

ESG Daily, STRATEGIC PERSPECTIVES—EPA issues proposed RCRA rules to address corrective action of PFAS contamination, (Feb 28, 2024)

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The first deadline for submitting comments to the EPA will close on March 11th.

On February 8, 2024, EPA proposed two rules under the Resource Conservation and Recovery Act (RCRA) that address corrective action processes and clean-up of nine per- and polyfluoroalkyl substances (PFAS) and other emerging contaminants at permitted and interim status RCRA treatment, storage, and disposal (TSDF) facilities. If finalized, these rules would add nine PFAS to the list of RCRA hazardous constituents and change RCRA's definition of "hazardous waste" to clarify that emerging contaminants, including PFAS, are subject to RCRA corrective action processes. EPA issued these as companion rules with an expectation that they will be final at or around the same time. The proposed rules are part of EPA's *PFAS Strategic Roadmap* that include multiple regulatory efforts to address PFAS contamination.

EPA will accept comments on first proposed rules for 60 days until April 8, 2024, and the second rule for 30 days until March 11, 2024 (see below).

EPA Proposes to Add Nine PFAS as RCRA Hazardous Constituents. In the first rule, *Listing of Specific PFAS as RCRA Hazardous Constituents* [Link], EPA proposes to add nine per- and polyfluoroalkyl substances (PFAS) (along with their salts, and their structural isomers) to its list of "hazardous constituents" in 40 CFR Part 261 Appendix VIII. See 89 Fed. Reg. 8606 (Feb. 8, 2024). To qualify for listing as a hazardous constituent under RCRA, EPA evaluated scientific studies to conclude that that these nine PFAS meet criteria showing that the chemicals have toxic, carcinogenic, mutagenic, or teratogenic effects on humans or other life forms. The nine PFAS are: PFOA, PFOS, PFBS, PFNA, PFHxS, PFDA, PFHxA, PFBA, and GenX.

The rule could impact approximately 1,740 facilities to additional RCRA corrective action requirements across fifty-six (56) different industry sectors identified by the North American Industrial Classification Systems (NAISC). The largest industry sector that could be impacted are Waste Management and Remediation Services, Chemical Manufacturing, and National Security and International Affairs.

Key Take-Aways.

- The listing of "hazardous constituents" is the first step in the process of designating PFAS as a potential "hazardous waste," which in turn, would trigger RCRA's full "cradle to grave" management requirements as well as automatically classify them as "hazardous substances" under CERCLA.
- The PFAS listing will have a significant impact upon TSDFs. Under Appendix VIII, these nine PFAS would be identified as a chemical of concern to be addressed under RCRA corrective action processes and include additional work potentially required by facility assessments, investigation, testing, monitoring, and cleanup.
- The proposed rule does not address how PFAS listings will be addressed in corrective action permits and/or orders for facilities that are undergoing or have completed remedial investigations and/or corrective action activities, the costs associated with these activities, and other important considerations.



EPA Rule to Change the “Definition of Hazardous Waste” for Corrective Actions. The second rule, *Definition of Hazardous Waste Applicable to Corrective Action for Solid Waste Management Units*, proposes to change the definition of “hazardous waste” to clarify its “long-standing position” that RCRA corrective action authority applies to releases from solid waste management units based on the broader, statutory definition of hazardous wastes (RCRA section 1004(5)) and not the narrower, regulatory definition of hazardous wastes or hazardous constituents. See 89 Fed. Reg. 8598 (Feb. 8, 2024). The statutory definition of hazardous waste [RCRA section 1004(5)] applies to 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.”

EPA states that the proposed rule is intended to clarify confusion created by the interpretation that RCRA corrective action applies to the narrower regulatory definition of hazardous waste applied to RCRA permitting under 40 CFR Part 264 and informational requirements under 40 CFR Part 270.14. EPA proposes to clarify these issues by (1) incorporating RCRA’s statutory definition of hazardous waste to regulatory provisions addressing under 264.101 and 40 CFR part 264 Subpart S, along with changes to RCRA’s informational requirements for permitting as applied to corrective action under 40 CFR §270.14(d); and (2) adding RCRA sections 3004(u) (v) and (h) to the statutory authorities in 40 CFR §261.1(b)(2). While the rule “would not directly address PFAS,” EPA states that the intent of the rule change is to facilitate the use of RCRA corrective action authority to address emerging contaminants such as PFAS along with other “non-regulatory” [statutory] hazardous wastes at TSDFs.

Key Take-Aways.

- EPA’s proposed rule is not limited to the nine PFAS. This rule applies to corrective action authority for releases of *statutory and non-regulatory hazardous wastes* from solid waste management units to address emerging contaminants, “such as PFAS,” meaning not only releases of listed and characteristic hazardous wastes and hazardous constituents (Appendix VIII).
- EPA states that it does not believe the proposed rule will result in additional costs or drive additional corrective action activity.
- EPA solicits comment on whether the potential impacts may be affected by other authorities relied upon to address PFAS at RCRA facilities including omnibus permitting authority (40 CFR §270.32(b)), RCRA section 7003 (Imminent and Substantial Endangerment), and CERCLA.

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