

PFAS UPDATE: SIGNIFICANT EXPANSION OF PFAS REGULATION UNDER RCRA

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In a letter to the Governor of New Mexico on October 26, 2021, the Administrator of the United States Environmental Protection Agency (“EPA”) announced that EPA would initiate two important rulemaking efforts to regulate PFAS substances under the RCRA framework:

- **Listing Four PFAS Substances as Hazardous Constituents.** PFOA, PFOS, PFBS and GenX (also known as HFPO-DA) are proposed to be listed as “hazardous constituents” under RCRA. As such, EPA will evaluate existing data for these chemicals and will establish a record supporting this designation. The recently published human health and toxicity assessments for GenX will probably be used in this analysis.
- **Clarify Correction Action Program Regulations.** Under RCRA, EPA has the authority to investigate, clean-up, and remediate hazardous wastes through the RCRA Corrective Action Program. Under the proposed rulemaking, EPA will be revising the Corrective Action Program regulations to clarify that EPA has the authority to require investigation and cleanup for emerging contaminants, such as PFAS substances, that meet the statutory definition of hazardous waste under RCRA section 1004(5).

HOW DO THESE ACTIONS AFFECT MY BUSINESS?

If both rulemaking efforts are successful, businesses across the country will need to characterize and handle PFAS waste in compliance with RCRA, and EPA can initiate investigation and cleanup actions to address legacy PFAS contamination. Specific business impacts include:

- **Increased Waste Management Costs.** If PFAS substances are defined as “hazardous constituents” and your business generates RCRA wastes that contains those compounds, you will have to comply with RCRA’s characterization, recordkeeping, and disposal requirements for that waste.
- **Investigation and Cleanup Liability.** Under EPA’s broadened RCRA Corrective Action Program authority, EPA will be able to order sites that historically used PFAS and may have generated PFAS waste, to investigate, and if necessary, cleanup residual contamination. This also

means that there could be federal investigation and cleanup of landfills and other waste disposal facilities that have received PFAS-containing waste.

- **Due Diligence and All Appropriate Inquiries.** Until they are designated as hazardous substances under CERCLA, PFAS impacts are not technically within the required scope of Phase I Environmental Site Assessments in order to satisfy the All Appropriate Inquiries. However, entities that are considering purchasing property or conducting a transaction should evaluate their potential RCRA liability resulting from the historic or ongoing presence of PFAS-contaminated RCRA waste.

In addition, a “hazardous constituent” designation under RCRA is an important step towards listing certain PFAS substances as “hazardous substances” under CERCLA, further reinforcing EPA’s commitment to listing certain PFAS compounds under CERCLA.

CONCLUSION

The drumbeat from EPA in recent weeks has been that regulations are coming, and this letter confirms some of the specifics of what those national regulatory changes will look like. The two proposed rule changes will have significant impacts on industries, and it is important to note that PFAS risks are no longer a state-by-state analysis, but rather, are quickly becoming a series of national compliance challenges.

For more information on PFAS chemicals, and the regulatory and litigation risks that they pose, please visit our [PFAS webpage](#). If you have a question about how a RCRA designation may impact your PFAS analysis, please contact Tom Lee, John Kindschuh, Dave Brankin, or any other member of our PFAS team at Bryan Cave Leighton Paisner LLP.

RELATED CAPABILITIES

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