

CHAPTER FOUR

PETITION TO LIST WASTE CONTAINING PFAS AS HAZARDOUS

Identifying “Hazardous Waste” (pages 329-334)

As noted on page 332 and in Note 5 on page 334, discarded PFAS have not been listed as hazardous waste despite the demonstrated toxicity of PFOA. On June 24, 2021, New Mexico Governor Michelle Lujan Grisham petitioned EPA to list PFAS as hazardous waste under RCRA. The Governor argued that this would avoid the patchwork of state standards. Waste that contains PFAS (regardless of amount) is also not listed as a “hazardous waste” under RCRA’s statutory scheme. Hence, DuPont was legally able to dump PFAS-laden waste in an unlined and unregulated landfill that poisoned drinking water.

Liability Provisions of CERCLA (pages 351-353)

CERCLA AND PFAS CONTAMINATION

As noted on page 351, because PFAS have not been listed as a CERCLA “hazardous substance,” PFAS contamination cannot triggered CERCLA liability. Although many chemical substances are automatically considered CERCLA hazardous substances when regulated under other federal statutes, this does not apply to contaminants regulated under the SDWA. Thus, even when EPA establishes a maximum contaminant level for PFAS in drinking water, it will be necessary to separately establish CERCLA hazardous substance designations for them as well. However, EPA-established maximum contaminant levels (MCLs) can be used as a factor in determining how aggressive CERCLA remedial actions should be.

Remediation of PFAS contamination from the environment presents a considerable challenge, much like the challenge of removing the chemical methyl tertiary butyl ether (MTBE) that widely contaminated drinking water years ago. MTBE was widely used to oxygenate gasoline but escaped easily from it contaminating sources of drinking water. While CERCLA could not be used to address MTBE contamination because petroleum is exempt from the statute’s coverage. Companies that used MTBE to oxygenate gasoline were forced to pay for the costs of remediating it through state tort law. In similar fashion, some states have settled tort actions against PFAS manufacturers seeking reimbursement for the costs of remediating PFAS.

A great deal of the PFAS found in drinking water throughout the country may be the result of the widespread use of these chemicals in products and packaging materials. Even when PFAS are listed as CERCLA hazardous substances, it is unclear whether CERCLA can be used as the primary vehicle for holding manufacturers liable for the costs of remediating contamination from PFAS used in products or packaging material. CERCLA imposes strict, joint and several liability for the costs of remediation on those who “arranged for disposal” of hazardous substances. However, as noted in the casebook, manufacturers who sell a useful product that subsequently is used by others in a manner that releases hazardous substances generally have not been deemed to have “arranged for disposal.”