

PFAS and RCRA: EPA's Latest Proposed Rules Significantly Expand Corrective Action Authority



February 14, 2024

Washington, DC

Environmental Alert

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On February 8, 2024, the U.S. Environmental Protection Agency (EPA) published two proposed rules to address per- and polyfluoroalkyl substances (PFAS) and other emerging contaminants under the authority of the Resource Conservation and Recovery Act (RCRA). Specifically, EPA is proposing to add nine PFAS (including their salts and structural isomers) to the list of “hazardous constituents” in Appendix VIII of 40 C.F.R. Part 261. EPA is also proposing to clarify, by regulation, that emerging contaminants – including PFAS – can be addressed under RCRA’s Corrective Action Program. Comments on the first proposed rule, [Listing of Specific PFAS as Hazardous Constituents](#), are due April 8, 2024, and comments on the second proposed rule, [Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units](#), are due March 11, 2024.

EPA first announced its intent to regulate PFAS under RCRA in its [2021 PFAS Strategic Roadmap](#). This came as a direct response to a petition by New Mexico’s Governor Michelle Lujan Grisham requesting the EPA list PFAS as RCRA Subtitle C hazardous waste, either as a class of chemicals or as individual chemicals. Then, in November 2021, the EPA announced it would initiate rulemaking for two RCRA actions, which have now been published in the *Federal Register* as proposed rules more than two years later.

RCRA and the Regulation and Cleanup of Hazardous Waste

RCRA gives EPA the authority to control and regulate hazardous waste from “cradle-to-grave” under its Subtitle C regulatory framework. 42 U.S.C. §§ 6921-6934; 40 C.F.R. Parts 260 – 273. RCRA also gives EPA the authority to require cleanup of hazardous waste under its Corrective Action Program. 42 U.S.C. § 6924(u). While both Subtitle C and the Corrective Action Program apply to “hazardous wastes,” the two programs differ in scope because each relies on a different definition of “hazardous waste.”

Scope of RCRA Corrective Action Program

RCRA’s Corrective Action Program applies to a broader category of substances than RCRA’s Subtitle C program because it is not tied to Subtitle C’s regulatory definition of hazardous waste. Specifically, RCRA section 3004(u) provides that any permit issued to a treatment, storage or disposal (TSD) facility under Subtitle C after November 8, 1984 must require corrective action for all releases of hazardous waste or hazardous constituents from solid waste management units at the facility. See 42 U.S.C. § 6924(u). EPA also can require corrective action through the issuance of RCRA administrative orders. The list of hazardous constituents for which EPA requires evaluation and cleanup under the Corrective Action Program is found in 40 C.F.R. Part 261 Appendix VIII. RCRA’s Corrective Action Program is implemented through EPA guidance and policy documents to assist entities conducting cleanups.

Scope of RCRA Subtitle C

In contrast to the Corrective Action Program, Subtitle C governs “hazardous wastes,” as defined under EPA regulations, which is a narrower definition than under the RCRA statute. Under Subtitle C regulations, a material must be classified as

a “solid waste” before it can be classified a hazardous waste. Generally, a solid waste is a hazardous waste if it is listed in EPA regulations as such, if it exhibits one of four hazardous characteristics, if it is a mixture of hazardous and non-hazardous waste, or if it is derived from a hazardous waste. See 42 U.S.C. § 6903(5); 40 C.F.R. §§ 261.21-.24 & 261.31-261.33. Subtitle C provides a rigid regulatory framework governing the generation, transportation, treatment, storage and disposal of hazardous wastes, including the permitting of TSD facilities. As noted above, TSD permits are required to include corrective action to address releases of hazardous waste, and those corrective action obligations apply to both hazardous waste and hazardous constituents.

EPA's Proposed Rules

1. Listing of Specific PFAS as Hazardous Constituents

EPA is proposing to add nine PFAS (including their salts and structural isomers) to the list of “hazardous constituents” in Appendix VIII of 40 C.F.R. Part 261. If finalized, this rule will expressly identify nine PFAS for consideration in RCRA facility assessments and, where necessary, further investigation and cleanup through the RCRA corrective action process at RCRA TSD facilities. The nine PFAS are: PFOA, PFOS, PFBS, PFNA, PFHxS, PFDA, PFHxA, PFBA, and GenX. EPA estimates that there are 1,740 TSD facilities with solid waste management units that have released or could release any of the nine PFAS proposed to be listed and, as such, could be subject to additional corrective action requirements under this proposed rule. 89 *Fed. Reg.* at 8607. Notably, EPA is not currently proposing to list any PFAS as “hazardous wastes” subject to RCRA Subtitle C’s full “cradle to grave” regulatory requirements. However, EPA has stated that “[a] hazardous constituent listing is a step toward a potential hazardous waste listing” and that “[i]f finalized, this hazardous constituent listing would form part of the basis for any future action the Agency may take to list these substances as a hazardous waste.” *Id.* at 8609.

2. Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units

EPA’s second proposed rule would clarify that emerging contaminants can be cleaned up through the RCRA corrective action process and therefore that EPA’s authority to address emerging contaminants is not limited by the narrower regulatory definition of hazardous waste in RCRA Subtitle C. While this proposed rule does not directly address PFAS, it facilitates the use of RCRA corrective action authority to address emerging contaminants, such as PFAS, at RCRA permitted TSD facilities. EPA intends that this revision codify the Agency’s existing interpretation of RCRA, which allows it to address releases from solid waste management units of all substances that meet the broader statutory definition of hazardous waste. Therefore, EPA is proposing to modify 40 C.F.R. § 260.10 to make clear that the statutory definition of hazardous waste applies to corrective action for release of hazardous waste from solid waste management units.

Impact of Proposed Rules

Both rulemakings would vastly expand the universe of sites subject to RCRA corrective action and the universe of substances that would need to be assessed and addressed under RCRA. They also lay the groundwork to regulate PFAS as a hazardous waste, subject to the full suite of RCRA’s Subtitle C hazardous waste management regulations. In addition, if PFAS are designated as hazardous wastes, they would automatically be considered “hazardous substances” under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund). This, in turn, would result in an even greater expansion of EPA’s authority to require cleanup of PFAS contaminated facilities and potentially result in the re-opening of sites that have already been closed under Superfund.

As the federal and state governments take multiple actions across many programs to address PFAS, Babst Calland attorneys continue to track these developments and are available to assist you with PFAS-related matters. Visit the [**PFAS Perspectives**](#) webpage for timely legal and regulatory information affecting businesses and industries.

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