



MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

March 26, 2024

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
EPA Docket Center - RCRA Docket, Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted electronically to: <https://www.regulations.gov/>

RE: Definition of Hazardous Waste Applicable to Corrective Action for Releases from Solid Waste Management Units - Docket ID No. No. EPA-HQ-OLEM-2023-0085

Dear Administrator Regan,

The New Mexico Environment Department (NMED) appreciates the opportunity to submit comments to the U.S. Environmental Protection Agency (EPA) on the subject rulemaking, published in the Federal Register on February 8, 2024, to clarify that the definition of “hazardous waste” in rule is aligned with the Resource Conservation and Recovery Act’s (RCRA) statutory definition.

The EPA’s proposed rule is in direct response to Governor Michelle Lujan Grisham’s June 23, 2021, petition and your October 26, 2021, commitment to address per- and polyfluoroalkyl substances (PFAS) under RCRA. In many states, the U.S. Department of Defense (DOD) has polluted communities around U.S. Air Force bases with aqueous film forming foams (AFFF) used for fire suppression trainings and emergencies. In New Mexico, the U.S. DOD has failed to take responsibility for clean-up under RCRA. Since 1985, New Mexico has managed hazardous wastes from cradle to grave, and quickly finalizing this proposed rule is critical to protect communities from hazardous wastes like PFAS. Moreover, finalizing the proposed rule will support RCRA-authorized states from arbitrary and capricious lawsuits that serve to undermine the implementation of federal laws like RCRA.

NMED supports the EPA’s proposed rule and asks that you finalize the proposed rule as quickly as possible. The final rule will properly clarify that the EPA, and approved state implementing agencies, are authorized to require investigation and cleanup under the Corrective Action Program for wastes meeting the statutory definition of “hazardous waste” rather than only those that meet the Subtitle C regulatory definition.

On behalf of the many New Mexicans who are impacted by PFAS, thank you for leading the effort to protect them from this chemical and the shortcomings of the U.S. DOD. Attached please find NMED’s comments regarding the subject rulemaking.

SCIENCE | INNOVATION | COLLABORATION | COMPLIANCE

Sincerely,

A handwritten signature in blue ink, appearing to read "James C. Kenney". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

James C. Kenney
Cabinet Secretary

Attachment (1)

Cc: Bruce Baizel, Director, Compliance & Enforcement, NMED
Courtney Kerster, Senior Advisor, Office of Governor Michelle Lujan Grisham
Dr. Sydney Lienemann, Deputy Cabinet Secretary of Administration, NMED
Zachary Ogaz, General Counsel, NMED
Rick Shean, Director, Resource Protection Division, NMED

Attachment:

Comments on EPA's proposed rule regarding the definition of hazardous waste applicable to corrective action for releases from solid waste management units.

EPA published the proposed rule in the Federal Register on February 8, 2024

Docket ID No. EPA-HQ-OLEM-2023-0085

NMED welcomes and supports the U.S. EPA's regulatory proposal to clarify the applicability of its regulations under Resource Conservation and Recovery Act (RCRA) regarding solid waste management unit corrective action to releases of substances that meet the statutory definition of hazardous waste. The proposed regulations will clarify States' full legal authority to require investigations and cleanups of substances pursuant to RCRA, including PFAS and other emerging contaminants of concern, that may pose a substantial hazard to human health or the environment. Once the proposed rule is finalized, the U.S. EPA and RCRA-authorized states have clear and explicit authority to enforce corrective action for releases at Treatment Storage and Disposal Facilities (TSDF).

Comment 1. Apply broader definition where disposal of RCRA hazardous waste has occurred.

NMED recommends EPA make further adjustments to the regulatory language to clarify that it aligns with the statutory definition of hazardous waste to situations where disposal of a RCRA hazardous waste has occurred via the failure to take appropriate immediate response to a release to the environment. As per 40 CFR 270.1(c), a RCRA permit is required for "treatment," "storage" and "disposal" of "hazardous waste" as identified or listed in 40 CFR part 261, however facilities generating hazardous wastes are exempt from the requirement to obtain a RCRA Permit if they are in compliance with conditions for exemption regarding on-site management of the restricted subset of hazardous wastes "listed and identified" in 40 CFR 261.

Comment 2. Apply broader definition to "disposal" so RCRA permit is required.

The proposed rule should also clarify that regulatory language is as protective of communities near a hazardous waste TSDF as required by the statutory definition. The proposal would not provide any additional protection against releases of statutory hazardous wastes from facilities not otherwise required to obtain a RCRA permit. Thus, NMED also recommends for EPA to revise 40 CFR 270.1(c) to apply the statutory definition of hazardous waste to "disposal," requiring a RCRA Permit.

Comment 3. Compliance with generator standards.

EPA would also need to make other changes to ensure that compliance with generator standards would not exempt a facility from a requirement to assess and remediate hazardous waste contamination. This change will allow EPA, New Mexico, and other states to ensure timely assessment and cleanup of hazardous waste contamination wherever it is found, rather than only at facilities that conduct non-exempt treatment, storage, or disposal of other hazardous wastes.