

## Updates

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### EPA's Latest PFAS Push Targets Nine Substances Under RCRA



U.S. Environmental Protection Agency (EPA) Administrator Michael Regan signed two proposed rules related to per- and polyfluoroalkyl substances (PFAS) and the agency's corrective action authority under the Resource Conservation and Recovery Act (RCRA) on January 31, 2024.

These proposed rulemakings align with [EPA's Strategic Roadmap](#), announced in 2021 as a "whole-of-agency" approach to addressing PFAS.

#### **What Are PFAS?**

PFAS, also known as "forever chemicals," are widely used, long-lasting chemicals that break down very slowly over time. Since the 1940s, PFAS have been used to manufacture many products, including nonstick cookware, roofing materials, adhesives, firefighting foam (known as AFFF), stain-resistant fabrics and carpets, some cosmetics, and other products that resist grease, water, and oil.

There are thousands of PFAS chemicals, which are typically identified by signature elemental bonds of fluorine and carbon that are extremely strong and difficult to break down in the environment. During production and use, PFAS can migrate into the soil, water, and air, where they can withstand high temperatures and highly corrosive environments. Scientific studies have shown that exposure to PFAS can lead to harmful health effects in humans and animals.

#### **RCRA's Regulation of Hazardous Waste**

RCRA's Subtitle C regulatory framework allows EPA to regulate hazardous waste from "cradle-to-grave." 42 U.S.C. §§ 6921-6934. The cradle-to-grave framework regulates the generation, transportation, treatment, storage, and disposal of solid waste and hazardous waste. If a hazardous waste is released into the environment,

RCRA authorizes "corrective actions" that can require investigating and cleaning up the release.

Subtitle C only governs hazardous wastes, and a material must be classified as a solid waste before it can be classified as a hazardous waste. Hazardous waste determinations are complex and technical, but generally, if a solid waste is listed on one of several specific lists of hazardous wastes, exhibits certain hazardous characteristics, is a mixture of hazardous waste and nonhazardous waste, or is derived from a hazardous waste, then it is subject to RCRA Subtitle C requirements. *See* 42 U.S.C. § 6903(5); 40 C.F.R. §§ 261.21–24 & 261.31–261.33.

Alternatively, a "hazardous constituent" is a chemical that has "toxic, carcinogenic, mutagenic or teratogenic effects on humans or other life forms," but has not yet been designated as a hazardous waste under RCRA. 40 CFR § 261.11(a). EPA lists these constituents at Appendix VIII in 40 CFR Part 261. The Appendix VIII list of hazardous constituents helps EPA identify the universe of chemicals of concern under RCRA.

### **The PFAS Rule: Nine PFAS Substances Proposed as Hazardous Constituents**

The first proposed rule, "[Listing of Specific PFAS as Hazardous Constituents](#)" (EPA-HQ-OLEM-2023-0278), proposes to list nine PFAS substances as "hazardous constituents" in RCRA's Appendix VIII, 40 C.F.R. Part 261. Those substances are:

- Perfluorooctanoic acid (PFOA).
- Perfluorooctanesulfonic acid (PFOS).
- Perfluorobutanesulfonic acid (PFBS).
- Hexafluoropropylene oxide-dimer acid (GenX).
- Perfluorononanoic acid (PFNA).
- Perfluorohexanesulfonic acid (PFHxS).
- Perfluorodecanoic acid (PFDA).
- Perfluorohexanoic acid (PFHxA).
- Perfluorobutanoic acid (PFBA).

The proposed rule will affect corrective action at permitted hazardous waste treatment, storage, and disposal facilities. RCRA Section 3004(u) requires corrective action for all releases of hazardous waste or hazardous constituents from solid waste management units at a permitted facility. Permitted treatment, storage, and disposal facilities that have accepted hazardous wastes and have had releases may be required to investigate for the presence of these nine PFAS chemicals and take corrective action both on-site and off-site if the chemicals are present. EPA estimates that up to 1,740 facilities could be subject to corrective action requirements because of the proposed rule.

Hazardous constituents are not subject to "cradle-to-grave" liabilities. However, under the RCRA framework, listing a substance as a hazardous constituent is the first step towards classifying the substance as a hazardous waste, which would result in "cradle-to-grave" responsibility. In order to classify these nine PFAS substances as hazardous wastes, EPA must consider several enumerated factors to determine whether the substances are "capable of posing a substantial present or potential threat to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed." 40 C.F.R. § 261.11(a)(3).

EPA is now accepting comments on the rule. The comment period ends on April 8, 2024.

### **The RCRA Rule: Clarifying EPA's Corrective Action Authority**

EPA's second proposed rule, "[Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units](#)" (EPA-HQ-OLEM-2023-0085), revises the definition of "hazardous waste" applicable to corrective actions for RCRA treatment, storage, and disposal facilities with solid waste management units. The new definition would apply the broader statutory definition rather than the narrower regulatory definition. The statutory definition of hazardous waste encompasses any solid waste that "may ... cause, or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness" or "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5). This modification clarifies that EPA can regulate emerging contaminants, like PFAS, that have not yet been designated as hazardous wastes under EPA's RCRA regulations but nevertheless meet the broader statutory definition of hazardous waste under the RCRA Corrective Action Program.

EPA is now accepting comments on the proposed rule. The comment period ends on March 11, 2024.

## **Key Takeaways**

Listing nine PFAS substances as hazardous constituents would result in increased responsibility for treatment, storage, and disposal facilities with solid waste management units where PFAS have been released. It also represents a step toward listing these substances as hazardous wastes. To be considered a hazardous waste, EPA must (1) show that the waste contains a hazardous constituent listed in Appendix VIII and (2) determine that the substance is capable of posing a substantial hazard. The proposed rule will satisfy the first step. The second step entails a longer, more complex process where EPA would determine whether these PFAS substances pose a substantial hazard to human health or the environment when improperly treated, stored, transported, or disposed of under 40 C.F.R. § 261.11(a)(3).

If EPA eventually designates these nine PFAS chemicals as hazardous wastes, each chemical will automatically become a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 42 U.S.C. § 9601. Regulating these chemicals under CERCLA would give rise to cost recovery and contribution causes of action. It may also lead EPA to reopen closed CERCLA and RCRA corrective action sites that may not have been investigated for PFAS contamination previously. It is important to note that in 2022, EPA issued a proposed rule that would independently designate two of the nine PFAS substances—PFOA and PFOS—as hazardous substances under CERCLA; however, EPA has yet to finalize the proposed rule.

The second proposed rule clarifies that EPA (and authorized states) have the authority to order corrective action at RCRA-permitted transportation, storage, and disposal facilities to address releases of hazardous wastes, hazardous constituents, and any other substance that meets the statutory definition of hazardous wastes. This would mean that not only could EPA impose corrective action measures to address the nine PFAS substances identified in the first proposed rule, but it could also do so for other emerging contaminants.

Last, the potential listing of the nine PFAS substances may increase the likelihood of citizen suits. The two proposed regulations could bolster citizen suit claims against facilities that treat, store, or dispose of PFAS waste in violation of RCRA requirements or where the treatment, storage, or disposal of PFAS wastes creates an imminent and substantial endangerment to human health or the environment. *See* 42 U.S.C. § 6972(a)(1).

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