



EPA PFAS Rules Could Cause Liability Headaches for Contractors

BY KEN GARCIA

In the intricate tapestry of environmental concerns, per- and poly-fluoroalkyl substances (PFAS) have emerged as focal points, sparking heightened attention and regulatory scrutiny. Some PFAS, a group of human-made chemicals known for their persistent nature and widespread use in various industrial and consumer products, have raised environmental and health concerns.

Because of this, the Environmental Protection Agency (EPA) proposed new regulations in 2022 that would classify two PFAS – perfluorooctanoic acid

(PFOA) and perfluorooctanesulfonic acid (PFOS) – as hazardous substances. This would fall under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Superfund.

This proposed rule could find contractors at the crossroads, at the frontlines of any remediation and infrastructure efforts as well as navigating the challenges posed by potential compliance requirements and what this could mean for their business. AGC of America is helping its members understand and address concerns raised by the EPA's proposed rules.

What are PFAS?

PFAS were invented in the 1930s by the chemical company DuPont. At the time, the company was looking for refrigerant alternatives when, during an experiment, they discovered this new product. This chance discovery led to the development of a class of synthetic chemicals characterized by strong carbon-fluorine bonds, making them highly resistant to heat, water and oil.

In the post-World War II era, PFAS gained widespread commercial use due to their remarkable properties, finding applications in various products such as



non-stick cookware, waterproof textiles, carpeting, sealants and fire-retardant foams. Their versatility and durability made them essential in multiple industrial processes and consumer goods, contributing to their ubiquitous environmental presence. There are approximately 5,000 PFAS.

As their use expanded, so did research about the potential impacts of some PFAS to the environment and human health including developmental problems to certain cancers. These impacts have triggered a reevaluation of the widespread use of all types of PFAS. It also prompted regulatory agencies worldwide to scrutinize and

address those substances demonstrating environmental and health impacts.

Specifically, two types of PFAS (PFOA and PFOS) are now being considered by the EPA to be added to their list of hazardous substances. While they are no longer produced in the United States, they are still imported. PFOA and PFOS are found nearly everywhere. According to Rick Bean, a principal geologist with Universal Engineering Sciences (UES), a member of multiple AGC chapters, these chemicals are also known as bio-accumulates.

“That carbon-fluorine bond, they don’t break down easily in the environment, meaning that they’re very persistent,” Bean said. “As an animal or human intakes, levels of PFAS bio-accumulates in their system and don’t just go away.”

EPA Proposed Rule

In 2022, the EPA announced it proposed a rule to designate PFOA and PFOS as hazardous substances under Superfund and a handful of others are slated to follow that regulatory pathway. The federal agency says its proposal would increase transparency around releasing these chemicals and hold those responsible for releasing them into the environment liable for the clean-up.

Like all proposed rules for federal agencies, there is a chance for public comment. AGC responded and provided its opinion on these rules. The association believes this proposed regulatory approach could impact construction contractors negatively as 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 clean-up.

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 project, including greenfield sites.

According to AGC, the rule is part of an across-the-board approach within the EPA in addition to Superfund.

“They are looking at it under all of their program offices, including Offices of Air and Radiation, Water and Waste (Land and Emergency Management),” said Melinda Tomaino, senior director, environment and sustainability, AGC of America. “They’re taking a multifaceted approach to how they can address PFAS and understanding it.”

While the EPA continues to work on its proposed rule, AGC is working hard to make members aware of these changes and encourages members to assess their potential risks and review their previous and future work portfolios.

Impact on Contractors

The rule’s impact remains unknown as the EPA continues through the approval process. However, AGC immediately chimed in during the public comment window on behalf of its members and the industry. The concern is the rule as proposed could open members up to liability for the cleanup of sites where those PFAS are found.

“They don’t know what projects they may have interacted with PFAS because it wasn’t part of the site assessments,” Tomaino said. “Now, when you’re talking about something like CERCLA that can stretch back decades, you can have liability for those projects where you didn’t even know that you were encountering PFAS.”

AGC wants the EPA to take a measured approach to managing PFOA and PFOS contamination or any other PFAS that emerge as a concern. Contractors are around PFAS daily. Various types could be found in degreasers, adhesives, roofing material, caulk, metal coating, etc. Because there are so many PFAS in legal use, AGC wants to ensure cleanup efforts are manageable and that they focus on those PFAS associated with known concerns.

The association is also pushing for an “innocent contractor” provision to be added to the existing law. Contractors will be on the frontlines of cleanup, and there

is funding for projects to address this type of contamination in drinking water. If the federal government wants them to bid on these projects, AGC suggests the provision be in place to reduce legal liability. The contractors were not responsible for the contamination on the site and only found it while working for a site owner.

For example, if a contractor works on a site with a stormwater or de-water operation underway, they could contaminate the environment and not realize it.

“If that water that they are controlling happens to be contaminated with PFAS through things they’re using on the construction site, they could be held liable,” Bean added.

AGC would also like the federal government to protect contractors from lawsuits by extending what is known as “passive receiver” protections. This would protect contractors from unwittingly encountering PFAS of concern on project sites, contributing to contamination by disposing of soil or groundwater effluent.

“We’re not confident that EPA’s promise of enforcement discretion would protect our members from third-party lawsuits,” Tomaino said. “CERCLA doesn’t provide any protection, so that would need to come from Congress.”

As part of their comments to the EPA, AGC expressed concern that the proposal would reopen past Superfund sites to PFAS. In addition, AGC believes there needs to be more proper disposal sites to place potentially large amounts of soil or debris contaminated with PFAS should a cleanup be needed.

AGC Members Getting Involved

While the EPA continues to work on its proposed rule, AGC is working hard to make members aware of these changes. It also encourages members to assess their potential risks and review their previous and future work portfolios. In addition, they should be putting in safeguards when managing materials.

“Contractors might be doing dewatering or earthmoving activities; now would be the time to start thinking about what you can put in place to protect the company,” Tomaino said.

AGC also has documentation that provides contractors with information on the proposed rule, the association’s stance and how contractors can speak about this with officials. Tomaino encourages anyone with questions to reach out to AGC.

Bean agrees and encourages other companies to pay attention to federal and state rules related to PFAS. He says companies are reaching out to UES to understand better how to handle PFAS to help determine future liability issues.

“They can determine their potential future liability to PFAS before these regs come down,” Bean noted. “They want to know what their costs may be and what they’re going to have to do before this rule hits.”

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EDITORIAL NOTE:

In early December 2023, the final rule to designate PFOA and PFOS as hazardous substances under CERCLA began interagency review and could be released by or before March 2024.