COMMENTS OF THE STATES OF NEW MEXICO, ARIZONA, COLORADO, CONNECTICUT, ILLINOIS, MINNESOTA, NORTH CAROLINA, NEW JERSEY, NEW YORK, OREGON, WISCONSIN, THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA, AND THE DISTRICT OF COLUMBIA 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;[1] 89 Fed. Reg. 8598 (Feb. 8, 2024)

The States of New Mexico,[2] Arizona, Colorado, Connecticut, Illinois, Minnesota, North Carolina, New Jersey, New York, Oregon, Wisconsin, the Commonwealth of Massachusetts, the Commonwealth of Pennsylvania, and the District of Columbia ("the States") submit these comments in strong support of the U.S. Environmental Protection Agency's ("EPA") proposal to conform the regulatory definition of "hazardous waste" for the Resource Conservation and Recovery Act ("RCRA")[3] Corrective Action Program,[4] with RCRA's plain language (Proposed Rule). The Proposed Rule would amend certain RCRA regulations to provide that EPA (and States) may exercise Corrective Action authority for releases of substances meeting the statutory definition of hazardous waste, even if such substances are not "regulatory" (i.e., not listed or "characteristic" as understood under RCRA) hazardous wastes. This is consistent with EPA's longstanding, well supported reading of the statute, and would simply rectify an inaccuracy caused by EPA's failure to fully codify the Corrective Action Program.

BACKGROUND

RCRA provides for "cradle to grave" waste management, providing comprehensive regulation of the generation, transportation, treatment, storage, and disposal of hazardous waste. In 1984, Congress supplemented the "base" program of hazardous waste management[5] with the Hazardous and Solid Waste Amendments (HSWA), which "focus[] on waste minimization and phasing out land disposal of hazardous waste as well as corrective action for releases."[6] Among other provisions, HSWA added RCRA Section 3004(u), requiring "corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility [TSDF] seeking a permit under [RCRA]." 42 U.S.C. § 6924(u). The Proposed Rule would amend Section 3004(u)'s implementing regulations by codifying EPA policy that, though longstanding, has heretofore not been reflected in EPA regulations.

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[1] 89 Fed. Reg. 8598 (Feb. 8, 2024)

[2] New Mexico commends EPA for proposing this rule in partial response to New Mexico Governor Michelle Lujan Grisham's June 23, 2021 petition to list PFAS as a class as hazardous waste, along with the proposed Listing *of Specific PFAS as Hazardous Constituents*, 89 Fed. Reg. 8606 (Feb. 8, 2024).

[3] 42 U.S.C. §§ 6901, et seq.

[4] 40 C.F.R.§§ 260.1, 261.1, 270.2.

[5] Regulations implementing pre-HSWA RCRA provisions are sometimes referred to as the "base" program and distinguished from those implementing the HSWA. *See* 40 C.F.R. § 271.1 tbl. 1.

[6] U.S. Envt'l Prot. Agency, *Summary of the Resource Conservation and Recovery Act*, https://perma.cc/XL8W-N8P9.

In 1990, EPA proposed "Subpart S" to 40 C.F.R. Part 264, which would have been a detailed, prescriptive regulatory regime for implementing the RCRA Section 3004(u)'s Corrective Action requirements. In the preamble to proposed Subpart S, EPA explained its rationale for its interpretation of Section 3004(u):

> The Agency believes that use of the term "hazardous waste" denotes "hazardous waste" as defined in section 1004(5) of RCRA. Accordingly, today's proposed rule repeats the statutory definition of "hazardous waste" found in that section. The term "hazardous waste" is distinguished from the phrase "hazardous waste listed and identified," which is used elsewhere in the statute to denote that subset of hazardous wastes specifically listed and identified by the Agency pursuant to section 3001 of RCRA. Thus, the remedial authority under section 3004(u) is not limited to releases of wastes 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.[7]

In 1999, EPA determined that Subpart S was "not necessary to carry out the Agency's duties under sections 3004(u) and (v)" and partially withdrew proposed Subpart S.[8] Because of this decision not to finalize Subpart S in its entirety, EPA's RCRA regulations were never amended to clarify that RCRA's plain text requires the application of a broad definition of "hazardous waste" in the Corrective Action context, unlike most (but not all) other contexts. Nonetheless, EPA has continued to rely on, and encouraged states to rely on, the proposed and withdrawn Subpart S as guidance when undertaking Corrective Action activities. Moreover, in the 1999 withdrawal action EPA expressly pointed to the Subpart S definition of "hazardous waste" as among those provisions *not* preserved for future rulemaking, because it did not involve any questions that had not already been definitively answered by the agency.[9]

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[7] *Proposed Rule; Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities*, 55 Fed. Reg. 30,798, 30,809 (July 27, 1990).

[8] *Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities, Partial Withdrawal of Rulemaking Proposal*, 64 Fed. Reg. 54604, (Oct. 7 1999). The withdrawal was partial in that in did not withdraw previously finalized regulations relating to "Corrective Action Management Units," which are hazardous waste management units used only for on-site treatment, storage, and disposal of hazardous wastes managed for implementing cleanup. *Id., see also 58 Fed. Reg. 8658 (Feb. 16, 1993).* The Partial withdrawal also did not affect provisions relating to the definition of ''facility'' for corrective action purposes, and provisions concerning corrective action responsibilities upon transfer of facility property, which EPA preserved for future rulemaking action. 64 Fed. Reg. at 54606.

[9] 64 Fed. Reg. 54607-608: "We have singled out these two jurisdictional issues [regarding definition of facility and land transfers] because, unlike others discussed in the 1990 proposal (e.g., definitions of release,3 hazardous waste or hazardous constituents, and solid waste management unit), these are issues about which the Agency expressed concern regarding the status quo, or raised questions that have not been definitively addressed by the Agency." Thus, it is apparent that EPA believed it had definitively addressed the meaning of "hazardous waste" in proposed Subpart S. EPA appears to have not been cognizant at the time of withdrawing Subpart S that a modification of the existing definition of Hazardous Waste at 40 C.F.R. 260.10 was also needed in order to avoid an inconsistency between RCRA 1004(u) and the definition of hazardous waste provided in the regulations.

EPA's continued reliance on the definition of "hazardous waste" in proposed Subpart S, however, is an imperfect solution. Under EPA's current RCRA regulations, 40 C.F.R. § 260.10 provides the definitions that apply across the full spectrum of regulations in 40 C.F.R. Parts 260 through 273. That spectrum includes Section 264.101, "Corrective action for solid waste management units," the provision implementing the Corrective Action Program established by RCRA Section 3004(u). The definition of "hazardous waste" in Section 260.10 is "a hazardous waste as defined in § 261.3 of this chapter," and Section 261.3 in turn contains the complex scheme of listed and characteristic wastes. Thus, by this series of cross-references, EPA's RCRA regulations purport to limit the Corrective Action Program to regulatory (i.e., listed or characteristic) hazardous wastes, directly contradicting EPA's preferred interpretation of the statute in proposed Subpart S.

The Proposed Rule would correct this definitional inaccuracy and align EPA's Corrective Action Program regulations with the correct, more expansive reading of RCRA that EPA has applied since 1990. The rule would amend the definition of "hazardous waste" at 40 C.F.R. § 260.10 to create an exception specifying, effectively, that for purposes of § 264.101 and the Corrective Action Program, "hazardous waste" means any waste that may be a hazardous waste within the meaning of RCRA Section 1004(5).

COMMENTS

EPA's 1990 Reading of RCRA Section 3004(u) Comports Both with Case Law and Congressional Intent

Effectively, the Proposed Rule would recognize—as EPA did in 1990—that the Corrective Action Program established by RCRA Section 3004(u) may reach releases of any substance that falls within the statutory definition of hazardous waste at RCRA Section 1004(5), not just releases of regulatory (i.e., listed or characteristic) hazardous waste.

This interpretation is based on a literal reading of RCRA without resort to extra-textual gloss. RCRA Section 1004(5) provides a narrative definition of "hazardous waste" that applies anywhere the term is "used in this subchapter"– that is, anywhere in the RCRA statute. Section 3004(u) in turn, enacted eight years later, requires corrective action in the event of "*all releases* of hazardous waste or constituents from" permitted solid waste management units, which necessarily includes any solid waste that is hazardous under Section 1004(5)'s statutory definition. 42 U.S.C. § 6924(u) (emphasis added).

Accordingly, EPA is correct to state that its reading of Section 3004(u) "simply applies the statutory definition to a term used in the provision."[10] The States agree that this reading is compelled by the unambiguous plain text of the statute and that any contrary reading would conflict with the text. And because Congress has spoken directly to the precise question at issue

[10] 89 Fed. Reg. at 8601.

– the meaning of "hazardous waste" as that term appears in RCRA – there is no need to consider whether EPA's construction of the Act is reasonable or permissible.

This conclusion is bolstered by comparisons to other RCRA provisions that refer only to the subset of hazardous waste "identified or listed" by EPA's RCRA regulations. As early as 1980, EPA relied on this distinction to clarify in 40 C.F.R. 261.1(b)(2) that RCRA Section 3007 (regarding inspections) and 7003 (regarding imminent hazards) cover all hazardous waste within RCRA's statutory definition, not just hazardous waste listed or identified by RCRA regulations.[11] Therefore, when Congress added Section 3004(u) in 1984, it legislated against the backdrop of EPA regulations that recognized the important distinction between RCRA provisions that refer to all hazardous waste, and those that refer only to hazardous waste that are listed or identified. *See, e.g., S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351, (1998) ("[W]e assume that Congress is aware of existing law when it passes legislation.").

Similarly, courts interpreting RCRA have recognized the important distinction between RCRA provisions that refer to all hazardous waste and those that refer only to hazardous waste that are listed or identified by regulation. *See, e.g., Nat'l-Standard Co. v. Adamkus*, 881 F.2d 352, 360 (7th Cir. 1989) (in construing RCRA Section 6927, explaining that "Congress significantly chose the broad, general term 'hazardous waste' defined in section 6903(5) [RCRA 1004(5)] . . . rather than 'hazardous waste identified or listed under this subchapter,' employed in other provisions" (citing 42 U.S.C. §§ 6924(a), 6925(b))).

Therefore, both in its proposed Subpart S rule in1990 and in the instant proposal, EPA has correctly and consistently respected Congress's decision to apply Section 3004(u) to releases of any "hazardous waste," not just the subset of hazardous waste listed or identified by RCRA regulations.

Finally, Section 3004 requires corrective action at solid waste management units "regardless of whether the solid wastes they treat are also hazardous." *Owen Elec. Steel Co. of S.C., Inc. v. Browner*, 37 F.3d 146, 148 n.3 (4th Cir. 1994). From this it logically follows that Corrective Action should not be limited to regulatory hazardous wastes; otherwise there would be no point in requiring clean up of sites that did not treat hazardous wastes to begin with.

States Have Long Relied on EPA's Subpart S Proposed Rule Definitions in Implementing Their Corrective Action Programs

[11] *Id.* at 8602 (citing Hazardous Waste Management System: Identification and Listing of Hazardous Waste, 45 Fed. Reg. 33,084, 33,090 (May 19, 1980)). Similarly, EPA has also long interpreted the statutory definition of "hazardous waste" to be applicable under the Monitoring, Analysis, and Testing provisions or RCRA Section 3013, which, like Section 3004(u), does not contain the additional clause "identified or listed." *See* U.S. EPA, EC-G-2002-071 ISSUANCE OF ADMINISTRATIVE ORDERS UNDER SECTION 3013 OF THE RESOURCE CONSERVATION AND RECOVERY ACT, , (1984), at 2, n.1 EPA recently determined that certain PFAS met the statutory definition of hazardous waste as defined in RCRA Section 1004(5) and incorporated in RCRA Section 3013(a). *Chemours Company*, RCRA-HQ-2024-001 (Admin. Order on Consent) Dec. 20, 2023, at ¶¶ 42, 43.

Although the 1990 proposed rule was not finalized and was later partially withdrawn, EPA continues to rely on its preamble as guidance. For example, in a 1996 *Advance Notice of Public Rulemaking Corrective Action for Releases From Solid Waste Management Units at Hazardous Waste Management Facilities,* EPA repeated that it "interprets the term 'hazardous waste,' as used in 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."[12]

In 1997, EPA's Assistant Administrator for the Office of Solid Waste and Emergency Response issued a memorandum to all RCRA/CERCLA Regional Senior Policy Managers, instructing them that the 1996 notice should be considered the primary corrective action implementation guidance.[13] In 1999, EPA extended that instruction to the public when it partially withdrew Subpart S, and again stated that the 1996 Federal Register notice "should be considered the primary corrective action implementation guidance."[14] EPA has compiled these and other resources related to RCRA corrective action and presents them to the public as current guidance in a web page entitled "Key Rulemakings Related to the Resource Conservation and Recovery Act (RCRA) Corrective Action Program."[15] Other instructive sources also recognize EPA's policy as law. *See, e.g.,* Statutory jurisdiction over nonhazardous waste under RCRA—Corrective action, 1 L. of Solid Waste, Pollut. Prevent. and Recycl. § 3:8 (2020) ("corrective action obligations can include the cleanup of wastes that do not meet the regulatory definition of hazardous wastes").

Not surprisingly, States have heeded EPA's guidance. For example, New Mexico has relied on EPA's guidance to require corrective action for substances for which EPA has promulgated a maximum contaminant drinking water level; for which New Mexico has issued a groundwater standard or listed as a "toxic pollutant" in its groundwater regulations; or for which are emerging contaminants under consideration by the EPA and known or suspected to be present at the permitted facility – even where EPA has not identified or listed those substances as hazardous under RCRA. *See Declaration of Dave Cobrain,* Attached Hereto as Exhibit 1, at ¶¶ 12–14. Acting in reliance on this policy, the New Mexico Environment Department listed per- and polyfluoroalkyl substances ("PFAS"), including PFOA (perfluorooctanoic acid) and PFOS (perfluorooctane sulfonate), along with other substances that are not regulatory hazardous wastes, as hazardous wastes for the purpose of Corrective Action in the permit issued to Cannon Air Force Base.[16] It was in response to this action that the Air Force brought the judicial

[12] 61 Fed. Reg. 19,432, 19,443 (May 1, 1996).
[13] U.S. Envt'l Prot. Agency, *Use of the Corrective Action Advance Notice of Proposed Rulemaking as Guidance* (Jan. 17, 1997), https://perma.cc/4FJY-9EVY.
[14] 64 Fed. Reg. 54,604, 54,607 (Oct. 7, 1999).
[15] U.S. Envt'l Prot. Agency, *Key Rulemakings Related to the Resource Conservation and Recovery Act (RCRA) Corrective Action Program*, https://perma.cc/Q4C5-2EPP.
[16] N.M. Env't Dep't, *Cannon Air Force Base: Resource Conservation and Recovery Act Permit: EPA ID # NM 7572124454*, at 16 (Dec. 2018), https://perma.cc/M4RK-TE5W.

challenge to the permit that prompted EPA to take "a fresh look" at its regulations.[17] Among other states, New York relies on a broad definition of hazardous waste to address PFAS under the RCRA Corrective Action Program in that state. The Propose Rule would confirm that practice.

Presently, states that attempt to comply with EPA's express guidance on Corrective Action are subject to legal challenges and related costs, as illustrated by the Air Force's challenge to the New Mexico permit. In that case, the Air Force argued that because the current regulations (including 40 C.F.R. § 261.10) in the Air Force's view unambiguously limit Corrective Action to listed or characteristic wastes, the court could not look beyond the regulatory text to consider EPA's contrary guidance. The court did not reach the merits and dismissed the case without prejudice, leaving the scope of Corrective Action unresolved. This uncertainty continues to hang over New Mexico's and other States' ability to impose Corrective Action requirements as Congress intended. The Proposed Rule would remove uncertainty and minimize the likelihood of similar future challenges.

EPA Should Promptly Finalize the Corrective Action Clarification

Because the Proposed Rule would simply conform regulations to RCRA's plain text and codify longstanding EPA policy on which States have long relied, we encourage EPA to quickly finalize the Proposed Rule. Congress never intended Corrective Action to apply only to releases of regulatory hazardous wastes listed or identified under RCRA, as confirmed by the statutory and regulatory history described above. Harmonizing the regulatory text with the statute and EPA policy will give EPA, States, and industry the regulatory certainty needed to continue making progress under the Corrective Action program, particularly as it relates to emerging contaminants such as PFAS.

Finally, EPA should finalize this rule regardless of when and whether it finalizes the rule listing certain PFAS as hazardous constituents under RCRA. Where a substance is listed as a hazardous constituent under 40 C.F.R. part 261 Appendix VIII, the permitting agency will likely rely on its authority to require Corrective Action for "hazardous constituents" under RCRA Section 3004(u), avoiding the need to make an additional showing that the substance satisfies the statutory definition of "hazardous waste." However, EPA has proposed such listing for only nine of the thousands of PFAS, and over time Corrective Action for additional PFAS will likely be necessary. Moreover, finalizing the Proposed Rule will provide EPA and states with flexibility to react to releases of other emerging contaminants. In addition, the rule may serve to fill a regulatory gap during the pendency of potential litigation over the hazardous constituent rule, or vice versa.

Thank you for the opportunity to provide these comments.

[17] 89 Fed. Reg. at 8600.

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Dated: March 26, 2024

EXHIBIT 1

DECLARATION OF DAVE COBRAIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Case No.: 2:19-cv-00046-KG-SMV**
NEW MEXICO ENVIRONMENT DEPARTMENT, and JAMES KENNEY, Secretary (in his official capacity),	)	
	)	
Defendants.	)	

DECLARATION OF DAVE COBRAIN

I, Dave Cobrain, state and declare as follows:

1. I submit this declaration in support of the New Mexico Environment Department's and James Kenney's (in his official capacity) Response to Plaintiff's Motion for Summary Judgment.
2. I am the Permits Management Program Manager with the Hazardous Waste Bureau ("HWB") at the New Mexico Environment Department ("NMED") and have served in that capacity since December 2013.
3. I earned a Bachelor's degree from Utah State University and a Master's degree in geology from the University of North Carolina Chapel Hill.
4. I am a registered professional geologist in Oregon and Wyoming. I have ten years of experience in environmental consulting prior to joining HWB in 1999. I have extensive experience conducting environmental field investigations at industrial and commercial sites including implementation of subsurface investigations, aquifer and remediation system testing, and completion and monitoring of remediation activities. I worked as a

project manager for environmental consulting firms where I performed proposal and bid specification preparation, project planning and implementation, and budget management on environmental assessment and remediation projects that included investigation, closure, demolition and monitoring activities. I conducted evaluations of remedial alternatives in accordance with Environmental Protection Agency ("EPA") and state requirements for remedy selection and provided clients with representation to regulatory authorities.

5. I have been an employee at the HWB for 22 years, which has included two years as a Water Resource Specialist, 12 years as a Staff manager, and eight years as a Program Manager. My current duties include preparation, issuance, and enforcement of Resource Conservation and Recovery Act ("RCRA") permits and compliance orders, as well as oversight of corrective action activities at RCRA-regulated facilities. My responsibilities include directing regulated facilities in the implementation of corrective actions to achieve compliance with New Mexico regulations prescribed in permits and orders. I am an environmental professional as defined in 40 C.F.R. § 312.10.
6. I have worked for 18 years as the manager of a technical team at NMED overseeing Cannon Air Force Base ("Cannon"), located near the city of Clovis, New Mexico.
7. In that role, I direct technical staff with regard to RCRA corrective actions; review technical documents, environmental data, and draft permits; and interact with Air Force representative concerning technical and regulatory issues.
8. In that role, I have helped to draft, or drafted myself, RCRA corrective action permits for several facilities, including Cannon. I am familiar with the facts that form the basis of the

claims made by the United States against NMED and James Kenney, especially the terms and conditions of the RCRA corrective action permit at issue in this matter.

9. When drafting a RCRA corrective action permit, HWB includes a list of defined terms within the permit itself.

10. These defined terms include defining the scope of hazardous waste and contaminants subject to corrective action within the scope of the permit.

11. To determine which substances to include within these definitions, HWB first cites to applicable regulatory authority, i.e. 40 C.F.R. 261.3, 40 CFR Part 261, appendix VII and VIII and 40 CFR Part 264, appendix IX and munitions constituents as defined in 10 U.S.C. 2710(e)(3).

12. Longstanding EPA guidance on this regulation states that corrective action is not specifically restricted to identified or listed hazardous wastes.[1] Rather, it extends corrective action to any substance meeting the statutory definition of hazardous waste, identified in New Mexico at NMSA 1978, Section 74-4-3(K) (2018) and 42 U.S.C. 6903(5).

13. As part of this analysis, HWB has interpreted its corrective action authority to include substances listed in 20.6.2.3103 and 20.6.2.7(T)(2) NMAC and constituents for which EPA has promulgated a maximum contaminant level (MCL) at 40 CFR parts 141 and 143 because they have already been determined to pose a threat to human health and the environment. 20.6.2.3103 NMAC includes the standards for groundwater of 10,000 mg/l total dissolved solids concentration or less, meaning it includes human health standards for contaminants that must be met in groundwater that has an existing total dissolved

[1] https://rcrapublic.epa.gov/files/14021.pdf

solids concentration of less than 10,000 mg/l. 20.6.2.7(T)(2) NMAC defines toxic pollutants as used in 20.6.2.3103(A)(2) NMAC. When concentrations of these standards exceed amounts listed in 20.6.2.3103 NMAC, the New Mexico Water Quality Control Commission has determined that there is a hazard to public health. 20.6.2.7(H) NMAC. Substances listed in the referenced regulations are therefore added to the definition of hazardous waste for corrective action if they are known or suspected to be present at the facility.

14. In accordance with 40 CFR 270.32(b)(2), HWB reviews constituents that are under consideration by EPA for regulation based on toxicity or other properties determined to potentially pose a threat to human health or the environment. As emerging contaminants, PFAS risk evaluation is evolving as additional data becomes available. Three PFAS compounds were referenced in NMED's 2017 *Risk Assessment Guidance for Site Investigation and Remediation.* Based on updated toxicological data, additional PFAS compounds have been identified as presenting a threat to human health. NMED's updated 2019 *Risk Assessment Guidance for Site Investigation and Remediation* contains 24 PFAS compounds and also compounds designed to replace PFAS compounds (e.g., GenX). As EPA identifies compounds that present a threat to human health or the environment, such compounds are added to the definition of hazardous waste for the purpose of corrective action in New Mexico RCRA permits, if those compounds are known or suspected to be present at a permitted facility in accordance with Section 74-4-3(K) of the New Mexico Hazardous Waste Act and 42 U.S.C. 6903(5) of RCRA.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 16, 2021 (date)

(signature)