

Federal Register

Tuesday
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Part V

Environmental Protection Agency

40 CFR Part 261

Hazardous Waste Management System;
Definition of Hazardous Waste; "Mixture"
and "Derived From" Rules; Proposed
Rule

**ENVIRONMENTAL PROTECTION
AGENCY**
40 CFR Part 261
[FRL-4109-1]
**Hazardous Waste Management
System; Definition of Hazardous
Waste; "Mixture" and "Derived From"
Rules**
AGENCY: U.S. Environmental Protection Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: On May 19, 1980 (45 FR 33066), EPA promulgated regulations to govern the management of hazardous waste under subtitle C of the Resource Conservation and Recovery Act (RCRA). As part of these rules, EPA defined "hazardous waste" to include, among other things, mixing hazardous waste with other solid waste or otherwise managing hazardous waste (40 CFR 261.3). These rules are known, respectively, as the "mixture" and "derived-from" rules.

On December 6, 1991, a panel of the United States Court of Appeals for the District of Columbia Circuit ruled that EPA had failed to give sufficient notice and opportunity for comment in promulgating the "mixture" and "derived-from" rules. The court therefore vacated the rules and remanded them to the Agency. On January 21, 1992, EPA filed a petition with the court requesting reconsideration of its decision. The court has denied this petition. At the invitation of the court, EPA is simultaneously removing and reissuing 40 CFR 261.3, including the "mixture" and "derived-from" rules, on an interim basis under section 553(b)(3)(B) of the Administrative Procedure Act (APA). The interim final rule which removes and reissues 40 CFR 261.3 is published elsewhere in today's *Federal Register*.

Today's notice of proposed rulemaking solicits comment on the "mixture" and "derived-from" rules and on other approaches to regulating waste mixtures and residues.

DATES: EPA will accept public comments on this proposed rule until April 2, 1992. Comments postmarked after this date may not be considered.

ADDRESSES: The public must send an original and two copies of all comments to: EPA RCRA Docket (OS-305), 401 M St., SW., Washington, DC 20460. The comments must be marked with the docket number F-92-MDFP-FFFFF. The Office of Solid Waste (OSW) docket is located in room 2427 at the above address, and is open from 9 a.m. to 4

p.m. Mondays through Fridays, except Federal holidays. The public must make an appointment to view docket materials by calling (202) 260-9327. The public may copy material from any regulatory docket at a cost of \$0.15 per page.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424-9346 or (703) 920-9810. For technical information contact Ms. Marilyn Goode, Office of Solid Waste (OS-332), U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, (202) 260-8551.

SUPPLEMENTARY INFORMATION:
OUTLINE

- I. Authority
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- III. Solicitation of Comments
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- V. Regulatory Flexibility Act
- VI. Paperwork Reduction Act

I. Authority

These regulations are proposed under the authority of sections 1006, 2002(a), and 3001-3005 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6905, 6912(a), and 6921-25.

II. Background

For the background to this proposed rule and a discussion of the remanded "mixture" and "derived-from" rules, see the Response to Court Remand: Interim Final Rule published elsewhere in today's *Federal Register*.

III. Solicitation of Comments

The Agency solicits comment on the appropriateness of the "mixture" and "derived-from" rules, and invites the public to suggest alternative approaches for regulating waste mixtures and residues. In the preamble to the final rules, EPA acknowledged that the "mixture" and "derived-from" rules would result in the regulation under subtitle C of some mixtures and residues with low concentrations of hazardous constituents. However, EPA concluded that the waste-specific delisting process would allow the removal of many such wastes from the hazardous waste system. In its 1990 RCRA Implementation Study (RIS), EPA acknowledged that there is a subset of wastes in the subtitle C system that can be managed just as effectively in a less restrictive fashion. The Agency still believes that to be the case, and has been considering several ways to address these concerns.

EPA believes that the decision in *Shell Oil v. EPA* (no. 80-1532 *et al.* (D.C. Cir., December 6, 1991)) provides a timely and appropriate opportunity to re-examine the scope of the "mixture" and "derived-from" rules. The Agency is therefore requesting comment in this notice on the impacts of the rules and on alternative ways to revise them. Specifically, EPA invites comment on which wastes are brought into the subtitle C system by the "mixture" and "derived-from" rules, and which of these wastes are not appropriately regulated under subtitle C. EPA welcomes comment on the risks these wastes present, the extent to which the "mixture" and "derived-from" rules reduce these risks, and the extent to which the wastes are already covered by other RCRA management requirements. The Agency also solicits comments on the costs of the "mixture" and "derived-from" rules. EPA anticipates that commenters will have both anecdotal and quantitative information. The Agency is particularly interested in information that reflects actual situations and the effects of the current regulatory regime.

EPA is considering alternative ways of addressing the problems posed by waste mixtures and by the wastestreams and residual materials associated with treating hazardous waste. One option would be a rule which would establish concentrations of hazardous constituents (measured either in leachate or in the waste itself) below which a waste, a mixture, or a residue would no longer be considered hazardous. The Agency believes that such concentrations should preferably be based upon an assessment of the health and environmental risks posed at varying concentrations. Concentration levels could also be based on attributes of particular wastes or materials.

EPA will consider options similar to that discussed in the December 18, 1978 proposal (43 FR 58947). Under that proposal, a listed waste would be delisted from subtitle C, and thus no longer subject to regulation, if a regulated party demonstrated that the waste did not exhibit any of the hazardous waste characteristics (i.e., ignitability, corrosivity, reactivity, and toxicity). In the 1978 notice, EPA solicited comment on four characteristics in addition to the four that have since been promulgated. Then, in the preamble to the May 19, 1980 final rules, the Agency noted that it had listed certain wastes because they pose hazards that were not reflected by any of the four characteristics promulgated in 1980 (e.g. the listed waste contained

carcinogens not covered by the then Extraction Procedure characteristic nor the subsequent toxicity characteristic). Further, in 1984, Congress added the statutory requirement in 3001(f) of RCRA that, when evaluating delisting petitions, "the Administrator shall consider factors (including additional constituents) other than those for which the waste was listed in the Administrator has a reasonable basis to believe that such additional factors could cause the waste to be a hazardous waste." The Agency solicits comment on options that are similar to the 1978 proposal, but address the issue noted by EPA in 1980 and the statutory amendments added in 1984.

EPA welcomes comment on all of the options discussed above and on any others that would achieve the statutory goal of protecting human health and the environment. Meanwhile, EPA has been discussing these issues with interested parties and considering possible modifications to these rules. By April 28, 1992, EPA will publish a **Federal Register** notice further explaining options the Agency is considering and seeking public comments on those options.

IV. Executive Order 12291

Under Executive Order No. 12291, EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis (RIA). The "mixture" and "derived-from" rules were first promulgated in 1980, before the enactment of Executive Order No. 12291. Thus, EPA did not perform and does not now have reliable estimates of the potential costs and benefits expected to have resulted from these rules. The Office of Management and Budget has declared the "mixture" and "derived-from" rules to be major rules under Executive Order No. 12291. Therefore, EPA will conduct an RIA before final promulgation.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires EPA and other agencies to prepare an initial regulatory flexibility analysis for all proposed regulations that have a significant impact on a substantial number of small entities. No regulatory flexibility analysis is required, however, where the head of the Agency certifies that the rule will not have a significant

economic impact on a substantial number of small entities. Because this proposal, if promulgated, would result in fewer wastes being regulated as hazardous wastes under subtitle C, it would impose no new costs or economic impacts on small entities. I hereby certify, pursuant to 5 U.S.C. 605(b), that this regulation will not have a significant impact on a substantial number of small entities.

VI. Paperwork Reduction Act

This proposal contains no information collection requirements which need approval by the Office Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Part 261

Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Dated February 18, 1992.

William K. Reilly,

Administrator.

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