

EPA Proposes to Regulate Nine PFAS as RCRA “Hazardous Constituents”

Alert

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The U.S. Environmental Protection Agency (EPA) has taken its first major action of 2024 to regulate per- and polyfluoroalkyl substances (PFAS) across environmental media. On January 31, 2024, EPA issued pre-publication versions of two proposed rules, the [first of which](#)¹ would add nine PFAS, their salts, and their structural isomers to the Resource Conservation and Recovery Act’s (RCRA) list of “hazardous constituents.”² The [second proposed rule](#)³ would clarify that “hazardous constituents” are subject to RCRA’s corrective action program. EPA is scheduled to publish both proposed rules in the *Federal Register* on February 8, 2024.

Notably, EPA did not go so far as to propose designating the nine PFAS as “hazardous wastes,” which would have subjected such PFAS-containing materials to RCRA’s cradle-to-grave regulatory scheme, despite requests to take this more stringent action from the governor of New Mexico and other stakeholders. EPA specifically notes, however, that a “hazardous constituent listing is a step toward a potential hazardous waste listing.”⁴

WHO DOES THIS IMPACT?

RCRA’s corrective action requirements apply to hazardous waste treatment, storage, and disposal facilities (TSD facilities) with solid waste management units that have released or could release hazardous waste or hazardous constituents. EPA has indicated that certain industries are most likely to be affected by the proposed rule, including chemical manufacturing facilities (three-digit North American Industry Classification System [NAICS] code 325), waste management and remediation services (NAICS code 562), petroleum and coal products manufacturing (NAICS code 324), fabricated metal product manufacturing (NAICS code 332), and merchant wholesalers (nondurable goods) (NAICS code 424). The proposed rule

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states EPA has identified 1,740 such facilities, and those facilities could be subject to additional corrective action requirements to address releases not already subject to corrective action. Of note, the corrective action requirements generally do not apply to generators that are not subject to RCRA permitting requirements.

WHICH PFAS FALL UNDER THE PROPOSED RULES?

To be listed as an RCRA hazardous constituent, scientific studies must show that a chemical has toxic, carcinogenic, mutagenic or teratogenic effects on humans or other life forms. In its proposed rule, EPA notes that it reviewed and evaluated key toxicity and epidemiological studies and assessments, and concluded that nine PFAS meet the criteria for listing as hazardous constituents.⁵

THE IMPACT OF RCRA’S “HAZARDOUS CONSTITUENTS” DESIGNATION

If the proposed rule is finalized, facilities undergoing required corrective action will be forced to consider a broader list of chemicals. These nine PFAS would be among the hazardous constituents that must be considered in RCRA facility assessments and, where necessary, further investigated and cleaned up through the RCRA corrective action process.

If finalized, the rule would be effective immediately in all states upon publication of the final rule. EPA’s current Unified Regulatory Agenda does not have an estimated date for finalizing this proposed rule. Initially, EPA would implement the new rule in all states until the states with EPA-authorized RCRA programs become authorized to implement the new rule.

THE IMPACT OF CHANGING THE DEFINITION OF HAZARDOUS WASTE SUBJECT TO CORRECTIVE ACTION

As noted, EPA concurrently issued a pre-publication version of a second proposed rule that, if finalized, would amend RCRA’s definition of “hazardous waste” to ensure that regulators have clear RCRA corrective action authority to address emerging contaminants, such as PFAS, as well as other non-regulatory hazardous wastes, at RCRA permitted TSD facilities. More specifically, EPA states the proposed rule would provide the agency clear authority to use corrective action to address releases of the full universe of substances that RCRA is intended to cover, not only hazardous waste and hazardous constituents listed or identified in the regulations, but all substances that meet the definition of hazardous waste in RCRA. Again, EPA’s current Unified Regulatory Agenda does not have an estimated date for finalizing this proposed rule.

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PROACTIVE STEPS TO TAKE NOW

Because these are proposed rules, stakeholders will have the opportunity to provide public comment once the rules are published in the *Federal Register*. EPA must then consider and address stakeholders’ public comments. The public comment period on the proposed rule to list nine PFAS as hazardous constituents will be 60 days, and the public comment period on the proposed rule to clarify that substances listed as hazardous constituents are subject to RCRA’s corrective action program will be 30 days.

Owners and operators of TSD facilities should analyze whether these nine PFAS have been used in operations and/or may have been previously released to the environment. Generators of hazardous waste should keep an eye on future EPA proposed rules that would designate additional PFAS, individually or as a class, as hazardous waste, which would subject wastes containing PFAS to RCRA’s cradle-to-grave regulatory scheme.

Stinson’s environmental attorneys are monitoring all developments related to the regulation of PFAS and are prepared to help you navigate the shifting regulatory landscape for PFAS and assess associated risks in real time.

1. Titled “Listing of Specific PFAS as Hazardous Constituents.”
2. The list of hazardous constituents is located at 40 CFR part 261, Appendix VIII.
3. Titled “Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units.”
4. To list a waste as a RCRA hazardous waste under 40 C.F.R. § 261.11(a)(3), EPA must show that the waste contains a hazardous constituent listed on Appendix VIII and determine that it is capable of posing a substantial hazard. That determination requires EPA to collect and consider information on the eleven (11) regulatory factors specified in 40 C.F.R. § 264.11(a)(3) (constituent toxicity, concentration, migration potential, persistence, degradation product potential, bioaccumulation potential, plausible management scenarios, waste quantity, damage cases, coverage by other regulatory programs, and other factors as may be appropriate).
5. The nine PFAS EPA proposes to list as hazardous constituents are: perfluorooctanoic acid (PFOA); perfluorooctanesulfonic acid (PFOS); perfluorobutanesulfonic acid (PFBS); hexafluoropropylene oxide-dimer acid (HFPO-DA or GenX); perfluorononanoic acid (PFNA); perfluorohexanesulfonic acid (PFHxS); perfluorodecanoic acid (PFDA); perfluorohexanoic acid (PFHxA); and perfluorobutanoic acid (PFBA).

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For more information on PFAS regulatory updates, please contact [Brittany Barrientos](#), [Aimee Davenport](#), [Andrew Davis](#), [Kyle Foote](#), [Kristen Ellis Johnson](#), [Sarah Struby](#), [Claire Williams](#) or one of the attorneys listed below or the Stinson LLP contact with whom you regularly work.

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