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PFAS to be Regulated as Hazardous Waste in RCRA Corrective Actions

Client Alert

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On January 31, 2024, the U.S. Environmental Protection Agency (EPA) released a pre-publication version of a proposed rule that would amend the definition of hazardous waste applicable to corrective action to address releases from solid waste management units at Resource Conservation and Recovery (RCRA)-permitted treatment, storage, and disposal facilities. EPA also provides notice of its interpretation that the statutory definition of hazardous waste applies to corrective action for releases from solid waste management units at permitted and interim status facilities.

The RCRA regulatory definition of “hazardous waste” found in 40 CFR § 261.3 provides that only solid wastes that are listed in the regulations or exhibit one of the four regulatory hazardous waste characteristics (ignitability, corrosivity, reactivity, and toxicity) are hazardous waste. The proposed rule broadens the definition of “hazardous waste” for corrective action purposes at permitted RCRA treatment, storage, and disposal facilities by relying on the definition of “hazardous waste” found in RCRA section 1004(5) which provides:

The term “hazardous waste” means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may:

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed

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To further justify the expansive definition of “hazardous waste,” EPA points to its July 1, 1990, proposed rule preamble for a new 40 CFR part 264 Subpart S to implement sections 3004(u) and (v) corrective action provisions. While acknowledging that the proposed Subpart S rule was eventually withdrawn, EPA reasons that the preamble is nonetheless instructive. In the preamble, EPA indicated its interpretation that “hazardous waste” for purposes of section 3004(u) means “hazardous waste” as defined in RCRA section 1004(5). This statutory definition is broader than the regulatory definition and is not limited to subsets of hazardous wastes specifically listed and identified in 40 CFR part 261. Instead, EPA reasoned, Congress meant for the broader statutory definition to apply to corrective action of releases from RCRA-permitted facilities.

In June of 2021, after the US Airforce appealed the federal district court’s dismissal of its complaint challenging a permit issued by the state of New Mexico imposing corrective action requirements for perfluoroalkyl substances (PFAS) at the Cannon Air Force Base, on jurisdictional grounds, the Governor of New Mexico filed a petition with EPA requesting a timely listing of PFAS, as a class of chemicals, as hazardous wastes under the RCRA Subtitle C regulations, or in the alternative, a listing of individual PFAS chemicals as hazardous wastes under the regulations. EPA, in response, promised the state of New Mexico that it would initiate two rulemakings—the first would list specific PFAS compounds as RCRA hazardous constituents. The second, which is addressed above, would allow EPA to include a broader category of hazardous constituents, including PFAS, in RCRA corrective actions. EPA will seek comments on the proposed rule and definitional changes for 30 days after the proposed rule is published in the Federal Register.

Please feel free to contact the authors of this Client Alert or your Butzel attorney for more information.

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