

## EPA Proposes New RCRA Rules With Significant Compliance Obligations

*The proposed rules would expand the RCRA Corrective Action regime to PFAS and potentially other emerging contaminants. They may complicate ongoing compliance efforts as well as lead to significant value chain impacts.*

The Resource Conservation and Recovery Act (RCRA) mandates a two-part “corrective action” regime:

1. Permits for any “solid waste management unit” (SWMU) at a “treatment, storage or disposal facility” (TSDF) must require “corrective action” for all releases of “hazardous waste” or “hazardous constituents,” “regardless of the time at which waste was placed in such unit”<sup>1</sup>
2. “Corrective action,” when required at any “facilities for the treatment, storage, or disposal of hazardous waste [that, pursuant to 42 U.S.C. 6921, is either] listed [as ‘hazardous waste’] or identified [as such based on ‘the characteristics of hazardous waste’],” must extend “beyond the facility boundary where necessary to protect human health or the environment”<sup>2</sup>

On February 8, 2024, the US Environmental Protection Agency (EPA) published two proposed rules that would apply the first part of this RCRA Corrective Action regime expressly to certain per- and polyfluoroalkyl substances (PFAS) and would potentially apply both parts of the regime to these PFAS as well as to other PFAS and non-PFAS emerging contaminants:

- **“Listing of Specific PFAS as Hazardous Constituents” (the PFAS Proposal):** EPA proposes to list certain PFAS as “hazardous constituents,” but makes clear that this listing would not make these PFAS (or wastes containing them) “hazardous wastes.” As a result, this proposal would require that these PFAS must be considered in any SWMU corrective action permitting and related corrective action investigation and cleanup pursuant to the first part of the RCRA Corrective Action regime.<sup>3</sup>
- **“Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units” (the Hazardous Waste Proposal):** EPA proposes to amend the RCRA Corrective Action regulations to provide clear regulatory authority for implementation of the statutory requirement that corrective action for releases from a hazardous waste treatment, storage, and disposal facility should extend to any material meeting the more general statutory “hazardous waste” definition (as opposed to applying only to the listed or identified substances in the regulatory

“hazardous waste” definition). This proposal — due to its focus on “hazardous waste” — would apply to both parts of the RCRA Corrective Action regime.<sup>4</sup>

Taken together, these proposed rules, if finalized, would have several real-world impacts:

1. All RCRA-permitted (and interim status) SWMUs at a TSDf will be subject to corrective action measures for the specific PFAS listed as “hazardous constituents.”
2. At these same facilities, EPA could, using the statutory “hazardous waste” definition, require corrective action measures for other PFAS not listed as “hazardous constituents” or even for non-PFAS emerging contaminants.
3. For any facility otherwise already subject to the RCRA Corrective Action regime, EPA could also rely on the statutory “hazardous waste” definition to require additional corrective action measures for these specific PFAS, for other PFAS, and/or for non-PFAS emerging contaminants.

## PFAS Proposal

The PFAS Proposal would amend EPA’s RCRA regulations by listing the following PFAS (collectively, the Listed PFAS) as “hazardous constituents” at 40 CFR Part 261 Appendix VIII:

- Perfluorooctanoic acid (PFOA)
- Perfluorooctanesulfonic acid (PFOS)
- Perfluorobutanesulfonic acid (PFBS)
- Hexafluoropropylene oxide-dimer acid (HFPO)
- Perfluorononanoic acid (PFNA)
- Perfluorodecanoic acid (PFDA)
- Perfluorohexanesulfonic acid (PFHxS)
- Perfluorohexanoic acid (PFHxA)
- Perfluorobutanoic acid (PFBA)
- The respective salts and structural isomers of each of the foregoing<sup>5</sup>

EPA makes clear in the PFAS Proposal that this “hazardous constituent” listing does not make these PFAS (or wastes containing them) “hazardous wastes.”<sup>6</sup> If these Listed PFAS are “hazardous constituents” (but not “hazardous waste”), the PFAS Proposal, if finalized, would apply to any SWMU at a TSDf subject to corrective action through permitting under RCRA, § 3004(u),<sup>7</sup> and would trigger corrective action measures as part of permitting assessments and related investigation and cleanup.<sup>8</sup>

EPA has identified 1,740 specific facilities falling into over 50 North American Industrial Classification System (NAICS) codes which “could be subject to additional corrective action requirements [...] to address releases not already subject to corrective action pursuant to EPA’s corrective action

regulations.”<sup>9</sup> Among these 1,740 facilities, EPA has further identified 831 as “facilities with higher likelihood of handling PFAS.”<sup>10</sup>

Of the 1,740 specific facilities falling into over 50 NAICS codes, the top five codes with the most facilities are:

1. Waste Management and Remediation Services (NAICS Code 562): 461 facilities, with 359 having higher likelihood of handling PFAS
2. Chemical Manufacturing (NAICS Code 325): 335 facilities, with 278 having higher likelihood of handling PFAS
3. National Security and International Affairs (NAICS Code 928): 142 facilities, with one having higher likelihood of handling PFAS
4. Petroleum and Coal Products Manufacturing (NAICS Code 324): 79 facilities, with 76 having higher likelihood of handling PFAS
5. Fabricated Metal Product Manufacturing (NAICS Code 332): 68 facilities, with 28 having higher likelihood of handling PFAS<sup>11</sup>

EPA also prepared, and is soliciting comments on, a draft Economic Assessment for the PFAS Proposal. The Assessment does not include an estimate of direct costs on the grounds that whether and to what extent each facility would incur additional direct costs is fact-specific. EPA estimated that indirect costs of corrective actions and other compliance measures could result in an increase to the overall costs of corrective actions by between 2% and 10%, for a total \$63 million to \$385.9 million nationwide.<sup>12</sup>

According to the PFAS Proposal, EPA selected the Listed PFAS based on studies linking them to a number of toxic health impacts, including cardiovascular effects, immune disorders, hepatic diseases, and cancers.<sup>13</sup> The PFAS Proposal is also EPA’s response to petitions submitted by the Environmental Law Clinic of the University of California, Berkeley, the Public Employees for Environmental Responsibility (PEER), and the Governor of New Mexico, each of which requested that certain of the Listed PFAS be listed as “hazardous wastes.”<sup>14</sup>

As noted, EPA makes clear that the PFAS Proposal would accomplish a “hazardous constituent” listing, and that such listing does not make the Listed PFAS (or wastes containing them) “hazardous waste.”<sup>15</sup> However, EPA also states that this “hazardous constituent” listing may be a step toward an eventual “hazardous waste” listing and could form the basis for other future regulatory actions.<sup>16</sup>

## Hazardous Waste Proposal

The Hazardous Waste Proposal would amend the regulations implementing the RCRA Corrective Action regime with reference to both (1) any SWMU at a TSD facility subject to corrective action through permitting under RCRA, § 3004(u),<sup>17</sup> as well as (2) any facility subject to corrective action under RCRA, § 3004(v),<sup>18</sup> that must extend “beyond the facility boundary where necessary to protect human health or the environment.” The amendments would expressly apply the statutory “hazardous waste” definition to both of these aspects of the RCRA Corrective Action regime.<sup>19</sup> These revisions aim to clarify EPA’s position that it has the authority to require corrective action for the full array of substances meeting the statutory definition, and is not limited to the listed and identified “hazardous waste” and listed “hazardous constituents” specified in the regulations.

Notably, RCRA Section 1004(5)<sup>20</sup> provides as follows with regard to the RCRA Corrective Action regime:

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; or
- (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.

EPA asserts that the Hazardous Waste Proposal simply will facilitate EPA’s application of the RCRA Corrective Action regime, as intended by the statute, by allowing EPA to require corrective action measures for chemicals that it deems fall within this definition. Legal questions are raised, however, by this assertion as well as by the mechanisms through which EPA may apply this definition, given its broad nature.

In the Hazardous Waste Proposal, EPA states that it “expects that the Agency’s attention on addressing risks associated with PFAS will likely result in additional corrective action to address releases of those substances.”<sup>21</sup> However, “EPA also expects that such increased corrective action activity would be supported principally not by this rule, but by” the PFAS Proposal.<sup>22</sup> Nevertheless, while EPA indicated that it does not expect the Hazardous Waste Proposal to “directly address PFAS,” it would pave the way from a regulatory standpoint for EPA to apply RCRA corrective action to address PFAS other than the Listed PFAS as well as non-PFAS emerging contaminants.<sup>23</sup>

Therefore, a primary impact of the proposal, if finalized, will likely be an increase in the number and cost of RCRA corrective actions involving PFAS — possibly including PFAS beyond the specific PFAS listed in the PFAS Proposal.<sup>24</sup> Although again, as noted above, legal questions are raised by this framing of EPA’s authority.

## Conclusion

Through the PFAS Proposal and the Hazardous Waste Proposal, EPA continues its efforts, as outlined in its 2021 PFAS Strategic Roadmap, to address PFAS — in this case, through the RCRA Corrective Action regime. Designation of the Listed PFAS as RCRA “hazardous constituents” will require any SWMU at a TSDf subject to corrective action through permitting under RCRA, § 3004(u)<sup>25</sup> to evaluate these substances as part of permitting assessments, and related investigation and cleanup and be subject accordingly to corrective action measures. The Hazardous Waste Proposal has broader implications because it would extend both corrective action under RCRA, § 3004(u)<sup>26</sup> as well as under RCRA, § 3004(v),<sup>27</sup> to substances not specifically listed or identified as this time by EPA, but that, in EPA’s view, satisfy the general “hazardous waste” statutory definition.

These changes would lead to a significant expansion of the RCRA Corrective Action regime to address PFAS. Indeed, EPA has already identified specific industries and facilities that it anticipates may be the most impacted. As such, both proposed rules may result in an increase in PFAS-related RCRA administrative actions and enforcement by regulators. Moreover, EPA’s PFAS Proposal indicates that it potentially provides the foundation for listing the Listed PFAS as RCRA “hazardous wastes.” Such an action, potentially in conjunction with the currently pending rule designating PFOA and PFOS as CERCLA “hazardous substances,” would have far-reaching “cradle-to-grave” impacts on PFAS in the value chain due to the significant regulatory and litigation risks that would come with such actions.

Moving forward, companies that store, treat, or dispose of waste containing any PFAS should consider how the PFAS Proposal and the Hazardous Waste Proposal, as well as future PFAS-related rules, might affect them and take affirmative steps to mitigate their potential RCRA liability.

Companies should also consider commenting on the proposals. Comments on the [Hazardous Waste Proposal](#) are due on March 11, 2024. Comments on the [PFAS Proposal](#) are due on April 8, 2024.

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If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**[Gary P. Gengel](#)**

gary.gengel@lw.com  
+1.212.906.4690  
New York

**[Julia A. Hatcher](#)**

julia.hatcher@lw.com  
+1.202.637.2200  
Washington, D.C.

**[Thomas C. Pearce](#)**

thomas.pearce@lw.com  
+1.212.906.2956  
New York

**[Guy Jack Mathews](#)**

jack.mathews@lw.com  
+1.212.906.4620  
New York

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**Endnotes**

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<sup>1</sup> RCRA, § 3004(u), 42 U.S.C. § 6924(u).

<sup>2</sup> RCRA, § 3004(v), 42 U.S.C. § 6924(v).

<sup>3</sup> 89 F.R. 8606 ([available here](#)).

<sup>4</sup> 89 F.R. 8598 ([available here](#)).

<sup>5</sup> 89 F.R. 8606.

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<sup>6</sup> *Id.* at 8610.

<sup>7</sup> 42 U.S.C. § 6924(u).

<sup>8</sup> 89 F.R. 8610. In the Preamble to PFAS Proposal, EPA makes reference to both RCRA, § 3004(u), 42 U.S.C. § 6924(u), and RCRA, § 3004(v), 42 U.S.C. § 6924(v), and appears to indicate that the facilities identified as potentially impacted by the PFAS Proposal would fall within either statutory provision. However, RCRA, § 3004(v), 42 U.S.C. § 6924(v), by its statutory terms, applies to “hazardous waste” and not to “hazardous constituents.” See RCRA, § 3004(v), 42 U.S.C. § 6924(v) (“As promptly as practicable after November 8, 1984, the Administrator shall amend the standards under this section regarding corrective action required at facilities for the treatment, storage, or disposal, of hazardous waste listed or identified under section 6921 of this title to require that corrective action be taken beyond the facility boundary where necessary to protect human health and the environment unless the owner or operator of the facility concerned demonstrates to the satisfaction of the Administrator that, despite the owner or operator’s best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action. Such regulations shall take effect immediately upon promulgation, notwithstanding section 6930(b) of this title, and shall apply to—(1) all facilities operating under permits issued under subsection (c), and (2) all landfills, surface impoundments, and waste pile units (including any new units, replacements of existing units, or lateral expansions of existing units) which receive hazardous waste after July 26, 1982. Pending promulgation of such regulations, the Administrator shall issue corrective action orders for facilities referred to in paragraphs (1) and (2), on a case-by-case basis, consistent with the purposes of this subsection.”).

<sup>9</sup> *Id.* at 8607.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Economic Assessment of the Potential Costs, Benefits, and Other Impacts of the Proposed Rulemaking to List Specific PFAS as RCRA Hazardous Constituents (Jan. 2024) at 17-21 ([available here](#)).

<sup>13</sup> 89 F.R. 8612-16.

<sup>14</sup> *Id.* at 8617.

<sup>15</sup> *Id.* at 8610.

<sup>16</sup> *Id.* at 8609.

<sup>17</sup> 42 U.S.C. § 6924(u).

<sup>18</sup> 42 U.S.C. § 6924(v).

<sup>19</sup> 89 F.R. 8598.

<sup>20</sup> 42 U.S.C. § 6903(5).

<sup>21</sup> 89 F.R. 8603.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 8600.

<sup>24</sup> *Id.*

<sup>25</sup> 42 U.S.C. § 6924(u).

<sup>26</sup> *Id.*

<sup>27</sup> 42 U.S.C. § 6924(v).