



6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 271**

[EPA-R09-RCRA-2018-0267; **FRL-9979-60-Region 9**]

### **Hawaii: Proposed Authorization of State Hazardous Waste Management Program Revisions**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** Hawaii has applied to the Environmental Protection Agency (EPA) for final authorization of certain changes to its hazardous waste program under the Resource Conservation and Recovery Act, as amended (RCRA). These changes correspond to certain federal rules promulgated between May 26, 1998 and June 30, 2016 (also known as RCRA Checklist 167 and Clusters IX through XXIV) plus several changes initiated by the State. EPA has reviewed Hawaii's application with regards to federal requirements and is proposing to authorize the changes. The EPA seeks public comment prior to taking final action.

**DATES:** Comments on this proposed rule must be received by *[insert date 30 days after date of publication in the Federal Register]*.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA-R09-RCRA-2018-0267 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be

accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>. You may also view Hawaii's application from 8 a.m. to 4 p.m. Monday to Friday, excluding State holidays at Hawaii State Department of Health OPPPD, 1250 Punchbowl Street, Room 120, Honolulu, Hawaii 96813, phone number: 808-586-4188.

**FOR FURTHER INFORMATION CONTACT:** Laurie Amaro, U.S. Environmental Protection Agency, Region 9, Land Division, 75 Hawthorne Street (LND-1-1), San Francisco, CA 94105, phone number: 415-972-3364, email: [amaro.laurie@epa.gov](mailto:amaro.laurie@epa.gov).

**SUPPLEMENTARY INFORMATION:**

A. *Why are revisions to state programs necessary?*

States which have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the federal program. As the federal program changes, states must change their programs and ask EPA to authorize the changes. Changes to state programs may be necessary when federal or state statutory or regulatory authority is modified or when certain other changes occur. Most commonly, states must change their programs because of changes to EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 268, 270, 273, and 279.

*B. What decisions has EPA made in this rule?*

On December 13, 2017, Hawaii submitted a final complete program revision application seeking authorization of changes to its hazardous waste program corresponding to certain federal rules promulgated between May 26, 1998 and June 30, 2016 (also known as RCRA Checklist 167 and Clusters IX through XXIV) plus several changes initiated by the State. EPA concludes that Hawaii's application to revise its authorized program meets all statutory and regulatory requirements established by RCRA, as set forth in RCRA section 3006(b), 42 U.S.C. 6926(b), and 40 CFR part 271. Therefore, EPA proposes to grant Hawaii final authorization to operate as part of its hazardous waste program the changes listed below in Section F of this document, as further described in the authorization application.

Hawaii has responsibility for permitting treatment, storage, and disposal facilities within its borders and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA).

*C. What is the effect of today's authorization decision?*

The effect of this decision is that the changes described in Hawaii's authorization application will become part of the authorized state hazardous waste program, and therefore will be federally enforceable. Hawaii will continue to have primary enforcement authority and responsibility for its state hazardous waste program. EPA retains its authorities under RCRA sections 3007, 3008, 3013, and 7003, including its authority to:

- Conduct inspections, and require monitoring, tests, analyses or reports;
- Enforce RCRA requirements, including authorized state program requirements, and

suspend or revoke permits; and

- Take enforcement actions regardless of whether the state has taken its own actions.

This action does not impose additional requirements on the regulated community because the regulations for which Hawaii is being authorized by today's action are already effective, and are not changed by today's action.

*D. What happens if EPA receives comments that oppose this proposed action?*

EPA will consider all comments received during the comment period and address all such comments in a final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so during the comment period for this proposed rule.

*E. For what has Hawaii previously been authorized?*

Hawaii initially received final authorization to implement its base hazardous waste management program including federal program revisions through May 25, 1998 (Cluster VIII partial) on November 13, 2001 (66 FR 55115). Since initial authorization Hawaii has not applied for or received authorization for revisions to its hazardous waste program.

*F. What changes is EPA proposing with today's action?*

Hawaii has applied to EPA for authorization of changes to its hazardous waste program that correspond to certain federal rules promulgated between May 25, 1998 and July 1, 2016 (also known RCRA Cluster VIII through XXIV) and for authorization of state-initiated changes that are equivalent to or more stringent than the federal program.

EPA proposes to determine, subject to public review and comment, that Hawaii's hazardous waste program revisions as described in the State's authorization revision application dated November 22, 2017 are equivalent to, consistent with, and no less stringent than the

Federal program, and therefore satisfy all the requirements necessary to qualify for final authorization. Regulatory revisions that are less stringent than the Federal program requirements and those regulatory revisions that are broader in scope than the Federal program requirements are not authorized. Accordingly, EPA proposes to grant Hawaii final authorization for the program changes described below.

Hawaii has revised the format of its hazardous waste regulations from verbatim adoption to incorporation by reference of the Federal hazardous waste management regulations into their counterpart Hawaii Administrative Rules (HAR). HAR chapter 11-280 has been repealed without replacement. The requirements for public availability of information (RCRA §3006(f)) previously found in 11-280 are met by HAR chapters 2-71 and 11-1, HRS chapter 92F and sections 342J-14 and 342J-14.5, and provisions adopted from Federal rules (40 CFR 260.2) in HAR chapter 11-260.1.

The repeal of the verbatim adoption of the Federal program in HAR Title 11 chapters 260, 261, 262, 263, 264, 265, 266, 268, 270, 271, 273, 279, and 280 is replaced by incorporation by reference (“IBR”) into HAR Title 11 chapters 260.1, 261.1, 262.1, 263.1, 264.1, 265.1, 266.1, 268.1, 270.1, 271.1, 273.1, and 279.1 and are effective July 17, 2017. The applicable Federal rules and analogous State rules are identified in the table below.

Federal hazardous waste requirements	Analogous State authority
40 CFR parts 260-266, 268, 270, 273, 279, effective by July 1, 2016	Hawaii Administrative Rules (HAR) 11-260.1-266.1, 11-268.1, 11-270.1, 11-273.1, 11-279.1, effective July 17, 2017
40 CFR Part 124 subparts A and B	HAR 11-271.1, effective July 17, 2017

*G. Where are the revised State rules different from the Federal rules?*

Under RCRA §3009, the EPA may not authorize state rules that are less stringent than the Federal program. Any state rules that are less stringent do not supplant the federal regulations. State rules that are broader in scope than the Federal program requirements are allowed but do not become part of the enforceable federal program. State rules that are equivalent to or more stringent than the federal program may be authorized, in which case they are enforceable by the EPA.

This section does not discuss the program differences previously published in Hawaii's base program authorization in 2001, at 66 FR 55115 (November 1, 2001). Areas identified in the base program authorization as more stringent or broader in scope than the federal program have been carried forward into the new regulations as amendments or additions to the incorporation by reference of the federal regulations. This section discusses new State requirements that are more stringent, or new requirements that are broader in scope and cannot be authorized.

1. More stringent

States may seek authorization for state requirements that are more stringent than federal requirements. The EPA has the authority to authorize and enforce those parts of a state's program the EPA finds to be more stringent than the federal program. This section does not discuss each more stringent finding made by the EPA, but rather rules of particular interest that were not previously described in 2001, available at 66 FR 55115, November 1, 2001. Persons should consult the docket for this rule, including Hawaii's revised Program Description, dated May 1, 2018 for a complete list of rules determined to be more stringent than federal rules.

i. More stringent regulation of specific wastes

- a. Solvent-Contaminated Wipes: Hawaii is adopting the conditional exclusions for solvent-contaminated wipes addressed by Revision Checklist 229, but is adding one additional condition to the incorporated version of 40 CFR 261.4(a)(26) and 261.4(b)(18): containers in which solvent-contaminated wipes eligible for the exclusion are being accumulated must be labeled with the accumulation start date.
  - b. Spent lead-acid batteries: Hawaii regulates persons who generate, transport, collect, or store spent-lead acid batteries sent for reclamation (other than through regeneration) as handlers/transporters of universal waste under chapter 11-273.1. This is more stringent than the federal program, which exempts these groups from many regulations under 40 CFR 266.80.
- ii. Notification before cancellation of certain financial assurance instruments. Hawaii requires hazardous waste treatment, storage, and disposal facilities, and reclamation and intermediate facilities managing hazardous secondary materials, to notify both the State Director and the Regional Administrator before cancellation of certain financial assurance instruments. The federal regulations require only one authority to be notified, so the requirement to notify the Regional Administrator in addition to the State Director is more stringent than the federal regulation. This applies to surety bonds, letters of credit, corporate guarantees, liability endorsements, certificates of liability insurance, and standby letters of credit (Incorporated version of 40 CFR 261.151(b), (c), (g), (h), (i), (j), (k), 264.151(b), (c), (d), (h), (i), (j), (k), and (l)).
  - iii. Used oil processor facility standards: The State does not allow for exceptions to the requirement that used oil processors have emergency equipment listed in 40 CFR

279.52(a)(2). The State also does not allow for the possibility that aisle space required in 279.52(a)(5) is not necessary.

- iv. Notification in case of emergency. Hawaii requires notification of emergencies to the State Hazard Evaluation and Emergency Response (HEER) office designated on-scene coordinator in addition to the National Response Center (NRC) for: facilities handling secondary hazardous materials (HSM), generators of hazardous waste, transporters of hazardous waste and used oil, treatment, storage, and disposal facilities and used oil processors.
- v. Recordkeeping requirements. The State requires the following additional recordkeeping requirements:
  - a. Generator container storage area inspection log: Generators must keep a log of the weekly container storage area inspections.
  - b. Universal waste transporters: Universal waste transporters must maintain the same type of records that Large Quantity Handlers of Universal Waste and Destination Facilities must maintain. Records must be maintained for three years.
  - c. Used oil generators: Used oil generators must keep records of shipments, similar to the records required for used oil transporters under the federal program. These records must be maintained for three years.
  - d. Used oil processors: Used oil processors must keep records of the equipment testing and maintenance required by 40 CFR 279.52(a)(3) (in the incorporated version of 279.57(a)(2)).
- vi. Permits: The State limits the duration of Remedial Action Plans to five years instead of ten (40 CFR 270.195).

- vii. No standard permit option: The State has not adopted federal regulations allowing standardized permits.
- viii. Used oil management.
  - a. Used oil testing: The State requires that used oil transporters and processors make a hazardous waste determination for used oil sent for disposal. The State regulations allow used oil burners and marketers to either test used oil for halogens or obtain results of tests performed by the processor.
  - b. Annual reporting for used oil processors: The State requires used oil processors to submit an annual report of used oil activities by July 31. The content of the report is similar to the biennial report required in the federal program and replaces the used oil biennial reporting requirement (40 CFR 279.57(b)).
- ix. Alternative groundwater monitoring plans. The State has added a requirement that any interim status facility opting for an alternative groundwater monitoring plan under the incorporated version of 40 CFR 265.90(d) submit a copy of the plan to the department, in addition to maintaining the plan on-site at the facility.
- x. Notification of newly regulated hazardous waste activity. State regulations (HRS 342J-6.5) require generators, transporters, and owners or operators of treatment, storage, or disposal facilities newly regulated due to a change in the definition of hazardous waste (HAR chapter 11-261.1) to submit a notification within 45 days of the regulatory revision (rather than the federal requirement of 90 days) (40 CFR 270.1(b)).
- xi. Academic laboratory generator standards: The State is not adopting the alternative requirements for hazardous waste determination and accumulation of unwanted materials at

academic laboratories, (73 FR 72912, December 1, 2008 and 75 FR 79304, December 20, 2010).

xii. Used oil storage requirements: The State has added language to the incorporated version of 40 CFR 279.22, 279.45, 279.54, 279.64, to clarify that containers and aboveground tanks storing used oil must be kept closed.

## 2. Areas where the State program is broader in scope

i. Coal combustion residuals: The State is not adopting the Federal final rule that added a list of coal combustion residuals to 40 CFR 261.4(b)(4)(ii) to the ash and other waste types from coal combustion that were already included in an exemption from the definition of hazardous waste, if these residuals are co-disposed with the waste types originally listed (80 FR 21302 – 21501, October 19, 2015). Hawaii does not exclude these waste types from the definition of solid waste.

ii. Cathode Ray Tubes and Carbon Dioxide Streams in Geological Sequestration Activities: Hawaii is not adopting the Federal final rules that introduced and/or revised conditional exclusions for (1) Cathode Ray Tubes (CRTs) from the definition of solid waste (40 CFR 261.4(a)(22)) and (2) carbon dioxide (CO<sub>2</sub>) streams in geological sequestration activities from the definition of hazardous waste (at 40 CFR 261.4(h)). Hawaii program is broader in scope so long as all the conditions of the Federal exclusion are met.

## 3. Universal Waste: Electronic Item Added

The State has added a category of universal waste to HAR chapter 11-273.1 called “electronic items” and defined waste management and labeling/marketing requirements for this type of universal waste. The State determined, based on extensive research, that most waste

electronic items are toxicity characteristic hazardous wastes due to the presence and concentration of one or more metals (e.g. lead, cadmium) and may also contain other dangerous constituents, such as a brominated (flame retardant) plastics. The State also determined that electronic items (as defined in HAR chapters 11-260.1 and 11-273.1) as a category meet the criteria of 40 CFR 273.81. EPA allows authorized States to create regulations for State-only universal wastes provided that these criteria are met for the waste or waste category, including the key requirements that universal waste management is sufficiently protective of human health and the environment and that regulation as universal waste increases the likelihood of similar unregulated wastes (such as CESQG or household wastes) being diverted from non-hazardous to hazardous waste management systems.

#### 4. Procedural rules

- i. Contested case hearings and declaratory orders: The State's previous regulations governing contested case hearings (HAR chapter 11-271 subchapter B, based on 40 CFR part 22) and declaratory rulings (HAR chapter 11-271 subchapter C) for the hazardous waste program have been repealed. The State Department of Health has similar department-wide procedures for case hearings and declaratory orders that now apply (HAR chapter 11-1). The State is not adopting an equivalent to 40 CFR 124.19 and instead adds procedures for requesting a contested case hearing in the incorporated version of 40 CFR 124.15 in HAR chapter 11-271.1.
- ii. Public availability of information: The State's previous regulations regarding public availability of information and treatment of confidential business information (HAR chapter 11-280) have been repealed. Requests for public information will be handled under HRS

342J-14 and 342J-14.5 and applicable provisions of HRS chapter 92F and HAR chapter 2-71, which are referenced in the incorporated version of 40 CFR 260.2. EPA determines that Hawaii's requirements for public availability of information and treatment of confidential business information are substantially similar to EPA's federal regulations.

Other than the differences discussed above, Hawaii incorporates by reference the remaining federal rules listed in Section F; therefore, there are no significant differences between the remaining federal rules and the revised state rules being authorized today.

*H. Who handles permits after the authorization takes effect?*

Hawaii will continue to issue permits for all the provisions for which it is authorized and will administer the permits it issues. Section 3006(g)(1) of RCRA, 42 U.S.C. 6926(g)(1), gives EPA the authority to issue or deny permits or parts of permits for requirements for which the State is not authorized. Therefore, whenever EPA adopts standards under HSWA for activities or wastes not currently covered by the authorized program, EPA may process RCRA permits in Hawaii for the new or revised HSWA standards until Hawaii has received final authorization for such new or revised HSWA standards.

*I. What is codification and is EPA codifying Hawaii's hazardous waste program as authorized in this rule?*

Codification is the process of placing 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 referencing the authorized state rules in 40 CFR part 272. EPA is not codifying the authorization of Hawaii's changes at this time. However, EPA reserves the amendment of 40 CFR part 272, subpart M for this authorization of Hawaii's program changes until a later date.

*J. Administrative Requirements*

The Office of Management and Budget (OMB) has exempted this action (RCRA State authorization) from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). This action authorizes state requirements for the purpose of RCRA 3006 and imposes no additional requirements beyond those imposed by state law. Therefore, this action is not subject to review by OMB. This action is not an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action because actions such as this proposed authorization of Hawaii's revised hazardous waste program under RCRA are exempted under Executive Order 12866. This action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Because this action authorizes pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). For the same reason, this action also does not significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely authorizes state requirements as part of the state RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because

it is not economically significant and it does not make decisions based on environmental health or safety risks. This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355 May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

Under RCRA 3006(b), the EPA grants a State's application for authorization, as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a state authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the “Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings” issued under the Executive Order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs,

policies, and activities on minority populations and low-income populations in the United States. Because this rule authorizes pre-existing state rules which are at least equivalent to, and no less stringent than existing federal requirements, and impose no additional requirements beyond those imposed by state law, and there are no anticipated significant adverse human health or environmental effects, the rule is not subject to Executive Order 12898. The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This action nevertheless will be effective 60 days after the final approval is published in the Federal Register.

## **List of Subjects in 40 CFR Part 271**

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

**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 8, 2018.

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Deborah Jordan,

Acting Regional Administrator, Region 9

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