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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 260, 261, and 270

[EPA-HQ-OLEM-2023-0085; FRL-9247-01-OLEM]

RIN 2050-AH27

#### Definition of Hazardous Waste Applicable to Corrective Action for Releases From Solid Waste Management Units

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend the definition of hazardous waste applicable to corrective action to address releases from solid waste management units at RCRA-permitted treatment, storage, and disposal facilities and make related conforming amendments, thereby providing clear regulatory authority to fully implement the Resource Conservation and Recovery Act (RCRA) statutory requirement that permitted facilities conduct corrective action to address releases not only of substances listed or identified as hazardous waste in the regulations but of any substance that meets the statutory definition of hazardous waste. The proposed rule would also provide notice of EPA's interpretation that the statutory definition of hazardous waste applies to

corrective action for releases from solid waste management units at permitted and interim status facilities.

**DATES:** Comments must be received on or before March 11, 2024.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA-HQ-OLEM-2023-0085, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, RCRA Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery/Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

*Instructions:* All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2023-0085, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the **ADDRESSES** section of this document. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

#### FOR FURTHER INFORMATION CONTACT:

Barbara Foster, Program Information and Implementation Division, Office of Resource Conservation and Recovery (5303T) Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington DC, 20460, 202-566-0382, [foster.barbara@epa.gov](mailto:foster.barbara@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Authority

These regulations are promulgated under the authority of sections 2002(a), 3004(u) and (v), and 3008(h) of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6912(a), 6924(u) and (v), and 6928(h).

##### II. Background

###### A. Overview of RCRA Corrective Action Requirements Applicable to Releases From Solid Waste Management Units

The 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA) expanded EPA's authority to address releases of hazardous waste and constituents at RCRA treatment, storage, and disposal facilities.

Sections 3004(u) and (v) of RCRA, added to the statute by HSWA, provided for corrective action requirements at permitted facilities. Section 3004(u) directed EPA to require corrective action for “all releases of hazardous waste or constituents from any solid waste management unit” at permitted hazardous waste treatment, storage, or disposal facilities regardless of the time at which waste was placed in the units. Section 3004(v) directed EPA to require that corrective action be taken beyond facility boundaries where necessary to protect human health and the environment unless facility owners/operators demonstrate to the Agency's satisfaction that, despite their best efforts, they were unable to obtain the necessary permission to undertake off-site corrective action.

Section 3008(h), also added by HSWA, provided EPA authority to require corrective action for “a release of hazardous waste into the environment from a facility” authorized to operate under interim status.

###### B. Brief History of Regulatory Actions Implementing HSWA and Leading to This Proposed Rule

Prior to HSWA, regulatory requirements for corrective action to address releases of hazardous waste and constituents were limited in scope. The regulations in 40 CFR part 264 Subpart F imposed requirements on owners and

operators of regulated units<sup>1</sup> to address releases to groundwater. These regulations included a corrective action requirement for releases to groundwater of those hazardous waste and hazardous constituents that are identified in the regulations. This corrective action requirement did not extend to releases to other media, or to other solid waste management units.

HSWA expanded EPA's corrective action authority to address not only releases to the groundwater from regulated units but all releases of hazardous waste and constituents from solid waste management units and authorized the Agency to issue regulations. On July 15, 1985, EPA issued a final rule that amended EPA's hazardous waste regulations to reflect certain of the new statutory provisions of HSWA (referred to as the 1985 Codification Rule because it codified a number of HSWA requirements).<sup>2</sup> That final rule added to the regulations in Part 264 a new § 264.101, which largely mirrored the language in section 3004(u) and required that permits require facility-wide corrective action to address releases of hazardous waste and constituents from solid waste management units. The Agency later amended § 264.101 to implement section 3004(v), which requires owners and operators to institute corrective action beyond the facility boundary where necessary to protect human health and the environment unless the owner or operator is denied access to adjacent lands despite their best efforts.<sup>3</sup>

Section 260.10 provides definitions for terms used in 40 CFR parts 260 through 273. The definition of "hazardous waste" in § 260.10 refers to the definition in § 261.3, that is, it applies the regulatory definition to those parts. Under that definition, only solid wastes that are listed in the regulations or exhibit one of the four regulatory hazardous waste characteristics (ignitability, corrosivity, reactivity, and toxicity) are hazardous waste. When EPA codified section 3004(u) in the final 1985 Codification Rule, the Agency did not discuss the question of whether the regulatory definition of hazardous waste, generally applicable to 40 CFR part 264, should also apply to the new corrective action authority.

On July 1, 1990,<sup>4</sup> EPA proposed requirements for a new Subpart S in 40 CFR part 264 that would establish in detail the procedures and standards for implementing sections 3004(u) and (v) including requirements for conducting remedial investigations, evaluating potential remedies, and selecting and implementing remedies at RCRA facilities.<sup>5</sup> In that proposed rule, EPA addressed the question of what definition of hazardous waste applies to corrective action for releases from solid waste management units.<sup>6</sup> In the preamble, EPA stated its interpretation that "hazardous waste" in section 3004(u) denotes "hazardous waste" as defined in RCRA section 1004(5).<sup>7</sup> EPA explained that the term "hazardous waste" appearing in section 3004(u) is distinguished from the phrase "hazardous waste listed and identified," which is used elsewhere in the statute to denote that subset of hazardous wastes specifically listed and identified by the Agency pursuant to section 3001 of RCRA. EPA stated that, under that interpretation, the remedial authority under section 3004(u) is not limited to releases of wastes identified as hazardous waste in 40 CFR part 261. Rather, it extends potentially to any substance meeting the statutory definition. EPA further stated that the use of the phrase "hazardous waste or constituents" in section 3004(u) indicated that Congress was particularly concerned that the Agency use the corrective action authority to address hazardous constituents.<sup>8</sup> EPA proposed to define hazardous constituents for purposes of Subpart S as those constituents listed on Appendix VIII of Part 261—Hazardous Constituents, or on Appendix IX of Part 264—Groundwater Monitoring List. EPA proposed moving § 264.101 to the new Subpart S and proposed a definition of hazardous waste that repeated the language in RCRA section 1004(5) and would be

applicable to the new subpart. That proposed rule thus would have expressly applied the statutory definition of hazardous waste to corrective action for releases from solid waste management units required under EPA's regulations.

The Agency promulgated a few elements of the 1990 Subpart S proposed rule on February 16, 1993.<sup>9</sup> These elements included final provisions for Corrective Action Management Units (CAMUs) and Temporary Units, and a definition of "facility" for corrective action. The remainder of the 1990 Subpart S proposed rule was not made final. However, EPA and authorized States began using the proposed rule and preamble as the primary guidance for the corrective action program soon after it was published.<sup>10</sup>

On May 1, 1996, EPA issued an Advance Notice of Proposed Rulemaking ("Subpart S ANPR") that, among other things, solicited comment on whether to issue detailed regulations along the lines of the 1990 Subpart S proposal to implement the Corrective Action Program. In the 1996 Subpart S ANPR, EPA repeated its interpretation that the term "hazardous waste" in section 3004(u) includes all wastes that are hazardous within the statutory definition in RCRA section 1004(5), not just those that are identified by EPA in regulation.<sup>11</sup> EPA again stated its position regarding the importance of addressing hazardous constituents through corrective action in the 1996 Subpart S ANPR.<sup>12</sup> The 1996 Subpart S ANPR replaced the 1990 Subpart S proposed rule as the primary guidance for much of the Corrective Action Program.<sup>13</sup>

On October 7, 1999, the Agency issued a **Federal Register** notice withdrawing the 1990 Subpart S

<sup>4</sup> Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities; Proposed Rule, July 27, 1990, 55 FR 30798.

<sup>5</sup> As discussed below, many provisions of this proposed rule were not made final.

<sup>6</sup> 1990 Subpart S Proposed Rule, 55 FR 30798 at 30809 (July 27, 1990).

<sup>7</sup> Section 1004(5) provides—(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may:

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

<sup>8</sup> 1990 Subpart S Proposed Rule, 55 FR 30798 at 30809.

<sup>9</sup> Corrective Action Management Units and Temporary Units; Corrective Action Provisions Under Subtitle C, 58 FR 8658, February 16, 1993.

<sup>10</sup> Memorandum from Lisa K. Friedman to Regional Counsel RCRA Branch Chiefs, Regions 1–10 entitled "Use of Proposed Subpart S Corrective Action Rule as Guidance Pending Promulgation of the Final Rule, March 27, 1991, available at: <https://rcrapublic.epa.gov/files/13461.pdf>, and in the docket for this rulemaking.

<sup>11</sup> Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities, May 1, 1996, 61 FR 19432 at 19443.

<sup>12</sup> Subpart S ANPR, May 1, 1996, 61 FR 19432 at 19443.

<sup>13</sup> Memorandum from Elliott P. Laws and Steven A. Herman to RCRA/CERCLA Senior Policy Managers entitled "Use of the Corrective Action Advance Notice of Proposed Rulemaking as Guidance," January 17, 1997, found in the docket for this rulemaking.

<sup>1</sup> A regulated unit is defined in § 264.90 as a surface impoundment, waste pile, and land treatment unit or landfill that receives hazardous waste after July 26, 1982.

<sup>2</sup> Hazardous Waste Management System; Final Codification Rule, 50 FR 28702, July 15, 1985.

<sup>3</sup> Hazardous Waste; Codification Rule for the 1984 Amendments 52 FR 45788, December 1, 1987.

proposed rule in part.<sup>14</sup> EPA explained that experience implementing the Corrective Action Program to date had demonstrated that more detailed regulations were not necessary to carry out the Agency's duties under RCRA 3004(u) and (v).<sup>15</sup> EPA did not withdraw the proposal with respect to two corrective action jurisdictional issues, because it concluded that those were issues about which the Agency had expressed concern regarding the status quo or raised questions that had not been definitively answered by the Agency.<sup>16</sup> The notice expressly contrasted those issues with the definition of hazardous waste or constituents, as to which EPA had not expressed concerns or raised questions that it had not definitively answered.<sup>17</sup>

### C. Litigation Pertaining to the Scope of Hazardous Waste Subject to Corrective Action

In December 2018, the New Mexico Environment Department issued a hazardous waste facility permit to Cannon Air Force Base under its RCRA-authorized hazardous waste authorities.<sup>18</sup> The permit, among other things, imposed corrective action requirements for perfluoroalkyl substances at the facility. Per- and polyfluoroalkyl substances (PFAS) are not listed or identified as hazardous wastes or hazardous constituents in EPA or New Mexico authorized regulations. In January 2019, the United States, on behalf of Air Force, challenged the permit in the Federal District Court for the District of New Mexico. In the complaint, the United States took the position that New Mexico's corrective action regulation—which mirrors the federal regulation—does not authorize

<sup>14</sup> Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities, Partial Withdrawal of Rulemaking Proposal, 64 FR 54604 (October 7, 1999).

<sup>15</sup> EPA stated several reasons for its decision to withdraw provisions of the 1990 Subpart S proposed rule. EPA had learned that additional final regulations were not necessary to authorize State programs and was concerned that regulations would disrupt State programs that had been authorized. EPA also recognized that its early goal of consistent application of rules and standards at all sites is not always appropriate given the diversity of facilities subject to corrective action. See the discussion of this issue in the 1990 Subpart S proposed rule 64 FR 54604 at 54605. The proposal to codify the statutory definition of hazardous waste was among the provisions of the proposed rule that was withdrawn.

<sup>16</sup> 64 FR at 54606–7. The two aspects of the proposal EPA preserved were the definition of “facility” for corrective action purposes and the question of who is responsible for corrective action when there is a transfer of facility property.

<sup>17</sup> *Id.*

<sup>18</sup> New Mexico is one of the 44 States (along with one territory) authorized to implement corrective action (1985 Codification Rule provisions).

corrective action for substances that are not listed or characteristic hazardous wastes under the State's regulations, even if they might be hazardous under the broader statutory definition.<sup>19</sup>

The case caused EPA to take a fresh look at its regulations.<sup>20</sup> As further described below, EPA now recognizes that, as a result of EPA's decision not to make final the hazardous waste definition portion of the Subpart S proposal, EPA's corrective action regulation does not fully and clearly reflect the scope of corrective action as required by RCRA 3004(u) and (v)). This proposed regulation would better align the regulation with the statutory requirement.

### D. New Mexico Rulemaking Petition

On June 23, 2021, the Governor of New Mexico filed a petition with EPA requesting a timely listing of PFAS, as a class of chemicals, as hazardous wastes under the RCRA Subtitle C regulations, or in the alternative, a listing of individual PFAS chemicals as hazardous wastes under the regulations.<sup>21</sup> EPA acted upon the Governor of New Mexico's petition with an October 26, 2021, letter. EPA indicated in that letter that it would be initiating the rulemaking process for two rulemakings.<sup>22</sup> This proposal, along with EPA's proposal titled *Listing of*

<sup>19</sup> The New Mexico Hazardous Waste Act (HWA) contains a provision defining corrective action as “an action taken in accordance with rules of the [New Mexico environmental improvement board] to investigate, minimize, eliminate or clean up a release. . . .” N.M. Stat. Ann. Section 74–4–3–C. RCRA does not contain a comparable provision, so the laws governing corrective action under RCRA and the HWA are not identical.

<sup>20</sup> The court dismissed the case on jurisdictional grounds in August 2022. The United States, on behalf of Air Force, has appealed the case to the United States Court of Appeals for the Tenth Circuit.

<sup>21</sup> Petition from the Governor of New Mexico to the Administrator of EPA concerning action on PFAS under RCRA. June 23, 2021, available at: [https://www.epa.gov/system/files/documents/2021-10/508compliant\\_ezd5442262\\_2021-06-23-governor-letter-to-epa-for-pfas-petition.pdf-incoming-document.pdf](https://www.epa.gov/system/files/documents/2021-10/508compliant_ezd5442262_2021-06-23-governor-letter-to-epa-for-pfas-petition.pdf-incoming-document.pdf), and in the docket for this rulemaking. The New Mexico petition incorporated by reference two earlier petitions submitted to EPA by Public Employees for Environmental Responsibility (PEER), submitted on September 19, 2019, available at: [https://www.epa.gov/system/files/documents/2021-09/peer\\_pfas\\_rulemaking\\_petition\\_metadata\\_added.pdf](https://www.epa.gov/system/files/documents/2021-09/peer_pfas_rulemaking_petition_metadata_added.pdf), and in the docket for this rulemaking; and Environmental Law Clinic of University of California, Berkeley (UC Berkeley), submitted on January 15, 2020, available at: [https://www.epa.gov/system/files/documents/2021-09/pfas\\_petition\\_for\\_haz\\_waste\\_jan\\_2020\\_metadata\\_added.pdf](https://www.epa.gov/system/files/documents/2021-09/pfas_petition_for_haz_waste_jan_2020_metadata_added.pdf) and in the docket for this rulemaking.

<sup>22</sup> EPA Response to New Mexico Governor's Petition on PFAS, October 26, 2021, available at: [https://www.epa.gov/system/files/documents/2021-10/oct\\_2021\\_response\\_to\\_nm\\_governor\\_pfas\\_petition\\_corrected.pdf](https://www.epa.gov/system/files/documents/2021-10/oct_2021_response_to_nm_governor_pfas_petition_corrected.pdf), and in the docket for this rulemaking.

*Specific PFAS as RCRA Hazardous Constituents*, constitutes initiation of those rulemakings. While this proposed rule would not directly address PFAS, it would facilitate the use of RCRA corrective action authority to address emerging contaminants such as PFAS, as well as other non-regulatory hazardous waste, at RCRA permitted treatment, storage, and disposal facilities.

### III. Summary of This Proposed Rule

This proposed rule would amend the regulations applicable to RCRA treatment, storage, and disposal facilities in two related respects. First, it would amend the definition of hazardous waste applicable to corrective action. Specifically, it would amend the definition in § 260.10 to expressly apply the RCRA section 1004(5) statutory definition of hazardous waste to corrective action requirements under § 264.101 and 40 CFR part 264 Subpart S. Similarly, it would amend the identical definition in the hazardous waste facility permitting regulations, § 270.2, to expressly apply the statutory definition of hazardous waste to the requirements relating to corrective action in § 270.14(d). These proposed revisions would more clearly provide EPA authority to address, through corrective action for solid waste management units, releases of the full universe of substances that the statute intended—not only hazardous waste and hazardous constituents listed or identified in the regulations, but all substances that meet the definition of hazardous waste in RCRA section 1004(5) at a facility.

Second, this proposed rule would add RCRA sections 3004(u) and (v) and 3008(h) to the statutory authorities identified in § 261.1(b)(2). That section provides that the statutory definitions of solid and hazardous waste govern the scope of EPA's authority under certain sections of RCRA, not the more limited 40 CFR part 261 regulatory definitions. These revisions provide notice of and codify the Agency's interpretation of the statute—that it provides authority to address releases from solid waste management units of all substances that meet the definition of hazardous waste under the statute.

### IV. Section-by-Section Analysis

#### A. Revisions to the Definitions in §§ 260.10 and 270.2

The definitions in 40 CFR 260.10 apply to 40 CFR parts 260 thru 273. The § 260.10 definition of hazardous waste refers to the definition in § 261.3 of the regulations, that is, the regulatory



phrase as used in the preceding, simultaneously enacted section.

To the extent EPA's reading is not compelled, it is clearly the best reading of the statute. As used in RCRA, the phrase "hazardous waste" governs the scope of investigative and response authorities that are developed and applied on a case-by-case basis. In addition to section 3004(u), the phrase is used, among other places, in section 3008(h), to define the scope of EPA's authority to order corrective action at interim status facilities; section 3007, to define the scope of EPA's Subtitle C inspection and information gathering authorities; section 3013, to define the scope of EPA's Subtitle C authority to order monitoring, analysis, and testing; and section 7003, to define the scope of EPA's imminent hazard authority. As discussed briefly below, EPA codified its interpretation of "hazardous waste" as used in sections 3007, 3013, and 7003 decades ago. In contrast, the phrase "hazardous waste identified or listed" under Subtitle C is used to define the scope of the uniform regulatory requirements applicable to the generation, transportation, treatment, storage, and disposal of hazardous wastes that EPA has identified or listed by regulation, pursuant to RCRA section 3001.

In imposing corrective action requirements on a non-regulatory substance under the amended regulation, a permit writer would need to develop, and present for public comment, an administrative record supporting any conclusion that the substance meets or may meet the statutory hazardous waste definition, as briefly discussed below in Section IV.B of this preamble. Any final permit conditions would be subject to administrative and/or judicial challenge to the same extent as other permit conditions.

EPA solicits comment on its proposed revisions to the definition of hazardous waste in § 260.10 for purposes of corrective action.

#### B. Revisions to § 261.1(b)(2)

Section 261.1(b)(2)<sup>32</sup> provides notice that the Agency's authority under

<sup>32</sup> This section of the regulations provides: "This part identifies only some of the materials which are solid wastes and hazardous wastes under sections 3007, 3013, and 7003 of RCRA. A material which is not defined as a solid waste in this part, or is not a hazardous waste identified or listed in this part, is *still* a solid waste and a hazardous waste for purposes of these sections if:

(i) In the case of sections 3007 and 3013, EPA has reason to believe that the material may be a solid waste within the meaning of section 1004(27) of RCRA and a hazardous waste *within the meaning of section 1004(5) of RCRA*; or

sections 3007, 3013, and 7003 of RCRA is not limited to solid waste and hazardous waste identified in the regulations but extends to include solid and hazardous wastes under the definitions in the statute. This proposed rule would add RCRA sections 3004(u) and (v) and RCRA section 3008(h) to § 261.1(b)(2) to clarify that the statutory definitions of solid waste and hazardous waste apply to those RCRA sections as well.

EPA established § 261.1(b)(2), in a final rule issued in May 1980,<sup>33</sup> to avoid confusion on several points. The provision made clear that the scope of the Agency's authority under the statutory provisions identified in that section is determined by the statutory definitions of solid and hazardous waste, not by the 40 CFR part 261 definitions that govern the Subtitle C hazardous waste management program. With respect to the hazardous waste definition, EPA explained: "Unlike Sections 3002 through 3004 and Section 3010, Congress did not confine the operations of Sections 3007 and 7003<sup>34</sup> to 'hazardous wastes *identified or listed under this subtitle*'. . . . To avoid future confusion on this point, EPA has stated it explicitly in § 261.1(b)."<sup>35</sup>

Because § 261.1(b)(2)(i) identifies information-gathering authorities and § 261.1(b)(2)(ii) identifies remediation and other response authorities, and consequently a different level of finding is required under each of these sections, EPA is proposing to add sections 3004(u) and (v) and section 3008(h) to both sections.

Section 261.1(b)(2)(i) states that a material that is not a regulatory solid waste or a regulatory hazardous waste is still a solid waste and a hazardous waste for purposes of sections 3007 and 3013 if EPA has reason to believe that the material *may be* a solid waste within the meaning of 1004(27) or a hazardous waste within the meaning of section 1004(5). This provision describes EPA's authority to use the investigative and information gathering authorities provided in those statutory sections, which, among other things, enable EPA to gather information to determine if a substance is in fact a solid waste or a hazardous waste under the statute. Consistent with this regulatory text,

(ii) In the case of section 7003, *the statutory elements are established*" (emphasis added).

<sup>33</sup> Hazardous Waste Management System: General, 45 FR 33084, May 19, 1980. EPA revised this section in 1985 see 50 FR 614, January 4, 1985.

<sup>34</sup> The reference to RCRA 3013 was added to this section in a 1985 rulemaking. 50 FR 614, January 4, 1985.

<sup>35</sup> 45 FR 33084, 33090 (May 19, 1980) (emphasis in original).

EPA is proposing to add sections 3004(u) and (v) and section 3008(h) to the existing § 261.1(b)(2)(i) to explicitly state EPA's authority to impose requirements to implement the investigative stages of corrective action where the findings required by the provision are met. EPA would not rely solely on the findings described in this provision to require remediation activities.

Section 261.1(b)(2)(ii) states that a material is a solid waste and a hazardous waste for purposes of RCRA section 7003 if the statutory elements are established. This paragraph describes EPA's authority to require remediation activities or other response measures under this section where the statutory definition of solid waste or hazardous waste is established. EPA is proposing to add sections 3004(u) and (v) and section 3008(h) to existing § 261.1(b)(2)(ii) to explicitly state EPA's authority to require remediation activities beyond the investigative stages of corrective action where the findings required by that section are met.

EPA does not believe that the addition of sections 3004(u) and (v) and section 3008(h) to § 261.1(b) would impose additional requirements on facilities. As described above, these amendments to § 261.1(b) would provide clarity by expressly stating the Agency's statutory authority under the specific RCRA sections listed.

EPA solicits comment on the proposed revisions to § 261.1(b).

#### V. Impact of the Proposed Rule on Corrective Action Program Implementation

In developing this proposed rule, EPA anticipated how the rule might affect implementation of the Corrective Action Program, for example, whether it would increase the issuance of permit conditions to address releases of substances not identified or listed in the regulations, and/or whether it would redirect the program away from its current focus on releases of identified or listed substances. EPA does not expect these impacts.

EPA expects that the proposed rule would facilitate corrective action to address substances that meet the statutory definition of hazardous waste, but are not regulatory hazardous waste, by providing clear regulatory authority and would thereby minimize the likelihood of challenges to corrective action requirements. EPA does not, however, expect that an increase in permit conditions to address corrective action will be attributable to the regulatory authority proposed in this rule. EPA has long held the position that

section 3004(u) provides authority to address statutory hazardous waste and, since 1990, has consistently instructed regional and State implementers that the corrective action authority reaches such waste. In addition, Corrective Action Program implementers have had authority to include corrective action conditions in permits either through State cleanup regulations or through the authority provided by § 270.32(b)(2), EPA's omnibus authority, and authorized State analogues.<sup>36</sup> In addition, as was discussed above, EPA has corrective action authority under section 3008(h) to address releases of statutory hazardous waste. Moreover, cleanup at RCRA treatment, storage, and disposal facilities also can be required or conducted pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

In the process of developing this proposed rule, the Corrective Action Program gathered permits that impose corrective action requirements to address substances not listed or identified in the regulations as hazardous waste or constituents and found very few. EPA's understanding is that, although permit writers possess authority to require investigation and cleanup of substances that are not regulatory hazardous wastes or constituents, they have generally focused the Corrective Action Program on addressing releases of substances that are identified in the regulations. Given that the ability to address substances that are not regulatory hazardous waste has been available to program implementers in the past, EPA has no reason to expect that those substances, in general, would be addressed through corrective action more frequently in the future as a result of this proposed rule.

<sup>36</sup> Section 270.32(b)(2) provides: "Each permit issued under section 3005 of this act shall contain terms and conditions as the administrator or State Director determines necessary to protect human health and the environment." EPA has long recognized the appropriateness of use of the omnibus authority to ensure the objectives of section 3004(u) are realized. In the 1996 Subpart S ANPR, EPA pointed out that Congress enacted the two authorities in the same HSWA amendments, 61 FR at 19433. EPA cited to the omnibus provision in explaining EPA's authority to require cleanup of releases from areas that do not qualify as solid waste management units. EPA stated: "Given the legislative history of RCRA section 3004(u), which emphasizes that RCRA facilities should be adequately cleaned up, in part, to prevent creation of new Superfund sites, EPA believes that corrective action authorities can be used to address all unacceptable risks to human health or the environment from RCRA facilities. In the permitting context, remediation of non-SWMU related releases may be required under the 'omnibus' authority." *Id.* at 19443.

At the same time, EPA expects that the Agency's attention on addressing risks associated with PFAS<sup>37</sup> will likely result in additional corrective action to address releases of those substances. EPA also expects that such increased corrective action activity would be supported principally not by this rule, but by the companion rule that EPA is developing to list a set of those substances as hazardous constituents in 40 CFR part 261 Appendix VIII.<sup>38</sup>

In the 1990 Subpart S proposed rule discussed above, EPA stated its belief that the use of the phrase "hazardous waste or constituents" in section 3004(u) indicates that Congress was particularly concerned that the Agency use its corrective action authority to address hazardous constituents and stated that the term "hazardous constituents" in section 3004(u) means those constituents found in 40 CFR part 261 Appendix VIII.<sup>39</sup> Thus, hazardous constituents listed on 40 CFR part 261 Appendix VIII are routinely assessed for and addressed as part of the corrective action process.

As a result of the PFAS Appendix VIII rulemaking, nine PFAS would be among the hazardous constituents expressly identified for consideration in RCRA facility assessments and investigations and, where necessary, cleanup through the corrective action process. EPA expects that this set of PFAS are those most likely to be addressed through corrective action, and that, if these specific PFAS are listed as hazardous constituents, corrective action to address those substances will be supported by their 40 CFR part 261 Appendix VIII listing, rather than the regulatory authority that would be provided by this proposed rule. EPA solicits comment on that expectation.

<sup>37</sup> For example, PFAS Strategic Roadmap, EPA's Commitment to Action 2021–2024, [https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap\\_final-508.pdf](https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf).

<sup>38</sup> The PFAS addressed in the proposed rule are: Perfluorobutanoic acid (PFBA), Perfluorobutanesulfonic acid (PFBS), Perfluorodecanoic acid (PFDA), Perfluorohexanoic acid (PFHxA), Perfluorohexanesulfonic acid (PFHxS), Perfluorononanoic acid (PFNA), Perfluorooctanoic acid (PFOA), Perfluorooctanesulfonic acid (PFOS), and Hexafluoropropylene oxide-dimer acid (HFPO–DA or GenX). All references to the nine PFAS in this notice are meant to include their salts and linear and branched structural isomers. EPA intends to process these two rulemakings in tandem, and EPA's expectation that increased corrective action activity for these nine PFAS would be supported by the Appendix VIII rule is premised on the assumption that the two rules will be made final at or around the same time.

<sup>39</sup> EPA also proposed in that rule to include within the definition of hazardous constituents those constituents identified in Appendix IX to 40 CFR part 264. See: 55 FR 30798 at 30809.

EPA also solicits comment on whether the potential impacts of this rulemaking may be affected by the availability of other authorities that program implementers might rely on to satisfy corrective action requirements to address PFAS at RCRA facilities including other RCRA authorities such as omnibus permitting authority and RCRA section 7003, and CERCLA.

As discussed above, EPA is proposing this rule to more clearly provide EPA authority to address, through RCRA corrective action for solid waste management units, releases of the full universe of substances that the statute intended. EPA believes that the regulations would, as a result of this rule, accurately reflect what the statute authorizes and requires, as interpreted by EPA. Finally, EPA believes that by providing clear regulatory authority, the proposed rule, if made final, would minimize the likelihood of challenges to corrective action requirements. EPA solicits comment on its understanding of the impact of this proposed rulemaking on its ability to effectively issue permit conditions to address statutory hazardous waste, and on whether there are possible alternatives that would achieve the benefits of this regulation, in light of the other actions and authorities described above.

EPA has presented this impacts discussion consistent with Executive Order 12866. The potential impacts of this rulemaking and the potential for associated benefits and costs do not form any part of the basis of EPA's decision to propose the amendments in this notice. As described above, the amendments proposed today implement the plain language of RCRA and reflect what EPA believes was Congress' intent as to the scope of RCRA sections 3004(u) and (v) and 3008(h). EPA believes its regulations should accurately reflect what the statute authorizes and requires, as interpreted by EPA. EPA's estimate as to the potential impact of the amendments is not relevant either to what Congress intended in enacting these provisions or to whether EPA's regulations should accurately reflect that intent. In any event, even if potential impacts were relevant to today's proposal, EPA would proceed with the proposed amendments because, as explained above, EPA does not expect that the rule would result in any impacts.

## VI. State Implementation

### A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to

administer their own hazardous waste programs in lieu of the federal program within the State. Following authorization, EPA retains enforcement authority under section 3008, 3013, and 7003 of RCRA, although authorized States have primary enforcement responsibility. The standards and requirements for State authorization are found in 40 CFR part 271.

Prior to the enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA) and of the Hazardous Waste Electronic Manifest Establishment Act,<sup>40</sup> a State with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the federal program in that State. The federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in that State, since only the State was authorized to administer the program and issue RCRA permits. When new, more stringent federal requirements were promulgated, the State was obligated to adopt equivalent authorities within specified time frames. However, the new federal requirements did not take effect in an authorized State until the State adopted the federal requirements as State law.

In contrast, with the adoption of RCRA section 3006(g), which was added by HSWA, new requirements and prohibitions imposed under the HSWA authority take effect in authorized States at the same time that they take effect in unauthorized States. EPA is directed by section 3006(g) to implement HSWA based requirements and prohibitions in authorized States until the State is granted authorization to do so. While States must still adopt HSWA related provisions as State law to retain final authorization, EPA implements the HSWA provisions in authorized States until the States do so.

Authorized States are required to modify their programs when EPA promulgates federal requirements that are more stringent or broader in scope than existing federal requirements. RCRA section 3009 allows the States to impose standards more stringent than those in the federal program (see also § 271.1). If EPA promulgates a federal requirement that is less stringent than an existing requirement, authorized States may, but are not required to, adopt the requirement regardless of whether it is a HSWA or a non-HSWA requirement.

### B. Effect on State Authorization

The regulations proposed in this notice would be promulgated under the authority of HSWA. Thus, the standards would be applicable on the rule's effective date in all States and would be implemented by EPA until the States receive authorization.

Moreover, as stated in Section A above, authorized States are required to modify their programs when EPA promulgates federal regulations that are more stringent or broader in scope than the authorized State regulations. The revisions in this proposed rule are considered to be more stringent than the existing federal requirements.<sup>41</sup> Therefore, authorized States would be required to modify their programs to adopt regulations equivalent to the provisions contained in this proposed rule.

As discussed earlier in this preamble, although the regulatory provisions would be new, these proposed amendments are consistent with EPA's longstanding interpretation of the RCRA statute. States with authorized RCRA programs already may have regulations similar to those in this proposed rule. These State regulations have not been assessed against the Federal regulations proposed today to determine whether they meet the tests for authorization. Thus, even after promulgation of final rules, a State would not be authorized to implement these regulations as RCRA requirements until State program modifications are submitted to EPA and approved, pursuant to § 271.21. Of course, States with existing regulations that are more stringent than or broader in scope than existing Federal regulations may continue to administer and enforce their regulations as a matter of State law. In implementing the HSWA requirements, EPA will work with the States under agreements to avoid duplication of effort.

### VII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

<sup>41</sup> As explained above, EPA does not expect this proposed rule to drive additional corrective action activity. However, it would amend the regulations in a way that makes them facially more stringent than the existing regulations. Because State regulations must be equivalent to and consistent with EPA regulations (RCRA section 3006(b); 40 CFR 271.3(a)), EPA believes that authorized State regulations will need to reflect the changes proposed today if those changes are made final, and EPA therefore considers the proposed revised rules to be more stringent than the existing rules.

### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under section 3(f)(4) of Executive Order 12866, this action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to recommendations received as part of Executive Order 12866 review have been documented in the docket.

Additionally, EPA prepared an analysis of the potential costs and benefits associated with this action. This draft analysis, *Economic Assessment for the Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units (Economic Assessment)*, is available in the docket for this action.

### B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

### C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601, *et seq.* EPA projects zero direct costs to regulated entities associated with the proposed rule. As explained in Section V, EPA does not expect that the rule would result in any impacts. While this analysis finds that this rule would not change costs for the regulated community, any unexpected costs would be indirect costs. For a given facility, the specific corrective measures required to address any statutory hazardous waste would depend on several facility-specific factors to be considered by EPA or authorized State permitting authorities, including the extent and magnitude of contamination. Because cleanups associated with any statutory hazardous waste would be implemented by either EPA or an authorized State permitting authority under the general corrective action standard in § 264.101, which requires corrective action be instituted "as necessary to protect human health or the environment," relevant corrective action cost impacts that may be incurred at certain TSDFs are considered indirect.

Because the proposed rule is not expected to result in any additional costs (including direct costs), it is also not expected to result in a significant economic impact for a substantial

<sup>40</sup> Public Law 112–195, October 5, 2012.

number of small entities. The number of small entities within the universe are estimated within the *Economic Assessment for the Definition of Hazardous Waste Applicable to Corrective Action at Solid Waste Management Units*. We have therefore concluded that this action will not have a significant regulatory burden for all directly regulated small entities. However, EPA solicits comment on its conclusion that the proposed rule would not result in any additional costs, including to small entities, along with any data bearing on that conclusion. Details of our economic analysis are presented in the *Economic Assessment for the Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units*, available in the public docket for this action.

#### *D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any State, local or Tribal governments or the private sector.

#### *E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

#### *F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action does not have Tribal implications as specified in Executive Order 13175 because it does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. EPA does not expect that it would result in any adverse impacts on Tribal entities. Thus, Executive Order 13175 does not apply to this action.

Consistent with the EPA Policy on Consultation with Indian Tribes, EPA intends to coordinate with Tribal officials.

#### *G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

Executive Order 13045 (62 FR 19885, April 23, 1997) directs federal agencies

to include an evaluation of the health and safety effects of the planned regulation on children in federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. This action is not subject to Executive Order 13045 because it is not deemed to be a significant regulatory action under section 3(f)(1) of Executive Order 12866, and because EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. Because the proposed rule is not expected to change the frequency, scale, or location of corrective action, EPA does not expect the proposed rule to result in, or reduce, disproportionate adverse impacts on children's health.

However, EPA's Policy on Children's Health applies to this action. Information on how the Policy was applied is available under "Children's Environmental Health" in the Economic Assessment, which is included in the docket for this rulemaking.

#### *H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use*

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action proposes to amend the regulatory definition of hazardous waste applicable to corrective action to address releases from solid waste management units at RCRA-permitted treatment, storage, and disposal facilities and make related conforming amendments, and thus, does not involve the supply, distribution, or use of energy.

#### *I. National Technology Transfer and Advancement Act (NTTAA)*

This rulemaking does not involve technical standards.

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All*

EPA believes that the human health or environmental conditions that exist prior to this action result in or have the potential to result in disproportionate and adverse human health or environmental effects on communities

with environmental justice concerns.<sup>42</sup> A screening analysis of six existing permitted facilities was conducted and revealed that two facilities appear to be sited such that EJ indices from EPA's EJScreen generally exceed the 70th percentile on both a State and national basis. This limited data and analysis indicate that conditions prior to a potential action could result in disproportionate and adverse human health or environmental effects to communities with environmental justice concerns.

EPA believes that this action is not likely to change existing disproportionate and adverse effects on people in communities with environmental justice concerns. As described in Chapter 3 of the Economic Assessment, EPA does not expect the proposed rule to change the frequency or scale of corrective action; further, EPA does not expect the proposed rule to alter the siting of RCRA treatment, storage, and disposal facilities in any way. Given that the ability to address substances that are not regulatory hazardous waste has been available to program implementers in the past, EPA has no reason to expect that those substances, in general, would be addressed through corrective action more frequently in the future as a result of this proposed rule.

#### **List of Subjects in Parts 260, 261, and 270**

Environmental protection, Hazardous waste.

**Michael S. Regan,**  
*Administrator.*

For the reasons set out in the preamble, the Environmental Protection Agency proposes to amend 40 CFR parts 260, 261, and 270 as follows:

#### **PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL**

- 1. The authority citation for part 260 is revised to read as follows:

**Authority:** 42 U.S.C. 6903(5), 6905, 6912(a), 6921–6927, 6930, 6934, 6935, 6937, 6938, 6939, and 6974.

- 2. Section 260.10 is amended by revising the definition "Hazardous waste" to read as follows:

<sup>42</sup> Based on data from EPA's RCRAInfo database, 1,740 treatment, storage, and disposal facilities have RCRA permits as of February 2023. The count of 1,740 includes all TSDFs with at least one permitted treatment, storage, or disposal unit. See the Economic Assessment for this rule, available in the docket, for a more detailed discussion of the universe of permitted facilities that would be subject to this rulemaking.

**§ 260.10 Definitions.**

\* \* \* \* \*

*Hazardous waste* means a hazardous waste as defined in § 261.3 of this chapter, except that, for purposes of §§ 264.101 and 270.14(d), “hazardous waste” means a waste that is subject to the requirements of RCRA section 3004(u) and (v) as provided in 40 CFR 261.1(b)(2).

\* \* \* \* \*

**PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE**

■ 3. The authority citation for part 261 is revised to read as follows:

**Authority:** 42 U.S.C 6903(5), 6905, 6912(a), 6921, 6922, 6924(u), 6924(v), 6924(y), 6928(h), and 6938.

■ 4. Section 261.1 is amended by revising the first sentence of paragraph (b)(2) and paragraphs (b)(2)(i) and (ii) to read as follows:

**§ 261.1 Purpose and scope.**

\* \* \* \* \*

(b)(2) This part identifies only some of the materials which are solid wastes and hazardous wastes under sections 3004(u) and (v), 3007, 3008(h), 3013, and 7003 of RCRA. \* \* \*

(i) In the case of sections 3007 and 3013, and in the case of activities, such as investigation and analysis, conducted to determine the need for and the extent of remediation necessary under sections 3004(u) and (v) and 3008(h), EPA has reason to believe that the material may be a solid waste within the meaning of section 1004(27) of RCRA and a hazardous waste within the meaning of section 1004(5) of RCRA; or

(ii) in the case of section 7003, and in the case of activities conducted for purposes of remediation under sections 3004(u) and (v) and 3008(h), including remediation conducted as an interim measure, the statutory elements are established.

\* \* \* \* \*

**PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM**

■ 5. The authority citation for part 270 is revised to read as follows:

**Authority:** 42 U.S.C 6903(5), 6905, 6912, 6924, 6925, 6927, 6939, and 6974.

■ 6. Section 270.2 is amended by revising the definition of “*Hazardous waste*” to read as follows:

**§ 270.2 Definitions.**

\* \* \* \* \*

*Hazardous waste* means a hazardous waste as defined in 40 CFR 261.3 except

that, for purposes of § 270.14(d), “hazardous waste” means a waste that is subject to the requirements of RCRA section 3004(u) and (v) as provided in 40 CFR 261.1(b)(2).

\* \* \* \* \*

[FR Doc. 2024–02328 Filed 2–7–24; 8:45 am]

BILLING CODE 6560–50–P

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Parts 261 and 271****[EPA–HQ–OLEM–2023–0278; FRL–9248–01–OLEM]****RIN 2050–AH26****Listing of Specific PFAS as Hazardous Constituents****AGENCY:** Environmental Protection Agency (EPA)**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA or the Agency) is proposing to amend its regulation under the Resource Conservation and Recovery Act (RCRA) by adding nine specific per- and polyfluoroalkyl substances (PFAS), their salts, and their structural isomers, to its list of hazardous constituents. These nine PFAS are perfluorooctanoic acid (PFOA), perfluorooctanesulfonic acid (PFOS), perfluorobutanesulfonic acid (PFBS), hexafluoropropylene oxide-dimer acid (HFPO–DA or GenX), perfluorononanoic acid (PFNA), perfluorohexanesulfonic acid (PFHxS), perfluorodecanoic acid (PFDA), perfluorohexanoic acid (PFHxA), and perfluorobutanoic acid (PFBA). EPA’s criteria for listing substances as hazardous constituents under RCRA require that they have been shown in scientific studies to have toxic, carcinogenic, mutagenic, or teratogenic effects on humans or other life forms. EPA reviewed and evaluated key toxicity and epidemiological studies and assessments for the nine PFAS to determine whether the available data for these PFAS meet the Agency’s criteria for listing substances as hazardous constituents under RCRA. Based on EPA’s evaluation, the above nine PFAS, their salts, and their structural isomers meet the criteria for being listed as RCRA hazardous constituents. As a result of this proposed rule, if finalized, when corrective action requirements are imposed at a facility, these PFAS would be among the hazardous constituents expressly identified for consideration in RCRA facility assessments and, where necessary, further investigation and

cleanup through the RCRA corrective action process at RCRA treatment, storage, and disposal facilities.

**DATES:** Comments must be received on or before April 8, 2024.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA–HQ–OLEM–2023–0278, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov> (our preferred method). Follow the online instructions for submitting comments.

- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, OLEM Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center’s hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

*Instructions:* All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

**FOR FURTHER INFORMATION CONTACT:** Narendra Chaudhari, Office of Resource Conservation and Recovery (5304T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number 202–566–0495; email address: [Chaudhari.narendra@epa.gov](mailto:Chaudhari.narendra@epa.gov).

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