



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA-R01-RCRA-2019-0617; FRL-10010-59-Region 1]

Maine: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is granting Maine final authorization for changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). The Agency published a Proposed Rule on December 20, 2019 and provided opportunity for public comment. EPA received one substantive and two non-substantive comments relevant to our proposed action.

DATES: This final authorization is effective [*insert date of publication in the Federal Register*].

FOR FURTHER INFORMATION CONTACT: Sharon Leitch, RCRA Waste Management, UST and Pesticides Section; Land, Chemicals and Redevelopment Division; EPA Region 1, 5 Post Office Square, Suite 100 (Mail code 07-1), Boston, MA 02109-3912; telephone number: (617) 918-1647; fax number (617) 918-0647; e-mail address: leitch.sharon@epa.gov.

SUPPLEMENTARY INFORMATION:

A. Authorization of Revisions to Maine's Hazardous Waste Program

On October 16, 2019, Maine submitted a complete program revision application seeking authorization of changes to its hazardous waste program in accordance with 40 CFR 271.21.

EPA now makes a final decision that Maine's hazardous waste program revisions that are being

authorized are equivalent to, consistent with, and no less stringent than the Federal program, and therefore satisfy all of the requirements necessary to qualify for final authorization. For a list of State rules being authorized with this Final Authorization, please see the proposed rule published in the **Federal Register** (84 FR 70135, December 20, 2019).

B. What comments were received on Maine’s proposed authorization and how is EPA responding to these comments?

EPA received three (3) comments on its December 20, 2019, proposed authorization of Maine’s hazardous waste program revisions. These comments are provided in the docket for today’s final action. *See* Docket ID No. EPA-R01-RCRA-2019-0617 at www.regulations.gov. Two of the comments submitted are non-substantive and generally support EPA’s proposed authorization. The third comment is substantive and it was submitted by Maine’s Attorney General and the Maine Department of Environmental Protection (MDEP) Commissioner (collectively “Maine”).

In Maine’s comment, Maine states three points of disagreement with EPA’s Proposed Authorization and provides EPA with three requests. Maine disagrees (1) with EPA’s characterization of the scope of Maine’s current hazardous waste program *submission*; (2) with EPA’s characterization of the scope of Maine’s current hazardous waste *program*; and (3) with EPA’s characterization of Maine’s environmental regulatory authority and jurisdiction. Maine requests that (1) EPA extend its authorization of Maine’s hazardous waste program to include all lands within the State, including Indian country; (2) EPA expressly acknowledge that Maine has environmental regulatory authority and jurisdiction statewide, including in Indian country; and (3) EPA expressly acknowledge that MDEP’s current hazardous waste program submission and supporting materials requests program authorization for all lands within the State, including

Indian country.

As EPA noted in its proposed authorization, Maine did not explicitly identify Indian country as lands for which it was seeking authorization in its October 16, 2019 hazardous waste program submission. It was in its subsequent comments on EPA's proposed authorization that Maine was explicit that its submission seeks authorization of its hazardous waste program for Indian country.

EPA's RCRA regulations require Maine to seek authority from EPA over activities on Indian lands with "an appropriate analysis of the State's authority" in the Attorney General's statement that Maine must provide to EPA in its hazardous waste program submission. 40 CFR § 271.7(b).

Additionally, under basic principles of federal Indian law, states generally lack civil regulatory jurisdiction within Indian country as defined in 18 U.S.C. Section 1151. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520,527 n.1 (1998). Thus, EPA cannot presume a state has authority to regulate in Indian country, including with regard to RCRA activities. Instead, a state must demonstrate its jurisdiction, and EPA must determine that the state has made the requisite demonstration and expressly determine that the state has authority, before a state can implement a program in Indian country. Where the State did not expressly seek authorization for Indian country in this authorization package, EPA properly did not include such lands in the proposed authorization of program revisions.

Based on the unique jurisdictional framework established in the Act to Implement the Maine Indian Claims Settlement ("Maine Implementing Act" or "MIA"), 30 M.R.S. §§ 6201 to 6214, and the federal Maine Indian Claims Settlement Act ("MICSA"), 1980 P.L. 96-420 (Oct. 10, 1980), and the two companion laws for the Aroostook Band of Micmacs, EPA has previously

determined that the State of Maine has civil regulatory jurisdiction in Indian country in two contexts. In 2012, EPA determined that the State of Maine has jurisdiction to issue National Pollutant Discharge Elimination System (“NPDES”) permits under the Clean Water Act in the territories of the Penobscot Indian Nation and Passamaquoddy Tribe. 77 FR 23481, 23482 (April 19, 2012); see also *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). In 2015, EPA determined that the State of Maine has authority to set water quality standards under the Clean Water Act for waters in Tribal lands. February 2, 2015, Letter from H. Curtis Spalding, EPA Regional Administrator, to Patricia W. Aho, Maine Department of Environmental Protection Commissioner, Re: Review and Decision on Water Quality Standards Revisions, available at https://www.epa.gov/sites/production/files/2016-04/documents/me_let_020215.pdf.

In recognition of the significant time and resources needed to address Maine’s assertion of authority to regulate hazardous waste activities on Tribal lands and EPA’s finding that Maine did not seek authority over activities on Indian lands through a required and appropriate analysis of the State’s authority in its Attorney General’s statement, EPA is not making a determination on such authority as part of this decision. This approach allows EPA to move forward with the approval of Maine’s program. EPA will act on such assertion following the necessary consultation with the federally recognized Indian tribes directly impacted by Maine’s assertion, consistent with Executive Order 13175 (Nov. 6, 2000) and EPA’s Policy on Consultation and Coordination with Indian Tribes (May 4, 2011). Because Maine’s submission for hazardous waste program approval did not explicitly seek authority on Indian lands, additional processes may be necessary and appropriate, including a public comment period, before EPA takes any action on the State’s assertion over Indian lands.

Therefore, EPA grants Maine final approval to operate its hazardous waste program with

the changes described in Maine's hazardous waste program submission and as outlined in the proposed authorization, except as it relates to hazardous waste activities on Indian lands. EPA grants Maine "full" program approval in accordance with 40 CFR Part 271.1(h).

In response to Maine's remaining comments, it is EPA's position that it has never explicitly approved the State to regulate RCRA activities in Tribal lands. Nor can EPA simply presume that Maine has authority to implement its RCRA program in Indian country. Rather, the Agency must first consult with the affected federally recognized Indian tribes and carefully consider the applicable legal authorities before making an explicit determination as to the State's authority. Finally, Maine's hazardous waste program submission is not the appropriate forum for EPA to address the State's asserted civil regulatory jurisdiction in Indian country with regard to other, non-RCRA environmental statutes.

C. What is codification and is EPA codifying Maine's hazardous waste program as authorized in this rule?

Codification is the process of placing citations and references to the State's statutes and regulations that comprise the State's authorized hazardous waste program into the Code of Federal Regulations. EPA does this by adding those citations and references to the authorized State rules in 40 CFR Part 272. EPA is not codifying the authorization of Maine's revisions as part of today's action.

D. Statutory and Executive Order Reviews

This final authorization revises Maine's authorized hazardous waste management program pursuant to Section 3006 of RCRA and imposes no requirements other than those currently imposed by State law. For further information on how this authorization complies with applicable executive orders and statutory provisions, please see the proposed rule published in

the **Federal Register** (84 FR 70135, December 20, 2019).

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Incorporation by reference, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

Dated: June 4, 2020.

Dennis Deziel,
Regional Administrator,
EPA Region 1.

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