated pipes and will install water filtration systems to remove PFAS from water systems. Liability concerns are starting to be voiced among contractors doing this type of work, leading to some questions about whether some contractors will continue to bid on this type of work.