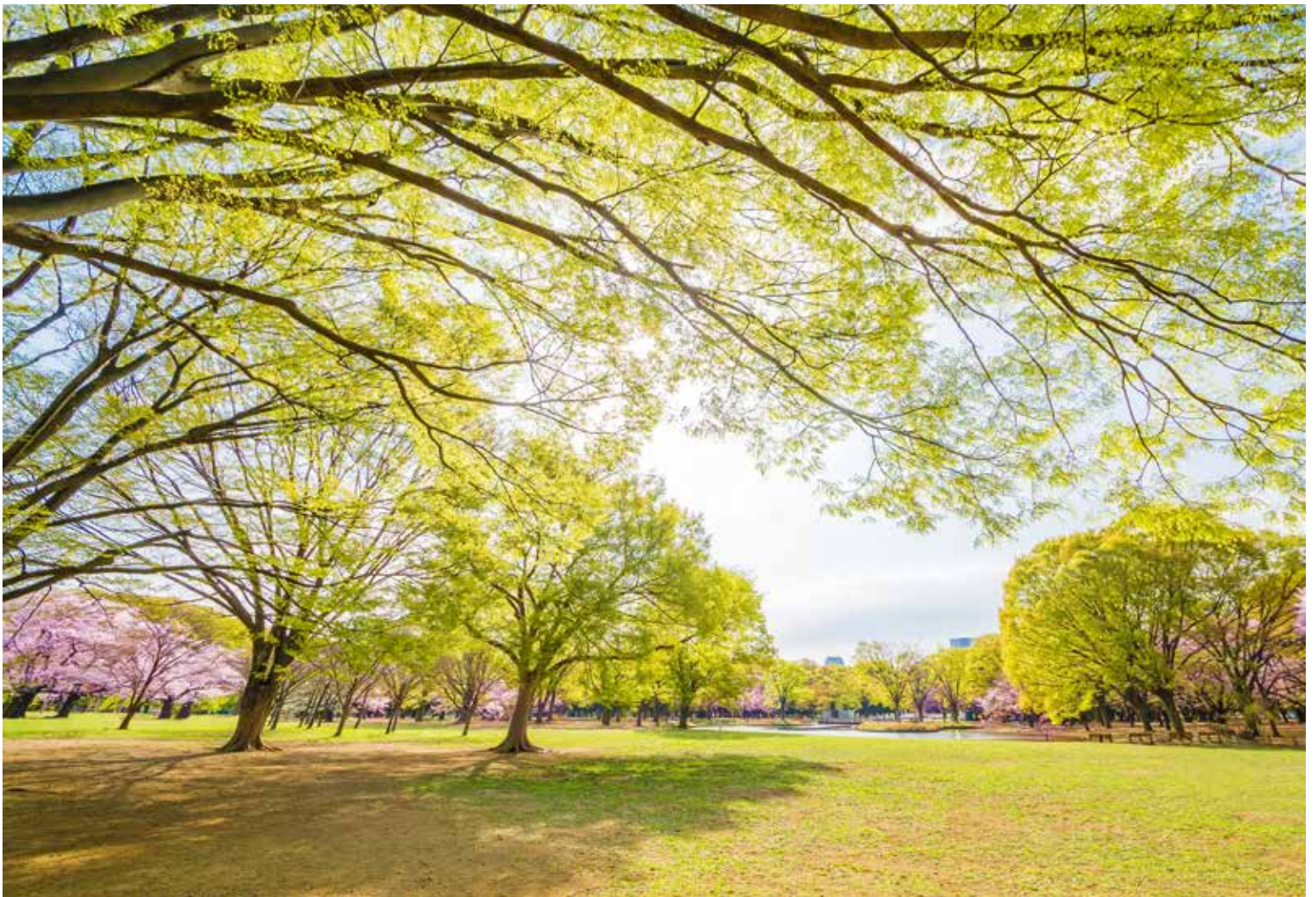


WILLIAMS MULLEN

Environmental Notes

April 2026





EPA Proposes Major Changes to 401 Water Quality Certification

BY ETHAN R. WARE

The U.S. Environmental Protection Agency (EPA) recently published a proposed rule to update and clarify several substantive and procedural requirements for the 401 water quality certification requirements of the Clean Water Act (CWA). 91 Federal Register 2008 (January 15, 2026) (“Proposed Rule”). Section 401 of the CWA authorizes “States to review for compliance with appropriate Federal, State, and Tribal water quality requirements any discharge into waters of the United States that may result from a proposed activity that requires a Federal license or permit.” *Id.* The public comment period ended February 17, 2026.

401 Water Quality Certification

Under CWA, Section 401, a Federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States (such as a 404 permit to fill or drain wetlands or dam a stream), unless the State or authorized Tribe where the discharge would originate either issues a section 401 water quality certification or certification is waived for failure to issue a decision within one year of the application. Under the statute “a certifying authority may grant, grant with conditions, deny, or waive certification in response to a request from an applicant. The certifying authority determines whether

the potential discharge or discharges from the proposed activity will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA and any other appropriate requirement of State law.” 91 Federal Register 2008, 2013. Certifying authorities also may add to a certification “any effluent limitations and other limitations, and monitoring requirements” necessary to assure compliance. *Id.* at 1341(d). These limitations and requirements must become conditions of the Federal license or permit should it be issued.

Proposed Rule Changes to 401 Water Quality Certification Process

The Proposed Rule would narrow the 401 water quality certification review process dramatically. The changes fall into four categories.

1. Certainty in the Request for Certification

The Proposed Rule first clarifies when the statutory timeline for certification review starts. “In order for a request for certification to start the statutory timeline for review, it must meet the requirements as defined in this [Proposed Rule], rather than as defined by the certifying authority.” *Id.* at 2017. The Proposed Rule includes an enumerated list of documents and information to include in a request for certification for all Federal licenses or permits, including the following: (1) the Federal license or permit application submitted to the Federal agency or a copy of the draft Federal license or permit; (2) readily available water quality-related materials on any potential discharges from a point source into waters of the United States from the Federally licensed or

permitted activity that informed the development of the application or draft license or permit; and (3) any additional project information as proposed in 40 CFR 121.5(c) not already included in the request for certification.

Under this proposed rulemaking, a request for certification must include all applicable components to start the statutory clock. States are no longer able to “blur” the “bright-line rule regarding the beginning of [the certification] review” process, which states the timeline for a certifying authority’s action regarding a request for certification “shall not exceed one year.” *Id.* The Agency is also proposing to remove provisions allowing State and Tribal certifying authorities to define additional content in a request for certification.

2. Restricting 401 Water Quality Certification to the Discharge

If finalized, the proposed rulemaking “would narrow the current regulation’s broad activity-based scope of certifying authority review to what Congress clearly intended: an assessment of whether a facility’s point source discharges into waters of the United States will comply with specified water quality requirements.” *Id.* at 2023.

According to the Preamble, this application is consistent with CWA. The first sentence in CWA section 401(a)(1) provides that “[a]ny applicant for a Federal license or permit to conduct any *activity* including, but not limited to, the construction or operation of facilities, which may result in any *discharge* into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which *the discharge* originates or will originate . . . that any *such discharge* will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act” (emphasis added). “The use of the phrase “such discharge” in the very sentence that identifies what a State must certify is strong textual support for EPA’s proposed interpretation.” *Citing, Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”); *PG&E v. FERC*, 113 F.4th 943, 948 (D.C. Cir. 2024) (explaining

that, “when ‘addressing a question of statutory interpretation, we begin with the text’”) (quoting *City of Clarksville v. FERC*, 888 F.3d 477, 482 (D.C. Cir. 2018)).

Conversely, EPA states 401(a)(1) of the CWA uses the term “activity” to describe the type of Federal license or permit that triggers CWA section 401 certification—namely, a “Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters.” *Id.* “[I]f a federal license or permit to conduct an activity may result in a discharge, then the certifying authority would certify that *any such discharge* will comply with the enumerated provisions of the CWA.” *Id.*

This approach is bolstered by other changes to the 401 regulations. The Proposed Rule would remove the requirement for “conditions” necessary to ensure compliance with the 401 programs. A certifying authority certifies compliance with “water quality requirements.” “Water quality requirements” would be defined as “applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and applicable and appropriate state or tribal water quality-related regulatory requirements for discharges” to ensure activity-based requirements do not creep back into the regulations. And, under the Agency’s proposal, “certifying authorities cannot consider water quality impacts to waters beyond waters of the United States, or impacts from outside the discharge itself.” 91 Federal Register at 2027.

3. Contents of a Certification Decision

As if to ensure activity-based regulations do not return, the Proposed Rule would also require each certification decision include a statement indicating whether the discharge will comply with water quality requirements, and if not, supporting information. In circumstances where a certifying authority grants certification with conditions, EPA proposes each condition includes an explanation why the condition is necessary to assure the discharge(s) from the proposed project will comply with water quality requirements, and a citation to the applicable water quality requirement upon which the condition is based. In circumstances where certification is denied, written notification

of denial must include “the specific water quality requirements with which the discharge(s) will not comply; a statement explaining why the discharge will not comply with the identified water quality requirements; or if the denial is due to insufficient information, a description of any missing water quality-related information.” *Id.*

Next Steps: Application of the Statute

After public comments are reviewed, a final rule may be issued. Certifying authorities like States and Tribal lands may then revise applicable requirements to be no less stringent than the EPA requirements. In the meantime, applicants for 401 water quality certifications may wish to rely on EPA interpretation of the CWA to argue conditions in 401 water quality certifications going beyond the impacts to water quality by “discharges” may exceed the scope of the CWA and implementing regulations.

EPA’s Proposal to Change the Clean Air Act Risk Management Program Rule

BY JESSICA J.O. KING

EPA published a new rule on February 24, 2026, to revise its Section 112r Clean Air Act Risk Management Program (RMP) regulations, withdrawing certain requirements of the Biden Era “Safer Communities by Chemical Accident Prevention” rule (the “2024 SCAAP Rule”). For facilities subject to RMP requirements, the rule, if finalized, will remove or simplify some of the duplicative and onerous requirements. This article will discuss just a few of the general changes proposed. A full reading of the rule may expose other changes relevant to a particular facility.

RMP regulations are meant to protect employees and communities from accidental releases through prevention, quick and planned response, and public communication. However, many critics of the 2024 SCAAP Rule have emphasized that some of its requirements are already covered by OSHA regulations relating to Process Safety Management (PSM) and thus, are unnecessary and not within EPA’s purview under the Clean Air Act.



If finalized as currently written, the proposed rule would:

- Rescind requirement that facilities perform a Safer Technologies and Alternatives Analyses (STAA) for all programs subject to RMP except for new Program 3 processes (i.e., those processes that (1) have commenced operation three years after the effective date of the proposed rule; (2) affect the public in case of a worst-case release or with releases with offsite consequences in the last five years; and (3) are subject to OSHA’s PSM standard) regardless of the NAICS code associated with the facility;
- Rescind requirement that facilities adopt inherently safer technologies and designs (IST/ISD) or document why they were not adopted even though recommended in the STAA analyses;
- Rescind triggers and the associated requirements for third-party audits or alternatively, apply them only to facilities with two accidents in a five-year period (with a 10-year sunset provision);
- Rescind requirement that Program 2 and Program 3 facilities address “natural hazards” in their reviews and analyses;
- Rescind various hazard evaluations required to address a loss of power and relating to standby or backup power for air pollution control/monitoring equipment;
- Rescind availability of a facility’s chemical hazard information to individuals living or working

within 6 miles of the RMP facility who make a request and replacing it with general data on the RMP public portal regarding facilities subject to RMP including regulated substances, accident history, emergency response and scheduled exercises;

- > Rescind requirement an analysis be performed to ensure processes are designed and maintained in accordance with Recognized and Generally Accepted Good Engineering Practices (RAGAGEP), while stating removal does not mean facilities can ignore RAGAGEP nor that EPA cannot enforce this requirement;
- > Rescind required employee participation in recommendations and findings of Process Hazard Analyses (PHAs) and employee stop work authority for Program 3 processes;
- > Simplify emergency notification requirements, including elimination of certain documentation requirements and replacing them with a one-time notification as part of the regular RMP submission to EPA to include: (1) type of community notification system in place; and (2) whether the facility owner or local emergency responder will notify the community of an accidental release triggering RMP; and
- > Rescind requirement that Program 2 and 3 facilities report why they declined PHA recommendations relating to natural hazards, power loss and siting and, for Program 3 facilities only, other recommendations relating to safety gaps.

EPA is pushing to quickly make the proposed rule final. To that end, it held a virtual public hearing on the proposed rule on March 10, 2026, and public comments were originally due before April 10, 2026. However, numerous comments requested a second public hearing and comment period extension. As a result, on April 2, EPA extended the comment period until May 11, 2026.

Frequently Asked Air Questions (FAQS): How Low Can You Go? BACT, RACT, MACT – And All the Way Down to the LAER Floor (Part 1)

BY SUSAN A. BRANCACCIO

Introduction

When a source seeks an air permit, one of its biggest questions is often: how exacting must my emissions controls be? The Clean Air Act answers that question through several technology-based standards, each with different applications, triggers and levels of stringency. This article aims to help untangle the “alphabet soup” of these control technology standards in a way that is easy to digest: what they are, when they apply, how they are enforced, and what key considerations a source should be thinking about when determining “how low” its emissions must “drop” under BACT, RACT, MACT, or LAER, (BACT and LAER are further defined below).

This article is the first in a two part series examining the Clean Air Act’s technology-based control standards. Part 1 focuses on BACT and LAER—two standards that play a central role in the Clean Air Act’s air permitting framework for new or major modified sources. Part 2 will examine RACT and MACT, which apply in other regulatory contexts. If you or your facility have questions regarding the applicability of any of these control technology standards or how they may impact your operations, the environmental team at Williams Mullen would be happy to assist.

Q: When do BACT and LAER apply?

As a refresher, under the Clean Air Act, “New Source Review” (NSR) permitting is a pre-construction permitting program. NSR permitting establishes requirements for new sources or existing sources undergoing major modifications (“major modified sources”).

There are two types of permits under NSR: PSD Permits and NNSR. PSD permits are for those sources located in areas attaining the NAAQS. Thus, a PSD permit is designed to “prevent significant deterioration” (“PSD”) of

existing air quality. Alternatively, sources located in an area not achieving the NAAQS (“non-attainment area”) would be subject to a nonattainment NSR permit or NNSR.

Best Available Control Technology or BACT (*pronounced “backt”*) applies to sources undergoing PSD permitting. Lowest Achievable Emissions Rate or LAER (*pronounced “layer”*), on the other hand, applies in the NNSR permitting context. Importantly, LAER applies only to pollutants for which the area is in nonattainment and for which a source is major. In turn, then, under NNSR a source does not trigger review for a significant increase (i.e., a major modification) if the source is not major for that particular pollutant to begin with.

Q: What pollutants do BACT and LAER apply to?

When considering what pollutant emissions must be reduced through control technology, BACT and LAER apply to “NSR regulated pollutants.”

NSR regulated pollutants include, but are not limited to, (1) any pollutant for which a NAAQS has been promulgated; (2) any pollutant that is a constituent or precursor for a pollutant for which a NAAQS has been promulgated; (3) any pollutant that is subject to any standard promulgated under Section 111 of the Clean Air Act (New Source Performance Standards); and (4) any Class I or II substance subject to a standard promulgated under title VI of the Clean Air Act (ozone depleting substances).

Q: What is BACT?

BACT is the maximum degree of reduction of pollutant emissions achievable for a particular source through the application of available control technologies, while taking into account energy, environmental, and economic impacts and other costs. Simply put, the BACT determination for a source will balance pollution reduction—the goal of the analysis—with economic and technological feasibility. Critically, BACT is a case-by-case determination and **not** a “one size fits all” approach to emission reductions.

Q: What NSR regulated pollutants must a new source apply BACT to?

A new source must apply BACT to **each** regulated NSR pollutant it would potentially emit in “significant” amounts. Notably, “significant amounts,” set forth in 40 CFR 52.21(b)(23), do not mean “major amounts.”

What does this look like in practice? Imagine a new source is constructed that emits 300 tpy of VOCs, 45 tpy of sulfur dioxide, and 95 tpy of carbon monoxide. Despite the fact the source is considered “major” **only** due to VOCs, it would need to apply BACT to each pollutant it is “significant” for. Under these circumstances, it would need to apply BACT to its VOCs **and** sulfur dioxide emissions because 40 tpy is the significant threshold for sulfur dioxide. Conversely, the source would not need to apply BACT to its carbon monoxide emissions because 95 tpy is less than the significant amount of 100 tpy.

Q: What NSR regulated pollutants must a major modified source apply BACT to?

An existing source must apply BACT to **each** regulated NSR pollutant for which it would result in a significant net emissions increase at the source.

A major modification means any physical change in or change in the method of operation of a major stationary source that would result in a “significant emissions increase” of any regulated NSR pollutant; and a “significant net emissions increase” of that pollutant from the major stationary source. 40 CFR 52.21(b)(2)(i). Thus, the increases that would be considered “major modifications” are coextensive with the pollutants a BACT analysis would need to be performed for.

What does this look like in practice? Imagine an existing facility is major because it emits 300 tpy of VOCs. It plans an expansion project, which would increase its VOC emissions by 10 tpy; its nitrogen oxide emissions from 10 tpy to 60 tpy; and its particulate matter emissions from 0 tpy to 30 tpy. This would be considered a major modification because its increases of both nitrogen oxides and particulate matter qualify as a major modification. Likewise, the source would have to do a BACT analysis for those pollutants. The source would not have to do a BACT analysis for VOCs even though VOCs are the reason the source was originally considered “major” as the 10 tpy increase is not considered “significant” for VOCs.

Q. How is BACT determined?

BACT is determined through a “top down approach.” At Step 1 the source lists all available control technologies. This list is designed to be comprehensive and should include all options applicable to the particular pollutant (even if the option will be eliminated in later steps). At Step 2, the source removes any technically infeasible



options and must document, with specificity, why that control option cannot be used. At Step 3, the source ranks the remaining control options against each other in order of overall effectiveness. Then, based on this ranking, at Step 4, the source evaluates each control option for energy, environmental, and economic impacts. If the top candidate (from Step 3) is unfavorable for any of these reasons, the source assesses the impacts of the next available control option. The most effective control option (the highest ranked at Step 3) that is not eliminated at Step 4 is then chosen as BACT at Step 5.

Accordingly, a source must include in its permit application: (1) its proposed BACT; and (2) a presentation of alternative control-technologies that could achieve a higher degree of emission control and why it was not selected due to “unreasonable adverse energy, environmental, or economic impacts.”

Q. What are energy, environmental or economic impacts?

- Energy: Considers items such as energy consumption, scarcity of fuels, and energy production impacts (utility impacts).
- Environmental: Considers items such as effects on air quality, irreversible or irretrievable commitment of resources, solid waste disposal, and water impacts.
- Economic: Considers items such as direct costs, capital availability, and local economic impacts.
- Note that EPA does not intend a BACT decision should force new projects to the brink of cancellation, but believes the decision should be made balancing these three (potentially competing) factors.

Q. Why does the Clean Air Act require BACT?

As a general matter, the PSD program was designed to ensure air quality in attainment areas, areas that are already relatively clean, is not degraded. Thus, requiring new sources or major modified sources to reduce their emissions helps ensure cumulative impacts to air quality do not arise. While a single new source may have only a small impact on air quality, regulators must be concerned with potential impacts in the aggregate from all new or major modified sources.

To that end, the purpose of BACT in PSD permits is two-fold. First, although emission limits exist in other parts of the Clean Air Act (such as NSPS), some sources are capable of achieving even greater emission reductions than those industry-wide standards require. Moreover, the process for updating those standards can take decades. BACT therefore allows regulators to obtain additional air quality benefits from sources that can achieve greater emission reductions, and helps ensure sources are not engaged in a “race to the bottom” when increased emission reductions are both technically feasible and economical.

Q. Can BACT ever apply to an existing source?

Yes. EPA has historically been concerned about the issue of a source improperly seeking and receiving a synthetic minor permit, constructing its facility subject to less demanding permitting requirements, and shortly thereafter relaxing its permit limits and actually operating at major source levels of pollution. EPA refers to such synthetic minor source permits as “sham permits.” 40 CFR 52.21(r)(4) prescribes the methodology for determining BACT at a synthetic minor source that becomes major after relaxing its permit

limits (i.e., determining BACT **as if construction never previously commenced**).

Why does this matter? As discussed above, when developing BACT, a source considers economics and need. And as a general rule, it is more expensive to retrofit existing equipment with pollution control measures than to install new equipment with better pollution control measures at the outset. In other words, older plants are often treated “more leniently” than those not yet constructed when costs are considered. Consequently, if EPA uses its authority in 52.21(r)(4), that potentially lenient treatment (i.e., less economically burdensome control technology) is no longer available.

Q. What is LAER?

LAER, like BACT, is also considered on a case-by-case basis, but it generally looks outward (to what others are achieving or are required to achieve) rather than inward (to the source’s own circumstances and constraints).

LAER is either (1) the most stringent emission limit contained in the state implementation plan (SIP) of **any** state for such class or category of source, unless a source is able to demonstrate such limitations are not achievable; or (2) the most stringent emissions limit which is achieved in practice by such class or category of source.

In other words, LAER is considered the most stringent emissions limit contained in a SIP for a source (adopted as a rule, regulation, or even an individual permit incorporated into a SIP)—unless a more stringent emissions limit has been achieved in practice, or the SIP limitation is demonstrated by the owner or operator of the proposed source to be unachievable.

Q. What is considered “achieved in practice?”

An emission limit or control technology is considered “achieved in practice” when it has been demonstrated by real-world sources. Of note, regulatory agencies may consider whether the control technology is performing as expected when determining whether it has actually been “achieved in practice.”

Q. Does LAER consider cost of implementation for a source, like BACT?

Generally no. EPA guidance does not allow consideration of costs in LAER determinations. Nevertheless, EPA

has suggested that if the cost of the control is so great a new source could not be built or operated, it may be considered “not achievable.” However, EPA further advises that if a source in the same or comparable industry uses that control technology, then this constitutes “de facto” evidence the cost to the industry is not prohibitive. Moreover, EPA guidance highlights that costs in a LAER analysis should only be considered if they involve unusual circumstances which in some way impact an individual source in a different or unique way, as compared to the rest of that industry.

Q. How does LAER positively impact non-attainment areas?

LAER is anchored to **all** states’ SIP requirements or emission levels already achieved by other sources or comparable industries, which ultimately prevents states or industries from lowering standards to gain a competitive advantage, ensuring the most stringent controls set the floor rather than the exception.

Don't Be Fooled by the Rollbacks: EPA's PFAS Enforcement Agenda Is Moving Forward

BY RYAN W. TRAIL

As the Trump Administration works to roll back environmental regulations across the board, many EHS professionals have understandably been watching for signs PFAS regulation might follow the same trajectory. The picture which has emerged, however, is more complicated, and in some respects more restrictive. On two of the most consequential PFAS regulatory fronts, EPA is not retreating. On the contrary, the Agency is pressing forward.

In April 2024, the Biden EPA finalized a rule designating perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers, as hazardous substances under CERCLA. The rule became effective in July 2024. When the Trump Administration took office, the rule’s fate was immediately uncertain. Several industry groups, led by the U.S. Chamber of Commerce, had already challenged it in the D.C. Circuit, and the Court initially held the case in abeyance while the new EPA leadership conducted its



specific PFAS compounds, and their salts and structural isomers, to the list of RCRA hazardous constituents in April 2026. The nine compounds are: PFOA, PFOS, PFBS, HFPO-DA (also known as GenX), PFNA, PFHxS, PFDA, PFHxA, and PFBA. Entities potentially affected include hazardous waste treatment, storage, and disposal facilities (TSDFs) with solid waste management units that have released or could release any of the nine PFAS proposed to be listed. EPA has identified approximately 1,740 such facilities, which could be subject to additional corrective action requirements.

The overarching message is PFAS regulation under the Trump Administration is not a uniform rollback. In highly consequential areas, particularly Superfund liability and RCRA corrective action, the regulatory framework is tightening, not loosening.

review. On September 17, 2025, EPA announced it would continue to defend the designations, with the stated intention of holding polluters accountable for cleanup costs. The litigation is moving again, with a D.C. Circuit decision possible later this year.

The practical consequences of this designation are widespread for industrial facilities. The rulemaking alters Phase I Environmental Site Assessment requirements, impacts Potentially Responsible Party determinations, enables site reopeners or modifications at previously closed sites, imposes release reporting obligations, and subjects PFOA and PFOS to the Hazardous Materials Transportation Act.

Release reporting obligations associated with PFOA and PFOS are of particular importance. Any entity who releases one pound or more of PFOA or PFOS, or their salts or structural isomers, into the environment in a 24-hour period must report such release under CERCLA Section 103 and EPCRA Section 304. For facilities who handle, generate, process, or dispose materials containing PFOA or PFOS, this is an immediate compliance requirement, not a future one.

Since EPA has confirmed its continued support for the PFOA and PFOS hazardous substance designations, parties may expect an increase in cost recovery and contribution litigation under CERCLA by both government and private parties. At certain open Superfund sites, EPA is moving forward with requests for additional sampling for PFAS compounds, even where PFAS was not known to be present.

In addition to PFAS regulation under CERCLA, EPA has stated it intends to finalize a rule designating nine

Contact Us: We find ways to help you move forward.



Ethan Ware
Partner & Chair
803.567.4610



**Carrick
Brooke-Davidson**
Partner
919.981.4027



Jessie King
Partner
803.567.4602



Channing Martin
Partner
804.420.6422



Speaker Pollard
Partner
804.420.6537



Sean Sullivan
Partner
919.981.4312



John Tamasitis
Partner
803.567.4617



Ryan Trail
Partner
803.567.4605



Dick Willis
Partner
803.567.4611



Susie Brancaccio
Associate
919.981.4041



Tanner Brantley
Associate
804.420.6071



Bill Kuriger
Associate
803.567.4608