March 26, 2024

Via Electronic Filing

Ms. Barbara Foster
Program Information and Implementation Division
Office of Resource Conservation and Recovery
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: **Comments of the U.S. Chamber of Commerce's Coalition of companies, trade associations, and other stakeholders on the U.S. Environmental Protection Agency's Proposed Rule, Definition of Hazardous Waste Applicable to Corrective Action for Releases From Solid Waste Management Units (EPA-HQ-OLEM-2023-0085) (Feb. 8, 2024)**

Dear Ms. Foster:

The undersigned organizations (the Coalition) appreciate the opportunity to provide these comments on the U.S. Environmental Protection Agency's (EPA's or Agency's) proposed rule on "Definition of Hazardous Waste Applicable to Corrective Action for Releases From Solid Waste Management Units" (Proposed Rule or Definition Rule).[1]

The Coalition represents downstream product manufacturers and users of PFAS chemistries[2] and manufacturers and users of other emerging contaminants that are subject to, or could be subject to, corrective actions under the Resource Conservation and Recovery Act (RCRA) through their operation of RCRA permitted treatment, storage, and disposal facilities (TSDFs) as well as interim status facilities. The Coalition also includes previous manufacturers and processors and businesses in other areas of the value chain potentially impacted by the proposal. The Coalition is composed of a wide cross-section of trade associations and industries, including aerospace, automotive, construction, electronics, energy, mining, health care, telecommunications, and textiles, and other community stakeholders, including first responder services, water and wastewater utilities, and waste management facilities. The Coalition also represents other businesses who could potentially be subject to corrective actions under RCRA.

The Coalition supports the safe management of PFAS chemistries and other emerging contaminants across the value chain, including disposal. We support the responsible cleanup of these chemistries, consistent with the best science and appropriate consideration of risk, and the protection of human health and the environment in communities across our nation. We also support accelerating the cleanup of select PFAS in the environment, such as by utilizing EPA's

[1] 89 Fed. Reg 8,598 (Feb. 8, 2024).
[2] Throughout these comments, when we refer to PFAS chemistries or any specific PFAS, all references also include all their salts and their branched and linear structural isomers. This is consistent with EPA's approach in the Definition Rule.

authority under RCRA Section 7003 as a viable alternative to joint and several liability regimes under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Businesses are actively collaborating with federal agencies and local and state government stakeholders to ensure an effective and balanced approach to addressing PFAS-related concerns.

Many Coalition members could potentially be subjected to unpredictable increased Corrective Action requirements and uncertainty if EPA broadens the RCRA Corrective Action program to include any chemistry that may meet an individual permit writer's application of the definition of a hazardous waste. There is also concern that an expansion of the RCRA corrective action program requirements would apply to units where closure and corrective action has already concluded. The comments below describe our specific concerns with the Definition Rule, including the following:

- RCRA's statutory text and structure indicate that the Corrective Action program addresses only ***characteristic and listed*** hazardous wastes.

- EPA's proposal ignores relevant legislative history, which confirms Congress's specific, articulated interest in ensuring that the Corrective Action program would address hazardous constituents listed under Appendix VIII. Congress did not intend for Section 3004(u) to cover non-listed and non-characteristic waste.

- Decisions to regulate emerging contaminants, including PFAS, should be uniform across the country. Such decisions should not be left to individual permit writers at the state level, which would lead to a confusing and uncertain regulatory patchwork.

- Because the scope of this rule is broad and undefined, EPA likely has seriously underestimated the costs.

- The proposed Definition Rule is unnecessary to address PFAS, is inconsistent with EPA's approach in the Hazardous Constituent Rule and should be withdrawn.

I. Overview of Relevant Statutory and Regulatory History

The Resource Conservation and Recovery Act,[3] passed in 1976, amended the Solid Waste Disposal Act of 1965 to address issues with municipal and industrial waste. RCRA gave EPA new authorities under a number of legal programs, including the solid waste program under Subtitle D and the hazardous waste program under Subtitle C. The hazardous waste program, which governs the regulations at issue in this rulemaking, gives EPA the authority to regulate hazardous waste from "cradle to grave," including generation, transportation, treatment, storage, and disposal. Most states have been authorized to implement the RCRA hazardous waste program. Major amendments to RCRA over time include the Solid Waste Disposal Amendments of 1980, which exempted certain wastes from Subtitle C; the Hazardous and Solid Waste Amendments of 1984 (HSWA), which expanded the hazardous waste program and is discussed

[3] 42 U.S.C. § 6901 *et seq.* (1976).

at length below; and the 1986 amendments, which enabled EPA to address programs resulting from underground storage tanks.

Section 3001 of RCRA directed EPA to "develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste."[4] Under this authority, EPA finalized a rule in 1980 that, among other actions, promulgated criteria for identifying the characteristics of hazardous waste at 40 C.F.R. Section 261.10 and the criteria for listing hazardous waste at 40 C.F.R. Section 261.11.[5] Where this comment letter addresses waste that is "identified or listed," it is referring to the process for identifying waste as hazardous based on possessing certain characteristics (also called "characteristic" waste) and for listing waste as hazardous based on the criteria set forth in these regulations.

During the fifteen years following the 1984 HSWA, which added the Corrective Action program to RCRA under Sections 3004(u) and (v), EPA took a series of rulemaking actions to shape the scope of the program. In 1985, EPA issued a final rule codifying the Corrective Action program in its regulations, which did not discuss how hazardous waste would be defined for purposes of Corrective Action.[6] In 1990, EPA proposed new requirements for Corrective Action, including explaining that "hazardous waste" for Corrective Action purposes denotes the definition in Section 1004(5) of RCRA.[7] The Corrective Action provisions of that proposed rule were never finalized, and were withdrawn in 1999.[8] In 1996, EPA issued an Advanced Notice of Proposed Rulemaking re-stating its position on defining hazardous waste from the 1990 proposed rule, which was also never finalized.[9]

II. The statute authorizes EPA to regulate only characteristic and listed hazardous wastes through the Corrective Action program.

Under Section 1004 of RCRA, "hazardous waste" is defined as follows:

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

[4] 42 U.S.C. § 6921(a).
[5] Identification and Listing of Hazardous Waste, 45 Fed. Reg. 33,084 (May 19, 1980).
[6] Hazardous Waste Management System; Final Codification Rule, 50 Fed. Reg. 28,702 (July 15, 1985).
[7] Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities; Proposed Rule, 55 Fed. Reg. 30,798 (July 27, 1990).
[8] Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities, Partial Withdrawal of Rulemaking Proposal, 64 Fed. Reg. 54,604 (Oct. 7, 1999).
[9] Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities, 61 Fed. Reg. 19,432 (May 1, 1996).

(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.[10]

In Section 3001 of RCRA, Congress directed EPA to undertake a two-step process to identify which solid wastes meet this broad statutory definition for purposes of implementing Subchapter III of RCRA, which includes the Corrective Action program. First, under Section 3001(a), EPA must "develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which shall be subject to the provisions of this subchapter."[11] Second, under Section 3001(b), EPA must "promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes (within the meaning of section 6903(5) of this title) ***which shall be subject to the provisions of this subchapter***."[12] The provisions of Subchapter III include Sections 3004(u), 3004(v) and 3008(h), which delineate the Corrective Action program. Thus, the hazardous wastes that are subject to those provisions must be characteristic or listed. There is no room in the statutory scheme to subject to the Corrective Action program wastes that a permit writer determines to meet the statutory definition of hazardous waste, but that is not characteristic or listed hazardous waste.

III. The statute's Corrective Action provisions did not expand EPA's authority to regulate beyond characteristic and listed hazardous wastes.

EPA reasons that because Section 3004(u) uses the term "hazardous waste" rather than the phrase "hazardous waste identified or listed, it can also regulate under the Corrective Action program a waste that meets the statutory definition of hazardous waste even if the waste is not a characteristic or listed hazardous waste. While it is true that Section 3004(u) does not use the phrase "hazardous waste identified or listed," the statutory text and structure confirm that the Corrective Action program addresses only listed and characteristic hazardous wastes and constituents.

As discussed above, Section 3001 of RCRA is explicit that for purposes of implementing Subchapter III of RCRA, EPA shall "develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which should be subject to the provisions of this subchapter."[13] The "provisions of this subchapter" include the Corrective Action provisions at sections 3004(u), 3004(v), and 3008(h). Therefore, only characteristic and listed hazardous waste may be subject to the Corrective Action.[14]

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[10] 42 U.S.C. § 6903(5).
[11] 42 U.S.C. § 6921(a).
[12] 42 U.S.C § 6921(b) (emphasis added). Note that Section 6903(5)—referenced in this provision—is the statutory definition of hazardous waste quoted above.
[13] 42 U.S.C. § 6921(a).
[14] EPA has previously explained that applying the broad definition of "hazardous waste" in Section 1004(5) requires EPA to follow the processes outlined in Section 3001(a). *See* EPA, Session 7 RCRA Hazardous Waste Identification, EPA Authority and Criteria 4 (date unknown), *available at* https://archive.epa.gov/epawaste/hazard/web/pdf/hwid-auth.pdf ("This is a **very broad definition** and could potentially include everything. So, Congress established **other provisions** to help guide EPA in

The 1984 Hazardous and Solid Waste Amendments (HSWA) to RCRA gave EPA new authorities related to Corrective Action. Section 3004(u) of RCRA directs EPA to require Corrective Action for "all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter."[15] Under Section 3004(v), that authority could extend beyond the boundary of the facility.[16] And under Section 3008(h), EPA received authority to require Corrective Action at facilities that have interim status.[17] None of these new Corrective Action provisions authorized EPA to define hazardous waste differently than as required under Section 3001 (*i.e.*, identifying the characteristics of hazardous waste and listing hazardous waste).[18] The Corrective Action program is part of Subchapter III of RCRA and thus is subject to the requirements of Section 3001, which defines the scope of Subchapter III requirements with reference to characteristic and listed hazardous wastes. Thus, there was no need for Congress to reference "hazardous waste identified or listed" in Section 3004(u) because the statute already stated in Section 3001 that the hazardous waste "which shall be the subject to the provisions of this subchapter"—including Sections 3004(u), 3004(v), and 3008(h)—comprises only those hazardous wastes that EPA identifies by identifying characteristics or listing.

In the case of Section 3004(u), the phrase "hazardous waste identified or listed" is further implied by the statutory structure. Section 3004(u) provides that permits "shall require[] Corrective Action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter. . . . Permits issued under section 6925 of this title shall contain schedules of compliance for such Corrective Action. . . ."[19] The referenced provision, Section 3005, requires EPA to "promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of ***hazardous waste identified or listed*** under this subchapter to have a permit issued pursuant to this section" (emphasis added).[20] EPA's proposed interpretation of 3004(u) is inconsistent with the provision's reference to Section 3005. Under the Definition Rule, EPA and authorized states would have the authority to permit facilities only to the extent that they are treating, storing, or disposing of ***identified or listed*** hazardous wastes, yet would have essentially unlimited authority to compel Corrective Action with respect to other hazardous wastes ***for which a permit would not be required*** at those same facilities. This is unreasonable and incorrect. The only internally consistent interpretation of the statute is that Corrective Action authority applies with respect to only ***identified or listed*** hazardous wastes and constituents, as specified in Section 3005(a).

Additionally, Section 3004(v), which authorizes EPA to require Corrective Action beyond the boundary of the facility, is an extension of the Section 3004(u) authority authorizing EPA to require Corrective Action within the facility. These two provisions were added to RCRA at the

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promulgating regulations to identify and regulate hazardous waste."); *see also id.* at 5 ("Congress told EPA to come up with some **criteria for defining what a hazardous waste is.** These criteria are located in Section 3001(a) of the RCRA Statute.").

[15] 42 U.S.C. § 6924(u).
[16] 42 U.S.C. § 6924(v).
[17] 42 U.S.C. § 6928(h).
[18] 42 U.S.C. § 6921(a).
[19] 42 U.S.C. § 6924(u).
[20] 42 U.S.C. § 6925(a) (emphasis added).

same time as part of HSWA and both pertain to EPA's Corrective Action authority. In Section 3004(v), Congress refers to "Corrective Action required at facilities for the treatment, storage, or disposal of hazardous waste listed or identified under section 6921 of this title."[21] The language is clear that Corrective Action beyond the facility boundary is limited to listed and identified hazardous waste. This language supports an interpretation of the phrase "hazardous waste" in 3004(u) to mean "hazardous waste listed or identified" as used in 3004(v) because the phrases clearly relate to the same Corrective Action authority as defined by Congress. EPA itself acknowledged this type of relationship can properly be drawn between the language in 3004(u) and 3004(v) in its arguments defending its interpretation of the term "facility" for Corrective Action purposes.[22]

Finally, Section 3004(u) is different in character from other sections of RCRA that EPA has historically interpreted as extending to "statutory hazardous wastes." In the 1980 rulemaking, EPA distinguished between portions of the statute that must be implemented with reference to the regulatory processes provided for in Section 3001 and those that are not so limited. The preamble explained that the two-step analysis EPA uses to list hazardous wastes—Appendix VIII listing followed by a factor-based analysis—applies to determining what may be regulated as a hazardous waste under Sections 3002 through 3005 and 3010 of RCRA but "does not limit those materials which may be considered 'hazardous wastes' under other sections of the statute, particularly Section 3007 (which authorizes EPA to obtain information on 'hazardous waste' in order to develop regulations or enforce RCRA) and Section 7003 (which authorizes the Agency to institute civil actions to abate imminent and substantial hazards caused by 'hazardous wastes')."[23] This distinction was codified in 40 C.F.R. § 261.1(b), which in 1985 was amended to include Section 3013.[24] In the 1985 rulemaking, EPA explained that its authority under all three provisions—3007, 3013, and 7003—"extends to all materials that *could* be solid wastes under RCRA, not just to those defined as solid wastes in the regulations."[25] EPA explained that, in the case of 3007, the Agency "retains the statutory authority to obtain the information necessary to determine whether the materials are solid wastes" and, in the case of Sections 3013 and 7003, retains authority "to take appropriate action under those provisions."[26]

Section 7003 is the only one of these three provisions that—like Section 3004(u)—provides a basis for compelling action by a regulated entity. Importantly, unlike Section 3004(u), Section 7003 is not part of Subchapter III of RCRA and therefore is not subject to the mandate in Section 3001 that only listed and characteristic wastes are subject to the requirements in Subchapter III.

Sections 3007 and 3013 are information-gathering provisions and are therefore more limited with respect to the burden they impose on regulated entities. Specifically, Section 3007 provides authority to conduct inspections, and Section 3013 provides authority to issue administrative

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[21] 42 U.S.C. § 6924(v).
[22] *See United Tech. Corp. v. U.S. EPA*, 821 F.2d 714, 722 (D.C. Cir. 1987). The D.C. Circuit has made a similar argument about the need to interpret terms consistently across these two provisions, and has accordingly defined "facility" in Section 3004(u) with reference to 3004(v). *See id.* ("[S]ince section 3004(v) . . . clearly employs a broader concept of a 'facility' than does the section 260.10 definition, one can reasonably assume a similarly broad meaning of 'facility' was intended in section 3004(u).").
[23] *Id.* at 33,090.
[24] Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. 614 (1985).
[25] *Id.* at 627.
[26] *Id.*

orders requiring monitoring, testing, and analysis. Under those provisions, EPA may not know until after it obtains information through inspection or investigation whether the facility is generating and managing characteristic or listed hazardous wastes. Further, the stated purpose of Section 3007 is to collect information "for the purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter."[27] As such, it makes sense that EPA would be able to collect information about non-listed and non-characteristic substances to promulgate regulations to account for those substances which may not otherwise be captured by the regulatory definition. Accordingly, it is reasonable for these provisions to apply to a broader range of substances.

It is also important to recognize that there are other sections within Subchapter III of RCRA that refer to "hazardous waste" and not "hazardous waste identified or listed." For example, the term "hazardous waste" is used in Sections 3001(d) (directing EPA to promulgate standards for small quantity generators); 3002(b) (requiring generators to certify to waste minimization programs); and 3004(b) and (c) (prohibitions on placing liquid hazardous waste in salt domes and landfills). EPA has never asserted that these sections are subject to the same broad interpretation advanced with respect to Sections 3007, 3013, and 7003, suggesting the Agency's apparent acceptance that Congress's use of the term "hazardous waste" does not necessarily broaden the scope of a provision beyond characteristic and listed wastes.

IV. Relevant legislative history confirms that Congress intended for the Corrective Action program to address hazardous constituents listed under Appendix VIII, not to incorporate an undefined universe of substances into the Corrective Action Program via state-by-state determinations.

HSWA's legislative history confirms that Congress intended for Corrective Action under Section 3004(u) to address hazardous constituents listed under Appendix VIII, a position consistent with the one advanced by EPA in the 1980 rulemaking with respect to 40 C.F.R. § 261.1(b). The House Energy and Commerce Committee Report accompanying HSWA made clear that Section 3004(u) was enacted out of congressional concern that "current EPA regulations do not address all releases of hazardous constituents from solid waste management units at facilities receiving permits under 3005(e)."[28]

The House Report explained that HSWA was "not intended to limit EPA's authority under Sections 3007 . . . or 7003 . . . , since EPA's authority under these provisions is not limited to wastes that are 'identified or listed' as hazardous, but rather includes all wastes that meet the statutory definition of hazardous waste."[29] By contrast, the report emphasized that Section 3004(u) was worded to allow permitting agencies to address releases of hazardous constituents listed in Appendix VIII.[30] Specifically, the report explained, "This section is not limited to hazardous wastes listed or identified under section 3001 of the Act ***because it may be impossible to determine if hazardous constituents come from hazardous wastes as currently defined by the Administrator***. The term 'hazardous constituent' as used in this provision is intended to

[27] 42 U.S.C. § 6927(a).
[28] H.R. Rep. No. 98-198, at 60 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5578, 5606 ("House Report").
[29] House Report, at 47.
[30] House Report, at 60.

mean those constituents listed in Appendix VIII of the RCRA regulations" (emphasis added).[31] The report thus helps explain that the wording of Section 3004(u) reflects congressional intent to include hazardous constituents listed under Appendix VIII within the scope of Corrective Action, not to provide broader interpretive authority to EPA, as in the case of Sections 3007 and 7003.

V. Despite repeatedly acknowledging, in prior rulemaking actions, Congress's intent to address listed hazardous constituents via the Corrective Action program, EPA continues to advance an overbroad interpretation that is inconsistent with Congress's objective.

EPA's 1980 rulemaking advanced an interpretation of the reach of Section 3004 that is consistent with the approach that Congress later took in enacting the HSWA. Since then, however, EPA has repeatedly acknowledged but ultimately ignored the implications of the legislative history it cites. The Definition Rule cites two prior proposed rulemakings that discussed the scope of Section 3004(u), and argues that the current Proposed Rule simply codifies those past Agency interpretations. Importantly, EPA's past statements have each acknowledged Congress's interest in ensuring that listed hazardous constituents be addressed via corrective action.

First, in the preamble to a 1990 proposed rule, EPA claimed that "remedial authority under section 3004(u) is not limited to releases of waste specifically listed in 40 CFR Part 261 or identified pursuant to the characteristic tests found in that section. Rather, it extends potentially to any substance meeting the statutory definition."[32] Immediately following this unsupported assertion, EPA acknowledged that Congress was in fact more narrowly concerned with addressing hazardous constituents listed in Appendix VIII via the Corrective Action program.[33]

Second, in a 1996 ANPRM, EPA again proposed to interpret the term "hazardous waste" under RCRA Section 3004(u) to include all wastes that are hazardous within the statutory definition in RCRA Section 1004(5), not just those that are either listed or identified by EPA pursuant to RCRA Section 3001."[34] Yet again, EPA inexplicably used HSWA's legislative history as support for this overbroad position, recognizing that Congress was "particularly concerned that . . . the Corrective Action authority should be used to address the specific subset of "hazardous constituents."[35]

For more than thirty years—starting with the 1990 NPRM, continuing with the 1996 ANPRM, and now extending to the current Definition Rule—EPA has clearly acknowledged, but ultimately ignored, in each proposal, Congress's intent for the Corrective Action program to be focused on hazardous constituents listed in Appendix VIII, as supported and as required by the weight of scientific evidence.

It is noteworthy that EPA's opinion regarding the scope of Corrective Action expressed in the 1990 NPRM and the 1996 ANPRM has never been finalized in rulemaking. Instead, the current rule at 40 C.F.R. § 261.1(a) provides that only characteristic and listed hazardous waste are

[31] *Id.* at 60-61 (emphasis added).
[32] 55 Fed. Reg. 30,798, 30,809 (July 27, 1990).
[33] 89 Fed. Reg. at 8,599.
[34] 61 Fed. Reg. 19,432, 19,443 (May 1, 1996).
[35] *Id.*

subject to Part 264, which contains the Corrective Action rules, *i.e.*, 40 C.F.R. § 264.101 and Part 264 Subpart S. EPA itself has acknowledged that the suggestions in its 1990 NPRM and 1996 ANPRM that statutory hazardous waste could be subject to Corrective Action did not have the legal effect of changing the regulations at 40 C.F.R. § 261.1(a). In 1991, for example, EPA issued a memorandum on the use of the 1990 NPRM as guidance pending promulgation of the final rule.[36] It stated, "As a general matter, portions of the preamble or rule that are interpretative and which are not based on changes to currently applicable regulatory requirements can be used as guidance during the interim, but must be established and defended on a case-by-case basis."[37]

VI. Decisions to regulate emerging contaminants, including PFAS, should be uniform across the country, and should not be left to individual permit writers at the state level leading to a confusing regulatory patchwork.

The regulatory process specified at Part 261 for listing and identifying hazardous wastes exists to supply a consistent and uniform baseline of what constitutes a hazardous waste as determined by one federal agency. By contrast, using the statutory hazardous waste definition without reference to that regulatory process would leave substantial discretion to individual permit writers at the federal level or in authorized states. EPA has not proposed any guidance to inform how the definition should be interpreted or applied outside the context of the prescribed listing and identification process. For instance, different permit writers may set different thresholds for determining whether or not an unlisted waste "significantly contributes" to increases in illness. In fact, even "illness" could be defined differently among permit writers. Similarly, permit writers may differ in determinations they make regarding whether an unlisted chemical may pose a "substantial present or potential hazard" under Section 1004.[38]

Allowing individual permit writers to make decisions about which unlisted wastes, or wastes not identified as hazardous based on characteristics, should be treated as hazardous wastes is likely to result in markedly inconsistent approaches as to whether a particular unlisted waste is treated as a RCRA hazardous waste. This is simply not a "good government" approach and creates significant uncertainty for the regulated community. Congress directed EPA—the expert agency—to set forth a process for identifying and listing hazardous wastes. It intended for EPA to set forth and apply this science-based decision-making process in a consistent way, rather than to advance an approach that could potentially lead to sharply disparate outcomes in different authorized states. These are technical determinations that should be made by an agency's waste classification experts after notice and comment rulemaking, not by individual permit writers who will not have the requisite breadth of expertise or the benefit of public comment. Regulated entities should have the ability to participate in reviewing the regulator's analysis and supporting data and to offer appropriate criticisms (or support) and relevant information.

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[36] Memorandum from Lisa K. Friedman, U.S. EPA Associate General Counsel, Solid Waste and Emergency Response Division, to Regional Counsel RCRA Branch Chiefs, Regions 1-10, *Use of Proposed Subpart S Corrective Action Rule as Guidance Pending Promulgation of the Final Rule* (Mar. 27, 1991).

[37] *Id.* Here, EPA cited two D.C. Circuit cases challenging EPA's interpretation of the applicability of Section 3004(u) requirements, *Am. Iron & Steel Inst. v. U.S. EPA*, 886 F.2d 390 (D.C. Cir. 1989), and *United Tech. Corp. v. U.S. EPA*, 821 F.2d 714 (D.C. Cir. 1987), neither of which support a broad interpretation of the definition of hazardous waste for purposes of Corrective Action.

[38] 42 U.S.C. § 6903(5).

EPA's approach in the Proposed Rule also creates significant additional practical challenges for permit writers and regulated entities. For example, EPA gives no consideration to how these statutorily-defined hazardous wastes will be identified through waste codes, how they will be manifested for transport and tracking, and whether TSDFs must be permitted to receive and treat the wastes.

As described in the Definition Rule, this highly discretionary approach contrasts greatly with the approach used by EPA, which includes opportunities for public comment. Following the two-step process outlined in the 1980 rulemaking[39] for determining whether a substance listed on Appendix VIII should be listed as hazardous waste, EPA assesses whether a waste presents a "substantial present or future hazard." In doing so, EPA is required to consider eleven factors pursuant to 40 C.F.R. § 261.11:

1. The nature of the toxicity presented by the constituent.

2. The concentration of the constituent in the waste.

3. The potential of the constituent or any toxic degradation product of the constituent to migrate from the waste into the environment under the types of improper management considered in paragraph (a)(3)(vii) of 40 C.F.R. § 261.11.

4. The persistence of the constituent or any toxic degradation product of the constituent.

5. The potential for the constituent or any toxic degradation product of the constituent to degrade into non-harmful constituents and the rate of degradation.

6. The degree to which the constituent or any degradation product of the constituent bioaccumulates in ecosystems.

7. The plausible types of improper management to which the waste could be subjected.

8. The quantities of the waste generated at individual generation sites or on a regional or national basis.

9. The nature and severity of the human health and environmental damage that has occurred as a result of the improper management of wastes containing the constituent.

10. Action taken by other governmental agencies or regulatory programs based on the health or environmental hazard posed by the waste or waste constituent.

11. Such other factors as may be appropriate.

EPA's regulations require the agency to take these eleven factors into account when determining whether a substance meets the "substantial present or potential hazard" standard for purposes of listing hazardous waste under Part 261.[40] By contrast, under the proposed Definition Rule, there

[39] 45 Fed. Reg. 33,066, 33,107 (May 19, 1980).
[40] 42 U.S.C. § 6903(5)(B).

is nothing that would require EPA or an authorized state to undertake a similarly structured analysis when determining whether a substance meets the definition of "hazardous waste" in the case of issuing, renewing, or modifying an individual permit. This is patently inconsistent with Congress's provision for a rigorous federal listing process.

A regulatory scheme that allows permit writers to make independent determinations about what substances meet the statutory criteria for hazardous waste—on a site-by-site basis, without going through a defined regulatory process—would not satisfy the requirements of the Administrative Procedure Act (APA), nor would it satisfy the plain requirements of RCRA as set forth by Congress. When an administrative agency promulgates legislative rules, the APA requires the agency to provide the public adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule.[41] Allowing permit writers to make case-by-case determinations as to which substances will be considered hazardous for purposes of corrective action would run afoul of this procedural requirement because the listing of hazardous waste under Subchapter III is a legislative rule,[42] meaning it imposes legally binding obligations on regulated parties, so notice-and-comment procedures are required.[43] Further, by allowing permit writers to make these determinations, EPA would be shirking responsibility for a task Congress expressly delegated to EPA under Section 3001 of RCRA, the authority to identify and list hazardous wastes for purposes of Subchapter III.[44]

VII. Because the scope of this rule is broad and undefined, EPA likely has seriously underestimated the costs.

EPA states that the agency "does not expect that the rule would result in any impacts."[45] This finding stems from EPA's overly confident conclusion that it does not expect an increase in permit conditions attributable to the proposed rule,[46] despite asserting only two pages later that "the revisions in this proposed rule are considered to be more stringent than the existing federal requirements."[47] For the reasons described below, we respectfully disagree with EPA's findings that there will not be any impacts from this rule and believe that the self-proclaimed "more stringent requirements" will in fact result in potentially significant impacts to the regulated community.

As described in the section above, the potential for permit writers to subject an undefined universe of wastes to corrective action would introduce an unreasonable level of unpredictability into the corrective action process, complicating the operational and financial planning for regulated entities. The organization representing state waste officials (ASTSWMO) highlighted in their annual report that current federal funding and staff provided through the State and Tribal Assistance Grant (STAG), combined with the States' required match, "are not enough to

[41] 5 U.S.C. § 553.
[42] *See e.g. Am. Mining Cong.*, 907 F.2d 1179 (D.C. Cir. 1990).
[43] *See Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014) ("An agency action that purports to impose legally binding obligations or prohibitions on regulated parties . . . is a legislative rule" as opposed to "an agency action that merely explains how the agency will enforce a statute or regulation," which would more likely be construed as a non-legislative policy statement).
[44] 42 U.S.C. § 6921(b).
[45] 88 Fed. Reg. at 8,603.
[46] *Id.* at 8,602.
[47] *Id.* at 8,604.

successfully implement the hazardous waste program" as it is.[48] Yet EPA does not consider these impacts, whether qualitatively nor quantitatively. Instead, in the Economic Analysis, EPA argues that "[b]ecause this proposed rule would better align the regulation with the statutory requirement, it would add regulatory certainty, thereby likely reducing confusion, disruption of Corrective Action Program implementation, and costly administrative or legal challenges to permit conditions for Corrective Action that address releases of substances not listed or identified as hazardous waste in the regulations."[49] In fact, as explained above, this proposal would misalign the regulations with the statute and would upend nearly 40 years of how the corrective action program has been administered. And there would be substantial costs associated with unpredictability and uncertainty regarding whether or not a particular permit writer may include an unlisted or non-characteristic waste in corrective action. Even if a determination is made in one permit, there is no certainty that a second permit writer would come to a similar conclusion regarding whether a waste should be treated as a hazardous waste. EPA is obligated to carefully consider the impacts of this unpredictability on regulated entities.

EPA states that an increase in the issuance of permit conditions is not expected,[50] but in its Economic Analysis, EPA also recognizes that future permits could include new or currently unknown statutory hazardous wastes due to the authorities outlined in the Definition Rule.[51] And EPA recognizes that these new authorities could increase per-facility corrective action costs and increase the number of facilities engaging in corrective action.[52] For example, expensive sampling may be imposed in order for sites to determine if a new regulated substance is present at a site in order to prove there is no contamination. The corrective action program covers both permitted TSDFs and facilities with interim status; both of these categories of facilities have the potential to face increased costs from inclusion of new or currently unknown hazardous wastes. Nevertheless, throughout the rest of the Economic Analysis, EPA makes no further mention of these potential costs, makes no effort to quantify them, and makes conclusory statements ignoring the fact that these potential costs are likely. Furthermore, EPA does not include any discussion of the need for potentially new disposal, destruction, and remediation technologies. Development of new technologies often comes with a high cost, and EPA has not considered such costs or the feasibility of developing and utilizing such technologies in a timely fashion.

EPA's Economic Analysis appears to assume that, because Corrective Action permits at six facilities included unlisted wastes, there has always existed broad knowledge by all states of their alleged authority to address non-listed constituents in RCRA corrective actions. This assumption is simply not supported. Using EPA's assumption that there are 1,740 permits, the findings from

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[48] Ass'n of State and Territorial Solid Waste Mgmt Officials, *Hazardous Waste Management Program Implementation Costs Report*, at 19 (Nov. 2023), available at: https://astswmo.org/files/Resources/Hazardous_Waste/2023-ASTSWMO-HW-Management-Program-Implementation-Costs-Report.pdf. FY2022 data shows that while States are required to match 25% of STAG funding provided by EPA, they are actually matching 48%. Based on the data obtained, in order to implement the hazardous waste program to the current level required (even in the absence of this rule becoming final), additional federal funds are needed.

[49] EPA, *Economic Assessment for the Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units*, at 4 (Jan. 2024), available at: https://www.regulations.gov/document/EPA-HQ-OLEM-2023-0085-0024 (Economic Analysis).

[50] 88 Fed. Reg. at 8,603.

[51] Economic Analysis, at 4.

[52] *Id.*

these six facilities equates to the inclusion of non-listed wastes at less than 0.005% of all permitted facilities. This clearly does not imply that there was broad knowledge in all states to use this authority. Additionally, EPA provides no survey results to support its conclusion. That a small handful of facilities included unlisted chemicals does not provide any meaningful rationale to suggest that the inclusion of an unknown amount of emerging contaminants in future permits would be similarly minimal. Nor does the small number provide a justification for EPA's assumptions that there would be "no change in practice under this rulemaking."[53] A final rule that provides a new explicit authority, which does not currently exist, to address non-characteristic hazardous wastes and non-listed hazardous wastes and hazardous constituents through Corrective Action, has the serious potential to lead to broad expansion of corrective actions. EPA has not justified ignoring the potential costs associated with this action.

While the universe of substances that permit writers could consider to be "statutory hazardous wastes" is unknown, this does not justify ignoring the potential costs. Even in the case of the proposed PFAS Hazardous Constituent Rule,[54] where the scope is limited to nine PFAS, EPA recognizes that there are "significant uncertainties" about indirect impacts and costs on regulated entities. Of the handful of unlisted contaminants identified in the Economic Analysis of the Definition Rule, only PFOA is considered in EPA's proposed PFAS Hazardous Constituent Rule. No economic analysis has been prepared for any of the other substances identified in EPA's evaluation of existing permits.

Permit writers could also include other substances that have not previously been included in Corrective Action permits, such as substances listed in the Toxic Substances Control Act (TSCA) 2014 Work Plan, substances identified as "high priority" under TSCA, or perhaps any new chemical substance that has a consent order under the TSCA section 5 program.[55] Without a clear evaluation framework, there are no bounds to the chemicals that could be included in the scope of a Corrective Action permit. Yet EPA has made no substantive effort to identify these potential costs.

The expansion of Corrective Action authority to address unlisted and unidentified hazardous wastes or hazardous constituents could extend the scope and timing of corrective actions, increasing the cost of those actions. Similarly, expanding the scope of corrective actions could also increase financial assurance requirements. EPA regulations require permits to "contain schedules of compliance for such Corrective Action. . . and assurances of financial responsibility for completing such Corrective Action."[56] In a guidance document, EPA acknowledges that regulators face "difficulties . . . in determining when financial assurance for Corrective Action should be established and the amount of financial assurance to be required" in the absence of detailed regulations governing financial assurance for Corrective Action.[57] EPA has made no effort to consider these potential additional costs for facilities, nor the additional resources that

[53] Economic Analysis, at 14.
[54] 89 Fed. Reg. at 8,606.
[55] 15 U.S.C. § 2604.
[56] 40 C.F.R. § 264.101(b).
[57] Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, EPA to Regions I – X, *Transmittal of Interim Guidance on Financial Responsibility for Facilities Subject to Corrective Action* (Sept. 30, 2003), available at: https://www.epa.gov/enforcement/interim-guidance-financial-responsibility-facilities-subject-rcra-corrective-action.

may be required for estimating the timing and amount of financial assurance required for any number of substances which could become the subject of Corrective Action under the proposed Definition Rule.

EPA acknowledges uncertainty regarding the obligations that facilities might be required to undertake as a result of the Definition Rule (because required corrective measures would depend on several facility-specific factors to be considered by EPA or authorized state permitting authorities).[58] Yet EPA inexplicably concludes that the Definition Rule is not expected to result in any additional costs to regulated parties (including small entities).[59] This conclusion simply does not follow.

Finally, EPA's consideration of potential costs to small businesses is seriously inadequate. By recognizing the potential for expanded corrective actions, yet somehow projecting no additional costs to regulated entities, EPA fails to engage in any meaningful cost analysis. As a result, EPA certifies, wholly without basis, that the rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act.

EPA recognizes in the Economic Analysis that, of the 1740 Transportation, Storage, and Disposal Facilities that would be potentially impacted by this rule, 706 (or 47 percent) could be small entities.[60] This is a significant number that justifies the need for EPA to consider potential costs to these small entities. If EPA finds that the rule would have a significant economic impact on a substantial number of small entities, then the Agency must complete a regulatory flexibility analysis and initiate the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel process.

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[58] The Coalition also notes that EPA's proposal to group Sections 3004(u) and 3004(v) with Sections 3007, 3013, and 7003 may have broader practical impacts than EPA has identified in the Proposed Rule. EPA is proposing to add Sections 3004(u) and 3004(v) to the list of provisions in 40 C.F.R. 261.1(b)(2) for which the statutory definitions of solid and hazardous waste apply in lieu of the regulatory definitions in Part 262, which currently states "[t]his part identifies only some of the materials which are solid wastes and hazardous wastes under sections 3007, 3013, and 7003 of RCRA." 40 C.F.R. 261.1(b)(2). This change would not only broaden the definition of hazardous waste, but would also broaden the definition of solid waste used in the context of corrective action. EPA does not directly address this issue in the Proposed Rule, and it is unclear what the potential effects of this change might be. The Coalition is concerned that, for example, defining Solid Waste Management Units without reference to solid waste regulatory exclusions could raise questions about whether certain process units are within the scope of the corrective action program. Also, wastes that are currently excluded from the definition of solid waste under EPA's regulations, e.g., reclaimed characteristic by-products and sludges at 40 CFR 261.2(c)(3), might be deemed statutory solid wastes, and thus hazardous wastes that could be subject to the corrective action program, if this aspect of the Proposed Rule were to be adopted. The notice and comment procedures required under the Administrative Procedure Act have not been followed with regard to this proposed change to use the statutory definition of solid waste. Moreover, such a change seems especially problematic and ill-advised. EPA may not (and should not) adopt such a change unless it proposes the change, identifies its ramifications, obtains public comment, and addresses the problems the change would create. Among other things, the Coalition urges EPA not to proceed further in this area without undertaking a robust and legally adequate notice and comment process.

[59] *Id*. at 8,604.

[60] Economic Analysis, at 18.

VIII. The proposed Definition Rule is unnecessary to address PFAS and inconsistent with the approach in the Hazardous Constituent Rule.

As discussed in the Coalition's comments on EPA's proposed designation of PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response Cleanup and Liability Act (CERCLA), EPA has numerous tools under CERCLA, the Safe Drinking Water Act, the Clean Water Act, and other laws to address sites containing PFAS that could present a risk.[61] The Coalition argued in those comments that "CERCLA's blunt liability scheme is an ill-suited solution in this instance, *particularly when far more precise legal tools are readily available*."[62] The current proposal to allow states unfettered discretion to treat any emerging contaminant as if it were a listed or characteristic hazardous waste, rather than identify and address specific risks with an appropriate legal tool, would provide authorized states with open-ended authority to regulate an undefined universe of substances.

In coordination with this Proposed Rule, EPA issued a separate proposal to add nine specific PFAS, their salts, and their structural isomers to its list of hazardous constituents under Appendix VIII ("Hazardous Constiutent Rule").[63] If the proposed Hazardous Constituent Rule were made final, these nine PFAS would be added to the hazardous constituents expressly identified for cleanup through the Corrective Action program. EPA notes in the Definition Rule that it "expects this set of PFAS are those most likely to be addressed through Corrective Action."[64] It is not clear from the proposal whether EPA believes there is a need to address other PFAS substances that have not been proposed for listing in Appendix VIII via Corrective Action. If so, EPA should notify the public of its intentions and should solicit further comment. If not, then it is unclear why the Definition Rule is needed, and we respectfully submit that the rule should be withdrawn.

Sincerely,

Alliance for Chemical Distribution
American Chemistry Council
American Foundry Society
American Petroleum Institute
Coalition for Responsible Waste Incineration

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[61] For example, EPA could support states in managing their water quality by evaluating and developing ambient water quality criteria for PFOA and PFOS under the Clean Water Act, assuming EPA has adequate data and appropriate justifications for doing so. Also, Section 1431 of the Safe Drinking Water Act provides "emergency powers" to EPA to issue imminent and substantial endangerment orders to abate potential threats to public health from "contaminants," which is broadly defined as "any physical, chemical, biological, or radiological substance or matter in water.". 42 U.S.C. § 300f(6); *see* Comments of the U.S. Chamber of Commerce Coalition of Companies and Trade Associations on Proposed Rule, Environmental Protection Agency; Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances; 87 Fed. Reg. 54,415 (Sep. 6, 2022), at 17-23 (submitted Nov. 7, 2022).

[62] *Id.* at 5.

[63] 89 Fed. Reg. 8,606 (Feb. 8, 2024). This approach necessitates a clear standard for listing hazardous constituents, when proposed separately from a hazardous waste listing. The criteria for listing a hazardous waste are embodied in a well-known regulatory process that includes the consideration of 11 potential exposure-related factors [40 CFR 261.11(a)], whereas the criteria for listing a hazardous constituent are vague and untested.

[64] 89 Fed. Reg. at 8,603.

Council of Industrial Boiler Owners
Fuel Cell & Hydrogen Energy Association
National Association for Surface Finishing
National Council of Textile Organizations
National Mining Association
National Oilseed Processors Association
PRINTING United Alliance
RCRA Corrective Action Project
Superfund Settlements Project
The Fertilizer Institute
The Meat Institute
TRSA - The Linen, Uniform and Facility Services Association
U.S. Chamber of Commerce