

# CLIENT ALERT

## EPA to Initiate Regulation of PFAS Under RCRA

November 9, 2021

On October 26, 2021, the U.S. Environmental Protection Agency (EPA) announced it would initiate two rulemakings to address per- and polyfluoroalkyl substances (PFAS) under the Resource Conservation and Recovery Act (RCRA). EPA's announcement comes on the heels of its release of the PFAS Strategic Roadmap, which lays out an agency-wide approach to addressing PFAS. Although the RCRA initiative was not listed in the PFAS Strategic Roadmap, EPA explained in its briefing on the Roadmap that this was due only to internal timing issues and that it otherwise would have been included.

EPA's announcement responded to a petition for rulemaking by New Mexico Governor Michelle Lujan Grisham requesting that EPA list PFAS as a class as a hazardous waste under Subtitle C of RCRA or, in the alternative, list individual PFAS chemicals as hazardous wastes. The New Mexico petition followed previous petitions to list PFAS as a hazardous waste filed by the Public Employees for Environmental Responsibility in 2019 and the Environmental Law Clinic at the University of California, Berkeley, in 2020.

In the first rulemaking, rather than list the entire class of PFAS or individual PFAS chemicals as a hazardous waste, EPA will initiate the process to propose listing four PFAS chemicals as "hazardous constituents" in 40 CFR Part 261, Appendix VIII: perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), perfluorobutane sulfonic acid (PFBS), and GenX. EPA places a substance on the list of hazardous constituents in Appendix VIII if scientific studies show the substance has toxic effects on humans or other life forms. In its announcement, EPA stated that it would start the rulemaking process by evaluating the existing data for these chemicals and establishing a record to support such a proposed rule.

Listing these PFAS chemicals in Appendix VIII would have two consequences:

- First, the listed chemicals would be subject to RCRA corrective action requirements at hazardous waste treatment, storage, and disposal facilities (TSDFs).
- Second, this listing would be the first step necessary toward a future formal rulemaking process under 40 CFR § 261.11(a)(3) to regulate these chemicals as listed hazardous wastes.

In the second rulemaking, EPA will clarify that the RCRA Corrective Action Program has the authority to require investigation and cleanup of "hazardous wastes" as defined by RCRA section 1004(5). Such a rule would resolve an ambiguity about whether the Corrective Action Program, such as an order under RCRA section 3008(h), applies to "hazardous waste" as defined by statute in section 1004(5) or to "hazardous waste" as identified and listed in the RCRA Subtitle C regulations. The statutory definition is much broader than the regulatory definition. EPA previously has suggested in guidance an interpretation in line with the former, and this new rule would codify such an approach.

## Key Takeaways for the Regulated Community

- This announcement is a significant step in EPA's efforts to regulate PFAS, particularly to provide federal investigation and cleanup authority over PFAS.
- The first rulemaking will have the most immediate impact on TSDFs because they are already subject to RCRA permitting requirements and EPA and authorized states can undertake modification of permits based on new regulatory requirements. The rulemakings together will expand the universe of facilities subject to corrective action.
- If EPA succeeds in listing PFOA, PFOS, PFBS, and Gen X in Appendix VIII, we would expect EPA to move next to designate these chemicals as listed hazardous wastes. RCRA hazardous wastes are automatically hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Thus, the hazardous waste listing would result in CERCLA cleanup authority over these PFAS chemicals and subject potentially responsible parties to cost recovery or contribution actions with respect to contaminated facilities.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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