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NO. 42668-4

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

K.P. MCNAMARA NORTHWEST, INC. AND KERRY MCNAMARA,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

RESPONDENT/CROSS APPELLANT'S REPLY BRIEF

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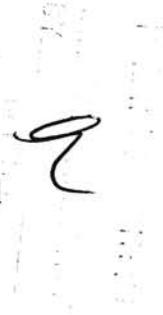


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I. INTRODUCTION

The Department of Ecology (Ecology) respectfully submits this Reply to address two points. First, the facts of the violations were properly before the Pollution Control Hearings Board (Board) through the issues identified for hearing. Second, the issues not briefed to the superior court that Kerry McNamara and K.P. McNamara Northwest, Inc. (McNamara) raise in their response brief are not properly before this Court.

The superior court erroneously ruled that the Board engaged in an unlawful procedure or decision making process when it upheld half of the penalty issued to McNamara for factual reasons not set out in the Notice of Penalty issued by Ecology. CP 376. As Ecology's opening brief demonstrates, the facts of the violations were set out in the Penalty, the Board did not engage in an illegal procedure when it decided the case, and the Board fully considered all relevant facts prior to making its decision.

McNamara makes a number of confusing arguments for why the Board erred procedurally, and in the process misstates and mischaracterizes the record. First, McNamara claims that only one of the Board's seven stated issues was dispositive of the portion of the Penalty related to its receipt of dangerous waste. App. Reply Br. at 37-39. Second, McNamara contends that the facts underlying the violations were

not before the Board because the Board's presiding officer restated issues for hearing. App. Reply Br. at 28-29. Finally, McNamara erroneously relies on a discussion during the hearing to argue that the Board stated that facts related to its mismanagement of dangerous waste were not relevant to the Penalty. App. Reply Br. at 31-34.

As explained below, none of these arguments have any merit. The Board did not engage in an illegal procedure that justifies remand under the Administrative Procedure Act (APA). There was no "bait and switch" of issues, as McNamara appears to allege,¹ because McNamara was fully appraised of all the issues before the Board. The fact is that McNamara received a full and fair evidentiary hearing, after which the Board affirmed Ecology's penalty in full. This Court should reverse the superior court's Order of Remand and affirm the Board's decision.

II. ARGUMENT

A. **Because The Facts Of McNamara's Mismanagement Of Dangerous Waste Were Before The Board, The Superior Court Erred By Remanding**

The facts of the violations found at the McNamara facility were properly before the Board through the issues spelled out in the Pre-Hearing Order. Ecology issued a \$20,000 penalty (Penalty) to McNamara in part because it was operating as a dangerous waste treatment, disposal

¹ App. Reply Br. at 39 ("the Board substituted issues").

and storage facility (often referred to as a “TSD facility” or a “TSDF”) without a permit. McNamara operated as a dangerous waste treatment, disposal and storage facility when it received containers of dangerous waste that did not meet the regulatory definition of “empty.” A container, or “tote,” is “empty” when it holds more material than allowed.² McNamara’s mismanagement of these “non-empty” totes led to Ecology’s enforcement, the facts related to them were properly before the Board, and therefore this Court should reverse the Order of Remand.

1. The issues in the Pre-Hearing Order made it clear that facts underlying the Penalty would be adjudicated at hearing.

The Board, a quasi-judicial body with expertise in environmental matters, is charged with “providing uniform and independent review of Ecology actions.” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 592, 90 P.3d 659 (2004). The Board conducts trial-like adjudicative hearings, which include briefing, opening statements, presentation of evidence and witnesses. *Id.* at 597. Washington courts have interpreted the Board’s rules “to allow Ecology and all other parties

² The definition of empty in state law is found in WAC 173-303-160(2). The federal regulation defining “empty” under the federal Resource Conservation and Recovery Act (RCRA) is found at 40 C.F.R. 261.7(2). A container of the size normally received at McNamara (approximately 300 gallons) is “empty” or “RCRA empty” when all wastes that can be removed by commonly employed practices have been taken out, and the volume remaining in the container is no more than 0.3 percent of the container’s total capacity. WAC 173-303-160(2)(a). *See also* Section B of this brief for further discussion.

to present all relevant information for the Board to make a decision.” *Id.* at 597-98 (internal citations omitted).

McNamara claims that “[o]nly issue number 5 [from the Pre-Hearing Order] and issue number 3 (concerning the shipment of rinse-water offsite) are related to Ecology’s penalty assessment.” App. Reply Br. at 29. The record demonstrates that this contention is incorrect.

The full list of the seven issues in the Pre-Hearing Order was:

1. Is Kerry McNamara a person liable pursuant to the Hazardous Waste Management Act (Chapter 70.105 RCW) for the alleged violations of K.P. McNamara Northwest, Inc.?
2. Did K.P. McNamara Northwest, Inc. violate the Washington State dangerous waste regulations Chapter 173-303 WAC as specified in Order No. 6237?
3. Did appellant “inappropriately dispose of” dangerous waste (rinse-water) when the waste was transported to and treated at an appropriate permitted waste water treatment facility?
4. Does Ecology’s jurisdiction under the Washington State Hazardous Waste Management Act extend to the trench and/or sump at which Ecology claims dangerous or hazardous waste was generated (i.e. the “point of generation”)?
5. Is appellant required to obtain a permit or to comply with the requirements for operating a dangerous waste treatment, storage and disposal (TSD) facility if appellant receives from off-site generators containers which are not “empty” pursuant to WAC 173-30[3]-160 and/or 40 CFR 261.7(b)(1) and which contain dangerous waste if the container was shipped without a hazardous (dangerous)

waste manifest and its contents were [not] designated a “dangerous waste” by the generator?³

6. Did K.P. McNamara violate the hazardous waste statute and regulations as alleged in Notice of Penalty No. DE 6229?

7. Is the penalty of \$20,000 issued through Notice of Penalty Incurred and Due No. DE 6229 on December 3, 2008, reasonable under the facts and circumstances of the case?

AR 5:2; CP 297.⁴ Issues #3 and #5 do relate to the Penalty. Additionally, Issue #6 addresses whether the violations that led to the Penalty took place, and Issue #7 addresses the reasonableness of the Penalty.

Of the seven issues recorded in the Pre-Hearing Order, four were adjudicated at hearing. App. Reply Br. at 31; RP 6:22-23.⁵ Specifically, the Board heard evidence on whether or not McNamara violated the regulations as stated in the enforcement order (Issue #2),⁶ whether or not McNamara was required to obtain a permit if it received dangerous waste

³ The parties agree that omission of the word “not” eight words from the end of Issue No. 5 in the Pre-Hearing Order was a typographical error.

⁴ “AR” is used to designate the administrative record filed in this matter, identified at Clerk’s Papers (CP) 60-61. Citations to the administrative record will appear as AR XX:yy where XX is the document number and yy the page number. Because relevant portions of the administrative record were submitted by the parties in briefing at the superior court, including some of the hearing exhibits, documents are also pincited to CP page numbers for ease of reference. If a document from the administrative record is not in Clerk’s Papers, a copy is provided for the Court’s convenience.

⁵ Citations to the Report of Proceedings (RP) refer to the Transcript of Proceedings before the PCHB, identified at CP 62, and include the page number followed by the appropriate line or lines.

⁶ Ecology issued an enforcement order in addition to a penalty. Only the penalty is at issue in this appeal.

(Issue #5), whether or not McNamara violated the regulations as alleged in the Penalty (Issue #6), and whether the Penalty was reasonable (Issue #7).⁷

The Notice of Penalty referenced in Issue #6 listed the two violations on which Ecology based its Penalty, the second of which was:

173-303-280 and -400: Failure to obtain a permit or to comply with the requirements for operating a dangerous waste treatment, storage and disposal (TSD) facility. KP accepted totes from off-site generators. These totes were not “empty” as defined in WAC 173-303-160(2), and contained significant amounts of ignitable, extremely hazardous and toxic dangerous waste. KP operated as an unpermitted dangerous waste treatment, storage and disposal facility when it accepted the totes containing dangerous waste.

AR 1:12; CP 265. This statement of the violation in the Notice of Penalty sets out the facts Ecology relied on to issue the Penalty.⁸ Thus, Issue #6, referencing the Penalty itself, gets at whether or not McNamara acted as an unpermitted dangerous waste treatment, storage and disposal facility, and whether it failed to comply with the requirements for operating such a facility, when it accepted non-empty containers of dangerous waste. After hearing the evidence, the Board concluded that Ecology met its burden of proving the violations, and the Board determined by applying the law to

⁷ The other three issues were resolved on summary judgment, including the issue of Kerry McNamara’s personal liability (Issue #1), McNamara’s improper disposal of the rinsewater it generated (Issue #3), and the mootness of the question of Ecology’s authority over a trench and sump that had been cemented shut (Issue #4). AR 22:20; CP 311.

⁸ Those facts were that McNamara had no permit, McNamara accepted non-empty totes from offsite generators, and the totes contained dangerous waste.

the facts that McNamara was subject to the requirements of WAC 173-303-280(1) and -400, which apply to permitted waste treatment, storage and disposal facilities. AR 28:23 ¶ 12; CP 292.

McNamara ignores the inherently factual nature of Issue #6 and instead focuses exclusively on the question of law it posed in Issue #5. App. Reply Br. at 38. Issue #5's question of law asked whether a facility was required to have a permit if the facility receives non-empty totes from off-site generators, if the container were shipped without a dangerous waste manifest and were not designated dangerous waste by the generator. App. Reply Br. at 39. This pure question of law was premised on a set of facts that turned out not to be descriptive of operations at the McNamara facility because McNamara did more than merely receive dangerous waste, it subsequently stored and processed the waste. *See infra* at B. The Board upheld the Penalty based on actual facts established at hearing, not the hypothetical set of facts contained in the issue statement. AR 28:23, CP 292 ¶ 12.

The superior court erred in ruling that the Board engaged in an unlawful procedure on the basis that it found that the facts of the violations were not set out in the Penalty, and that the Board's decision therefore "exceeded the scope of the Pre-Hearing Order." CP 376. The facts were contained in the Notice of Penalty and Issue #6 put them in

front of the Board. The superior court's Order on Remand requiring the Board to make a ruling of law on Issue #5 should be reversed, and the Board's decision on McNamara's receipt of dangerous waste should be affirmed. CP 996.

2. Ecology's factual findings were not restated or eliminated from the hearing.

McNamara asserts that the administrative law judge presiding for the Board at the pre-hearing conference, somehow "restat[ed] for hearing the Ecology finding" that McNamara, by accepting containers of dangerous waste, was operating as an unpermitted dangerous waste treatment, storage and disposal facility. App. Reply Br. at 28 (emphasis in the original).⁹ Even if this did occur, which it did not, McNamara fails to show how this would constitute an unlawful procedure justifying remand. Further, McNamara fails to point to anywhere in the record that supports its assertion that the judge transformed findings made by Ecology in its enforcement documents into hearing issues. To the contrary, the record demonstrates that the issue McNamara references was proposed by McNamara itself.

In preparation for the pre-hearing conference, the parties filed their proposed lists of legal issues. AR 3, 4; CP 299-305. McNamara listed

⁹ See also App. Reply Br. at 40.

seven issues (with subparts). AR 4:2-3; CP 300-01. Ecology listed two issues. AR 3:1; CP 303. The list of issues in the Pre-Hearing Order combined proposed issues from the lists filed by the parties.

Issue #5 on McNamara's list was:

Is appellant required to obtain a permit or to comply with the requirements for operating a dangerous waste treatment, storage and disposal (TSD) facility if appellant receives from off-site generators containers which are not "empty" pursuant to WAC 173-303-160 and/or 40 CFR 261.7(b)(1) and which contain dangerous waste if the container was shipped without a hazardous (dangerous) waste manifest and its contents were not designated a "dangerous waste" by the generator?

AR 4:2; CP 300. McNamara's proposed issue appears, word for word, as Issue #5 in the Board's Pre-Hearing Order. AR 5:2; CP 297. The record does not support McNamara's contention that Judge Brown restated Ecology findings to create issues. However, even if the Board had altered the wording of one issue, and went on to decide the case on the other issues presented, this would not constitute an illegal procedure justifying remand under the APA.

3. McNamara's erroneous identification of the context and relevance of a discussion before the Board is misleading.

To bolster its argument that the Board should not have considered evidence of McNamara's mismanagement of waste, McNamara points to a discussion between counsel and the Board at hearing regarding testimony

about a particular set of containers at the facility. App. Reply Br. at 32-34. The discussion stems from a series of objections from McNamara to the testimony of the Ecology inspector. RP 44:9-45:18. After objecting to the form of the testimony, McNamara then objected as to foundation, because at that point in the hearing, Ecology's inspector was testifying about McNamara's management of 55-gallon drums that held the residues emptied from the bottom of containers, referred to as container "heels." RP 46:20-21.^{10,11} The containers at issue were not non-RCRA empty containers of dangerous waste received from offsite, but rather 55-gallon drums that had been filled by McNamara itself. *Id.* McNamara argued to the Board that the heel material was not regulated dangerous waste, and therefore management of the 55-gallon drums full of such heels was not relevant. RP 46:22-47:1. The Board ultimately decided that the management of the 55-gallon drums of drained heels was relevant to Ecology's enforcement order, but not to the Penalty. App. Reply Br. at 32-34; RP 47:10-49:5.

However, in its brief, McNamara claims that this discussion was about the non-empty containers of dangerous waste it received from

¹⁰ "Mr. Benke: I have another objection to this line of the testimony. It's my understanding that the testimony being given now relates to the management of heels that have been drained from these containers." RP 46:18-21 (emphasis added).

¹¹ The drums are first identified by the inspector at RP 42:8-13, then discussed further at RP 43:20-44:7.

others. App. Reply Br. at 32. McNamara's misstatement of the identity of the particular containers that were subject of the discussion leaves the erroneous impression that they were non-RCRA empty containers of dangerous waste that McNamara received from outside sources. App. Reply Br. at 37-38.¹² The presiding officer's statement in the hearing transcript that the management of the containers under discussion was relevant only to the order—which McNamara wants to use to show that its management of non-empty containers of dangerous waste received from other sources was not before the Board under the Penalty—in fact relates to the 55-gallon drums, not to non-empty totes of dangerous waste. App. Reply Br. at 38; RP 48:24-49:5. No such statement was made regarding the non-RCRA empty containers.

After making its objection as to the relevance of its management of the 55-gallon drums of heels (RP 46:18-21), McNamara stated:

The other relevancy objection is that I thought that what we were going to be litigating was this issue of the alleged non-RCRA empty totes out in the yard and how they were managed, not the issue of whether or not the drums of these heels should have been placarded while the heels were being profiled.

¹² "In response to continued objections, the Board stated, and counsel for Ecology confirmed, that the \$10,000 penalty related only "receipt" of non-"RCRA empty" totes and that KPM-NW's management of those wastes upon receipt was relevant only to reasonableness of the penalty amount." App. Reply Br. at 37-38.

RP 47:2-7 (emphasis added). McNamara cannot now credibly maintain that the management of the non-RCRA empty containers of dangerous waste was not before the Board.

McNamara does not demonstrate how the Board used an illegal procedure justifying remand. The Board appropriately heard evidence on all matters relevant to whether the violations took place. It did not reach the legal question of a facility's receipt of non-empty containers posed in Issue #5 because the facts of the violations were dispositive of the penalty and therefore the question was irrelevant. McNamara had a full opportunity to litigate this case at an evidentiary hearing. The Court's order of remand should be reversed and the Board's order affirmed.

B. Issues Not Briefed To Superior Court Are Not Properly Before This Court

At superior court McNamara raised multiple assignments of error on the merits of its receipt of dangerous waste. CP 3-7. The superior court did not reach those issues because it ordered remand on the procedural issue. CP 994-997. McNamara suggests that this Court's de novo review under the APA includes review of the issues the superior court did not reach.¹³ App. Reply Br. at 39. However, "[o]nly issues

¹³ McNamara, apparently in the alternative, also appears to seek remand of these same issues because their review was mooted by the Order of Remand. App. Reply Br. at 48. Included in McNamara's list of issues to be remanded is an evidentiary ruling of the Board. *Id.*, CP 7. The evidentiary ruling was not mooted by the remand, not briefed

raised in the assignments of error, or related issues, and argued to the appellate court are considered on appeal.” *U.S. West Commc’ns, Inc. v. Wash. Utils. & Transp. Comm’n*, 134 Wn.2d 74, 112, 949 P.2d 1337 (1998). The only issue before this Court related to McNamara’s receipt of dangerous waste is Ecology’s cross-appeal on the superior court’s finding that the Board engaged in an illegal procedure. However should this Court determine that it may reach the merits, Ecology replies as follows:

1. Dangerous Waste Regulations required McNamara to have a permit when it received dangerous waste.

McNamara received dangerous waste subject to regulation when it received a non-empty container that held dangerous waste. WAC 173-303-160(3)(b); Identification and Listing of Hazardous Waste, 45 Fed. Reg. 78525, 78529 (Nov. 25, 1980).¹⁴ McNamara does not dispute that it received containers holding so much material that those containers were not “empty.” It also does not dispute that at times the material in the non-empty containers was dangerous waste. Facilities that receive dangerous waste must have a permit to do so. WAC 173-303-280; 45 Fed.

to the superior court, and has not been briefed to this Court. It should therefore be deemed abandoned. RAP 12.1; RAP 10.3(a)(6); “If a party fails to support assignments of error with legal arguments, they will not be considered. . . .” *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 46, 785 P.2d 815 (1990).

¹⁴ In general, the terminology in state regulations is “dangerous waste” and in the corresponding federal regulations is “hazardous waste.” For the Court’s convenience, attached hereto as Attachment 2 is a copy of relevant excerpts of Identification and Listing of Hazardous Waste, 45 Fed. Reg. 78524 (Nov. 25, 1980).

Reg. 78529. McNamara did not have a permit. AR 22:16; CP 307.

Therefore, McNamara was in violation of the regulations.

2. McNamara's reliance on the "manifest discrepancy" rules is misplaced.

McNamara argues that the "manifest discrepancy" regulations allowed it to receive dangerous waste at its facility. App. Reply Br. at 44. These regulations instruct a facility how to respond to a shipment of dangerous waste that does not conform to its shipping manifest, by virtue of either the waste's quantity or quality. WAC 173-303-370(4).¹⁵ The manifest discrepancy regulations do not apply to facilities like McNamara however, because they apply to permitted transfer, storage and disposal facilities. Even if WAC 173-303-370(4) could apply to McNamara, the record before the Board demonstrated that McNamara failed to comply with any of its provisions.

a. McNamara's unpermitted receipt of dangerous waste violated the regulations.

The manifest discrepancy regulations do not allow McNamara to receive dangerous waste without a permit. In support of its argument that they do, McNamara relies heavily on the language of the 2005 Modification of the Hazardous Waste Manifest System (70 Fed. Reg.

¹⁵ WAC 173-303-370 was revised effective July 31, 2009. Attached as Attachment 1 is WAC 173-303-370 as it existed during the relevant time period in this case.

10776-10825 (Mar. 4, 2005)), in which is published the most recent federal rule on manifest discrepancies. App. Reply Br. at 43-47. The federal rule was not in effect in Washington at the time of the violations.

McNamara argues that its management and holding of the dangerous waste it received was not “storage” of those materials (within the meaning of the dangerous waste regulations), but rather something else termed “temporary staging” or “secure, temporary custody,” and therefore McNamara was exempt from the requirement to have a transfer, storage or disposal permit when it received this dangerous waste. App. Reply Br. at 46. McNamara claims that “USEPA was careful in its wording” so as not to imply the need for a permit. App. Reply Br. at 46. McNamara cites to no authority for this claim.

The manifest discrepancy rules do not create a loophole under which unpermitted facilities can receive dangerous waste. If the rules did so, any business would be able to receive dangerous waste and have such waste on site for 60 days entirely without consequence and at peril to human health and the environment. Even if the application of the discrepancy rules were expanded from treatment, storage and disposal facilities to include businesses like McNamara that generate their own dangerous waste (in McNamara’s case, its rinsewater), businesses such as neighborhood gas stations, printers, and dry cleaners would all be

permitted to take in dangerous waste and hold that waste on site for two months, regardless of proximity to schools, residences, water bodies or other sensitive locations. This would undermine the protections provided by the Hazardous Waste Management Act (RCW 70.105) and the regulations.

The essence of McNamara's argument is that it can somehow "receive" dangerous waste and hold it in limbo. App. Reply Br. at 44 ("The rule expressly contemplated that the owner or operator of the receiving facility might take possession of the waste"). To the contrary, If McNamara received and then stored or treated dangerous waste, it was obligated to comply with the regulations. WAC 173-303-280.

Ecology's interpretation of what "receipt" of dangerous waste means is consistent with the Ninth Circuit's interpretation of "receipt" under the corresponding federal regulations. The Ninth Circuit said "we cannot conceive of a situation in which a person who did not have a permit could receive hazardous waste without subsequently 'treat[ing], stor[ing], or dispos[ing] of' that waste." *United States v. Fiorillo*, 186 F.3d 1136, 1148 n.11 (9th Cir. 1999). The court went on to say "[i]n fact, RCRA's definitions of the latter three terms establish that treatment, storage, and disposal occupy the field of possibilities for a recipient of hazardous waste: a person who has it either must keep it, get rid of it, or change it

into something else.” *Id.* McNamara provides no authority for its contention that, when it held containers of dangerous waste on its site, it was doing something other than storing that dangerous waste as contemplated in the dangerous waste regulations.

McNamara’s contention also ignores the context of the manifest discrepancy rules. In both state and federal regulation, the rules are found within the regulations that apply to permitted treatment, storage and disposal facilities.¹⁶ Even the final federal rule publication on which McNamara relies refers to facilities holding rejected wastes as “TSDFs” or treatment, storage and disposal facilities. *See* App. Reply Br. at 46 (citing to 70 Fed. Reg. at 10809).

The permitting process for treatment, storage and disposal facilities provides several layers of protection of human health and the environment. The first layer is requirements for where such a facility can be located. WAC 173-303-282. Additional protections are contained in the permit itself, which incorporates the standards and requirements of the regulations into the plan of the individual facility. WAC 173-303-280

¹⁶ In the state dangerous waste regulations WAC 173-303-280 through WAC 173-303-395 apply to permitted facilities, and the manifest discrepancy rules are at WAC 173-303-370. In federal regulation, 40 C.F.R. 264 contains the standards for owners and operators of hazardous waste treatment, storage and disposal facilities, and the manifest discrepancy regulations are found at 40 C.F.R. 264.72. The federal law also codifies the manifest discrepancy regulations in its interim status facility standards at 40 C.F.R. 265.72.

through WAC 173-303-395. McNamara had not undergone the permitting process, so the protections that process affords were not present at the facility.

Ecology's evidence at hearing demonstrated that McNamara had received and was storing non-empty containers of dangerous waste.¹⁷ Mr. McNamara admitted in his testimony that McNamara received non-empty containers on a regular basis averaging once a month, and that containers sometimes came in groups of three or four at a time. RP 405:1-4. In actual fact, during one visit on October 17, 2008, Ecology's inspector identified numerous non-empty containers on site, some of which appeared to contain dangerous waste. RP 111:13-115:10. McNamara's consultant confirmed that some of these non-empty containers held dangerous waste. RP 351:11-22. When McNamara received those containers, it was required to have a permit to do so.

b. McNamara failed to comply with the manifest discrepancy regulations.

Even if the manifest discrepancy regulations could have applied at McNamara, the Board found that McNamara failed to comply with the requirements of those regulations. AR 28:22 ¶ 11; CP 291. The

¹⁷ Respondent's Hearing Exhibits R-2 – Compliance Inspection Reports (Aug. and Sept. 2007) (CP 691-705 at 702,705), R-8 - Immediate Action Letter (Oct. 20, 2008) (relevant pages at CP 766-772 at 772) and R-10 – Compliance Inspection Report (Oct. 27, 2008) (CP 778-780 at 778).

regulations in effect at the time of Ecology's inspections required the receiver of a shipment that did not conform with the shipping documents to attempt to reconcile the discrepancy, and if that took longer than fifteen days, to notify Ecology by letter. WAC 173-303-370(4)(b). The regulations also authorized sending the shipment to a proper facility. WAC 173-303-370(5)(b). The Board found that McNamara "presented no evidence, other than the vague testimony of Mr. McNamara, that the facility attempted to resolve discrepancies." AR 28:22 ¶ 11; CP 291. McNamara also failed to present any evidence that it had submitted letters to Ecology reporting the discrepancies. *Id.*

In fact, with regard to the non-empty containers holding dangerous waste identified on October 17, 2008, the Ecology inspector testified that McNamara employees told her they were not contacting the generators. RP 112:25-113:3. This violated WAC 173-303-370(4)(b), because McNamara was not even attempting to resolve the shipment discrepancies. The staff also indicated they were going to process the materials themselves. *Id.* The facility had no permit to process dangerous waste, so such processing violated the dangerous waste regulations.

Ecology's inspector also testified that, in general, the practice at McNamara was:

They [non-empty containers] were off loaded from a truck, placed over a gravel driveway. The operator, Terrance Dutchman, led me to believe that there was no other course of action for those totes other than routine processing. They were being staged outside to be worked through their process, through their regular processes. There was no indication that those totes were – that they were working with a generator or that he even knew who the generator was. There was no indication that he knew what the risks were associated with any of the materials that were in the totes. There was no indication that he understood what the potential spill risks were for having materials stored outside above gravel.

RP 183:5-18.¹⁸ The inspector also saw no indication that the non-empty containers of dangerous waste were being isolated from other totes.

RP 183:19-20. Additional testimony and evidence led the Board to conclude that “non-empty totes remained on site for considerably more than a few days at a time, and that they were stored outdoors, uncovered, on gravel without any secondary spill containment, and without proper labeling or accumulation start date information.” AR 28:22 ¶ 11; CP 292.

Although not altogether clear, McNamara appears to argue that the 2005 federal manifest discrepancy rules should be applied to its facility. App. Reply Br. at 43-46. Ecology’s evidence demonstrated that McNamara was not complying with those regulations either. McNamara

¹⁸ Again, McNamara, as an unpermitted facility, violated the regulations when it processed dangerous waste. McNamara’s failure to attempt to resolve the discrepancy violated WAC 173-303-370(4)(b). McNamara’s handling of dangerous waste did not conform to the standards for dangerous waste treatment, storage, and disposal facilities, WAC 173-303-280 through WAC 173-303-395.

points to no evidence indicating McNamara consulted with waste generators as required by 40 C.F.R. 264.72(d)(1). As the inspector's testimony indicated, McNamara's handling of non-empty containers could not reasonably be characterized as "secure" custody.¹⁹ In fact, McNamara concedes that it did more than just passively store the non-empty containers. App. Reply Br. at 22. At times McNamara combined residues from two or more containers and then disposed of it. *Id.* When it did so, McNamara was acting as an unpermitted treatment, storage and disposal facility. Respondent's Hearing Exhibit R-10 – Compliance Inspection Report (Oct. 27, 2008) (CP 778) (explaining that McNamara "would further act as a TSD if they tried to bulk chemicals for disposal (i.e., drained residue out of the totes for disposal). This is also prohibited unless they meet the TSD standards.")

Even if the manifest discrepancy rules had applied at the McNamara facility, the record demonstrates that McNamara did not comply with their requirements. McNamara fails to point to anyplace in

¹⁹ See 40 C.F.R. 264.72(d)(2). Dangerous waste was offloaded onto gravel, not a solid surface. RP 114:7-8. The containers were held outside without "secondary containment," which is a structure designed to catch their contents if the integrity of the original container failed. AR 28:11, CP 280 ¶ 21. In some cases, the lids from containers of dangerous waste were removed, leaving the contents exposed. RP 114:8-10. The containers were not labeled as to their contents. RP 114:10-11. They were not isolated from other containers. RP 114:11-13. Holding dangerous waste in this matter did not reasonably conform to the standards found in the dangerous waste regulations either for generators (WAC 173-303-200 – which McNamara was) or for treatment, storage, and disposal facilities (WAC 173-303-630). Such conditions for the storage of dangerous waste cannot be deemed reasonable.

the record that documents an attempt at compliance with the rules at its facility. Rather, McNamara stored waste under conditions that were not secure, and it actively processed and disposed of the waste. Therefore the Board did not err in finding that McNamara did not comply with requirements of the manifest discrepancy regulations. AR 28:22-23 ¶ 11, CP 291-92.

The Board found that McNamara's operation was not a case where a container recycling facility was being required to be permitted on the off chance it might someday inadvertently receive a non-empty tote. AR 28:23; CP 292 ¶ 12. The Board also stated this was not a case where a facility was being penalized for having offloaded a single non-empty tote. *Id.* Rather, the Board found that McNamara received more than an incidental or occasional number of non-empty containers, even after being directed by Ecology to cease doing so. *Id.* Therefore "[r]egardless of whether the manifest discrepancy rules are directly applicable to the KP McNamara facility," McNamara was obligated to conform to the permitting and operating requirements of the dangerous waste regulations. AR 28:22, CP 291 ¶ 11.

McNamara had no permit to be a treatment, storage and disposal facility. Nonetheless McNamara was operating as a treatment, storage and disposal facility because it was storing and treating waste received in non-

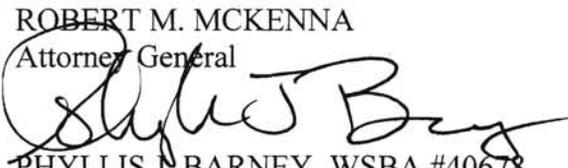
empty containers. Regulations that allow treatment, storage and disposal facilities to reconcile shipping discrepancies do not provide authority for an unpermitted facility to receive and store dangerous waste. Even if McNamara could have benefited from the manifest discrepancy rules, in this case the facts before the Board demonstrated McNamara's failure to comply with those rules. This Court should find that the Board properly upheld the penalty, and dismiss all other issues related to McNamara's receipt of dangerous waste.

III. CONCLUSION

For the reasons discussed above and in Ecology's earlier briefing, the Board correctly decided this case. Ecology respectfully requests that this Court reverse the Clark County Superior Court's Order of Remand, and instead affirm the Board's decision in its entirety. Ecology further requests that this Court deny McNamara all costs and attorney's fees.

RESPECTFULLY SUBMITTED this 12th day of April 2012.

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ATTACHMENT

1

WAC 173-303-370 Manifest system. (1) Applicability. The requirements of this section apply to owners and operators who receive dangerous waste from off-site sources.

(2) If a facility receives dangerous waste accompanied by a manifest, the owner or operator, or his agent, must:

(a) Sign and date each copy of the manifest to certify that the dangerous waste covered by the manifest was received;

(b) Note any significant discrepancies in the manifest, as described in subsection (4) of this section, on each copy of the manifest;

(c) Immediately give the transporter at least one copy of the signed manifest;

(d) Within thirty days after the delivery, send a copy of the manifest to the generator; and

(e) Retain at the facility a copy of each manifest for at least three years from the date of delivery.

(3) If a facility receives, from a rail or water (bulk shipment) transporter, dangerous waste which is accompanied by a manifest or shipping paper containing all the information required on the manifest (excluding the EPA/state identification numbers, generator's certification, and signature), the owner or operator, or his agent, must:

(a) Sign and date each copy of the manifest or shipping paper to certify that the dangerous waste covered by the manifest or shipping paper was received;

(b) Note any significant discrepancies in the manifest or shipping paper, as described in subsection (4) of this section, on each copy of the manifest or shipping paper;

(c) Immediately give the rail or water (bulk shipment) transporter at least one copy of the manifest or shipping paper;

(d) Within thirty days after the delivery, send a copy of the signed and dated manifest or shipping paper to the generator. However, if the manifest is not received within thirty days after the delivery, the owner or operator, or his agent, must send a copy of the signed and dated shipping paper to the generator; and

(e) Retain at the facility a copy of each shipping paper and manifest for at least three years from the date of delivery.

(4) Manifest discrepancies.

(a) Manifest discrepancies are significant discrepancies between the quantity or type of dangerous waste designated on the manifest or shipping paper and the quantity or type of dangerous waste a facility actually receives. Significant discrepancies in quantity are variations greater than ten percent in weight for bulk quantities (e.g., tanker trucks, railroad tank cars, etc.), or any variations in piece count for nonbulk quantities (i.e., any missing container or package would be a significant discrepancy). Significant discrepancies in type are obvious physical or chemical differences which can be discovered by inspection or waste analysis (e.g., waste solvent substituted for waste acid).

(b) Upon discovering a significant discrepancy, the owner or operator must attempt to reconcile the discrepancy with the waste generator and transporter. If the discrepancy is not resolved within fifteen days after receiving the waste, the owner or operator must immediately submit to the department a letter describing the discrepancy and attempts to reconcile it, and a copy of the manifest or shipping paper at issue.

(5) Reasons for not accepting dangerous waste shipments. The owner or operator may decide that a dangerous shipment should not be accepted by his facility.

(a) The following are acceptable reasons for denying receipt of a dangerous waste shipment:

(i) The facility is not capable of properly managing the type(s) of dangerous waste in the shipment;

(ii) There is a significant discrepancy (as described in subsection (4) of this section) between the shipment and the wastes listed on the manifest or shipping paper; or

(iii) The shipment has arrived in a condition which the owner or operator believes would present an unreasonable hazard to facility operations, or to facility personnel handling the dangerous waste(s) (including, but not limited to, leaking or damaged containers, and improperly labeled containers).

(b) The owner or operator may send the shipment on to the alternate facility designated on the manifest or shipping paper, or contact the generator to identify another facility capable of handling the waste and provide for its delivery to that other facility, unless, the containers are damaged to such an extent, or the dangerous waste is in such a condition as to present a hazard to the public health or the environment in the process of further transportation.

(c) If the dangerous waste shipment cannot leave the facility for the reasons described in (b) of this subsection, then the owner or operator must take those actions described in the contingency plan, WAC 173-303-350(3)(b).

(6) Within three working days of the receipt of a shipment subject to 40 CFR part 262, subpart H (which is incorporated by reference at WAC 173-303-230(1)), the owner or operator of the facility must provide a copy of the tracking document bearing all required signatures to the notifier, to the Office of Enforcement and Compliance Assurance, Office of Compliance, Enforcement Planning, Targeting and Data Division (2222A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, D.C. 20460, and to competent authorities of all other concerned countries. The original copy of the tracking document must be maintained at the facility for at least three years from the date of signature.

ATTACHMENT

2

**ENVIRONMENTAL PROTECTION
AGENCY**
40 CFR Parts 261, 262, and 265
[SWH-FRL 1680-3]
**Hazardous Waste Management
System: General Hazardous Waste
Management System; Identification
and Listing of Hazardous Waste**
AGENCY: Environmental Protection
Agency.

ACTION: Final amendment and interim
final amendments to rule and request for
comments.

SUMMARY: These amendments modify 40 CFR 261.33(c) and add a new section, 40 CFR 261.7, to EPA's May 19, 1980, hazardous waste management regulations. This new section and the change to § 261.33(c) clarify the situations in which residues of hazardous waste that are contained in drums, barrels, tank trucks or other types of containers must be managed as hazardous wastes under 40 CFR Parts 261 through 265 and 122 through 124.

DATES:

Effective dates: The effective date for § 261.7 is November 19, 1980.

The effective date for the amendments to § 261.33, § 265.173 and to § 262.51 is May 25, 1981.

Comment date: Today's amendments, with the exception of § 261.7(b)(3), which is merely a recodification, are being promulgated as interim final rules. EPA will accept comments on them until January 26, 1981.

Compliance dates: See Supplementary Information for details on compliance dates.

ADDRESSES: Comments of these amendments should be sent to Docket Clerk (Docket No. 3001), Office of Solid Waste (WH-565), U.S. Environmental Protection Agency, 401 M St., S.W., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Alfred W. Lindsey, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 (202) 755-9185.

SUPPLEMENTARY INFORMATION:
I. Authority

These amendments are issued under the authority of Sections 1006, 2002(a), and 3001 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6905, 6912(a), and 6921.

II. Compliance Dates

EPA does not consider new § 261.7 to be a "revision" of the Section 3001 regulations within the meaning of Section 3010(b) of RCRA. It is merely a clarification of the May 19, 1980, regulations and does not subject any person to regulatory control who was not already subject to the May regulations. All such persons, of course, should have already notified EPA of their hazardous waste activities on or before August 18, 1980, and if they are hazardous waste treatment, storage or disposal facilities must submit a Part A permit application to EPA on or before November 19, 1980.

Today's amendment to § 261.33(c), which clarifies that EPA considers as hazardous wastes container residues of acutely hazardous materials that are discarded, and does not consider the containers themselves to be hazardous wastes when they are discarded, will require additional persons to notify EPA that they handle these acutely hazardous wastes and will require any treatment, storage or disposal facility which wants to continue to handle such wastes also to submit a Part A permit application and qualify for interim status.

A. Notification

Persons who generate, transport, treat, store or dispose of wastes which are newly subject to regulation under Parts 261 through 265, 122 and 124 because of today's revision to § 261.33(c) are not required to notify EPA so long as they previously notified the Agency that they handle a hazardous waste and received an EPA identification number.¹ Persons who have not previously notified EPA and who now generate or handle the wastes newly included by the amendment to § 261.33(c) must now notify EPA of their activities under Section 3010 no later than January 26, 1981. Notification instructions are set forth in 45 FR 12746 (February 26, 1980).

B. Part A Permit Applications

The owners or operators of all existing hazardous waste management facilities (see the definition of "existing HWM facility" in 40 CFR 122.3, 45 FR 33421 (May 19, 1980) and 45 FR 67756 (October 14, 1980)) which treat, store or dispose of wastes newly included in these regulations by the amendment to § 261.33(c), and who wish to qualify for

¹ EPA's authority for this action is the recent amendment to Section 3010(a) of RCRA contained in the Solid Waste Disposal Act Amendments of 1980 (Pub. L. 96-452, (October 21, 1980)) which leaves the requirements for notification following revision of the Section 3001 regulations to the discretion of the Administrator.

interim status under Section 3005(e) of RCRA, must file a notification by January 26, 1981, unless they have notified previously (as described in II.A. above), and must file a permit application by May 25, 1981 (see 40 CFR 122.23(a)(1) and (2), 45 FR 33434 (May 19, 1980)).

Owners or operators of facilities who have qualified for interim status and who wish to manage wastes newly included in these regulations by the amendment to § 261.33(c) must submit an amended permit application by May 25, 1981 (see 40 CFR 122.23(c)(1), 45 FR 33434 (May 19, 1980)).

Owners or operators who do not comply with the notification or permit application requirements are precluded from managing these wastes after May 25, 1981 until they have obtained an RCRA permit under Part 122.

C. Compliance With the Requirements of Parts 262 Through 265, 122 and 124

Beginning on May 25, 1981, persons handling wastes newly included by today's amendment to § 261.33(c) must comply with all applicable standards for hazardous waste generators, transporters, and owners and operators of hazardous waste management facilities set forth in 40 CFR Parts 262 through 265, 122 and 124 with respect to these wastes.

III. Background

In May of 1980, EPA promulgated regulations implementing Subtitle C of the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"). These regulations, among other things, identify and list hazardous waste (Part 261), establish standards for generators and transporters of hazardous waste (Parts 262 and 263), and set management and permit requirements for owners and operators of facilities that treat, store or dispose of hazardous waste (Parts 264 and 265 and Parts 122 and 124). 45 FR 33066 (May 19, 1980). These regulations are designed to ensure the proper handling and management of hazardous wastes from their generation through their ultimate disposition.

Hazardous wastes are often stored or transported in containers.² Some of these containers may be full, others partially full. Depending on how a particular hazardous waste is to be managed and whether a container is to be re-used, some containers may be emptied, leaving a residue in the container. Other containers may be

² "Container" is defined in 40 CFR 260.10 as "any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled."

cleaned, perhaps creating a rinsate containing hazardous waste.

EPA has received numerous questions about the extent to which partially full, "empty" and cleaned containers, or more precisely, the waste or waste residues in such containers, are regulated under RCRA. Specifically,

(1) What is an "empty container?"

(2) Under what circumstances is a container that has held hazardous waste, but is now "empty," controlled under the RCRA hazardous waste regulations?

(3) How do the small quantity provisions (§ 261.5) and the use, re-use, recycling and reclamation provisions (§ 261.6) apply to container management?

(4) Are container cleaning operations subject to the RCRA facility and permitting requirements?

In response to these questions, EPA is modifying its hazardous waste regulations to better explain the circumstances under which a container which has held hazardous waste (including any of the chemicals listed in § 261.33 (e) and (f), when they are wastes) remains subject to the requirements of Parts 261 through 265, 122 and 124, and the notification requirements of Section 3010 of RCRA. The Agency is doing this by adding a new section of Part 261, § 261.7, which deals exclusively with the issue of when residues in containers will be subject to regulation. This new section will enable persons who deal with container residues to look to one section of the regulations to determine whether they are regulated.

IV. The Control of Residues in Empty Containers and the Definition of Empty Container

In the May 1980 regulations the only specific references to containers of hazardous waste in Part 261, which identifies those wastes subject to regulation, are in §§ 261.33(c) and 261.5(c)(3)-(4). Section 261.33(c) provides that any container or inner liner from a container that has been used to hold any acutely hazardous commercial chemical product or manufacturing chemical intermediate listed in § 261.33(e) is a hazardous waste when it is discarded or intended to be discarded, unless it has been triple rinsed or otherwise appropriately cleaned. Sections 261.5(c)(3) and 261.5(c)(4), part of the special requirements for hazardous waste generated by small quantity generators, excluded from regulation certain small containers and a certain amount of inner liners from containers identified in § 261.33(c). Otherwise, the May 1980 Part 261 regulations are silent

on the control of "empty" containers and hazardous waste residues in "empty" containers.

A. Full or Partially Full Containers

Under Part 261, all solid waste that is identified or listed as hazardous waste is subject to regulation under Parts 261 through 265, 122 and 124. Thus, the May 19, 1980, regulations clearly regulate hazardous wastes in full or partially full containers.

B. "Empty" Containers

The typical emptying of a container by pouring, pumping, aspirating or other common emptying methods is not capable of removing all residues. So-called "empty" containers hold small amounts of residue unless they have been thoroughly rinsed or otherwise cleaned to remove such residues. Many persons have concluded that unless hazardous waste residues in "empty" containers are excluded by the small quantity generator exclusion of § 261.5, all such residues are fully controlled as hazardous wastes and thus persons handling such containers would, because of the residues have to ship such containers accompanied by a manifest and have a permit (or interim status) for the treatment, storage or disposal of the residues.

The Agency did not intend, however, to regulate hazardous waste residues in "empty" but unrinsed containers, except where the hazardous waste is an acutely hazardous material listed in § 261.33(e). See the preamble discussion at 45 FR 33116, May 19, 1980. EPA believes that, except where the hazardous waste is an acutely hazardous material listed in § 261.33(e), the small amount of hazardous waste residue that remains in individual empty, unrinsed containers does not pose a substantial hazard to human health or the environment. If there are certain situations where this presumption is unjustified, the Agency will consider amendments to the regulations to accommodate them. See the discussion below in section IV.E. of this preamble.

In making this presumption, the Agency considered the amounts of hazardous waste residues contained in "empty" containers from which all hazardous wastes have been removed by common methods of emptying containers: Dumping, pouring, pumping and aspirating and, for containers of contained gas, allowing the pressure in the container to reach atmospheric. Although EPA officials have explained in many public meetings that the only residues in "empty" containers that the Agency intended to regulate were those of acutely hazardous materials listed in

§ 261.33(e), (see 40 CFR 261.33(c), 45 FR 33124, (May 19, 1980)), the Agency did not articulate this in the regulations.

To rectify this omission, the Agency is amending the regulations to expressly specify that the hazardous waste remaining in an "empty" container is not subject to the regulations. See § 261.7(a). On the other hand, the hazardous waste residue in any container that is not considered empty is subject to full regulation as a hazardous waste unless any of the special requirements or exclusions in Part 261 or § 262.34 apply. To implement this clarification EPA is also amending the regulations to provide a definition of "empty container." See § 261.7(b). This definition is in three parts and is keyed to the type of waste in the container, i.e., the methods that must be used to remove the residue from a container for it to be considered empty under § 261.7(b) depend on the material that the container held. What should be clear from § 261.7, however, is that no "empty" containers are subject to regulatory control because no "empty" containers hold residues that are considered hazardous wastes for regulatory purposes.

1. *Containers that have held hazardous wastes other than gases and acutely hazardous materials.* The first part of the definition of "empty container" deals with containers that have held hazardous wastes other than compressed gases and acutely hazardous materials listed in § 261.33(e). For such containers, the definition provides that an empty container is one from which all wastes or other materials have been removed that can be removed using the practices commonly employed to remove materials from that type of container. The definition further provides that no more than 2.5 centimeters (one inch) of residue may remain on the bottom of the container for it to be considered empty. The Agency recognizes that this part of the definition is not perfectly precise and may be subject to interpretation in difficult cases. For example, if the hazardous waste is a two-phase mixture of a liquid and a non-viscous solid or semi-solid and is contained in a drum with a sealed top (with only bung holes provided for filling and emptying the drum), it is very possible that common emptying methods will not remove all of the waste. Common emptying methods might remove the liquid phase and leave the solids or semi-solids adhering to the sides so that there is less than 2.5 centimeters of waste on the bottom of the container. In this example, the Agency would not view the container as an empty container because the total

subject to the requirements of Parts 264 and 265.

C. Facilities Which Handle Only "Empty" Containers

Section 261.7 clarifies that container cleaning facilities which handle only "empty" containers are not currently subject to regulation unless they generate a waste that meets one of the characteristics in Subpart D. The mixture rule (§ 261.3(a)(2)(ii)) is inapplicable to any residues excluded from regulation by 261.7(a)(1), which would be the only residues with which a facility that handles only "empty" containers would deal.

D. Facilities Which Handle "Non-Empty" Containers

Any facility that handles any "non-empty" containers, i.e., containers which don't meet the definition of "empty" in 261.7(b), is managing regulated hazardous waste.

If the facility is the generator of the hazardous waste, i.e., the container residue, then the small quantity generator exclusion (§ 261.5) and the non-permitted accumulation time provision (§ 262.34) are available to the facility as a generator. Unless one of those provisions is applicable, though, all treatment, storage and disposal of regulated residues must be carried out in accordance with all applicable Part 264 or 265 standards at a facility with a permit or interim status. Note also that any regulated residue of a listed hazardous waste is subject to the mixture rule, so that rinse waters or solvents containing these residues also are considered hazardous wastes, unless they have been delisted in accordance with the procedures in §§ 260.20 and 260.22.

IX. Request for Comments

EPA invites comments on all aspects of the interim final amendments promulgated today and all of the issues discussed in this preamble. The Agency is providing a 90-day comment period and will carefully consider all comments received during that period.

X. Regulatory Impacts

The clarification to § 261.33(c) will bring a small number of additional persons under regulation as generators, transporters, or owners or operators of treatment, storage or disposal facilities. EPA is unable to estimate the number of such persons and thus cannot accurately estimate the increased impacts of the clarification.

The effect of the promulgation of

§ 261.7 is to reduce the overall costs, economic impact and reporting and recordkeeping impacts of EPA's hazardous waste management regulations. This is achieved by clarifying that container residues of hazardous waste, measuring an inch or less, except residues of certain acutely hazardous materials, are not subject to the regulations. The Agency is unable to estimate these cost and impact reductions.

Dated: November 19, 1980.

Douglas M. Costle,
Administrator.

For the reasons set out in the preamble, Title 40 of the Code of Federal Regulations is amended as follows:

1. Add the following new section to Part 261:

§ 261.7 Residues of hazardous waste in empty containers.

(a)(1) Any hazardous waste remaining in either (i) an empty container or (ii) an inner liner removed from an empty container, as defined in paragraph (b) of this section, is not subject to regulation under Parts 261 through 265, or Part 122 or 124 of this chapter or to the notification requirements of Section 3010 of RCRA.

(2) Any hazardous waste in either (i) a container that is not empty or (ii) an inner liner removed from a container that is not empty, as defined in paragraph (b) of this section, is subject to regulation under Parts 261 through 265, and Parts 122 and 124 of this chapter and to the notification requirements of Section 3010 of RCRA.

(b)(1) A container or an inner liner removed from a container that has held any hazardous waste, except a waste that is a compressed gas or that is identified in § 261.33(c) of this chapter, is empty if:

(i) all wastes have been removed that can be removed using the practices commonly employed to remove materials from that type of container, e.g., pouring, pumping, and aspirating, and

(ii) no more than 2.5 centimeters (one inch) of residue remain on the bottom of the container or inner liner.

(2) A container that has held a hazardous waste that is a compressed gas is empty when the pressure in the container approaches atmospheric.

(3) A container or an inner liner removed from a container that has held a hazardous waste identified in § 261.33(c) of this chapter is empty if:

(i) the container or inner liner has

been triple rinsed using a solvent capable of removing the commercial chemical product or manufacturing chemical intermediate;

(ii) the container or inner liner has been cleaned by another method that has been shown in the scientific literature, or by tests conducted by the generator, to achieve equivalent removal; or

(iii) in the case of a container, the inner liner that prevented contact of the commercial chemical product or manufacturing chemical intermediate with the container, has been removed.

2. Revise the title of § 261.33 and paragraph (c) to read as follows:

§ 261.33 Discarded commercial chemical products, off-specification species, container residues, and spill residues thereof.

The following materials or items are hazardous wastes if and when they are discarded or intended to be discarded:

• • • • •

(c) Any residue remaining in a container or an inner liner removed from a container that has held any commercial chemical product or manufacturing chemical intermediate having the generic name listed in paragraph (e) of this section, unless the container is empty as defined in § 261.7(b)(3) of this chapter. [Comment: Unless the residue is being beneficially used or reused, or legitimately recycled or reclaimed; or being accumulated, stored, transported or treated prior to such use, re-use, recycling or reclamation, EPA considers the residue to be intended for discard, and thus a hazardous waste. An example of a legitimate re-use of the residue would be where the residue remains in the container and the container is used to hold the same commercial chemical product or manufacturing chemical intermediate it previously held. An example of the discard of the residue would be where the drum is sent to a drum reconditioner who reconditions the drum but discards the residue.]

§ 265.173 [Amended]

3. Delete the first sentence of the "Comment" to § 265.173.

§ 262.51 [Amended]

4. Change the reference for triple rinsing in § 262.51 from "§ 262.33(c)" to "§ 261.7(b)(3)."

[FR Doc. 80-28862 Filed 11-24-80; 8:45 am]

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

BY DONALD R. CARPENTER

CLERK

K.P. MCNAMARA NORTHWEST,
INC. AND KERRY MCNAMARA,

Appellants/Cross-Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondents/Cross Appellant.

CERTIFICATE OF
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 12th day of April 2012, I caused to be served Respondent/Cross Appellant's Reply Brief in the above-captioned matter upon the parties herein as indicated below:

THOMAS R. BENKE	<input checked="" type="checkbox"/> U.S. Mail
THE ENVIRONMENTAL COMPLIANCE	<input type="checkbox"/> Hand Delivered
ORGANIZATION LLC	<input type="checkbox"/> Overnight Express
7845 SW CAPITOL HWY, STE 8	<input type="checkbox"/> By Email
PORTLAND, OR 97219	

LARISSA RASSKOZOVA	<input checked="" type="checkbox"/> U.S. Mail
ATTORNEY AT LAW	<input type="checkbox"/> Hand Delivered
1020 SW TAYLOR STREET #425	<input type="checkbox"/> Overnight Express
PORTLAND, OR 97205	<input type="checkbox"/> By Email

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the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12th day of April 2012, in Olympia, Washington.


TRICIA KEALY
Legal Assistant