



MICHELLE LUJAN GRISHAM  
GOVERNOR

JAMES C. KENNEY  
CABINET SECRETARY

## MEMORANDUM

TO: James Kenney, Secretary, New Mexico Environment Department

FROM: Chris Catechis, Division Director, Resource Protection Division

DATE: May 2, 2022

SUBJECT: Request for Release of Hazardous Waste Emergency Funds to Provide Emergency Response for Removal and Disposal of PFAS Contaminated Livestock

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With approval of this request, the New Mexico Environment Department (NMED) will utilize the Hazardous Waste Emergency Fund to assist Mr. Art Schaap, the owner and operator of Highland Dairy, a business located in Clovis, New Mexico, with expenses associated with the proper disposal of per- and polyfluoroalkyl substances (PFAS) contaminated livestock in accordance with an NMED-approved plan for depopulation and disposal.

Contamination of the dairy herd resulted from groundwater used by Highland Dairy that was polluted by the U.S. Air Force. The U.S. Air Force caused a PFAS plume in the aquifer from the use and disposal of PFAS-containing materials at Cannon Air Force Base. Highland Dairy is not currently a transportation, storage, or disposal facility; and Mr. Schaap did not dispose of the PFAS that caused the initial contamination. However, NMED has consistently required corrective action for PFAS contamination pursuant to the Hazardous Waste Act, NMSA 1978, Sections, 74-4-1 to -14, as PFAS meets the statutory definition of hazardous waste found at NMSA 1978, Section 74-4-3(K) due to the threat it poses to human health and the environment. This application of the HWA to PFAS is consistent with existing U.S. Environmental Protection Agency (EPA) guidance, as well as New Mexico's ongoing litigation with the U.S. Department of Defense (DOD) to compel remediation of the PFAS contamination via the Hazardous Waste Act.

Since August 2020, Highland Dairy has managed the mortalities through onsite burial. As of April 30, 2022, Highland Dairy has euthanized its entire contaminated herd. Pursuant to the revised dairy indemnification rule issued by the U.S. Department of Agriculture, Farm Service Agency (FSA) on December 13, 2021,<sup>1</sup> NMED is the appropriate state agency to approve a removal plan submitted by Mr. Schaap to take advantage of the Dairy Indemnity Payment Program for Highland Dairy. The preamble to the final rule provides, "The removal plan must provide FSA, to the satisfaction of the FSA county committee, a timeline of all aspects of cow removal, how and where cows will be depopulated, including how the cows and chemical residues, if applicable, will be disposed of, and documentation of the approval of the removal plan from the applicable public agency." Implementing an approved removal plan will require disposal at a licensed hazardous waste disposal facility for PFAS-contaminated carcasses and PFAS-contaminated soil or composted material associated with herd mortalities.

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<sup>1</sup> Supplemental Dairy Margin Coverage Payment; Conservation Reserve Program; Dairy Indemnity Payment Program; Marketing Assistance Loans, Loan Deficiency Payments, and Sugar Loans; and Oriental Fruit Fly Program, 86 Fed. Reg. 70,689 (Dec. 13, 2021).

In making this request, I have considered that discarded PFAS waste is hazardous under state law, as described above. In addition, I referred to the U.S. EPA's Administrator Michael Regan's October 26, 2021, response letter to Governor Michelle Lujan Grisham's petition. According to this letter, the U.S. EPA intends to include specific PFSA chemicals as RCRA Hazardous Constituents to ensure they are subject to corrective action requirements as an initial step to regulate PFAS as a listed hazardous waste. The U.S. EPA also stated it intends to clarify federal regulations to ensure the RCRA Corrective Action Program has the authority to require investigation and cleanup for wastes that meet the statutory definition of hazardous waste, as defined under RCRA section 1004(5). This modification would clarify that emerging contaminants such as PFAS can be cleaned up through the RCRA corrective action process. In addition, I have considered the human health risks associated with PFAS contamination in the environment, the extremely large volume of waste to be generated at Highland Dairy, and the associated estimated costs of hazardous waste disposal. Improper handling and disposal of mortalities of the Highland Dairy herd could result in new or expanded PFAS-contaminated groundwater in the Clovis area, which is already the subject of an imminent and substantial endangerment lawsuit related to PFAS. Furthermore, onsite disposal of hazardous waste is prohibited under state law.

For the reasons stated above, I recommend your approval for the use of the Hazardous Waste Emergency Fund for emergency response assistance to Highland Dairy to properly remove, remediate, transport and dispose of PFAS-contaminated carcasses and associated contaminated materials, including soil in areas on the dairy's property used for onsite burial. The current fund balance of the Hazardous Waste Emergency Fund is \$2,021,515. Upon authorization, the Hazardous Waste Bureau staff will begin assisting Mr. Schaap.

Approval

By my signature below, I concur that the circumstances outlined above constitute a "hazardous substance incident" as defined in 74-4-3.H NMSA 1978. The activities outlined in this memorandum are authorized under 74-4-8 NMSA 1978. I hereby authorize release of the Hazardous Waste Emergency Fund for this work in an amount not to exceed \$850,000.

  
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James C. Kenney  
Cabinet Secretary  
New Mexico Environment Department

5-4-2022  
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Date