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Beyond Cradle to Grave: EPA Proposes to Regulate PFAS “Forever Chemicals” Under RCRA

In response to a petition from New Mexico Governor Michelle Lujan Grisham, the U.S. Environmental Protection Agency announced on October 26, 2021, that it will take steps toward regulating per- and polyfluoroalkyl substances commonly referred to as "PFAS," under the Resource Conservation and Recovery Act (RCRA). This announcement follows EPA's recent unveiling of its PFAS Strategic Roadmap—a plan for taking an agency-wide approach to address PFAS under various statutory and regulatory authorities.

What Are PFAS?

PFAS are a group of man-made chemicals identified by signature elemental bonds of fluorine and carbon, which are extremely strong and difficult to break down in the environment. As a result, PFAS are persistent and can withstand high temperatures and highly corrosive environments. While PFAS include the commonly known and used PFOA, PFOS, and GenX, the PFAS family of chemicals also contains more than 4,700 different compounds.

PFAS have been manufactured and used in a variety of industries around the globe, including in the United States since the 1940s. Because of their ability to repel water and oil, PFAS are used in many different types of products, including firefighting foam known as "AFFF," stain-resistant carpets, roofing materials, coatings, food packaging, water-resistant outdoor clothing and gear, nonstick cookware, and boots, among others.

RCRA and the Regulation of Hazardous Waste

RCRA's Subtitle C regulatory framework gives EPA the authority to control and regulate hazardous waste from "cradle-to-grave." 42 U.S.C. §§ 6921-6934. Specifically, Subtitle C requires tracking hazardous waste from generation to disposal and permits hazardous waste management facilities. 42 U.S.C. § 6921(a).

Subtitle C only governs "hazardous wastes," and a material must be classified as a "solid waste" before it can be classified a hazardous waste. Hazardous waste determinations are complex and technical, but generally, if a solid waste is listed on one of several specific lists of hazardous wastes; exhibits certain hazardous characteristics; is a mixture of hazardous waste and non-hazardous waste; or is derived from a hazardous waste, then it is subject to RCRA Subtitle C requirements. *See* 42 U.S.C. § 6903(5); 40 C.F.R. §§ 261.21–.24 & 261.31–261.33.

RCRA Corrective Action

The RCRA Corrective Action Program requires facilities that treat, store, or dispose of hazardous wastes to investigate and clean up contaminated soil, groundwater, and surface water. The Corrective Action Program is not a rigid regulatory framework, rather, EPA has developed guidance and policy documents to assist facilities conducting cleanups. Facilities are generally brought into the Corrective Action process when (1) there is an identified release of hazardous waste or hazardous constituents, or (2) when EPA is considering whether to issue a RCRA operating permit for a treatment, storage, and disposal facility. In general, corrective action allows EPA to do the following:

- Request information relating to hazardous waste from anyone who generates, stores, treats, transports, disposes of, or otherwise handles such waste. 42 U.S.C. § 6927.
- Require monitoring, testing, or other related activities at facilities where the hazardous waste was, or has been stored, treated, or disposed, or where the release of the hazardous waste may present a substantial hazard to human health or the environment. 42 U.S.C. § 6934.
- Issue an order assessing a penalty for any past or current violation of any RCRA Subtitle C requirement and/or requiring compliance immediately or within a specified time period. 42 U.S.C. § 6928(a).
- Issue an order requiring corrective action or other response measures necessary to protect human health or the environment when there is a release or a threat of a release of hazardous waste into the environment from a facility with RCRA "interim status" (i.e., before a RCRA operating permit is issued). 42 U.S.C. § 6928(h).

New Mexico's Request and EPA's Response

New Mexico's petition requested that EPA list PFAS as a RCRA Subtitle C hazardous waste. Specifically, New Mexico requested that PFAS be listed either as a class of chemicals or, in the alternative, as individual PFAS chemicals.

EPA declined New Mexico's request to list PFAS as Subtitle C hazardous waste at this time, but it partially granted New Mexico's petition in two other ways. Specifically, EPA announced that it will initiate rulemaking for two RCRA actions:

- First, EPA will initiate rulemaking to add PFOA, PFOS, PFBS, and GenX as RCRA "hazardous constituents" under 40 C.F.R. Part 261 Appendix VIII. RCRA hazardous constituents are subject to corrective action requirements at hazardous waste treatment, storage, and disposal facilities. This addition of one or more PFAS chemicals to Appendix VIII in the regulations is a step towards a formal hazardous waste listing determination under RCRA. Hazardous wastes are listed based on specific statutory requirements or pursuant to EPA's published listing criteria. A waste must be listed if it contains one or more of the hazardous constituents listed in Appendix VIII, and after EPA considers the enumerated factors in the RCRA statute (see 42 U.S.C. §§ 6903, 6921(a)).
- Second, EPA will initiate rulemaking to clarify that EPA has the authority under the RCRA Corrective Action Program to require investigation and cleanup for wastes that meet the broader, statutory definition of hazardous wastes. This modification will clarify that emerging contaminants like PFAS can be addressed through corrective action.

Implications

EPA's announcement is a significant step towards federal regulation of PFAS. Not only would the proposed rulemaking vastly expand the universe of sites potentially subject to RCRA corrective action, it would lay the groundwork to regulate PFAS as a listed hazardous waste. If PFAS are listed hazardous wastes, they would automatically be designated as "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which would both greatly expand EPA's authority to require cleanup of facilities that are contaminated with these substances and increase exposure to CERCLA cost-recovery/contribution litigation for companies associated with such facilities.

EPA's announcement follows actions by state agencies, such as the Washington State Department of Ecology, which recently announced that PFAS chemicals fall under the Washington Model Toxics Control Act's

definition of "hazardous substances."

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