

EPA ANNOUNCES TWO PROPOSED RULEMAKINGS TO REGULATE PFAS UNDER RCRA

Hodgson Russ Environmental Alert
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Last week, the United States Environmental Protection Agency (“EPA”) announced that it will initiate two rulemakings to address per- and polyfluoroalkyl substances (“PFAS”) contamination across the country. This announcement builds off the agency’s Strategic Roadmap for regulating PFAS, which we discussed in our October 20 [alert](#).

The proposed rulemakings are intended to act cooperatively by subjecting PFAS to regulation under the Resource Conservation and Recovery Act (“RCRA”), the Federal law governing the generation, management, and disposal of hazardous waste.

The first proposed rulemaking will designate four PFAS chemicals—PFOA, PFOS, PFBS, and GenX—as “Hazardous Constituents” under 40 CFR Part 261, Appendix VIII. Once listed as a Hazardous Constituent, these PFAS chemicals will be subject to potential corrective action requirements embedded within the RCRA regime.

The second proposed rulemaking will clarify that EPA, through the RCRA Corrective Action Program, has the authority to require investigation and cleanup for wastes that meet the statutory definition of hazardous waste. This modification will clarify that EPA can regulate emerging contaminants, like PFAS, under the RCRA Corrective Action Program.

Hodgson Russ Takeaways

Once this rulemaking is finalized, it will have significant implications under not just RCRA Corrective Action remedial programs, but also for Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”) sites. This is due to the fact that by finalizing the hazardous designation under RCRA, the same constituents will then fall within the CERCLA hazardous substance definition that allows for remedial action and statutory cost recovery litigation. Accordingly, this designation could have an immediate effect on active remedial sites, and may result in reopener circumstances for closed CERCLA and RCRA Corrective Action sites that may not have been previously investigated for PFAS contamination. The potential impacts to cost recovery litigation could have a similarly important effect, given the number of ongoing enforcement and litigation

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matters involving private and public parties over PFAS contamination and liability. Federal and State agencies are taking a close look at responsibility for large-scale PFAS remedial sites where to date there has been difficulty in bringing responsible parties to the table and forcing settlements. The threat of litigation to recoup the costs associated with the cleanup of PFAS-contaminated sites through CERCLA-based cost recovery actions should help in that manner. Finally, the broader definition will raise the specter of potential citizen suit-based litigation under RCRA.

Hodgson Russ will continue to monitor these proposed rulemakings. If you have questions related to the Roadmap, or navigating any other environmental-related issue, please contact [Michael Hecker](#) (716.848.1599) or anyone else on the Hodgson Russ [Environmental](#) team, and we would be happy to help.