



MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

April 8, 2024

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

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

RE: Listing of Specific PFAS as Hazardous Constituents - Docket ID No. EPA–HQ–OLEM–2023–0278

Dear Administrator Regan,

The New Mexico Environment Department (NMED) endorses the U.S. Environmental Protection Agency's (EPA) proposed rule to list specific per- and polyfluoroalkyl substances, collectively referred to as "PFAS" as hazardous constituents under the Resource Conservation and Recovery Act (RCRA). This letter provides the EPA with NMED's comments in response to the proposed rule which appeared in the Federal Register on February 8, 2024, under Docket ID No. EPA–HQ–OLEM–2023–0278. The attached comments offer recommendations to strengthen the implementation of the proposed rule.

EPA's proposed rule is in direct response to Governor Michelle Lujan Grisham's June 23, 2021, petition to include PFAS under RCRA as a listed hazardous waste and implements the EPA's October 26, 2021 letter committing to address PFAS under RCRA. NMED supports EPA's regulatory proposal to amend the regulations under RCRA by adding nine specific PFAS, their salts, and their structural isomers, to its lists of hazardous constituents. The proposed regulations clarify authorized states' full legal authority to require investigations and cleanups of the listed PFAS. While NMED understands that itself and other RCRA-authorized states are able to address PFAS today, finalizing this proposal will affirm New Mexico's position and provide clarity for federal agencies, particularly the Department of Defense.

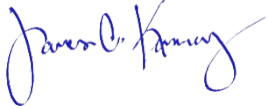
Although NMED supports EPA's proposed rule, it is not enough. In keeping with Governor Michelle Lujan Grisham's June 23, 2021 petition, NMED urgently requests EPA to take immediate action to list all PFAS as a hazardous waste under RCRA. The goal of the petition was to seek clarification and assistance from EPA to protect New Mexico communities that have been adversely impacted by PFAS contamination or may be in the future, and to help prevent further releases to the environment by creating federally supported framework under RCRA.

On behalf of the 50,000 residents who are living around U.S. Air Force bases in Clovis, New Mexico and Alamogordo, New Mexico, NMED respectfully asks EPA to include the full range of these chemicals as hazardous waste. Since New Mexico's June 23, 2021 petition, the U.S. Air Force has not cleaned up any contaminated land or groundwater outside of these facilities. Listing PFAS as hazardous waste will

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solidify NMED's and other RCRA-authorized states' authority to manage PFAS wastes from cradle to grave -ensuring prevention, accountability, and cleanup for releases of these toxic chemicals. NMED's position is clear: PFAS is a hazardous waste by definition and therefore must be listed as such under federal regulations so states can protect communities from polluters, including the U.S. Department of Defense.

Sincerely,



James C. Kenney
Cabinet Secretary

Attachment (1)

Cc: 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 listing of specific PFAS as hazardous constituents.
EPA published the proposed rule in the Federal Register on February 8, 2024
Docket ID No. EPA-HQ-OLEM-2023-0278**

Introduction

The U.S. Environmental Protection Agency (EPA) published a proposed rule to amend its regulation under the Resource Conservation and Recovery Act (RCRA) by adding nine specific per- and polyfluoroalkyl substances (PFAS), their salts, and their structural isomers, to its lists of hazardous constituents. PFAS are used in food packaging, cleaning products, stain resistant carpet treatments, nonstick cookware and firefighting foam, among other products. Due to the widespread use of PFAS and the fact that they bioaccumulate, they are found in the bodies of people and animals all over the world, as well as ground and surface water and other natural resources.

The health effects of these contaminants are clear. Scientific research indicates that some PFAS affect reproductive health, increase the risk of some cancers, affect childhood development, increase cholesterol levels, affect the immune system, and interfere with the body's hormones. EPA and others have presented extensive documentation on Perfluorooctanoic acid (PFOA) and Perfluorooctanesulfonic acid (PFOS) toxicity, mobility, persistence, and widespread presence in the environment, which result in substantial danger to public health and welfare and the environment, including animals.

EPA, like states, must continue to move quickly to protect communities from these toxic chemicals. This proposed rulemaking and the many other actions underway by EPA are necessary to ensure federal, state, tribal, and local governments have the regulatory framework, tools, and resources needed to protect human health and the environment. Throughout the development and implementation of the final rule, EPA must lead the way for states, tribes, and local governments with strong risk communication resources and tools, with special attention to historically marginalized and disadvantaged communities.

Comment 1: List all Discarded PFAS as Hazardous Waste

NMED urgently requests that EPA list all discarded PFAS compounds as hazardous waste under RCRA in a separate proposal to create a uniform regulatory scheme around the release, clean-up, and disposal of these chemicals. In doing so, EPA would achieve cradle-to-grave management of discarded PFAS wastes across RCRA-authorized states. Moreover, EPA could broadly define listing criteria to address primary sources of PFAS contamination from chemical plants and military bases where acute intervention is needed. In contrast, EPA could exercise discretion in listing criteria to address passive receivers of PFAS contamination like municipal landfills and water utilities.

Comment 2: List all Discarded PFAS as Hazardous Constituents

The RCRA Corrective Action Program requires facilities that treat, store, or dispose of hazardous wastes to investigate and clean up contaminated soil, groundwater, and surface water. Under this proposed rulemaking, EPA has established that nine PFAS, their salts, and their isomers meet the criteria for listing

as RCRA hazardous constituents which will explicitly require RCRA-authorized states to include these nine PFAS, their salts, and their isomers in the RCRA Corrective Action Program.

In Section V, “Review of the Available Toxicity and Health Effects Information for PFAS,” the EPA states: “Interpreting epidemiology data for PFAS and determining the individual toxicological responses of each PFAS individually (or their interaction effects) is an ongoing challenge because multiple PFAS have been shown to induce similar adverse health effects (e.g., immune, developmental, hepatic, cardiovascular effects, cancer). This is a subject where the science is rapidly evolving.”

This statement establishes the precise argument why listing all PFAS as hazardous constituents under the RCRA Corrective Action Program through this rulemaking is essential to protecting human health and the environment.

While these nine PFAS represent a majority of the ingredients in common PFAS-containing consumer and industrial products responsible for significant environmental contamination, there are some 14,991 other PFAS chemicals to consider that are moving into our environment on a daily basis. Addressing nine PFAS through RCRA Corrective Action will generally mean other PFAS are cleaned up as well since remedial technologies are not selective to regulatory definitions. However, determining cleanup levels for PFAS under RCRA Corrective Action will be limited to these nine specific compounds. This means that regulated facilities and RCRA-authorized states may forgo cleaning up 14,991 other PFAS chemicals to safe levels – even when science suggests doing so – simply because the EPA rulemaking process takes time. For example, EPA committed to this rulemaking in October of 2021 and two-and-half years later, the rule is not yet final. In approximately that same period, Science Direct reports 19,700 PFAS-related studies were published. The EPA is not resourced to address PFAS under RCRA Corrective Action one chemical at a time. Further, this approach means that regulated entities may “clean close” a RCRA Corrective Action unit for some PFAS only to “re-open” the RCRA Corrective Action unit later to further address newly regulated PFAS under RCRA Corrective Action. Finally, communities across the U.S. and in New Mexico cannot wait for EPA and RCRA-authorized states to address PFAS on a chemical-by-chemical basis once it is in their drinking water, agricultural land, dairy cows, etc.

To expedite cleanup while creating regulatory certainty for regulated entities and protect communities, EPA should list all discarded PFAS compounds as hazardous constituents in Appendix VIII to Part 261 in this proposed rulemaking.

Comment 3: Ensure Existing and New RCRA Corrective Action Sites are Required to Address PFAS Hazardous Constituents

In Section II, General Information, of the Federal Register it states: “...EPA is proposing to designate these PFAS as hazardous constituents so that when corrective action requirements are imposed by program implementers these PFAS would be among the constituents expressly identified for consideration in RCRA facility assessments, and where necessary, further investigation and cleanup through the RCRA corrective action process at RCRA TSDFs.”

NMED requests that EPA clarify that the addition of PFAS hazard constituents allows RCRA-authorized states to require existing RCRA Corrective Action units to investigate for PFAS hazardous constituents irrespective of the existing status of the RCRA permitted facility.

Comment 4: Relationship between RCRA Hazardous Constituents and RCRA Hazardous Substances

In January of 2019, the U.S. Department of Justice (DOJ) and the U.S. Department of Defense (DOD) sued New Mexico for trying to protect communities from PFAS exposure. In the complaint, the U.S. DOJ took the position that New Mexico's corrective action regulation – which mirrors the federal regulation – does not authorize corrective action for substances that are not listed or characteristic hazardous wastes under the State's regulations, even if they might be hazardous under the broader statutory definition.

On June 1, 2021, the U.S. DOJ filed a memorandum defending its position that the NMED acted arbitrarily and capriciously when it issued a permit requiring the U.S. Air Force to clean up its PFAS contamination at Cannon Air Force Base that resulted from decades of releases of PFAS containing firefighting foams known as aqueous film forming foams (AFFF) under the State's Hazardous Waste Act as it relates to the implementation of RCRA. However, the U.S. DOJ's argument failed and was remanded back to state court.

Through this rulemaking, EPA should affirm its interpretation that the statutory definition of hazardous waste applies to corrective action for releases from solid waste management units at permitted and interim status facilities.

Comment 5: Environmental Justice

In Section VII, Statutory and Executive Order Reviews, EPA addresses numerous Executive Orders, including Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All.

In this section, EPA states: "The EPA believes that this action may indirectly reduce existing disproportionate and adverse effects on communities with environmental justice concerns. To the extent that the proposed rule leads to the remediation of releases for any of the nine PFAS, their salts, and their structural isomers that EPA proposes to list as RCRA hazardous constituents, health risks for populations living in close proximity to these sites (particularly populations that rely on private well water near these sites) may decline. As groundwater and surface water have been identified as potential exposure pathways of PFAS, the inclusion of private well usage rates in areas surrounding facilities known to use, produce, or release PFAS provides additional information about populations that may have a potentially higher likelihood of negative health outcomes from a PFAS release. In some cases, focusing the analysis solely on those potentially more vulnerable populations served by private wells reveals further demographic disparities compared to the total U.S. population served by private wells."

NMED seeks EPA's assistance to ensure consistency nationally with respect to achieving environmental justice across RCRA-authorized states.