



Contaminants *Compass*

February 2024 Edition

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“Contaminants Compass” is a monthly McGuireWoods newsletter that provides updates, legal observations and actionable tips to navigate the evolving legal challenges of per- and polyfluoroalkyl substances (PFAS). This edition discusses two proposed federal rules that would expand EPA’s authority to require investigation and cleanup of PFAS releases, recent federal and state legislative efforts, new PFAS litigation, and other federal and state PFAS-related issues.

Look for new editions every month and feel free to reach out to the McGuireWoods team with questions regarding PFAS issues.

I. What’s Happening on the PFAS Federal Regulatory Front?

EPA proposes two rules to subject PFAS releases to the RCRA Corrective Action Program.

On Feb. 8, 2024, the U.S. Environmental Protection Agency (EPA) announced two proposed rules that would give EPA and states greater authority to require cleanup of environmental contamination caused by releases of PFAS and other emerging contaminants: (i) *Listing of Specific PFAS as Hazardous Constituents* ([listing rule](#)) and (ii) *Definition of Hazardous Waste Applicable to Corrective Action for Releases From Solid Waste Management Units* ([definition rule](#)). The proposed rules would amend EPA’s regulations that implement the Resource Conservation and Recovery Act’s (RCRA) corrective action program, which addresses releases of hazardous wastes and hazardous constituents from treatment, storage and disposal facilities (TSDFs).

The two proposed rulemakings under RCRA are in addition to EPA’s September 2022 proposed rule to designate perfluorooctanoic acid and perfluorooctane sulfonate acid as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act. These proposed rules are likely to affect any industry that handles PFAS, including, but not necessarily limited to, industries with permitted hazardous waste TSDFs. Additionally, these rules may affect TSDFs that do not currently handle PFAS but which are located on properties where PFAS have been released.

EPA will receive public comments on the definition rule until **March 11, 2024**, and will receive comments on the listing rule until **April 8, 2024**. Comments may be submitted electronically to each rule's respective docket at <https://www.regulations.gov>.

- Listing Rule: **Docket ID No. EPA-HQ-OLEM-2023-0278**
- Definition Rule: **Docket ID No. EPA-HQ-OLEM-2023-0085**

Listing Rule

The listing rule would add nine PFAS, their salts and their structural isomers to EPA's Appendix VIII list of hazardous constituents. Under RCRA, every permitted hazardous solid waste TSD is required to take corrective action for all releases of hazardous waste *or hazardous constituents* at the facility. See 42 U.S.C. §3004(u), (v). Therefore, if finalized, the listing would automatically subject the nine PFAS to RCRA corrective action requirements.

To be designated as a "hazardous constituent," a substance must be shown to have toxic, carcinogenic, mutagenic or teratogenic effects on humans or other living organisms. Listing a substance as a "hazardous constituent" on Appendix VIII does not make it — or solid waste containing the substance — a RCRA "hazardous waste." However, EPA acknowledges that it "is a step toward a potential hazardous waste listing." It therefore appears likely that EPA will seek to designate one or more of these nine PFAS as RCRA hazardous wastes in future regulatory actions.

The nine PFAS being considered for addition to Appendix VIII are provided below:

CHEMICAL NAME	CHEMICAL ABSTRACTS NUMBER
Perfluorooctanoic acid (PFOA)	335-67-1
Perfluorooctanesulfonic acid (PFOS)	1763-23-1
Perfluorobutanesulfonic acid (PFBS)	375-73-5
Hexafluoropropylene oxide-dimer acid (HFPO-DA or GenX)	13252-13-6
Perfluorononanoic acid (PFNA)	375-95-1
Perfluorohexanesulfonic acid (PFHxS)	355-46-4
Perfluorodecanoic acid (PFDA)	335-76-2
Perfluorohexanoic acid (PFHxA)	307-24-4
Perfluorobutanoic acid (PFBA)	375-22-4

These nine PFAS have been employed in a broad array of commercial uses, including aqueous film-forming foam (AFFF) or firefighting foam, metal plating, cleaning agents, waxes and energetic materials. Additionally, several of these PFAS have been used as processing aids to make fluoropolymers, which have applications in the medical, aerospace, automotive, electronics and energy industries. Any facility that uses or disposes of PFAS or PFAS-containing materials has the potential to release PFAS into the environment and thus be subject to corrective action requirements.

EPA identified 1,740 facilities that could be subject to additional corrective-action requirements to address releases not already subject to corrective action if the proposed listing rule is finalized. Of those, EPA identified 831 facilities that have a "higher likelihood of handling PFAS."

Definition Rule

The definition rule would amend the regulatory definition of “hazardous waste” applicable to the RCRA corrective action program (see 40 CFR 260.10) to incorporate the statutory definition of “hazardous waste” found in 42 U.S.C. § 6903(5). It would also amend the identical definition in the hazardous waste facility permitting regulations (see 40 CFR 270.2) to expressly apply the statutory definition of hazardous waste for purposes of imposing corrective action requirements.

Under the current regulatory definition, corrective action requirements apply only to hazardous wastes that have been identified and specifically listed by EPA through rulemaking. The definition rule would expand the reach of the corrective action program to encompass releases of unlisted wastes, if EPA or authorized states determine that the waste meets the statutory definition of hazardous waste.

EPA characterizes this proposed rule as merely clarifying the regulatory language to apply EPA’s longstanding, correct interpretation of its authority under RCRA. One might question, then, why this rulemaking is necessary. Critics of the definition rule would argue that it is a dramatic expansion of EPA’s authority and that it injects uncertainty and discord into the RCRA corrective action program. Indeed, EPA states that it is proposing this rule, in part, to foreclose future legal challenges by industry attempting to avoid corrective action for PFAS or other substances “not listed or identified in the regulations as hazardous waste or constituents.” Thus, EPA is acknowledging that the rule will have the effect of expanding the universe of substances — and facilities — that are subject to corrective action under RCRA.

This proposed rulemaking will affect any facility that potentially treats, stores or disposes of PFAS or other emerging contaminants. Certainly, EPA had PFAS in mind when it was developing the definition rule, which it is proposing alongside the listing rule. While the listing rule applies to only nine PFAS, the definition rule would authorize EPA to bring an unlimited number of PFAS under the corrective action program. So far, EPA has approved testing methods for approximately 30 PFAS, but it is estimated that more than 10,000 different PFAS exist.

Notably, the definition rule is not limited to just facilities that handle PFAS. The statutory definition of hazardous waste can equally apply to non-PFAS. This proposed rulemaking, therefore, broadly affects any industry or regulated entity that treats, stores and disposes of hazardous waste or hazardous constituents. Further, given the discretion EPA would have to make new hazardous waste determinations outside of rulemaking, this rule could potentially affect any facility that handles solid waste, even though the waste is presently considered non-hazardous.

II. What’s Happening in PFAS Litigation?

Connecticut attorney general sues chemical manufacturers for alleged PFAS contamination.

On Jan. 23, 2024, the attorney general of Connecticut filed two lawsuits in state court against companies that manufacture PFAS or use PFAS in their products, including firefighting foam, food packaging, cookware, carpeting, upholstery, clothing and cosmetics. The lawsuits allege that these manufacturers knowingly released PFAS into the environment, contaminating public water supplies and natural resources. The lawsuits seek civil penalties for decades of past violations, injunctive relief to abate and remediate the contamination, and monetary compensation. See [Connecticut PFAS Lawsuit](#).

III. What’s Happening on the PFAS Federal Legislative Front?

On Jan. 10, 2024, House lawmakers introduced a bipartisan bill that would establish a compensation fund for military firefighters who have been exposed to PFAS. The “Military Firefighters Compensation Fund” would provide compensation to firefighters or their surviving family members who suffer illness due to exposure to PFAS during their employment. PFAS were widely used in fire-suppressing foam (AFFF) and in firefighting gear. Firefighters will be presumed to have been exposed to PFAS if they were employed at a military facility during a period when PFAS would have been present at the facility. See [Firefighter Compensation Fund Bill](#).

IV. What's Happening on the PFAS State Regulatory Front?

- [New Jersey](#) (Jan. 9, 2024) — A newly introduced bill would prohibit the use of PFAS in many consumer products.
- [New York](#) (Feb. 1, 2024) — Newly introduced legislation would phase out the sale of consumer products that contain PFAS.
- [Vermont](#) (Jan. 5, 2024) — Lawmakers introduced legislation that would prohibit disposal of materials containing PFAS in landfills.
- [Virginia](#) (Feb. 7, 2024) — A bill working its way through the state legislature would increase PFAS monitoring requirements for publicly owned treatment works and potential sources of PFAS that discharge wastewater into sewer systems and surface water.

V. Science Corner

A. CDC publishes updated guidance for clinicians on PFAS exposure.

The Centers for Disease Control and Prevention (CDC) issued guidance for clinicians to evaluate a patient's exposure to PFAS and mitigate risks. The guidance provides strategies clinicians can recommend for patients to reduce exposure to PFAS, including installing water filtration, limiting or avoiding consumption of food known to be contaminated with PFAS, and avoiding consumer products that contain PFAS. According to CDC, clinicians should consider recommending blood testing for patients who have high exposure to PFAS or who rely on water sources in which PFAS have been detected. [See CDC Clinician Guidance.](#)

B. Study links processed meats and other food packaging to higher PFAS exposure.

A study published Feb. 4, 2024, in *Environment International* found a link between dietary habits and PFAS exposure. Researchers at the Keck School of Medicine at the University of Southern California tracked the eating habits of young adults and monitored concentrations of PFAS levels in their blood. The study found that greater consumption of processed meats, certain bottled beverages and takeout food was associated with higher levels of PFAS in the body over time. The study identified positive associations with specific foods and increased levels of specific PFAS. For example, higher consumption of processed meat was associated with higher PFOA levels. Note that the researchers did not perform representative testing of any food products. [See PFAS Exposure Study.](#)

What McGuireWoods Is Monitoring.

- [NGO petitions to add PFAS to Clean Water Act Toxics List.](#)
- “[Safer Sites: Bill Tracker](#)” tracks legislation introduced or adopted in more than 30 states related to PFAS and other environmental issues.

About McGuireWoods

McGuireWoods supports clients as they assess and mitigate their PFAS risk, develop and apply business operational responses to changing PFAS laws and regulations at federal and state levels, and defend litigation as it arises, including navigating and coordinating national scientific defenses in novel contexts. [Click here](#) to learn more.

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