

EPA Proposals on PFAS Compounds and Hazardous Waste May Presage Opening the Floodgates for RCRA Regulation and Enforcement

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On January 31, the US Environmental Protection Agency (EPA) issued two proposed rules to facilitate the targeting of PFAS.

The [first proposed rule](#) would add certain per- and polyfluoroalkyl substances (PFAS) compounds to the list of hazardous constituents under the Resource Conservation and Recovery Act (RCRA), and the [second proposed rule](#) would expand the definition of “hazardous waste” under RCRA. Together, these rules would ensure that PFAS compounds are subject to targeted RCRA enforcement actions and more stringent RCRA regulations.

PFAS Background

PFAS refers to a group of more than 1,300 chemicals that have been used in a number of consumer and industrial products for 80 years. As a result of their widespread use and chemical composition, PFAS has been found in soil, groundwater, surface water, and the air. In recent years, PFAS has been the subject of greater scrutiny and multiple regulatory proposals at the federal level, with an EPA “[Action Plan](#)” for regulating PFAS in 2019, an EPA “[Strategic Roadmap](#)” for regulating PFAS announced in 2021, a proposed rule designating PFAS compounds as “[hazardous substances](#)” [under CERCLA](#) in 2022, and [stringent drinking water health advisories](#) for PFAS in 2022. Just last fall, EPA [finalized a rule](#) for PFAS reporting and recordkeeping.

Proposed Hazardous Constituent Rule

EPA’s first January 2024 proposal seeks to add nine PFAS compounds, their salts, and their structural isomers to RCRA’s list of “hazardous constituents” at 40 CFR part 261 Appendix VIII. To identify chemicals as “hazardous constituents” under RCRA, EPA must demonstrate that the chemicals have been shown in scientific studies to have toxic, carcinogenic, mutagenic (affecting

genetic material), or teratogenic (affecting fetal development) effects on life. EPA has evaluated nine PFAS compounds and found that they meet EPA's requirements for "hazardous constituents."

The nine PFAS compounds at issue are:

- Perfluorooctanoic acid
- Perfluorooctanesulfonic acid
- Perfluorobutanesulfonic acid
- Hexafluoropropylene oxide-dimer acid
- Perfluorononanoic acid
- Perfluorohexanesulfonic acid
- Perfluorodecanoic acid
- Perfluorohexanoic acid
- Perfluorobutanoic acid

What is the Impact of Listing These Compounds as "Hazardous Constituents" Under RCRA?

RCRA authorizes EPA to regulate solid and hazardous waste from "cradle to grave" — that is, from generation to disposal. RCRA regulations establish a series of standards for cleanup and remediation of sites involving the improper treatment, storage, or disposal of solid and hazardous waste. There are numerous regulatory impacts for listing a chemical as a "hazardous constituent" under RCRA. Most immediate is that, when corrective action is initiated at a RCRA facility, the hazardous constituents are expressly identified for investigation and remediation activities.

Any entity involved in the handling, storage, or disposal of solid waste that may have or could release one of the PFAS compounds in the proposed rule may be impacted. EPA has initially identified over 1,700 facilities that may be subject to additional corrective action under the proposed rule. These facilities include utilities, petroleum, and coal product manufacturers, chemical manufacturers, waste management facilities, and dozens of other categories of potentially affected facilities.

Proposed Hazardous Waste Rule

EPA's second January 2024 proposed rule would change the regulatory definition of "hazardous waste" in RCRA's regulations to reflect RCRA's broader statutory definition. Current RCRA regulations employ a limited definition of "hazardous waste" to include only wastes that are explicitly listed by EPA as "hazardous" and wastes that meet one of four characteristics: ignitability, corrosivity, reactivity, or toxicity.

The broader statutory definition of "hazardous waste" includes any solid waste that may "cause, or significantly contribute to an increase in mortality or...serious...illness" or may "pose a substantial present or potential hazard to human health or the environment..." 42 U.S.C. § 6903(5).

By adopting and applying the broader statutory definition, EPA seeks to establish its authority to require corrective action for releases of a wider array of substances. EPA asserts that it already has this authority, but in January 2019, the United States (on behalf of the US Air Force) rejected that position in federal court filings. Accordingly, EPA now seeks to amend its regulations to "fully and clearly reflect the scope" of its corrective action authority under RCRA.

Although this rule is not specific to PFAS, the court filings that spurred this rule revolved around EPA's authority to require PFAS corrective action in a RCRA hazardous waste permit.

What is the Impact of Expanding the Regulatory Definition of “Hazardous Waste” Under RCRA?

Hazardous waste is subject to a host of additional, more demanding regulations under RCRA Subtitle C. These regulations impact every aspect of generating, transporting, and disposing of hazardous waste, including permitting, enforcement, and corrective action.

As such, the proposed definitional change could have profound impacts on the regulated community. First, it would allow EPA to require RCRA facilities to target a more expansive list of substances for corrective action. The size, scope, and cost of RCRA corrective action could rapidly expand under this proposed rule.

Second, the proposed change would allow EPA to apply the more demanding hazardous waste regulations under RCRA Subtitle C to more facilities. This change would immediately impact RCRA permitting regulations, subjecting facilities to more stringent regulations if they handle substances that meet the broader “hazardous waste” definition.

What are the Potential Ramifications of These Two Rules Down the Road?

If the proposed rules are finalized, the coming years may see waste containing PFAS subject to the hazardous waste requirements of RCRA Subtitle C. Additionally, any state RCRA programs authorized by EPA would be required to be revised to conform with these new rules. Even on the state level, more stringent hazardous waste regulations may soon apply to a much broader universe of substances.

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