

EPA One Step Closer To Regulating PFAS Under Superfund Law

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Earlier today, the [EPA announced](#) that it will begin work to add four types of PFAS to the Resource Conservation and Recovery Act's (RCRA) Hazardous Constituent List. Once the EPA completes the process to add certain PFAS to the RCRA list, those PFAS would automatically be designated as "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) – also known as the "Superfund law." Designations under both Acts would have enormous "cradle to grave" liability and enforcement action consequences to numerous companies, although the PFAS under the Superfund law designation will have particularly significant ramifications. Companies in numerous sectors (industrial, manufacturing, consumer products, etc.) absolutely must ensure that their compliance programs account for the changes that the EPA is well on its way to enacting.

EPA's RCRA Announcement

Today's announcement by the EPA is relatively brief; however, it indicates the EPA's intention to list PFOA, PFOS, PFBS and GenX under the Hazardous Constituents List of the RCRA. A final listing would allow the EPA to regulate these four PFAS more directly in terms of the generation, transportation, treatment, storage and disposal of the four PFAS. It also gives the EPA significant power to subject violators of the RCRA to hefty penalties, and in some cases, criminal prosecution. While much of the EPA's actions to date with respect to PFAS have been preventative in nature, a designation under the RCRA would be one of the most significant steps giving the EPA the authority to take proactive and corrective actions.

While the RCRA statement is a significant step for the EPA, critics quickly commented that the step does not go far enough, mainly because the EPA declined to list all PFAS as a class under the RCRA. However, doing so would have been in contrast to statements from just the past two weeks from the EPA, notably in their [Strategic Roadmap](#), to regulate PFAS as sub-classes, as opposed to individually or as one large class of chemicals.

Direct Impact of the RCRA Listing

If adopted, the EPA's new regulation under the RCRA would most immediately impact landfill operators, wastewater treatment plants, and water treatment facilities. Since these facilities naturally

accumulate PFAS more readily than other types of sites, the owners of the facilities will need to explore expensive technological steps that will avoid discharges of the listed PFAS into the environment in order to avoid penalties. However, under the RCRA's "cradle to grave" regulatory authority, the EPA would also have the power to pursue any companies discharging the listed PFAS into the environment.

PFAS Under Superfund Law

Once the EPA lists the four PFAS under RCRA, those PFAS are automatically listed as "hazardous substances" under CERCLA (the Superfund law). Numerous legislators, media, and interest groups have pressed the EPA for years to list at least PFOA and PFOS as hazardous substances under CERCLA. Today's RCRA announcement suggests that the EPA is willing to go a bit further than that and designate other types of PFAS, as well.

Once a chemical is listed as a "hazardous substance" under CERCLA, the EPA has the authority to order responsible parties to clean up sites contaminated with the designated chemicals, with the cost being born entirely by the responsible parties. Alternatively, the EPA can clean up the site on its own and then seek payment of the costs from responsible parties. Either way, the cleanup of so-called Superfund sites can be costly – anywhere from a few hundred thousand dollars for a small parcel of land to hundreds of millions of dollars. The designation also triggers considerable reporting requirements for companies. Currently, those reporting requirements with respect to PFAS do not exist, but they would apply to industries well beyond just PFAS manufacturers.

While we have been stressing this point for quite some time, it bears repeating that companies of many types absolutely must ensure that they are prepared for when the EPA designates certain PFAS as hazardous, either under RCRA or CERCLA. A hazardous substance designation for certain PFAS will have enormous liability and financial impacts on a wide array of industry types, and a full compliance check is the best way to avoid unwelcome surprises.

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