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Is PFAS a Regulated Hazardous Waste? Eh, Not So Fast

Much has been said about EPA's response to the State of New Mexico's petition to address PFAS under RCRA. Some of those articles make it sound like a straightforward process from intent to regulation. But it's a little more complicated than that

In order to obtain a hazardous waste listing, EPA needs to add the four PFAS chemicals in question— PFOA, PFOS, PFBS and GenX—as RCRA Hazardous Constituents under 40 C.F.R. Part 261, Appendix VIII. EPA will also need to take the necessary steps to establish the hazardous waste listing, which includes addressing the criteria in 40 CFR 261.11(a)(3). The criteria include 11 factors for determining that the listed waste is a substantially present or potential hazard to human health and the environment—and that also requires a risk analysis. All of this has to be introduced in a proposed rule in the Federal Register (FR), which then has to undergo public comments, followed by documentation in a final FR ruling.

Also of significance, adding the four PFAS chemicals as hazardous constituents under 40 C.F.R. Part 261, Appendix VIII will allow EPA to pursue PFAS under RCRA Corrective Action authorities. And a hazardous waste listing will automatically make the PFAS chemicals hazardous substances under CERCLA. There are a couple of other factors to keep in mind:

- This should be an interesting process and EPA should expect an extremely large volume of comments on the proposal to add the four PFAS as RCRA hazardous constituents and establish a hazardous waste listing. I think the solid/hazardous waste management industry will provide support for the rulemaking, while certain sectors of the manufacturing industry will align against the rulemaking. And then there are the interest groups on both ends of the spectrum that will weigh in on the rulings. Keep in mind that EPA also needs to establish land disposal restrictions (LDRs) for the listed hazardous wastes, which can be a complicated process. Time will tell how this all plays out.

- A review of 40 C.F.R. Part 261, Appendix VIII indicates that the list of hazardous constituents has been amended 15 times—but only three times since 2000. Also, the addition of listed hazardous wastes is fairly infrequent. As an example of how the hazardous waste rule will probably play out, it is instructive to review the FR from 2005, which includes the final rule for EPA’s hazardous waste listing determination for wastes generated from the production of dyes and pigments (K181). This included the addition of five chemicals as RCRA Hazardous Constituents under 40 C.F.R. Part 261, Appendix VIII ([K181 Federal Register](#)). Note that the rule was proposed in November 2003, and the final rule was issued in February 2005, some 15 months later.

So right now, EPA has kicked off the process to add the four PFAS as RCRA hazardous constituents and to establish a hazardous waste listing. But keep in mind, this is a *process* that will take time to get to the finish line. And with interest in all things PFAS continuing to grow, it will be interesting to follow this process as it plays out. But it might take a little patience.

11/09/2021