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# Environmental Notes

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# EPA Continues its Deregulatory Agenda

BY JESSICA J.O. KING

On September 4, 2025, the White House published its Semiannual Agenda of Regulatory and Deregulatory Actions in which it discussed EPA's plans regarding the issuance or revocation of regulations under certain environmental laws including the Toxic Substances Control Act (TSCA), the Safe Drinking Water Act (SDWA), the Clean Air Act (CAA), and the National Environmental Policy Act (NEPA). EPA is required to review rules "with significant impacts on a substantial number of small entities" within ten years of promulgation pursuant to the Regulatory Flexibility Act of 1980 (RFA). In the Spring of 2025, the Trump Administration announced its deregulatory agenda with the announced aim to promote American energy and manufacturing. The fall 2025 agenda addresses many intensely watched regulatory topics such as PFAS, climate and energy, and environmental review of federal projects.

## PFAS

EPA is on schedule to propose an amendment to TSCA's PFAS reporting rules that would roll back the requirement that manufacturers of PFAS or PFAS-containing materials disclose their use, production, disposal, and exposures to the chemicals by October 13, 2026. The amendments would provide additional exemptions and narrow the rule's scope.

As also recently indicated, EPA is deregulating certain PFAS and extending deadlines under the SDWA. Specifically, EPA is keeping the drinking water standards for PFOA and PFOS but removing the standards for several short chain PFAS chemicals including PFHxS, PFNA, PFBS and GenX. EPA will propose a regulation this month to be finalized in April of 2026 that will provide additional time for public water systems to come into compliance with the maximum contaminant levels of PFOA and PFOS in drinking water.

## Greenhouse Gas Emissions

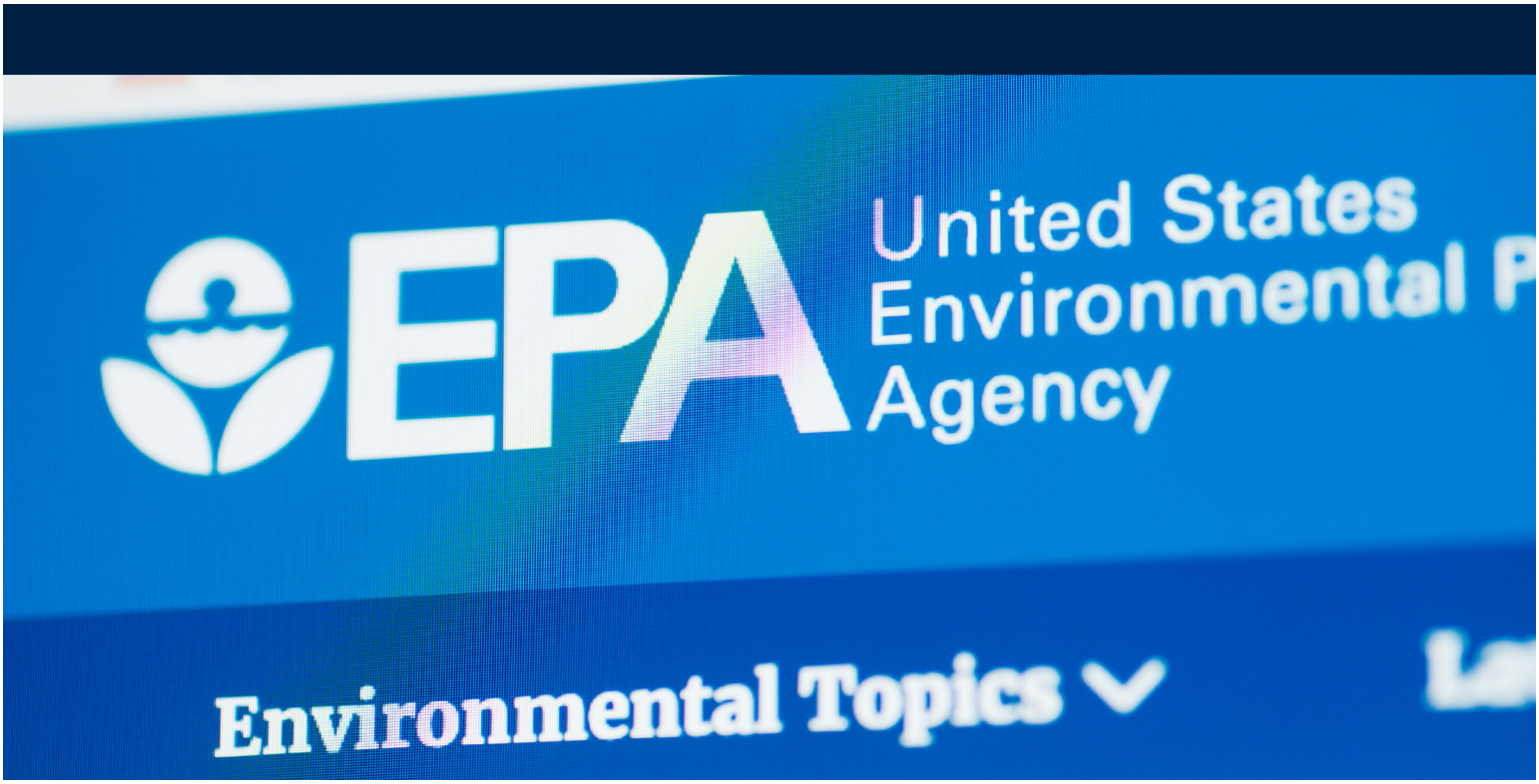
EPA issued a proposed rule that will rescind the mandatory reporting rule for greenhouse gases (GHGs) and finalize the July 2025 proposed rule reconsidering the 2009 Endangerment Finding for GHGs under the CAA. These rules form the basis of regulation of greenhouse gas emissions and vehicle GHG emission standards under the CAA. Currently, there are almost fifty categories of facilities that are subject to the reporting rule, including those that indirectly emit GHGs such as suppliers of fossil fuels and hydrofluorocarbons and oil recovery CO2 injectors. The repeal will eliminate the reporting requirements for all but one source category: petroleum and natural gas systems (although they are proposing to eliminate the natural gas distributor systems and to give others regulated facilities until 2034 to report). A federal repeal will of course not benefit facilities who are subject to state GHG reporting requirements. Also, there have been lawsuits filed to challenge the rescission of the Endangerment Finding, among others.

## NEPA

EPA is also revisiting the role of NEPA in protection of the nation's natural environment. The current Semi-Annual Agenda touts EPA's promise to reduce the requirements and speed up the process by which federal agencies assess environmental effects of proposed agency actions. This is to be done by the issuance of a final rule to remove existing implementing and procedural regulations for NEPA. This is a rebirth of the effort to revise the NEPA regulations under Trump's first presidency to remove some of the burdens and delays imposed by the current NEPA review system and authorities.

## Conclusion

The issues discussed in this article are just a few of the environmental regulations being reviewed by the Trump Administration and head of EPA. Others include the Exceptional Events Rule, Good Neighbor Plan and Risk Management Program under the CAA, National Ambient Air Quality Standards for Particulate Matter, and Oil and Gas Effluent




Limitations Guidelines and Waters of the United States Definition under the Clean Water Act.

**United States Office of Information and Regulatory Affairs, Office of Management and Budget, Spring 2025 Unified Agenda of Regulatory and Deregulatory Actions**

## Till Waste Do Us Part? EPA Says "I Do" to Biden-Era PFAS "Forever Chemicals" Rule (For Now)

**BY SUSAN A. BRANCACCIO**

In May 2024, the EPA issued a final rule designating Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS), two substances under the PFAS umbrella, as Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) hazardous substances. EPA determined that PFOA and PFOS "may present substantial danger to public health or welfare or the environment" when released into the environment after considering the available scientific and technical information. For example, EPA considered that human exposure to PFOA and/or PFOS may be linked to various adverse health effects, including immune effects (*e.g.*, antibody production and immunity), developmental effects to fetuses during pregnancy or to infants (*e.g.*, low birth weight, accelerated puberty, skeletal variations), and liver effects (*e.g.*, tissue damage). EPA also considered its prior toxicity risk assessment of PFOA and PFOS in the drinking water context, highlighting studies that concluded PFOA and/or PFOS may cause carcinogenic effects in humans and animals. Additionally, EPA noted that the potential health and environmental risks associated with PFOA and PFOS are compounded by the very nature of the substances—these "forever chemicals" are highly resistant to breaking down in the environment and can readily move through soil and water once released.

The designation of these chemicals as hazardous substances was "on the rocks" after President Trump's election, and many wondered if the Administration would "divorce" itself from the rulemaking given the President's executive orders emphasizing regulatory rollback and requiring agencies to consider costs associated with their regulations. Nevertheless, on September 17, 2025, EPA announced its intention to retain the rule.

In 1980, Congress established CERCLA (the "Superfund" statute) to ensure that contaminated

property is remediated and that those remediation costs are efficiently allocated to responsible parties. In other words, CERCLA's end goal was to shift the cost of remediation from the public to polluters at "fault" for the contamination, reflecting a "polluter pays" public policy goal. CERCLA, however, is not "regulatory" or "preventative" in the same sense as other environmental statutes; rather, CERCLA is typically "enforced" retroactively (*i.e.*, after contamination has already occurred), through the EPA's authority to demand cleanup or undertake a cleanup. In the event EPA undertakes cleanup efforts, it also has the authority to demand reimbursement from responsible parties.

CERCLA, however, does contain a regulatory requirement that releases into the environment of hazardous substances above an assigned threshold or "reportable quantity" be reported. The purpose of this requirement is to inform the government of a release "so that the need for response can be evaluated and any necessary response [is] undertaken in a timely fashion." 48 Fed. Reg. 23552, 23553 (May 25, 1983). To that end, this reporting requirement alerts EPA of releases of hazardous substances that may threaten the environment or public health, and which may warrant immediate remedial action by the responsible party or the EPA. Additionally, many states have incorporated CERCLA's hazardous substances and reportable quantities into their state-level release reporting regulations, such as Louisiana (incorporating by reference CERCLA's reportable quantities), Florida (defining reportable quantity as the amount sets forth in CERCLA's implementing regulations), and Illinois (noting that the reportable quantity varies depending upon the substance involved and is determined under CERCLA's implementing regulations).


Chemicals listed as hazardous substances under CERCLA occur in two contexts. First, if a chemical is designated for regulation under a different environmental law—such as the Clean Air Act—then it is automatically defined as a hazardous substance. There are over 800 substances listed in this manner as hazardous substances, including lead, epinephrine, chromium, and nitric acid. Alternatively, CERCLA grants EPA the authority to "promulgate and revise as may be appropriate, regulations designating as hazardous substances ... such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment." 42 U.S.C. § 9602(a).

EPA's designation of PFOA and PFOS as hazardous substances in May 2024 was the very first time EPA relied on this authority and designated hazardous substances through this second mechanism.

Despite EPA's decision to retain the designation, the agency was also critical of the alleged "failure" of the previous administration to provide the "rules of the road" (*i.e.*, the criteria for designating a substance as hazardous) prior to designating. To that end, EPA noted it intends to develop a CERCLA Framework Rule; this Framework Rule will provide a uniform approach to guide future hazardous substance designations, including how the agency will consider the costs of proposed designations.

Ultimately, while EPA has said "I do" to the rule for now, the agency appears to have left the door open for future changes, noting that it will continue to collect information on the rule's costs and benefits. Moreover, EPA's response to this PFAS rule is consistent to the agency's overall approach to other Biden-ERA PFAS rules: signaling conditional support for the rules while scrutinizing the costs of compliance. For example, in May 2025, the agency announced it will keep the newly established National Primary Drinking Water Regulations (NPDWR) for PFOA and PFOS but will extend compliance deadlines and establish an exemption framework.

Trump EPA Announces Next Steps on Regulatory PFOA and PFOS Cleanup Efforts, Provides Update on Liability and Passive Receiver Issues (September 17, 2025)

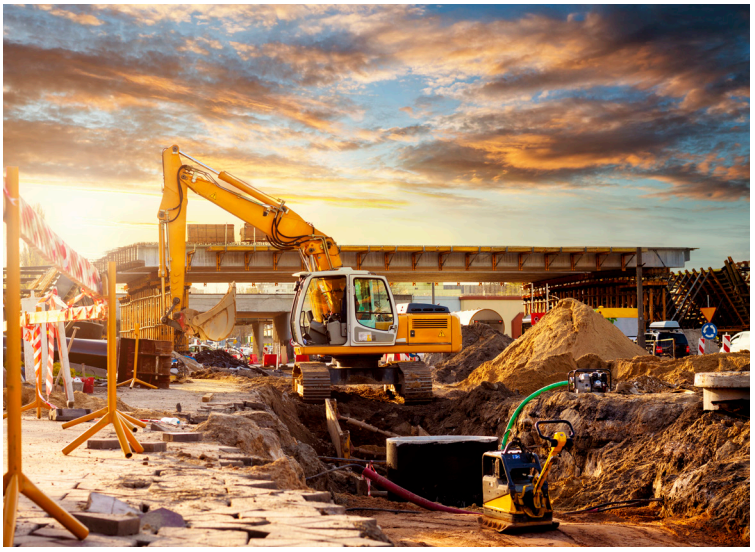
# North Carolina Brownfields Updates

**BY SEAN M. SULLIVAN**

The North Carolina legislative Session Law 2025-53 made some important changes to the tax incentives and fee structure for North Carolina's brownfields program. One of the revisions makes it clear that improvements constructed after a developer enrolls a project in the program, but prior to recordation of the final agreement, are eligible for the state's significant property tax incentives. Several other amendments modify NCDEQ's fee structure to address the expiration of a significant EPA grant in 2027. The final bill is the culmination of many months of stakeholder meetings, which included several private-sector attorneys and consultants, as well as program director, Bruce Nicholson, and NCDEQ's new general counsel, Dan Hirschman.

## Summary of Changes

North Carolina's property tax incentives for brownfields program participants are quite generous:  an overall fifty-one percent reduction in ad valorem taxes on all new improvements for five years (the reductions scale down from ninety



percent in year one to ten percent in year five). Recently, several local governments had taken the position that this reduction only applies to improvements made after recordation of the final brownfields agreement. Because most brownfields projects in North Carolina begin construction well in advance of recording the final agreement, this interpretation had the potential to undermine one of the primary financial benefits of the program. Session Law 2025-53 makes it clear that the reductions apply to any improvements constructed after the developer receives written confirmation that its project is eligible for the brownfields program. It also codifies a long-standing Department of Revenue opinion stating the credit also applies to additional rounds of improvements made in the future. In other words, the credit is available for the initial redevelopment and for subsequent improvements as well.

There are several important changes to the brownfields program's fee structure. First, there are now three fee classes for projects: (1) local governments; (2) standard track projects; and (3) Redevelopment Now and Ready for Reuse projects. Local government projects are subject to an $8,000 fee. The fee for private-sector, standard-track projects increases from $8,000 to $12,000. Notably, this option is now only available for projects with an estimated capital investment of $5 million or less. The fee for Redevelopment Now and Ready for

Reuse projects (which will now include all projects whose capital investment value is greater than $5 million) increases from $30,000 to $45,000.

In addition, NCDEQ has added a "Construction Review" fee of $10,000 per year that construction is ongoing at a brownfields property. The fee will begin upon approval of the Environmental Management Plan for the project and will continue until submission of the Final Redevelopment Summary Report. The fee is intended to cover NCDEQ's costs to review construction-related submissions such as a vapor mitigation plan and post-construction sampling.

Session Law 2025-53 also authorizes NCDEQ to recover its enforcement costs for sites that are not complying with a recorded brownfields agreement. Frequently, these are cases where the property owner does not submit its annual Land Use Restrictions Update (LURU) by the January 31 deadline, and owners of brownfields properties may wish to consider an increased focus on submitting LURUs in a timely manner. However, in cases of significant violations of land use restrictions, NCDEQ will now have express statutory authority to seek recovery of its (and the North Carolina Department of Justice's) enforcement costs. Developers should keep this new authority in mind when negotiating the language of their brownfields agreements. Many brownfields agreements contain an absolute prohibition on filing a lawsuit against NCDEQ regarding its "implementation" of a brownfields agreement. While it is unclear if this provision is enforceable at all, developers may wish to "carve-out" the right to seek review of an excessive enforcement costs assessment specifically.

### Commentary

The restructuring and increases in fees are necessary to make up for the expiration of an EPA grant in 2027. However, it is important to note that the brownfields program is funded solely through grants and fee receipts, and that it receives no appropriations from the General Assembly. Given the significant, positive effect this program has had throughout North Carolina (as an economic development incentive), it may be time for the legislature to consider a small, annual appropriation to avoid the need for future fee increases.

## Back from the Dead? D.C. Circuit Resurrects Emergency Affirmative Defense to Title V Air Permit Noncompliance

**BY HENRY R. "SPEAKER" POLLARD, V**

Owners and operators of facilities subject to permitting under the Clean Air Act's Title V permit program have cause for rejoicing. Title V permittees have just seen their fortunes improve, if only in a narrow way, with the resurrection of a key "emergency" affirmative defense to exceedances of technology-based emission limits set by their Title V permits.

The "emergency" affirmative defense, based on "any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God," had been a mainstay of the Title permit program for over thirty years, but EPA rescinded it in 2023. However, in a September 5, 2025 ruling in *SSM Litigation Group v. Environmental Protection Agency,* the United States Circuit Court of Appeals for the District of Columbia ("D.C. Circuit"), held that EPA's recission of the emergency affirmative defense was unlawful. In short, the D.C. Court found that EPA's rationale for repealing the defense in 2023 was based on "erroneous legal justifications" and that more recent case law undermines EPA's chief arguments.

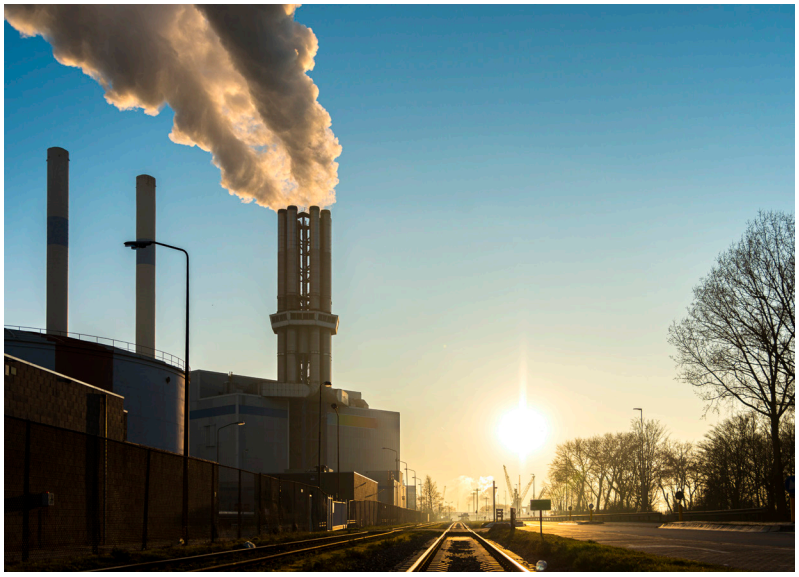
When EPA promulgated the Title V permit program regulations, it included the emergency affirmative defense as a very limited but important means for the permittee to avoid regulatory liability for exceedances of technology-based emission limits

included within a Title V permit. This defense, included in Title V permits issued by states that had been authorized by EPA to administer the Title V program or issued by EPA directly, provided an important excuse from meeting such limits due to "reasonably unforeseeable" circumstances over which the permitted did not have control, including, for example, acts of God. This meant that such an exceedance resulting from such factors as major storms, lightning strikes, power outages, or fires could be barred from noncompliance risk and liability, if such event were not reasonably foreseeable and beyond the permittee's control and the permittee documented such factors and reported the emergency event.

With the *SSM Litigation Group* decision, Title V permittees have reason to believe that the emergency affirmative defense has been restored. This case was argued before the D.C. Circuit on January 14, 2025, in the last week of the Biden Administration, and EPA defended its repeal of the emergency affirmative defense, along with some environmental groups. It seems less likely that a Trump Administration EPA would appeal this decision even though it restores a defense to enforcement action. Still, should the policy directive at EPA change again during a following administration, EPA could change its mind and again seek to unwind the defense or make it even narrower.

There are several other cautionary points to consider as well. First, this decision could yet be appealed by environmental groups that were involved in the case, or a request for rehearing by all of the active judges of the D.C. Circuit could be sought, so the case may not be fully over and final in its effect.

Second, EPA will still need to amend its own regulations to adhere to the D.C. Circuit's decision (assuming it stands), and many states will likely follow suit, but perhaps not all. Restoration of the emergency affirmative defense to the federal Title V regulations does not mean that states implementing



the Title V permit program will automatically restore the emergency affirmative defense in their own regulations after repealing it to comport their respective programs with the federal program. States are allowed by the Clean Air Act to be more stringent than the federal Title V permit program, and some may choose not to reinstitute the defense within their state Title V permit program.

Third, the emergency affirmative defense is conditional and requires that the permittee carry the burden of proof in mounting such defense and demonstrate eligibility of the technology-based limitation under the defense's criteria as discussed above and to maintain the proper documentation of related events. While the burden on the permittee is as it has always been, these criteria bear repeating as the defense appears available once again:

- "An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error;"
- "An emergency occurred and . . . the permittee can identify the cause(s) of the emergency;"
- "The permitted facility was at the time being properly operated;"

- "During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit;" and

- "The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency, [which] notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken."

**57 Fed. Reg. 32250, 32306 (July 21, 1992); 61 Fed. Reg. 34202, 34239 (July 1, 1996)**

Title V permit holders can find good news in the *SSM Litigation Group* decision, even if it is of limited scope given the breadth of Title V permit obligations and compliance risks. Permittees now need to watch for any challenge of the decision by environmental groups and next steps by EPA restate the emergency affirmative defense into the Title V program regulations and which states follow EPA's lead and so the same for their state-level Title V program implementation.

***SSM Litigation Group v. EPA,* No. 23-1267, 2025 WL 2552531 (D.C. Cir. Sept. 5, 2025)**

**Operating Permit Program, 57 Fed. Reg. 32250, 32306 (July 21, 1992) (providing emergency affirmative defense as part of state-issued Title V permits), codified at 40 C.F.R. § 70.6(g)**

**Federal Operating Permits Program, 61 Fed. Reg. 34202, 34239 (July 1, 1996) (providing emergency affirmative defense as part of EPA-issued Title V permits), codified at 40 C.F.R. § 71.6(g)**

**Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program, 88 Fed. Reg. 47029 (August 21, 2023)**

# Multiphase Solid Waste Ignitability Rule: Regulating the Unknown

BY ETHAN R. WARE AND RYAN W. TRAIL

Deciding the regulatory status of solid phase wastes is difficult but determining whether those wastes should be evaluated as ignitable liquids at some time in the future is nearly impossible. Yet, that is what the law requires. In fact, EPA requires generators look into a magic ball and determine if their wastes will ever settle or separate in transit into a multiple-phase waste, and if so, are any of those phases ignitable liquids—seemingly ignoring the mixture rule.

## Background

Under the Resource Conservation and Recovery Act (RCRA), every facility must determine if solid wastes accumulated onsite exhibit one or more of the characteristics of a hazardous waste or are otherwise specifically listed by EPA as a hazardous waste. 40 CFR 262.11. The characteristics of a hazardous waste are ignitability, corrosivity, reactivity, and toxicity. 40 CFR 261.20-24. By definition, a "solid waste" may be a solid, liquid, or semi-solid phase material or even contained gases.

## Problem: Ignitability Characteristic Test for Different Phases

Because of the lack of ASTM standards, ignitability for solids and liquids are not measured the same. Where a waste is truly a liquid, it is considered ignitable if it has a flash point less than 60 °C (140 °F) using a prescribed EPA methodology; solid phase materials are ignitable if under standard temperature and pressure they are readily combustible through friction, absorption of moisture or spontaneous chemical changes and, when ignited, burn so vigorously and persistently that it creates a hazard. 40 CFR 261.21(a),(b).

## Solution: Evaluate the Phases Based on the Container as a Whole

Certain containers of solid wastes pose a problem because the contents settle or separate into multiple phases. In 2020, EPA provided guidance on multi-phase waste containers, and it is not an easy read.

EPA declares the generator must evaluate each phase of waste to determine if the waste phase is a characteristic hazardous waste. This is not so easy when it comes to the characteristic of ignitability. 85 Fed. Reg. 40594, 40601(July 7, 2020). A generator of a waste should consider the individual liquid phases of a multiple phase waste under the criteria in 40 CFR § 261.21(a)(1) and non-liquid phases of a multiple phase waste under the criteria of 40 CFR § 261.21(a)(2).

A bigger problem is deciding what physical state a particular phase is, i.e., is the phase a regulatory "liquid" and when should the phase be tested as a regulatory "solid." EPA recommends generators use the Paint Filter Liquids Test (EPA Method 9095B) in determining whether to apply the ignitability test for liquids to any phase in the container:

> When determining if a waste contains multiple phases, a generator has to consider the properties of the waste as generated and the properties of the waste under the conditions that it is likely to encounter during normal management (e.g., during initial accumulation, storage, transport, treatment and disposal). A generator should also consider the Paint Filter Liquids Test to be the minimum requirement for determining whether a solid phase waste contains a liquid phase. *Id.*

Knowing the characteristic of a specific phase within a multiphase container is not enough to characterize contents of an entire container for offsite disposal, however. Federal regulations require the hazardous waste characterization to

be made based on a "representative sample" of the multiphase waste container. 85 Fed. Reg. at 40601. A "representative sample" means a sample of a universe or whole…which can be expected to exhibit the average properties of the universe or whole." 40 CFR 260.10. As a result, the generator must use knowledge or testing to determine if the remaining portion of wastes in the container changes the results of tests on an individual phase before shipment.

## Conclusion: Characterize the Entire Waste, Not the Phase

Generators accumulating solvent-based wastes may wish to carefully consider the EPA guidance. Sampling is only reliable if it is "representative" of the hazardous waste unit, and that may be the container in which it is accumulated. This means even if one phase appears to be "ignitable," the waste may not exhibit the characteristic if a representative sample of the waste as a whole does not meet the regulatory definition of ignitability. And, the phase may not be considered a liquid and subject to a flashpoint test unless it fails the paint filter test.

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