

No. 42668-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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

Appellants and Cross-Respondents

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY

Respondent and Cross-Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Daniel L. Stahnke, Judge

REPLY BRIEF OF APPELLANTS / CROSS-RESPONDENTS
KPM-NW & MCNAMARA

Reply Re Superior Court's Failure to Award Attorneys' Fees
Reply Re Superior Court's Failure to Remand Rinse-water Issue
Reply Re Superior Court's Upholding Personal Liability of McNamara
Response Re Illegal Procedure at PCHB
Response Re Attorneys' Fees at Court of Appeals

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CLARK COUNTY

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A. REPLY TO ECOLOGY'S ARGUMENT REGARDING THE SUPERIOR COURT'S DENIAL OF ATTORNEY'S FEES TO KPM-NW AND MCNAMARA AS PREVAILING PARTIES ON THE UNLAWFUL PROCEDURE ISSUE (RECEIPT OF DANGEROUS WASTE WITHOUT A PERMIT).

Summary of KPM-NW's and McNamara's Proposition on Appeal:

RCW 4.84.350 requires that the court award attorneys' fees to a prevailing party in a judicial review of agency action. KP McNamara NW, Inc. ("KPM-NW") and Kerry McNamara prevailed on their claim that the Pollution Control Hearings Board ("PCHB") engaged in an unlawful procedure or decision making process. The Superior Court erred when it declined to award attorneys' fees pending outcome of the matter on remand and pending the court's ruling on an unrelated claim.

Summary of KPM-NW's and McNamara's Argument:

This issue is addressed at pages 25-27 of Appellants' Opening Brief. KPM-NW's and McNamara's argument is that the statute says "shall" and that the Superior Court expressly stated that Appellants "prevailed". Whatever the PCHB may do on remand, the Board erred in failing to follow an established procedure at the first hearing and Appellants are entitled to an award of attorneys' fees having successfully appealed to the Superior Court.

Summary of Ecology's Response:

This issue is addressed at pages 42-48 of Ecology's Opening Brief. Ecology claims that the Superior Court erred on the underlying issue of unlawful procedure, but that if the Superior Court's holding is affirmed at the Court of Appeals that the Superior Court did not deny costs and attorneys fees but merely "reserved [its] decision". As additional grounds for its opposition, Ecology argues in succession: First, that because KPM-NW and McNamara prevailed on a "procedural issue" that they did not obtain relief on a "significant issue"; Second, that KPM-NW and McNamara did not "brief" the court on the basis for an award of attorneys' fees; Third, that KPM-NW and McNamara have not shown that they are "qualified parties"; Fourth, that KPM-NW and McNamara have not proven that their attorneys' fees are "reasonable"; Fifth, that it would be unjust to award attorneys' fees against Ecology when the error was the Board's; and Sixth, that the Board's error was "substantially justified" and in "good faith".

KPM-NW's and McNamara's Reply:

KPM-NW and McNamara filed a Motion for Reconsideration Regarding Award of Attorney Fees (CP 49) and supporting Memorandum (CP 48) with the Superior Court in which they requested "leave to file a cost bill with the court for an award of attorneys' fees and expenses

relating to the legal issues pertaining to the receipt of non-“RCRA empty” totes. CP 49 The Superior Court denied KPM-NW and McNamara leave to file their cost bill. CP 51

Ecology’s argument that KPM-NW and McNamara did not obtain relief on a significant issue, based on the fact that KPM-NW and McNamara prevailed on a “procedural issue”, is specious. KPM-NW and McNamara did not prevail because of a “procedural issue” at the Superior Court – they prevailed because of an unlawful procedure at the PCHB. The basis for an award of attorneys’ fees was fully briefed to the Superior Court. KPM-NW and McNamara were denied the opportunity to file a cost bill. This matter should be remanded to the Superior Court for submission and review of a cost bill, including a determination of whether KPM-NW and McNamara are “qualified parties” and whether the fees incurred were “reasonable.”

B. REPLY TO ECOLOGY’S ARGUMENT REGARDING THE SUPERIOR COURT’S DECISION IN FAVOR OF ECOLOGY ON THE RINSE-WATER ISSUE (WHETHER THE RINSE-WATER WAS A DANGEROUS WASTE).

Summary of KPM-NW’s and McNamara’s Proposition on Appeal:

Because the evidence introduced by KPM-NW and McNamara in response to Ecology’s Summary Judgment motion was sufficient to meet their burden on Summary Judgment, and because the Superior Court relied

on evidence introduced by Ecology at hearing to uphold the Board's decision, the Superior Court erred in failing to remand the issue to the Board for an evidentiary hearing to determine whether the rinse-water actually met the criteria of a dangerous waste.

Summary of KPM-NW's and McNamara's Argument:

This issue is addressed at pages 28-36 of Appellant's Opening Brief. KPM-NW and McNamara focus on Ecology and the Board's errant premise that "designation as" a dangerous waste (by the generator or by Ecology) does a dangerous waste make. Appellants point out that the definition of a "dangerous waste" references certain "criteria", and that a generator's duty is "to determine" whether the solid waste at issue meets any of those criteria (as set forth in WAC 173-303-081, -082, -090 and -100.) Whether KPM-NW had "identified", "designated", "characterized" or "declared" it as such is immaterial for purposes of Ecology's jurisdiction.

Because Ecology bears the burden of proving that the rinse-water met the definition of a dangerous waste (a question of fact), and because KPM-NW and McNamara met their burden of production on that issue, the Court of Appeals should reverse the Board's ruling on Issue #3 and remand the matter to the Board for an evidentiary hearing and findings of

fact as to whether the rinse-water that was shipped without a UHWM met the definition of a dangerous waste.

Summary of Ecology's Response:

This issue is addressed at pages 20-30 of Ecology's Opening Brief. Ecology argues that Appellant's "determination" based on "process knowledge" is controlling (relying in part on language in EPA's December 18, 1978 rule proposal that "If a person believes his waste to be hazardous, he may also simply declare it to be so..."). To its list of words describing the "Policies and Practices" that KPM-NW adopted with respect to the rinse-water ("identified", "designated", "characterized" and "declared") Ecology adds "certified" at page 27 of its Brief.

KPM-NW's and McNamara's Reply:

Ecology continues to conflate the *definition* of a dangerous waste, which is the subject of WAC 173-303-081 (listed discarded chemical product), WAC 173-303-082 (listed dangerous waste source), WAC 173-303-090 (exhibits any dangerous waste characteristic) and WAC 173-303-100 (meets any dangerous waste criteria aka "toxic" or "persistent dangerous waste") with the *procedures* "for determining" whether or not a solid waste is a dangerous waste, which is the subject of WAC 173-303-070. All of Ecology's arguments regarding "declaration", "designation as" and "process knowledge" relate to the procedures for determining

whether or not a solid waste is a dangerous waste. None of Ecology's arguments address the fundamental jurisdictional question of whether a solid waste – in this case KPM-NW's rinse-water – meets the definition of a dangerous waste as set out in sections **-081, -082, -090 and -100**. "If a person has checked the waste against each [of sections -081, -082, -090 and -100] and the waste is not designated, then the waste is not subject to the requirements of chapter 173-303 WAC." WAC 173-303-070(3)(b).

The Washington Supreme Court's decision in U.S. v. Hoffman, 154 Wn.2d 730, 116 P3d 999, 1003 (2005) is 100% in accord with the above paragraph. The court stated:

For a material to "designate" as dangerous waste, it must either be specifically listed as a dangerous waste under WAC 173-303-081 through -082, exhibit one of four characteristics (ignitability, corrosivity, reactivity, or toxicity) under WAC 173-303-090(5)-(8), or meet the criteria of toxicity or persistence under WAC 173-303-100(1).

It is true that the procedures for determining whether or not a solid waste is dangerous waste, WAC 173-303-070 "Designation of dangerous waste", give a generator the choice of testing the waste or "apply[ing] knowledge of the waste in light of the materials or the process used." WAC 173-303-070(3)(c)(ii). But "Evidence that the knowledge or test results a person has regarding a waste is not sufficient for determining whether or not it designated and/or designated properly." WAC 173-303-

070(4)(e). In other words, a generator's reliance on "process knowledge" would no more capture a waste that does *not* meet the definition of a dangerous waste than it would exclude a waste that *does* meet the definition.

Appellants KPM-NW and McNamara did not use "process knowledge" to determine whether the rinse-water that was shipped without a manifest met the definition of a dangerous waste. In fact, the record clearly reflects that KPM-NW and McNamara had tested rinse-water generated in previous years to establish that its rinse-water did not meet the criteria of toxicity (the only basis for jurisdiction over the rinse-water alleged by Ecology) and at most had relied on "process knowledge" to determine that its rinse-water continued to be non-toxic.

Disappointingly, Ecology relies on a December 18, 1978 U.S.E.P.A. draft rule proposal (Exh. 1) in support of its argument that a person may make a solid waste a dangerous waste by simply "declaring" it to be a dangerous waste. The quote itself does not support Ecology's position; EPA was merely clarifying that it is lawful for a generator to "declare" its waste to be a hazardous waste for purposes of making the Generator's/Offeror's Certification required as part of a complete a Uniform Hazardous Waste Manifest (e.g., "I hereby declare that the contents of this consignment are fully and accurately described above...")

(Exh. 2) if the person simply believes the waste is hazardous. The greater problem with Ecology's argument is that EPA subsequently abandoned the 1978 rulemaking (proposed 40 CFR Part 250) in favor of the regulatory regime in effect today, first promulgated May 19, 1980. 45 FR 33066 et seq. (Exh. 3) In its final rulemaking the EPA placed the definition of a hazardous waste in an entirely separate "Part" (40 CFR Part 261.3 "Definition of a hazardous waste") from a generator's duty to determine whether his solid waste is a hazardous waste (40 CFR Part 262.11 "Hazardous Waste Determination"), thus clarifying the distinction between the "definition" of a hazardous (or dangerous waste) and the duty "to determine" upon which Ecology bases its arguments today.

Even more disappointing is Ecology's failure to provide any authority for its statement (at page 23 of its Opening Brief) that "[O]nce waste is designated as dangerous, its management must comply with the state's dangerous waste regulations." Ecology draws this most important conclusion from United States v. Hoffman, 154 Wn.2d 730, 116 P.3d 990 (2005), but the extrapolation is a bridge too far. The Washington Supreme Court in Hoffman was asked to interpret the Clean Priority Act, RCW 70.105E, relating to management of so-called "mixed waste", meaning in part dangerous waste mixed with radioactive waste. The Court ruled that the requirement for "actual characterization" in the CPA – a

term not found in the dangerous waste regulations at issue in this case – could be satisfied through use of “process knowledge.” But nowhere does the Court hold that once waste is designated as dangerous that its management must comply with the state’s dangerous waste regulations.

Every federal case that Appellants have reviewed included as an element of the State’s or EPA’s claim of hazardous waste violations that the State or EPA prove that the material at issue was a hazardous waste identified or listed under subchapter III of the Resource Conservation and Recovery Act (“RCRA”). For example, see U.S. v. Self, 2 F3d 1071 (C.A. 10, Utah 1993) (Exh. 4):

*SCGC erroneously believed (which we understand) that the natural gas condensate was a hazardous waste and, therefore, prepared a manifest for the shipment. SCGC was only required to ship the natural gas condensate under a RCRA manifest if it was, in fact, hazardous waste. * * * Because the natural gas condensate was not a hazardous waste, the manifest was not required “for purposes of compliance with [RCRA] regulations.” 42 U.S.C. Sec. 6928(d)(3). Therefore, the government’s failure to prove that natural gas condensate was a hazardous waste renders its proof on count 3 insufficient as a matter of law.*

Self, 2 F3d at 1083. In fact, U.S.E.P.A. was rebuked by a federal Administrative Law Judge in the earliest days of RCRA enforcement for advancing the same argument that Ecology now urges on the Washington Court of Appeals. In In Re Quaker State Oil Refining Corp., reported at 1986 WL 69020 (February 6, 1986) (Exh. 5), U.S.E.P.A. took the position

that “if a facility mistakenly identifies a waste managed by its facility as a hazardous waste, it must live with that decision forever more even though subsequent evaluations determine that the material should never have been listed in the first place.” The ALJ found this approach to be “illogical”.

The ALJ wrote in his opinion:

Under the circumstances in this case, it occurs to me that the Respondent’s conduct in regard to this material was certainly consistent with one who wanted to take every precaution to assure itself that no harm to man or the environment would occur and chose to take the conservative approach and handle this material in a way which is mandated by the regulations as though it were, in fact, a hazardous waste. Certainly, the Respondent should not be punished for its honest mistake and its zeal in electing to abide by what it perceived to be applicable regulations and requirements in regard to the material in question.

Based on the entire record before me, I am of the opinion that the solid waste in question is not, in fact, a hazardous waste as defined by the regulations either as to its source of generation under the listing requirements nor as to its constituents by their characteristics. Having determined that the material in question is not K049 and is not, in fact, a hazardous waste of any description, there is no necessity to make a determination as to what penalty would be appropriate since there was no violation of RCRA.

All that Ecology’s evidence establishes is that KPM-NW adopted “Policies and Practices” (Exh. 1 of Appellants’ Opening Brief) in which it promised to “designate” future rinse-water “as dangerous waste” as an “additional protective measure” to address concerns that Ms. Williams had about variability of toxicity of the rinse-water. CP 13 (Adm. Record – PCHB Hearing Transcript pp. 292, ll. 16-19.) It was a “best management

practice”. CP 13 (Adm. Record – PCHB Hearing Transcript pp. 294, ll. 5-6.) At most, the “Policies and Practices” is evidence that the rinse-water that was shipped without a UHWM *could* have been a dangerous waste. In opposition to this evidence KPM-NW submitted Mr. McNamara’s Declaration (Exh. 2 of Appellants’ Opening Brief) in which he testified “The rinse-water generated by KPM-NW is not dangerous waste” and explained in detail why the rinse-water could not have been a dangerous waste. KPM-NW and McNamara do not believe that the evidence offered by Ecology (e.g., that the rinse-water could have been dangerous waste) was sufficient to meet Ecology’s burden on this element of its claim, but if Ecology’s evidence was sufficient to shift the burden of production to KPM-NW and McNamara then the evidence offered by KPM-NW and McNamara was sufficient to create a genuine issue of fact as to whether the rinse-water that was shipped without a UHWM met the definition of a dangerous waste.

The Superior Court made two alternative rulings in upholding the Board’s decision against KPM-NW and McNamara on the rinse-water issue, neither of which should be upheld by this court. One ruling was that “Inspector Williams’ positive dangerous waste test post dated [the earlier toxicity tests] and establishes a new foundation for future action.” CP 51 As Appellants noted in their Opening Brief at page 36, the Superior Court

erred in this regard because the test referenced by the Court was of a different waste and for a characteristic that was not at issue with respect to the rinse-water. The Superior Court's other alternative ruling was that Mr. McNamara's Declaration was not "admissible at trial". CP 51 The Superior Court erred in this regard because the Declaration was admissible, as it was based on Mr. McNamara's personal knowledge, and at a minimum was admissible given the low bar for admissibility set by the Board. In any event, it was not proper for the Superior Court to make these evidentiary rulings; rather, the Superior Court should have remanded the matter to the Board just as the Court of Appeals must remand for findings of fact by the Board.

Given the posture of this case, the Court of Appeals should dismiss Ecology's claim regarding the rinse-water entirely because Ecology failed to offer sufficient probative evidence that the rinse-water met the definition of a dangerous waste. In the alternative, the Court of Appeals should remand the rinse-water issue (Issue #3 – "Did the appellant "inappropriately dispose of" dangerous waste...") to the Pollution Control Hearings Board for an evidentiary hearing and decision regarding whether the rinse-water actually met the definition of a dangerous waste.

C. REPLY TO ECOLOGY’S ARGUMENT REGARDING THE SUPERIOR COURT’S DECISION IN FAVOR OF ECOLOGY ON THE ISSUE OF KERRY MCNAMARA’S PERSONAL LIABILITY.

Summary of KPM-NW’s and McNamara’s Proposition on Appeal:

The Superior Court erred in finding Kerry McNamara personally liable with respect to the alleged rinse-water violations because the standard of liability is established by RCW 70.105.080(1) (“procures, aids or abets”) or alternatively because liability under the “responsible corporate officer doctrine” requires more than the “ability to control the facility” and “knowledge of the violation” upon which the Superior Court based its ruling.

Summary of KPM-NW’s and McNamara’s Argument:

This issue is addressed at pages 37-40 of Appellant’s Opening Brief. KPM-NW’s and McNamara’s first argument is that Issue #1 as certified by the Board expressly limits the basis upon which it could find Mr. McNamara personally liable to RCW 70.105.080(1) (“procures, aids or abets”). Secondly, KPM-NW and McNamara argue that if the common law “responsible corporate officer” doctrine does apply, the Board failed to determine what duty was imposed upon McNamara “by the interaction of [his] authority and the statute” with respect to rinse-water shipments.

Summary of Ecology's Response:

This issue is addressed at pages 30-34 of Ecology's Opening Brief. Ecology's first argument is that the last sentence of RCW 70.105.080(1) ("procures, aids or abets") is not the basis for Mr. McNamara's statutory liability but rather the first sentence of that statute ("every person who fails to comply..."). Ecology's second argument is that the common law "responsible corporate officer" doctrine is a separate basis for Mr. McNamara's personal liability and that there is no requirement that "wrongful action" be shown for the doctrine to apply.

KPM-NW's and McNamara's Reply:

McNamara is not a "person" to whom the first sentence of RCW 70.105.080(1) applies because the corporate entity provides a shield from liability from corporate acts. If Mr. McNamara personally committed some violation of the dangerous waste rules with respect to the transport of rinse-water without a Uniform Hazardous Waste Manifest then he could be such a "person", but the evidence is that every act by Mr. McNamara was in conformance with the dangerous waste rules. Ecology's argument that "Kerry McNamara is a person and is liable for the violations at [KPM-NW] because of his actions at the facility" is wholly unsupported by any reference to the factual record. It is important to remember that Mr. McNamara was not present at the facility when the

subject rinse-water was shipped, and that prior to those shipments he had given clear instructions to his employees that the rinse-water was to be shipped by a certified transporter and under a UHWM.

Failure to act is the provenance of the “responsible corporate officer” doctrine, Ecology’s second basis for holding Mr. McNamara liable with respect to the rinse-water shipments. KPM-NW and McNamara proffer three reasons why the “responsible corporate officer” doctrine is not a basis for Mr. McNamara’s personal liability. First, RCW 70.105.080(1) is the exclusive basis for liability afforded by the Washington legislature. Ecology provides no authority for application of the “responsible corporate officer” doctrine in the context of dangerous waste violations that are the subject of RCW 70.105.080(1). Second, Ecology does not address the element of duty required by the court in Lundgren, that the “responsible corporate officer” doctrine imposes liability upon corporate officers who fail “to fulfill the duty imposed by the interaction of the corporate agent’s authority and the statute.” Third, Mr. McNamara’s liability with regard to the rinse-water violation was decided on Summary Judgment. There was at a minimum a genuine issue of fact as to whether Mr. McNamara failed to fulfill any duty imposed upon him “by the interaction of the corporate agent’s authority and the [dangerous waste] statute.” If the Court of Appeals holds that the

“responsible corporate officer” doctrine can be a basis for the personal liability of a corporate officer for violations of the Washington dangerous waste rules, then the Court should remand the issue of Mr. McNamara’s personal liability (certified Issue #1) to the PCHB for an evidentiary hearing and findings.

D. RESPONSE TO ECOLOGY’S ARGUMENT REGARDING THE SUPERIOR COURT’S DECISION IN FAVOR OF KPM-NW ON THE UNLAWFUL PROCEDURE ISSUE (RECEIPT OF DANGEROUS WASTE WITHOUT A PERMIT).

Summary of Ecology’s Proposition on Appeal:

There was no illegal procedure because the Board properly decided the appeal on the facts before it.

Summary of Ecology’s Argument:

This issue is addressed at pages 35-42 of Ecology’s Opening Brief. Ecology argues that “The Board did not need to consider the legal issue [Issue #5] posed by McNamara [and certified by the Board] because the facts were dispositive” and that KPM-NW violated “the regulations” [e.g., other regulations] regardless of how that legal issue was resolved. Alternatively, Ecology argues that the Board’s Order on Reconsideration “gave explicit notice to the parties” that the facts of the “nature and extent” of McNamara’s receipt of dangerous waste would be in dispute at

hearing and that Appellants were therefore not “substantially prejudiced” in this case.

KPM-NW’s and McNamara’s Response:

APPLICABLE LAW

The rules of practice and procedure of the Pollution Control Hearings Board are found at Chapter 371-08 of the Washington Administrative Code. These rules provide as follows:

WAC 371-08-435 – Prehearing Conferences

(2) The issues which the prehearing order identifies for the hearing shall control the subsequent course of the appeal, and shall be the only issues to be tried at the hearing, unless modified for good cause by subsequent order of the board or the presiding officer.

The Washington Administrative Procedures Act, codified at RCW 34.05.010 et seq., provides as follows:

RCW 34.05.570 – Judicial Review

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

** * * * **

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

WAC 173-303-040 provides the following definition:

"Generator" means any person, by site, whose act or process produces dangerous waste or whose act first causes a dangerous waste to become subject to regulation.

WAC 173-303-180 “Manifest” provides that:

A generator who transports, or offers for transport a dangerous waste for off-site treatment, storage, or disposal, or a treatment, storage, and disposal facility who offers for transport a rejected dangerous waste load, must follow all applicable procedures described in this section.

*(1) Form and contents of dangerous waste manifests. 40 CFR Part 262 Appendix - Uniform Hazardous Waste Manifest and Instructions (EPA Forms 8700-22 and 8700-22A and Their Instructions) is incorporated by reference. The manifest must be EPA Form 8700-22 and, if necessary, EPA Form 8700-22A. **The manifest must be prepared in accordance with the instructions for these forms, as described in the uniform manifest Appendix of 40 CFR Part 262.***

The Uniform Hazardous Waste Manifest (EPA Form 8700-22) (Exh. 2) requires that the “Offeror” of a hazardous waste (in Washington, of a dangerous waste) identify the waste by any applicable hazardous “waste codes” and make the following certification:

*I hereby **declare** that the contents of this consignment are fully and accurately described above by the proper shipping name, and are classified, packaged, marked, and labeled/placarded, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations.*

WAC 173-303-160(3)(a) provides:

Any residues remaining in containers or inner liners that are “empty” as described in subsection (2) of this section will not be subject to the requirements of this chapter, and will not be considered as accumulated wastes for the purposes of calculating waste quantities.

A container is considered “empty” if all wastes in it have been taken out

that can be removed using practices commonly employed to remove materials from that type of container and no more than one inch of waste remains at the bottom of the container or if the volume of waste remaining in the container (for containers over one hundred gallons) is no more than 0.3 percent of the container's total capacity.

Washington's "Manifest Discrepancies" rule [WAC 173-303-370] in effect at the time of the alleged violations (Exh. 9) provided:

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

* * * * *

(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 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).

The federal Manifest Discrepancies rule in effect at the time, and subsequently adopted by the Washington Department of Ecology, is found at 40 CFR § 264.72 (promulgated March 4, 2005) and at WAC 173-303-370 (proposed March 2008 and promulgated July 31, 2009):

(c) Upon discovering a significant difference in quantity or type, the owner or operator must attempt to reconcile the discrepancy with the waste generator or 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.

(d)(i) Upon rejecting waste or identifying a container residue that exceeds the quantity limits for "empty" containers set forth in

*WAC 173-303-160(2), the facility must consult with the generator prior to forwarding the waste to another facility that can manage the waste. If it is impossible to locate an alternative facility that can receive the waste, the facility may return the rejected waste or residue to the generator. The facility must send the waste to the alternative facility or to the generator within **sixty days** of the rejection or the container residue identification.*

*(ii) While the facility is making arrangements for forwarding rejected wastes or residues to another facility under this section, it must ensure that either the delivering transporter retains custody of the waste, or, **the facility must provide for secure, temporary custody of the waste**, pending delivery of the waste to the first transporter designated on the manifest prepared under paragraph (e) or (f) of this section. (emphasis added)*

Pursuant to “paragraph (e) or (f)” referenced in subparagraph (d)(ii) above, the receiving (rejecting) facility is required to prepare a new Uniform Hazardous Waste Manifest (“UHWM”) for shipment of the offending container to either an alternate facility or back to the generator.

FACTS

KPM-NW is a re-conditioner and recycler of industrial plastic containers. KPM-NW cleans the containers and re-sells them or destroys containers that cannot be cleaned, shipping the scrap plastic to China for recovery. CP 13 [Hearing Transcript (Kerry McNamara), p. 391, ll. 5-17.] Customers contact KPM-NW to request shipping instructions and are required to certify that the containers are completely empty and that they have all their fittings in place. CP 13 [Hearing Transcript (Kerry McNamara), p. 391-392, ll. 18-8, p. 402, ll. 17-21.] Containers are either transported to the KPM-NW facility by the customer {CP 13 [Hearing

Transcript (Kerry McNamara), p. 402-403, ll. 3-17]} or by common carrier (freight service) {CP 13 [Hearing Transcript (Kerry McNamara), p. 392, ll. 18-22]}.

If a non-conforming (“heavy”) container arrived on a truck owned and operated by the customer (the generator) the container would be sent back to the customer on the same truck (“We just didn’t remove those, we left them.”) CP 13 [Hearing Transcript (Kerry McNamara), p. 403, ll. 11-17.]

If a non-conforming (“heavy”) container arrived by common carrier the container would be segregated (“We would isolate those containers”) and a KPM-NW representative would contact the “emptier” (the customer) to confirm what was in the container and, if it contained dangerous waste, to determine the appropriate disposition of the material. CP 13 [Hearing Transcript (Kerry McNamara), p. 393, ll. 16-22.] Residue from two or more non-“RCRA empty” containers was sometimes combined and managed (shipped and disposed of) off-site according to its designation as dangerous waste. CP 13 [Hearing Transcript, pp. 118-119, ll. 25-4.]

During one or more inspections, Ecology inspector Deanne Williams observed in the KPM-NW unloading area “several totes . . . that contained a significant amount of residue”, which she estimated as being

more than the amount allowed under the definition of an “empty container”. CP 13 [Hearing Transcript (Deanne Williams), pp. 111-112, ll. 13-16.] Ms. Williams observed labels on these totes that indicated to her that the contents of these several containers could be a dangerous waste. CP 13 [Hearing Transcript (Deanne Williams), p. 112, ll. 18-24.] Ms. Williams testified that she was told that KPM-NW had not contacted the generators of the waste and that KPM-NW was going to “work” the material in those containers. CP 13 [Hearing Transcript (Deanne Williams), pp. 112-113, ll. 25-3.] By her “immediate action letter” dated October 20, 2008, Ms. Williams directed that KPM-NW “Immediately cease accepting totes that are not ‘empty’ as defined in WAC 173-303-160.” She further directed that “Within two days of receipt of this letter” KPM-NW “inventory all totes stored outside and determine which totes contain over one gallon of dangerous waste residue” and otherwise ensure that the non-empty totes would be “properly managed.” She further directed that KPM-NW “return non-empty totes to the generator or designate and dispose of the waste off-site.” Ms. Williams concluded her “immediate action letter” as follows:

KP McNamara has repeatedly violated WAC 173-303, and Ecology has repeatedly expressed concerns about KP McNamara’s acceptance of totes that are not “empty”. At this time, Ecology is considering formal enforcement as allowed under the Hazardous Waste Management Act (RCW 70.105.080).

Failure to take the actions defined in this Immediate Action letter could directly result in enforcement, including a penalty of up to \$10,000 per day per violation.

CP 10 [Ecology Hearing Exhibit R-8.]

The Department of Ecology's December 3, 2008 "Notice of Penalty Incurred and Due" assessed a \$10,000.00 penalty based on the following finding of the Department:

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.

CP 10 [Ecology Hearing Exhibit R-13.]

At hearing, Ecology inspector Deanne Williams testified that she did not recognize any distinction between when a facility "receives" a shipment and when a facility "accepts" a shipment. She testified:

[A]s far as semantics go, receive, accept, there's no difference for me as an inspector.

CP 13 [Hearing Transcript Day 2, p. 339, ll. 13-15.] She continued her answer:

The difference that I would say, you know, whether you call it received or accepted, if it's at the facility and the end result of it being there is that it's going to be processed, I would say it's in receipt or accepted. If it's sitting on the ground and they're sorting through it, I would say it hasn't yet been received or accepted, you know.

CP 13 [Hearing Transcript, p. 340, ll. 12-20.]

From the inception of Ecology's enforcement action Ecology has interpreted the dangerous waste rules (WAC 173-303-010 et seq.) as prohibiting KPM-NW from off-loading non-"RCRA empty" containers.

Deanne Williams testified:

Q Okay. Now, when you went out to the facility, what was your understanding of the law with respect to receipt? Was it your understanding that it was unlawful for K. P. McNamara to even off load [a] non-conforming container, one that contained dangerous waste in amounts greater than the non-RCRA empty standards?

A Yes.

Q Is that still your understanding of the law today?

A Yes.

Q So, to be clear, the law has changed with respect to manifest discrepancies, at least in Washington, since the time of these inspections; is that right?

A Yes.

Q Okay. So, is it your testimony then that under the law as in effect then, it was unlawful for them to actually remove them from the truck?

A Yes.

Q That was your understanding of the law?

A Yes.

Q And, so, your enforcement action is premised on that assumption and that's what you told K. P. McNamara, wasn't it?

A Starting in 2005, yes.

CP 13 [Hearing Transcript (Deanne Williams), p. 172-173, ll. 8-5.]

Also from the inception of Ecology's enforcement activities at the KPM-NW facility Ecology has interpreted the dangerous waste rules (WAC 173-303-010 et seq.) as requiring that non-"RCRA empty" containers be immediately shipped back to the generator under the original bill of lading. Deanne Williams testified:

Q Could K. P. McNamara lawfully put one of those non-conforming totes back into transport without a uniform hazardous waste manifest based on your understanding of the law?

A By rejecting a shipment?

Q By, yeah, just sending it on its way, saying you can't leave it here?

A And returning it to the generator?

Q Rejecting the shipment.

A Yes.

Q Okay. That's your understanding?

A Yes.

CP 13 [Hearing Transcript (Deanne Williams), p. 176, ll. 13-24.]¹

Similarly, Deanne Williams testified:

Q My client is telling the Board that the law is that when a non-conforming shipment arrives at the facility of regulated material, that the receiving facility has to take custody of the material and then gather whatever information is necessary to fill out a uniform hazardous waste manifest and either send it back to the generator or to an alternate designated facility, but the point is my client's position on the law is that they have to take custody of the waste, they can't just send it back out and transport it without a hazardous waste

¹ Deanne Williams testified during her first day on the stand that it was the

manifest or without an appropriate designated facility being identified. But your position even today is that they're required to *not* take possession, to *not* let it in their yard or on the ground, and send it off without a manifest, that's your position; have I stated it correctly?

A Yes.

CP 13 [Hearing Transcript, p. 181, ll. 20-11.]

In its December 6, 2007 enforcement letter Ecology mandated (on threat of penalty) the following “Policies and Practices” with regard to non-“RCRA empty” containers:

Totes (or other containers) that are not “empty” will not be off-loaded at KP McNamara in Vancouver. They will not be accumulated at the site for any period of time. These containers will be shipped directly back to the generating facility.

CP 10 [KPM-NW Hearing Exhibit A-19.]

Prior to the Hearing before the PCHB, Ecology reaffirmed that the violation cited (“Failure to obtain a permit or to comply with the requirements for operating a dangerous waste treatment, storage and disposal (TSD) facility”) was based on KPM-NW’s mere receipt of non-“RCRA empty” containers:

Ecology unequivocally states that it has never abandoned its position that McNamara was required to immediately reject non-empty totes. Ecology unequivocally states that it has never, and will never, adopt Appellants’ position that it was good practice, lawful or appropriate for McNamara to receive non-empty containers and store them without a permit.

CP 10 [Respondent Department of Ecology’s Reply to Appellant’s Response to Motion in Limine p.3, ll. 14-18.]

Ecology inspector Deanne Williams was asked at hearing whether Ecology's penalty assessment was based in part on the "90 day accumulation" standards for dangerous waste storage applicable to generators and she testified as follows:

Q You assessed a penalty for what you said was the acceptance of these totes, and I'm wondering if the basis for that penalty is noncompliance with the standards for storage of dangerous waste by generators?

A No, the penalty was assessed for K. P. McNamara operating as an illegal treatment, storage and disposal facility.

CP 13 [Hearing Transcript (Deanne Williams), pp. 187-188, ll. 18-16.]

In her Pre-Hearing Order dated February 9, 2009, Administrative Law Judge Kay Brown certified Issue 5 – restating for hearing the Ecology finding that “*KP operated as an unpermitted dangerous waste treatment, storage and disposal facility when it **accepted** the totes containing dangerous waste*” – as follows:

Is appellant required to obtain a permit or to comply with the requirements for operating a dangerous waste treatment, storage and disposal facility (TSD) facility if appellant **receives** from off-site generators containers which are not “empty” pursuant to WAC 173-30-160 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]² designated a “dangerous waste” by the generator?

² The parties concur that the February 9, 2009 Pre-Hearing Order at page 2 mistakenly excluded the word “not” in the phrase “...and its contents were [not] designated a ‘dangerous waste’ by the generator.” There is no allegation that Petitioners accepted or received shipments of totes that had been identified or

CP 10 [PCHB Pre-Hearing Order dated February 9, 2009 (emphasis added).] CP 10 [Findings of Fact, Conclusions of Law, and Final Decision, p. 18-19, ll. 18-3.]

Only issue number 5 and issue number 3 (concerning the shipment of rinse-water offsite) are related to Ecology's penalty assessment (\$10,000.00 each). CP 13 [Hearing Transcript, p.14-15, ll. 8-2.] CP 10 [Respondent Department of Ecology's Motion in Limine to Exclude Evidence at Hearing dated October 8, 2009, page 5, ll. 5-6.]

"Issue 5 is a question of law, not fact." CP 10 [Respondent Department of Ecology's Motion and Memorandum in Support of Partial Summary Judgment, p. 6, ll. 3-4.]

On or about April 21, 2009, the duties of ALJ Kay Brown as presiding officer were transferred to Andrea McNamara Doyle. CP 10 [Letter of the Environmental Hearings Office dated April 21, 2009.]

The Pollution Control Hearings Board initially granted Summary Judgment in favor of Ecology on Issue 5 based on a finding that:

[A]t the time [Appellant KPM-NW] received, consolidated, and stored dangerous or hazardous waste from off-site sources...Appellant...was required to obtain proper permitting and observe storage and disposal requirements.

"designated as" dangerous waste by the generators. See CP 10 [Ecology Motion for Partial Summary Judgment page 6, footnote 2.]

CP 10 [PCHB Order Granting Motion for Partial Summary Judgment at page 19, lines 12 – 16).] Petitioners filed a Motion for Reconsideration, pointing out that because the Board’s finding was not limited to whether Appellant’s receipt of (“receives”) unmanifested non-“RCRA-empty” totes required a TSD facility permit that the Board should reconsider and reverse its decision on this Issue 5. CP 10 [KPM-NW Motion for Reconsideration at pages 3-4.] The Board withdrew its decision in its Order on Summary Judgment (As Amended on Reconsideration). In its amended decision the Board wrote:

*The Board finds that material facts are in dispute regarding the **nature and extent** of Appellant’s **receipt** of non-RCRA-empty containers from off-site generators containing dangerous waste that were shipped without a manifest. These factual disputes make it premature for us to reach a legal conclusion on the issue of whether K.P. McNamara is required to obtain a permit or to comply with the requirements for operating a dangerous waste TSD facility **by virtue of receiving such containers**. The Board believes that because there are disputed facts, conflicting interpretations of the law, and potentially significant implications for the regulatory scheme involving manifest discrepancies, it is appropriate to reserve judgment at this time. The Board therefore denies summary judgment on Issue 5 and sets this issue over for hearing.*

CP 10 [Order on Summary Judgment (As Amended on Reconsideration), pages 19-20 (emphasis added).]

As the administrative hearing began, ALJ Andrea McNamara Doyle reiterated the issues that had been certified for hearing. She stated:

I wanted to address a number of preliminary issues. I would just state for the record that the scope of the issues at hearing have been narrowed as a result of motion practice in this case. The order on summary judgment, as amended on reconsideration and reissued on November 6 of 2009, resolved three of the legal issues in this case and set over four of the remaining issues for hearing. It's those four remaining issues that the Board will be addressing as part of today's hearing.

CP 13 [Hearing Transcript (Opening Statements) p. 6, ll. 16-25.]

Counsel for Ecology, in her opening remarks, stated:

This case actually has boiled down to just the four remaining issues as certified by the Board in the pre-hearing order.

CP 13 [Hearing Transcript (Opening Statements) pp. 12-13, ll. 25-2.]

And:

Issue number 5 that has been part of the discussion of this case for sometime is whether or not McNamara was obligated to have a permit when it received totes that contained above the regulatory definition of empty amount of hazardous waste. Ecology has argued this position, this board has indicated to us that you want to hear more information on this particular issue...

CP 13 [Hearing Transcript (Opening Statements) p. 14, ll. 8-15.]

But in her opening remarks counsel for Ecology also argued that the manner in which KPM-NW stored non-“RCRA empty” totes at its non-permitted facility was at issue:

The other [issue], again, discusses the issue that McNamara acted as an unpermitted TSD when it received non-empty containers. And then it also did not comply with the dangerous waste regulations when it received non-empty containers on site.

CP 13 [Hearing Transcript (Opening Statements), pp. 14-15, ll. 19-2.] In his opening remarks, counsel for Petitioners objected to this expansion of the issue. CP 13 [Hearing Transcript (Opening Statements), pp. 16-17, ll. 19-2.]

Counsel for KPM-NW and McNamara objected to testimony from Ecology inspector Deanne Williams regarding the management of non-“RCRA empty” containers, prompting the following discourse among counsel for Ecology (Ms. Barney), counsel for KPM-NW and McNamara (Mr. Benke) and the presiding officer of the Board (Ms. Doyle):

MS. BARNEY: Well, in terms of the issues that remain before the Board, the violations as alleged in the order and penalty are still at issue here. Those issues were not addressed nor resolved on summary judgment. And one of the issues involved in the order is whether or not waste was properly being contained and managed and whether or not containers were properly labeled and stored correctly. So, the testimony is that inspector's observations that directly go to issue number 2 in terms of whether or not McNamara was complying or whether they violated the regulations as alleged in the order.

CP 13 [Hearing Transcript, p. 47, ll. 10-21.] PCHB certified Issue #2 was stated as follows (CP 10):

“Did K.P. McNamara Northwest, Inc. violate the Washington State dangerous waste regulations Chapter 173-303 WAC as specified in Order No. 6237?”

Counsel and the Presiding Officer continued their discussion about the relevance of testimony relating to KPM-NW's management of non-

“RCRA empty” containers:

MR. BENKE: And, Your Honor, respectfully, Ms. Barney is wrong. She is forgetting the discussion that we had with the hearings officer when we determined what issues were going to be litigated. The distinction is important. Even if Ms. Barney is right that this is relevant, this management of the heels in these containers, that's not what the penalty was assessed for. There's a \$10,000 penalty assessed for the receipt of non-RCRA empty totes, there's a \$10,000 penalty assessed for the not manifesting of the rinse water, and all this other testimony is irrelevant to, at a minimum, irrelevant to those penalty determinations, and I would like the Board to keep that in mind.

MS. DOYLE: Ms. Barney, the penalty that was issued does not tie directly to the placarding and labeling; is that correct?

MS. BARNEY: That's correct, but aren't we still also looking at issue 2 and, plus, I believe also the reasonableness of the penalty determination that the Board makes is based on the entire facts and circumstances of the case. Because we have a particular violation that was specifically enumerated in the order, it would seem to me that that violation would be relevant in terms of the Board's determination of the entire reasonableness of the penalty.

MS. DOYLE: I'm going to overrule the objection at this time. I do think that the conduct and the violation that is being discussed at this point does fall within the scope of issue number 2 and that still is a live issue in the hearing. I think it's a valid distinction to point out that the penalty does not relate -- was not specifically tied to this conduct. That's helpful for the Board to keep in mind.

CP 13 [Hearing Transcript, p. 47-49, ll. 22-5.]

The testimony sponsored by Ecology is replete with complaints about how non-empty³ totes were stored on site. For example:

And, you know, these totes, just standing there, just to put you in that picture for a moment, are stored over gravel. There's a lid on the top of every tote and in some cases that lid had been removed and set to one side. There was no labeling as far as this is a dangerous waste or there weren't setbacks from other types of totes that were on the site, so my concern in the immediate action letter was that those risks for fires or spills that employees understood what they were dealing with based on labeling on the containers, that those concerns would be addressed right away.

CP 13 [Hearing Transcript (Deanne Williams) p. 114, ll. 6-16.]

At the end of Deanne Williams' testimony, in response to a question from Board member Mix, Ms. Williams testified to how the agency exercised its "discretion" (Ms. Mix's word) to require, or not require, that KPM-NW operate under a TSD facility permit:

A Well, our concern with K.P. McNamara was that, you know, ultimately what we started to see or what we were afraid we were seeing was an escalation of the number of non-empty totes that were being received at the facility, that were landing at the facility. So the first time that I observed non-empty totes at the facility, my objective was, this is a facility that was not identified as a large

³ Ms. Williams testified that she did not know then, and could not testify from personal knowledge, that any of the non-empty totes she saw contained "dangerous waste." Hearing Transcript (Deanne Williams) p. 194, ll. 10-19. Ms. Williams was concerned about non-empty containers even if they did not contain "dangerous waste" because of the potential for releases of hazardous substances to soil or groundwater. Hearing Transcript (Deanne Williams) pp. 136-137, ll. 22-1, pp. 142-143, ll. 22-1 and p. 186, ll. 1-5., p. 270, ll. 15-18.

quantity generator of dangerous waste. They weren't intending to operate as a treatment, storage and disposal facility. They weren't intending to accept dangerous waste from other generators.

So that's exactly what we did, was look at them as a generator, ask them to manage that waste accordingly, meaning that they needed to designate it and determine how it should be managed.

So as we saw more totes arriving at the facility, I mean, if you look back at the record, you'll see that we cited WAC 173-303-950 several times, and that was stating essentially our authority. If you're operating without a permit, that's our authority that essentially puts you on notice that you need to get a permit if you're going to continue operating this way.

So that's exactly the way that we looked at it for quite a long time.

This is a generator who's had waste abandoned, essentially, on them through the generator's sites. Let's work with them to shore that up so it doesn't keep happening.

And when it continued to happen, that's when we went to: You look like you're operating like a TSD. You look like you're either not capable of stopping it from happening or, at the very least, when it does land at your facility, you're not managing it appropriately.

CP 13 [Hearing Transcript, page 328-330.]

At the close of Ecology's case, Petitioners asked for a directed verdict on issue 5. CP 13 [Hearing Transcript, p. 344, ll. 8-16.] Ecology's counsel, Ms. Barney, responded in part:

I believe that Ecology's witness has provided the Board with testimony to the effect of her [Deanne Williams'] particular interpretation, and I think rather than a directed verdict at this time, our request would be that the Board would consider [Deanne Williams' interpretation] in the context of the facts of this particular case. And it is a question of law, but it also is

impacted by Ecology's role as a regulator and their interpretation of the regulations.

CP 13 [Hearing Transcript, p. 345, ll. 11-18.] The Board denied Petitioners' motion for directed verdict. CP 13 [Hearing Transcript, p. 346, ll. 4-13.]

The PCHB, in its Final Decision, based its ruling against KPM-NW on the following findings:

*We further find that at least some of these non-empty totes remained outside for a period of several days to several weeks, in an uncovered area without secondary containment, without proper labeling or accumulation start dates, and without proper inspections. As such, KP McNamara's handling of the non-empty totes at its facility failed to comply with the on-site accumulation requirements of WAC 173-303-200. Although **KP McNamara did not generate the waste**, the manner in which it managed the non-empty totes did not comport with the on-site accumulation **requirements applicable to generators** providing that dangerous wastes must be accumulated in containers that are properly labeled, inspected, and stored.*

CP 10 [Findings of Fact, Conclusions of Law, and Final Decision, p. 11, ll. 4-11 (emphasis added).] The Final Decision continues:

*Regardless of whether the manifest discrepancy rules are directly applicable to the KP McNamara facility, we conclude **they do not operate to shield** KP McNamara from a penalty or from TSD facility permitting or operating requirements under the facts of this case. This is because KP McNamara failed to demonstrate that the manner in which it responded to receipt of the non-empty totes complied with the manifest discrepancy regulations (either the former or current versions).*

CP 10 [Findings of Fact, Conclusions of Law, and Final Decision, p. 22, ll. 9-13 (emphasis added).] The Final Decision continues:

*[W]e find that KP McNamara **continued receiving** more than an **incidental or occasional** number of non-RCRA empty totes after being directed by Ecology to cease doing so. We also find that KP McNamara repeatedly failed to follow its own standard operating procedures directing that it would not **receive and manage** non-empty totes. Accordingly, we conclude that KP McNamara was reasonably subjected to the requirements of WAC 173-303-280(1) and -400.*

CP 10 [Findings of Fact, Conclusions of Law, and Final Decision, p. 23, ll. 9-13 (emphasis added).]

ARGUMENT

Two \$10,000 penalties were assessed by Ecology, one relating to the receipt of non-“RCRA empty” totes (PCHB certified Issue #5) and the other relating to the transport of rinse-water without a Uniform Hazardous Waste Manifest (PCHB certified Issue #3). From the beginning of the evidentiary hearing KPM-NW and McNamara objected to the introduction of evidence relating to the on-site management of dangerous waste that had been received by KPM-NW. In response to continued objections, the Board stated, and counsel for Ecology confirmed, that the \$10,000 penalty related only to “receipt” of non-“RCRA empty” totes and that KPM-NW’s management of those wastes upon receipt was relevant only to the reasonableness of the penalty amount. As presiding officer Doyle stated:

I'm going to overrule the objection at this time. I do think that the conduct and the violation that is being discussed at this point does fall

within the scope of issue number 2 and that still is a live issue in the hearing. I think it's a valid distinction to point out that the penalty does not relate -- was not specifically tied to this conduct. That's helpful for the Board to keep in mind.

So, only if “receipt” constituted a violation of the dangerous waste rules (as the question was set out in PCHB certified Issue #5) could the Board uphold the penalty assessment in the first place. This is why Ecology’s first argument in its Opening Brief (at page 36) that “The Board did not need to consider the legal issue posed by McNamara...” is baseless.

The alternative argument proffered by Ecology, that KPM-NW and McNamara were on notice that the facts of the “nature and extent” of McNamara’s receipt of dangerous waste were in dispute at the hearing, was rightfully rejected by the Superior Court. First, because Ecology and the Board had made it abundantly clear that the “nature and extent” would relate only to the reasonableness of the amount of the penalty assessment and second, because the issues certified by ALJ Brown were not “modified for good cause by subsequent order of the board or the presiding officer” as required by WAC 371-08-435(2). As Ecology itself points out in its Opening Brief (at page 38), the Board never reached a decision on the “legal issue posed by McNamara” (Issue #5). Instead, the Board substituted issues relating to KPM-NW’s management of non-

“RCRA empty” totes (e.g., compliance with the “TSD facility permitting or operating requirements” and compliance with the notice and reporting requirements of the “manifest discrepancies rule.”) Because Ecology did not assess any penalty for these alleged violations of other dangerous waste rules, and because the Board is precluded from substituting issues by its own administrative rules [WAC 371-08-435(2)], Ecology’s “notice” argument is also baseless.

The Superior Court did not reach the underlying issues relating to KPM-NW’s alleged non-compliance with the “TSD facility permitting or operating requirements” or the notice and reporting requirements of the “manifest discrepancies rule” because it held that the PCHB had improperly substituted these issues for Issue #5 (and remanded the matter to the PCHB for a decision on that seminal issue.) KPM-NW and McNamara did contest the Board’s findings with respect to those secondary issues in their Petition for Review of Administrative Order (Issues C and D at page 4 of the Petition.) Because Ecology argues that the Court of Appeals review is *de novo*, these underlying issues are addressed herein. The following analysis should be helpful, in addition to explaining why allegations of other dangerous waste rules violations are baseless, in that it explains why ALJ Kay Brown certified Issue #5 as she did.

The Board concluded in its Findings of Fact, Conclusions of Law, and Final Decision that “K.P. McNamara was reasonably subjected to the requirements of WAC 173-303-280(1) and -400.” The Department of Ecology had, in its Notice of Penalty, cited KPM-NW for an alleged violation of WAC 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.”) WAC 173-303-**280** “General requirements for dangerous waste management facilities” provides in pertinent part:

(1) Applicability. The requirements of WAC 173-303-280 through 173-303-395 apply to all owners and operators of facilities which store, treat, or dispose of dangerous wastes and which must be permitted under the requirements of this chapter 173-303 WAC, unless otherwise specified in this chapter. Whenever a shipment of dangerous waste is initiated from a facility, the owner or operator of that facility must comply with the requirements for generators, WAC 173-303-170 through 173-303-230.

WAC 173-303-**400** “Interim status facility standards” apply to facilities that have submitted a “Part B permit application” and are awaiting issuance of an operating permit by Ecology. KPM-NW has not submitted a Part B permit application and was not awaiting issuance of an operating permit, so the “Interim status facility standards” cited by Ecology in its “Notice of Penalty Incurred and Due” do not apply to KPM-NW.

The Board also cited WAC 173-303-**200** in its Final Decision even

though this rule is not mentioned in Ecology's "Notice of Penalty Incurred and Due". Ecology does not cite WAC 173-303-200 as a basis for its enforcement action against KPM-NW because that subsection -200 falls within a section of the dangerous waste rules that applies to persons who "generate" dangerous waste, WAC 173-303-170 through -230. KPM-NW did not "generate" any of the dangerous waste at issue and thus could not be held liable for violating WAC 173-303-200. Nevertheless, at the urging of Ecology at hearing, the Board cited WAC 173-303-200 as a basis for its holding that KPM-NW and McNamara could be assessed a penalty due to the "nature and extent" of the "receipt" of dangerous waste. WAC 173-303-200 "Accumulating dangerous waste on-site" provides, in pertinent part that a "generator" may accumulate dangerous waste on-site without a permit for ninety days or less after the date of generation provided that it complies with a long list of record keeping, spill containment and other safety standards. The Board stated in its Final Decision at page 11, ll. 3-11:

"We further find that at least some of these non-empty totes remained outside for a period of several days to several weeks, in an uncovered area without secondary containment, without proper labeling or accumulation start dates, and without proper inspections. As such, KP McNamara's handling of the non-empty totes at its facility failed to comply with the on-site accumulation requirements of WAC 173-303-200. Although KP McNamara did not generate the waste, the manner in which it managed the non-empty totes did not comport with the on-site accumulation

requirements applicable to generators providing that dangerous wastes must be accumulated in containers that are properly labeled, inspected and stored.” PCHB Final Decision p. 11, ll. 3-11.

CP 10. That remarkable turn of phrase – “*Although KP McNamara did not generate the waste, the manner in which it managed the non-empty totes did not comport with the on-site accumulation requirements applicable to generators...*” – reveals much about the bankrupt logic of Ecology and the PCHB. Ecology was concerned about the manner in which KPM-NW was storing non-“RCRA empty” totes prior to manifesting and shipment to an appropriate off-site disposal facility but it could not identify any applicable management standard in its rules. It was that gap in Ecology’s regulations that underlay Ecology inspector Deanne Williams’ directive that KPM-NW not even off-load non-“RCRA empty” containers and to send them back into transport without a Uniform Hazardous Waste Manifest, and it was that gap in Ecology’s regulations that explains the precise wording of Issue #5 (i.e., whether “receipt” alone was unlawful.)

The TSD facility permitting rules (WAC 173-303-280 through 395) apply to all “owners and operators of facilities which store, treat, or dispose of dangerous wastes and which must be permitted under the requirements of ... chapter 173-303- WAC, unless otherwise specified in [WAC Chapter 173-303.]” There are more than a few exclusions from

TSD facility permitting rules in the Washington Dangerous Waste rules, among them the exclusion for generators who store dangerous waste for 90 days or less (WAC 173-303-200), the exclusion for so-called “small quantity generators” who store dangerous waste for 180 days or less, the exclusion for transporters who store dangerous waste at their “transfer” facilities for 10 days or less (WAC 173-303-240), and the exclusion for facilities that “handle” so-called “universal waste” for a year or less (WAC 173-303-573). Each of these permitting exclusions include situation-specific standards for storage of dangerous waste that are generally less restrictive than the permitted facility standards given the temporary and limited scope of the management activity. One other such exclusion, and the one at issue in this case, applies to TSD facilities that “reject” dangerous waste that the facility is not permitted to “accept”, e.g. the Manifest Discrepancies rule.

The Manifest Discrepancies rule then, as now, “appl[ies] to owners and operators who receive dangerous waste from off-site sources.”) WAC 173-303-370(1) “Applicability”. The rule (as then in effect) required that upon discovering a significant discrepancy “the owner or operator must attempt to reconcile the discrepancy with the waste generator and transporter.” (See Exh. 9 hereto, page 4 of 7, ll. 2-5.) The rule expressly contemplated that the owner or operator of the receiving facility might

take possession of the waste, stating that “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” (See Exh. 9 hereto, page 4 of 7, ll. 5-9) and that the owner or operator may send the shipment on to an alternate 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.” (See Exh. 9 hereto, page 6 of 7, ll. 26-33.) However – and this is key – the Washington Manifest Discrepancies rule then in effect did not include standards for managing (storing) rejected dangerous waste. That is why Ecology argued to the PCHB that KPM-NW had not complied with the Generator Accumulation standards even though those standards clearly did not apply to KPM-NW because KPM-NW had not “generated” the waste.

The United States Environmental Protection Agency (“USEPA”) – three years prior to the alleged violations at KPM-NW – addressed this gap in the regulations with adoption of amendments to its Manifest Discrepancies rule of 40 CFR § 264.72.⁴ Under the amended federal rule,

⁴ The state dangerous waste rules mirrored the federal hazardous waste rules, then as now, because Washington was administering the federal hazardous waste

“Manifest Discrepancies” include “container residues, which are residues that exceed the quantity limits for “empty” containers set forth in 40 CFR 261.7(b).” The federal Manifest Discrepancies rule sets out procedures for dealing with receipt of non-“RCRA empty” containers, including the following provision at § 264.72(d)(2):

*(d)(1) Upon rejecting waste or identifying a container residue that exceeds the quantity limits for “empty” containers set forth in 40 CFR 261.7(b), the facility must consult with the generator prior to forwarding the waste to another facility that can manage the waste. If it is impossible to locate an alternative facility that can receive the waste, the facility may return the rejected waste or residue to the generator. The facility must send the waste to the alternative facility or to the generator within **60 days** of the rejection or the container residue identification.*

*(2) While the facility is making arrangements for forwarding rejected wastes or residues to another facility under this section, it must ensure that either the delivering transporter retains custody of the waste, or, **the facility must provide for secure, temporary custody of the waste**, pending delivery of the waste to the first transporter designated on the manifest prepared under paragraph (e) or (f) of this section. (emphasis added)*

Pursuant to the referenced paragraphs (e) or (f) of the federal Manifest Discrepancies rule, the receiving facility is required to prepare a new Uniform Hazardous Waste Manifest (“UHW”) for shipment of the offending container to either an alternate facility or back to the generator.

program. However, the federal amendments to the Manifest Discrepancies rule did not become effective in Washington until they were formally adopted by the State some four years later.

As described by USEPA in its rulemaking, the Manifest Discrepancies rule amendments were proposed “to improve the tracking of certain problematic hazardous waste shipments known as ‘rejected loads’ or ‘container residues’ ...” 70 FR 10775, 10803. (Exh. 6) Adopted within the context of broader rulemaking modifying the hazardous waste manifesting system, without any changes to existing TSD facility standards, the amendments only clarified what “management controls” were appropriate under existing law with respect to the “temporary staging of rejected wastes”. 70 FR 10775, 10809. (Exh. 6) USEPA was careful in its wording, using the terms “temporary staging” and “secure, temporary custody” to describe appropriate “management controls” for rejected waste rather than “storage,” which might have implied the necessity of compliance with TSD facility permitting rules or the Generator Accumulation standards. USEPA wrote in its final rule promulgation that “[T]here are very few management controls on temporary staging of rejected wastes by TSDFs, as opposed to the detailed technical requirements that apply to generator accumulation under 40 CFR 262.34(a).” 70 FR 10775, 10809. (Exh. 6)

Beyond highlighting the lack of any management standard applicable to rejected shipments of non-“RCRA empty” containers in the old Washington Manifest Discrepancies rule, the above discussion of the

amended federal and Washington rule is relevant because it also illustrates the key quandary for KPM-NW as it struggled to satisfy the mandate of Ecology inspector Deanne Williams that KPM-NW not off-load non-“RCRA empty” containers: KPM-NW could not “offer” the dangerous waste for further transport on a common carrier (within Washington or across state lines) without a Uniform Hazardous Waste Manifest, and it could not complete the Manifest without certifying the appropriate federal “waste code” for the waste. An appropriate “waste code” designation takes time, at a minimum to confer with the generator and at worst to complete an independent chemical analysis of the waste. The amendments allow up to 60 days to determine the appropriate designations and to identify an authorized alternate TSD facility. When Deanne Williams was instructing KPM-NW to immediately send non-“RCRA empty” containers back to the generator on a common carrier she was directing them to violate both the Washington and federal Manifesting rules. This KPM-NW would not do, and was duly penalized for it by Ecology. (!!!)

As stated in KPM-NW’s and McNamara’s January 14, 2011 letter to Judge Bennett, if the Court of Appeals rules in favor of Ecology on this issue (reversing the Superior Court’s decision on the unlawful procedure claim) then the Court of Appeals must remand to the Superior Court the

following secondary issues (relating to receipt of non-“RCRA Empty” containers) which KPM-NW and McNamara raised in their Petition for Review of Administrative Order but which were not reached by the Superior Court: Erroneous Ruling that the “Manifest Discrepancies” Rule is Only a “Shield” Against Application of the TSD Facility Permitting and Interim Status Rules. (Issue C. at page 4 of the Petition); Unlawful Application of the TSD Facility Permitting and Interim Status Standards. (Issue D. at pages 4-5 of the Petition); Erroneous Exclusion of Evidence of an Admission by Ecology. (Issue H. at page 7 of the Petition); and the various Findings not Supported by Substantial Evidence or which are Arbitrary and Capricious.

E. RESPONSE TO ECOLOGY’S ARGUMENT THAT KPM-NW AND MCNAMARA SHOULD NOT BE AWARDED ATTORNEYS’ FEES BY THE COURT OF APPEALS EVEN IF KPM-NW AND MCNAMARA PREVAIL ON APPEAL TO THE COURT OF APPEALS.

Summary of Ecology’s Proposition on Appeal:

KPM-NW and McNamara failed to brief their request for attorneys’ fees to this court.

Summary of Ecology’s Argument:

This issue is addressed at page 49 of Ecology’s Opening Brief. Ecology argues that KPM-NW and McNamara have made no more than a “bald statement” that they are entitled to attorneys’ fees on appeal and,

moreover, that they have not established that they are a “qualified party” under RCW 4.84.340(5).

KPM-NW’s and McNamara’s Response:

This issue is addressed at page 41 of Appellants’ Opening Brief. This court requires no elucidation of the holding in Costanich v. Washington State Department of Social and Health Services, 164 Wash.2d 925, 194 P.3d 988 (2008), which is referenced in Appellants’ Opening Brief. The appellate court determines costs in all cases after the filing of a decision terminating review. RAP 14.1(a) A party seeking costs on review must file a cost bill with the appellate court and serve a copy of the cost bill on all parties within 10 days after the filing of an appellate court decision terminating review. RAP 14.4(a) Any issue as to whether either Appellant is a “qualified party” should be resolved within the context of determining what expenses are to be allowed as costs pursuant to RAP 14.3. Alternatively, if the Court requires further briefing on the issue of whether either Appellant is a “qualified party” under the attorneys’ fees statute, prior to decision on the underlying issues, Appellants are prepared to respond as ordered.

F. CONCLUSION

The Court of Appeals should:

(A) Remand this matter to the Superior Court for award of appropriate attorneys' fees and costs with regard to Petitioners' unlawful procedure claim;

(B) Remand this matter to the PCHB with directions that it make findings of fact as to whether the rinse-water that was transported without a UHWM met any dangerous waste criteria, WAC 173-303-100;

(C) Rule that Kerry McNamara cannot be held liable for the alleged violations of dangerous waste rules with respect to the rinse-water that was transported without a UHWM;

(D) Remand this matter to the PCHB for a ruling on the narrow legal issue stated in certified Issue #5 (with regard to "receipt" of non-"RCRA empty" totes); and

(E) Order that Appellants KPM-NW and McNamara be awarded their attorneys' fees for this appeal upon submission of a cost bill in accordance with RAP 14.4 and a showing that they are "qualified persons" pursuant to RCW 4.84.340(5).

DATED this 11th day of March 2012.

Respectfully submitted,



THOMAS R. BENKE
OSB No. 922251
Attorney for Appellants

APPENDIX

- Exhibit 1 – December 18, 1978, USEPA Hazardous Waste Rules Proposal
- Exhibit 2 – EPA Form 8700-22 Uniform Hazardous Waste Manifest
- Exhibit 3 – May 19, 1989, USEPA Hazardous Waste Rules Promulgation
- Exhibit 4 – US v. Self, 2 F3d 1071 (C.A. 10 Utah)
- Exhibit 5 – In Re Quaker State Oil Refining Corp., 1986 WL 69020
- Exhibit 6 – March 4, 2005, USEPA Amended Manifest Discrepancies Rule Promulgation
- Exhibit 7 – There is no Exhibit 7
- Exhibit 8 – There is no Exhibit 8
- Exhibit 9 – Manifest Discrepancies Rule (Old) – As published in Amendatory Section (Amending Order 97-03, filed 1/12/98)

CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, I served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS / CROSS-RESPONDENTS KPM-NW & MCNAMARA to:

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Marc Worthy
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Pollution Control Hearings Board
800 Fifth Ave, Ste 2000 MS TB-14
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LALSeaEF@atg.wa.gov

- by first class mail, postage prepaid
- by hand delivery
- by facsimile transmission
- by electronic transmission

Dated: March 12, 2012

12 MAR 13 PM 1:41
STATE OF WASHINGTON
BY _____
DEPUTY



s/ Thomas R. Benke

THOMAS R. BENKE
OSB 922251
503-246-1514
Attorney for Appellants and Cross-
Respondents K.P. McNamara Northwest
Inc. and Kerry P. McNamara

Registered
Federal Order

MONDAY, DECEMBER 18, 1978
PART IV



**ENVIRONMENTAL
PROTECTION
AGENCY**

Hazardous Waste

**Proposed Guidelines and
Regulations and Proposal on
Identification and Listing**

EXHIBIT 1

PAGE 1 OF 3

[6560-01-M]

**ENVIRONMENTAL PROTECTION
AGENCY**

[40 CFR Part 250]

[FRL 1014.5]

**HAZARDOUS WASTE GUIDELINES AND
REGULATIONS**

AGENCY: Environmental Protection Agency.

ACTION: Proposed rules.

SUMMARY: The Environmental Protection Agency (EPA) today issues proposed rules under Sections 3001, 3002, and 3004 of the Solid Waste Disposal Act as substantially amended by the Resource Conservation and Recovery Act of 1976 (Pub. L. 94-580 (Oct. 21, 1976)). These proposals respectively cover: (1) criteria for identifying and listing hazardous waste, identification methods, and a hazardous waste list; (2) standards applicable to generators of such waste for recordkeeping, labeling, containerizing, and using a transport manifest; and (3) performance standards for hazardous waste management facilities. In separate sections of today's FEDERAL REGISTER EPA explains in detail the proposals under Sections 3002 and 3004.

These proposals together with those already published pursuant to Section 3003, (April 28, 1978, 43 FR 18506-18512), Section 3006 (February 1, 1978, 43 FR 4366-4373), Section 3008 (August 4, 1978, 43 FR 34738-34747), and Section 3010 (July 11, 1978, 43 FR 29908-29918) and that of the Department of Transportation pursuant to the Hazardous Materials Transportation Act (May 25, 1978, 43 FR 22626-22634) along with Section 3005 regulations constitute the hazardous waste regulatory program under Subtitle C of the Act.

EPA has chosen to integrate its regulations pursuant to Section 3005 and Section 3006 of the Act with proposals under the National Pollutant Discharge Elimination System required by Section 402 of the Clean Water Act and the Underground Injection Control Program of the Safe Drinking Water Act. This integration of programs will appear soon as proposed rules under 40 CFR Parts 122, 123, 124 and 128.

In addition to the proposals announced today, EPA is publishing in today's FEDERAL REGISTER an Advance Notice of Proposed Rulemaking, that calls attention to suggested expansion of characteristics to be used in identifying hazardous waste under Subtitle C.

DATES: Comments are due March 16, 1979. Hearings: listed below.

ADDRESSES: Comments should be addressed to: John P. Lehman, Director, Hazardous Waste Management Division, Office of Solid Waste (WH-565), U.S. Environmental Protection Agency, Washington, D.C. 20460. Communications should identify the regulatory docket or notice number, such as "Section 3001", Section 3002", etc.

The official record for this rulemaking is available at: Room 2111D, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, and is available for viewing from 9:00 a.m. to 4:00 p.m. Monday through Friday, excluding holidays.

Hearings: Five sets of consolidated public hearings on Section 3001-4 proposals are scheduled. The portion of the hearing devoted to Section 3003 will be held jointly with the Department of Transportation.

The schedule and location for the hearings are as follows:

February 7, 8, 9 (1979)—United Engineering Center, Main Auditorium, 345 East 47th Street, New York, N.Y.

February 14, 15, 16—Breckenridge Pavilion Hotel, One Broadway, St. Louis, Missouri 63102, 314-421-1776

February 20, 21, 22—Department of Commerce, Main Auditorium, 14th Street Entrance, Washington, D.C.

March 7, 8, 9—Holiday Inn-Airport, P.O. Box 38218, 4040 Quebec Street, Denver, Colorado 80216, 303-321-6666.

March 12, 13, 14—EPA Regional Office, Sixth Floor Conference Room, 215 Fremont Street, San Francisco, Calif.

A block of rooms has been reserved in St. Louis and Denver for attendees. Please make reservations directly with the hotel by requesting an EPA reserved room at least two weeks prior to the hearing.

An evening session will be held the second day of each hearing to accommodate those who cannot attend during the day. The evening session will cover all four proposed regulations.

The agenda below will generally be followed:

Day 1:
Registration—8:00-8:30 a.m.

Section 3001—8:30-5:30 p.m.

Day 2:

Continuing Registration—8:00-8:30 a.m.

Section 3002—8:30-12:30

Section 3003—2:00-5:00 p.m.

Section 3001-3004—7:00 p.m.

Day 3:

Continuing Registration—8:00-8:30 a.m.

Section 3004—8:30-5:00 p.m.

Anyone wishing to make an oral statement(s) at the hearing(s) should notify, in writing;

Mrs. Geraldine Wyer, Public Participation Officer, Office of Solid Waste (WH-562), U.S. E.P.A., 401 M Street SW., Washington, D.C. 20460.

Please indicate which hearing (location) and the specific regulation(s) that comment(s) will be directed to.

Oral or written comments may be submitted at the public hearings. Persons who wish to make oral presentations must restrict their presentations to ten minutes, and are encouraged to have written copies of their complete comments for inclusion in the official record.

**FOR FURTHER INFORMATION
CONTACT:**

Hazardous Waste Management Division, Office of Solid Waste (WH-565), U.S. Environmental Protection Agency, Washington, D.C. 20460.

Section 3001—Mr. Alan Corson, 202-755-9187.

Section 3002—Mr. Harry Trask, 202-755-9187.

Section 3004—Mr. Timothy Fields, Jr., 202-755-9296.

SUPPLEMENTARY INFORMATION:**INTRODUCTION**

The EPA is today proposing the core elements of a major regulatory program to manage and control the country's hazardous waste from generation to final disposal. The Congress directed this action in the Resource Conservation and Recovery Act of 1976 (RCRA), recognizing that disposal of hazardous waste is a crucial environmental and health problem which must be controlled.

In our proposal, we have outlined two sets of requirements: one which sets norms of conduct for Federal and State agencies in implementing the program and the second which sets minimum norms of conduct for those who generate, transport, treat, store, and dispose of hazardous waste.

These requirements, we believe, will close the circle of environmental control begun earlier with regulatory control of emissions and discharges of contaminants to air, water, and the oceans.

We do not underestimate the complexity and difficulty of our proposed regulations. Rather, they reflect the large amounts of hazardous waste generated and the complexity of the movement of hazardous waste in our diverse society. These regulations will affect a large number of industries. Other non-industrial sources of hazardous waste, such as laboratories and commercial pesticide applicators, as well as transporters of hazardous waste, will also be included. The Agency estimates that approximately 270,000 waste generating facilities and 10,000 transporters will be regulated, although only about 30,000 of that number will require treatment, storage, or disposal permits. Under this

[6560-01-M]

(40 CFR PART 250 SUBPART B)

SECTION 3002—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

Section 3002 requires the Administrator to promulgate regulations establishing standards for persons generating waste identified or listed as hazardous under Subpart A (Identification and Listing of Hazardous Waste). These standards are designed to protect human health and the environment by establishing requirements for:

1. Recordkeeping to identify quantities, constituents, and disposition of hazardous waste generated;
2. Labeling of containers used for storage, transport, or disposal of hazardous waste;
3. Use of appropriate containers for hazardous waste;
4. Furnishing information on general chemical composition to persons transporting, treating, storing, or disposing of hazardous waste;
5. A manifest system to assure that hazardous waste is designated for and delivered to a permitted treatment, storage, or disposal facility; and
6. Submission of reports to the Administrator (or authorized State agency) setting out quantities and disposition of hazardous waste.

WASTE DESIGNATION

It is a generator's responsibility to determine if his waste is hazardous. This determination can be made by evaluating the waste against the characteristics outlined in § 250.13 of Subpart A, or by identifying the waste on the hazardous waste lists presented in § 250.14 of Subpart A.

A person who has knowledge of the raw materials input into his process and knows these materials to be present in the waste may utilize this information to determine whether the waste would match the characteristics set forth in § 250.13 without testing. This can be accomplished by using the manufacturer's specifications and data or by consulting scientific literature and comparing the physical and chemical properties of the raw materials in the waste to the characteristics in § 250.13 which make a waste hazardous.

If a person believes his waste to be hazardous, he may also simply declare it to be so without any references to Subpart A or to scientific literature.

IDENTIFICATION OF HAZARDOUS WASTE GENERATORS

The Act does not define a hazardous waste "generator;" however, § 1004(6) defines "hazardous waste generation" as "the act or process of producing hazardous waste." EPA has used this language to define a hazardous waste generator as a "person or Federal

Agency whose act or process produces hazardous waste." Examples of generators of hazardous waste are some manufacturers included in SIC codes 20-39, laboratories, and aerial and commercial pesticide applicators.

Although the term "produces hazardous waste" implies that only manufacturers are included in the definition of generator, it is important to point out that a person who accumulates hazardous waste is considered a generator because the process of accumulation results in a hazardous waste disposal problem. For example, a laboratory that accumulates a waste designated as hazardous under Subpart A of these proposed rules would be subject to the requirements in this Subpart.

The Agency has proposed that persons who produce and dispose of less than 100 kilograms (approximately 220 pounds) of hazardous waste in any one month are exempted from the requirements of this Subpart if they comply with the provisions of § 250.29. The 100 kilogram per month level for defining generators was developed as a result of an effort to exclude from this Subpart persons whose generation of small amounts of hazardous waste does not pose a substantial threat to human health or the environment. Based on surveys of industrial waste production in five States (New Jersey, Texas, Illinois, Tennessee, Maryland) and data presented in the Draft Environmental Impact Statement for Subtitle C, it is estimated that the cut-off point of 100 kilograms per month for hazardous waste generation will allow control of 99.5 to 99.9 percent of potentially hazardous industrial waste while at the same time excluding up to 60 percent of the generators in the manufacturing industry (SIC 20-39).

Persons who dispose of less than 100 kilograms must comply with the provisions of Section 250.29. These provisions require that any hazardous waste generated, no matter how small the quantity, be disposed of either in (1) a solid waste facility which has been permitted or otherwise certified by the State as meeting the criteria pursuant to Section 4004 of RCRA; or (2) a treatment, storage, or disposal facility permitted by the Administrator pursuant to the requirements of Subpart E or permitted by an authorized State program pursuant to Subpart F. Compliance with these provisions will assure protection of human health and the environment from the disposal of all hazardous waste.

The Agency has also proposed that retailers and farmers generating any amount of hazardous waste be exempted from the requirements of this Subpart if they comply with the provisions of Section 250.29. Excepted from this are gasoline stations and

companies that accumulate more than 100 kilograms per month of waste oil. Retailers rarely generate hazardous waste in excess of 100 kilograms per month. In the event that a retailer has a need to dispose of more than 100 kilograms of hazardous waste in a given month, this disposal must be in compliance with § 250.29(a). Farmers are exempted because the Federal Insecticide, Fungicide, and Rodenticide Act can be used to control the disposal of excess pesticides and pesticide containers. Pesticides and pesticide containers are likely to be the only hazardous wastes generated by farmers, and disposal will be required in accordance with § 250.29(b).

Gasoline stations and other companies that accumulate and dispose of more than 100 kilograms per month of waste oil will be subject to the requirements of this Subpart. Waste oil presents a special environmental problem because it is ubiquitous and because it is a potential carrier for other hazardous waste and substances. For example, it is sometimes mixed with transformer oil containing PCB's. Regulation of waste oil under this Subpart will tend to direct such oil to permitted treatment or recovery facilities that will promote resource conservation, a major goal of the Act.

The Agency does not anticipate that the requirements of this regulation will impose an undue burden on accumulators of waste oil because transporters and disposers have expressed a willingness to perform the generator's responsibilities under this section for a reasonable fee. Generators who arrange with transporters or disposers to perform their recordkeeping and reporting requirements will be relieved of most of the risk of non-compliance. Section 250.28 of this regulation provides that where a transporter regulated by Subpart C or a disposer regulated by Subparts D and E of this Part contracts with the generator to perform the generator's duties, the transporter or disposer will become independently liable under the Act for failure to perform. Although the generator cannot completely transfer his liability under the Act for a failure to perform, EPA enforcement actions will focus on the delinquent transporter or disposer rather than a generator who has entered into an assumption of duties contract.

Congress did not intend households to be considered generators, nor did it intend that the type of waste substances normally used in households be included in the Subtitle C regulatory program. (S. Rep. No. 94-988, 94th Cong., 2nd sess. at 16.) Thus, households and similar establishments such as apartment houses, condominiums, and hotels are not included in the Subtitle C program.

UNIFORM HAZARDOUS WASTE MANIFEST		1. Generator ID Number	2. Page 1 of	3. Emergency Response Phone	4. Manifest Tracking Number	
5. Generator's Name and Mailing Address			Generator's Site Address (if different than mailing address)			
Generator's Phone:						
6. Transporter 1 Company Name				U.S. EPA ID Number		
7. Transporter 2 Company Name				U.S. EPA ID Number		
8. Designated Facility Name and Site Address				U.S. EPA ID Number		
Facility's Phone:						
9a. HM	9b. U.S. DOT Description (including Proper Shipping Name, Hazard Class, ID Number, and Packing Group (if any))	10. Containers		11. Total Quantity	12. Unit Wt./Vol.	13. Waste Codes
		No.	Type			
1.						
2.						
3.						
4.						
14. Special Handling Instructions and Additional Information						
15. GENERATOR'S/OFFEROR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by the proper shipping name, and are classified, packaged, marked and labeled/placarded, and are in all respects in proper condition for transport according to applicable international and national governmental regulations. If export shipment and I am the Primary Exporter, I certify that the contents of this consignment conform to the terms of the attached EPA Acknowledgment of Consent. I certify that the waste minimization statement identified in 40 CFR 262.27(a) (if I am a large quantity generator) or (b) (if I am a small quantity generator) is true.						
Generator's/Offeror's Printed/Typed Name			Signature		Month Day Year	
16. International Shipments <input type="checkbox"/> Import to U.S. <input type="checkbox"/> Export from U.S. Port of entry/exit: _____ Transporter signature (for exports only): _____ Date leaving U.S.: _____						
17. Transporter Acknowledgment of Receipt of Materials						
Transporter 1 Printed/Typed Name			Signature		Month Day Year	
Transporter 2 Printed/Typed Name			Signature		Month Day Year	
18. Discrepancy						
18a. Discrepancy Indication Space <input type="checkbox"/> Quantity <input type="checkbox"/> Type <input type="checkbox"/> Residue <input type="checkbox"/> Partial Rejection <input type="checkbox"/> Full Rejection						
Manifest Reference Number: _____						
18b. Alternate Facility (or Generator)				U.S. EPA ID Number		
Facility's Phone:						
18c. Signature of Alternate Facility (or Generator)					Month Day Year	
19. Hazardous Waste Report Management Method Codes (i.e., codes for hazardous waste treatment, disposal, and recycling systems)						
1.	2.	3.	4.			
20. Designated Facility Owner or Operator: Certification of receipt of hazardous materials covered by the manifest except as noted in Item 18a						
Printed/Typed Name			Signature		Month Day Year	

EXHIBIT 2
PAGE 1 OF 1

5-19-80
Vol. 45—No. 98
BOOK 2:
PAGES
33063-33285

Federal Register

Book 2 of 3 Books
Monday, May 19, 1980

ENVIRONMENTAL PROTECTION AGENCY Hazardous Waste Management System

- 33066 Part II
Hazardous Waste Management System;
General
- 33084 Part III
Identification and Listing of Hazardous
Waste
- 33136 Part IV
Proposal To Modify 40 CFR Part 261—
Hazardous Waste Lists
- 33140 Part V
Standards Applicable to Generators of
Hazardous Waste

orders of

Exh 3

Standards
Hazardous
Disposal

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EXHIBIT 3
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REYNOLDS
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MAY 27 1980

Federal Register

Monday
May 19, 1980

Part II

**Environmental
Protection Agency**

Hazardous Waste Management System:
General

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 260

[FRL 1395-7]

Hazardous Waste Management System: General

AGENCY: Environmental Protection Agency.

ACTION: Revisions to final rule and interim final rule and request for comments.

SUMMARY: Subtitle C of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (RCRA), directs the Environmental Protection Agency (EPA) to promulgate regulations to protect human health and the environment from the improper management of hazardous waste. The first phase of EPA's regulations implementing this directive are contained in Parts 262 and 263 of this chapter (which were promulgated on February 26, 1980) and Parts 261, 264, 265, 122, 123, and 124 of this chapter (which are being promulgated today).

This regulation (Part 260) sets forth definitions of words and phrases which appear in Parts 261 through 265 and contains provisions which are generally applicable to all those regulations. It was originally published on February 26, 1980, concurrent with the promulgation of EPA's Part 262 and 263 regulations. It is now being amended to add new provisions required by today's publication of Parts 261, 264 and 265 and to revise one of the definitions published in February.

DATES: Effective date: November 19, 1980. Comment date: For the interim final portions of this regulation, public comments will be accepted until July 18, 1980.

ADDRESSES: Comments on interim final portions should be sent to Docket Clerk [Docket No. 3000], Office of Solid Waste (WH-562), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. The public docket for this regulation is located in Room 2711 of the above address, and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays.

Single copies of these regulations will be available approximately 30 days after publication from Ed Cox, Solid Waste Information, U.S. Environmental Protection Agency, 26 West St. Clair Street, Cincinnati, Ohio 45268 (513) 684-5362. Multiple copies will be available from the Superintendent of Documents, Washington, D.C. 20402.

For information on the implementation of these regulations, contact the EPA Regional Offices below:
Region I—Dennis Huebner, Chief, Waste Management Branch, John F. Kennedy Building, Boston, Massachusetts 02203 (617) 223-5777;

Region II—Dr. Ernest Regna, Chief, Solid Waste Branch, 26 Federal Plaza, New York, New York 10007 (212) 264-0504/5;

Region III—Robert L. Allen, Chief, Hazardous Materials Branch, 6th and Walnut Streets, Philadelphia, Pennsylvania 19106 (215) 597-0980;

Region IV—James Scarbrough, Chief, Residuals Management Branch, 345 Courtland Street N.E., Atlanta, Georgia 30365 (404) 881-3016;

Region V—Karl J. Klepitsch, Jr., Chief, Waste Management Branch, 230 South Dearborn Street, Chicago, Illinois 60604 (312) 886-6148.

Region VI—R. Stan Jorgensen, Acting Chief, Solid Waste Branch, 1201 Elm Street, First International Building, Dallas, Texas 75270 (214) 767-2645

Region VII—Robert L. Morby, Chief, Hazardous Materials Branch, 324 E. 11th Street, Kansas City, Missouri 64106 (816) 374-3307

Region VIII—Lawrence P. Gazda, Chief, Waste Management Branch, 1860 Lincoln Street, Denver, Colorado 80203 (303) 837-2221

Region IX—Arnold R. Den, Chief, Hazardous Materials Branch, 215 Fremont Street, San Francisco, California 94105 (415) 556-4606

Region X—Kenneth D. Feigner, Chief, Waste Management Branch, 1200 6th Avenue, Seattle, Washington 98101 (206) 442-1260

FOR FURTHER INFORMATION CONTACT: John P. Lehman, Office of Solid Waste (WH-565), U.S. Environmental Protection Agency, 401 M Street, SW., Washington D.C. 20460 (202) 755-9185.

SUPPLEMENTARY INFORMATION:

I. Authority

This regulation is issued under the authority of Sections 1006, 2002(a), 3001 through 3007, 3010, and 7004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. 6905, 6912(a), 6921 through 6927, 6930, and 6974.

II Background

Subtitle C of RCRA establishes a Federal program to provide comprehensive regulation of hazardous waste. When fully implemented, this program will provide "cradle-to-grave" regulation of hazardous waste. Section 3001 of Subtitle C directs EPA to identify

the characteristics of and to list those hazardous wastes which are subject to regulation under Subtitle C. Sections 3002 and 3003 require EPA to establish standards for generators and transporters of hazardous waste which will ensure proper recordkeeping and reporting, the use of a manifest system to track shipments of hazardous waste, the use of proper labels and containers, and the delivery of the waste to properly permitted treatment, storage, and disposal facilities. To ensure that these facilities are designed, constructed, and operated in a manner which protects human health and the environment, Section 3004 of RCRA directs EPA to promulgate technical, administrative, monitoring, and financial standards for them. These independently enforceable standards will be used by EPA to issue permits to owners and operators of facilities under Section 3005. For those States interested in administering the RCRA program instead of EPA, Section 3006 requires the Agency to issue guidelines under which States may seek authorization to carry out the program. Finally, under Section 3010, all persons engaging in activities subject to control under Sections 3002 through 3004 above must notify EPA or States having authorized RCRA hazardous waste programs.

Early this year, EPA began issuing the regulations which comprise the Subtitle C hazardous waste management system. On February 26, 1980, it promulgated standards for generators and transporters of hazardous waste under Sections 3002 and 3003 of RCRA, respectively (Parts 262 and 263), and issued a public notice establishing procedures for filing a notice of hazardous waste activity under Section 3010. Today EPA is publishing permit procedures and guidelines for the approval of State hazardous waste programs under Sections 3005 and 3006, respectively (Parts 122, 123, and 124), and the first phase of its Section 3001 hazardous waste list and characteristics and Section 3004 facility standards (Parts 261, 264, and 265). As discussed in the preambles to those two latter regulations, EPA expects to be amending its Sections 3001 and 3004 regulations later this year to bring additional wastes into the hazardous waste management system and to add additional facility standards.

Table 1 below, shows where each of these regulations appears in the Federal Register.

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Table 1¹

40 CFR	Corresponding RCRA section and descriptive title	Federal Register date
Part:		
260	Definitions used in other Parts corresponding to the Sections 3001 through 3004 rules, and general provisions applicable to these Parts.	5/19/80 Part II.
261	Section 3001: Identification and Listing of Hazardous Waste.	5/19/80 Part III.
262	Section 3002: Standards Applicable to Generators of Hazardous Waste.	5/19/80. Part V.
263	Section 3003: Standards Applicable to Transporters of Hazardous Waste.	5/19/80. Part VI.
264	Section 3004: Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities.	5/19/80. Part VII.
265	Section 3004: Interim Status Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities.	5/19/80 Part VII.
122 and 124.	Section 3005: Permits for Treatment, Storage, and Disposal of Hazardous Waste.	5/19/80 Part X.
123	Section 3006: Guidelines for Authorized State Hazardous Waste Programs.	5/19/80. Part X.
.....	Section 3010: Preliminary Notification of Hazardous Waste Activity.	2/26/80. (45 FR 12746)

¹This table is self-explanatory except for that portion of it dealing with section 3004 of RCRA. There are three groups of owners and operators of hazardous waste facilities subject to control under this Section: owners and operators with interim status, those who own or operate RCRA permitted facilities, and those with neither interim status nor a permit. Owners and operators in the first group are subject to the Part 265 rules; those in the second group must comply with RCRA permits based on the Part 264 rules; those in the third group must stop operations on the effective date of these regulations. (See the preamble to the Parts 264 and 265 rules issued elsewhere in today's FEDERAL REGISTER for an explanation of how owners and operators qualify for interim status.)

The purpose of this regulation (Part 260) is to consolidate in one place a number of provisions which are applicable to all the Part 261 through 265 regulations. Subpart A contains rules concerning the designation and handling of confidential information and rules of grammatical construction which are generally applicable to Parts 261 through 265. Subpart B contains definitions of key words and phrases which are used in those Parts. Subpart C outlines the general procedures which EPA will follow in acting on petitions to amend Parts 260 through 265 and special procedures applicable to petitions for the approval of equivalent testing and analytical methods and petitions to amend Part 261. Finally, Appendix I contains a "road map" to the Subtitle C regulations which is designed to acquaint persons unfamiliar with EPA's Subtitle C regulations with the most important regulatory provisions in Parts 260 through 265 and Parts 122 through 124. (Note that Appendix I contains guidance, not regulations. If any part of the appendix is inconsistent with the

regulations, the regulations should be considered controlling.)

III. Subpart A

1. *Section 260.1 (Purpose, scope, and applicability)*. This section explains the purpose of Part 260 and outlines the contents of the remaining sections. It is largely self-explanatory.

2. *Section 260.2 (Availability of information; confidentiality of information)*. The Agency expressed its basic stance on confidentiality in § 250.27 of the proposed Section 3002 regulations, which stated that all information provided in connection with the requirements of RCRA must be made available to any person, as authorized by Section 3007(b) of RCRA, the Freedom of Information Act (FOIA, 5 U.S.C. 552), and the EPA regulations adopted to implement the FOIA and Section 3007(b) (40 CFR Part 2). Proposed § 250.27 applied also to the recordkeeping and reporting systems under Section 3004 of the proposed regulations, because they were designed to use information supplied on the manifest as the data base.

A number of commenters argued that all RCRA reports and information should be made known to the public because public knowledge of this information is essential to the effective enforcement of RCRA. In particular, they argued that in order for the public oversight and citizen suit provisions of RCRA to be effective, the public must have information on the types and amounts of waste being handled by facilities, data from the monitoring of ground water and surface water, information on the type of process generating the waste and the hazardous properties of the waste, and any information reported to the Agency regarding fires, explosions, and discharges of hazardous waste, including data on the degradation of ground water.

The Agency has sought to balance the public need for information against legitimate claims of confidentiality. Neither Section 3007(b) of RCRA nor the Freedom of Information Act, however, authorize or require full public disclosure of information collected pursuant to RCRA. Section 3007(b) directs the Administrator to consider as confidential any information which would be entitled to protection under Section 1905 of Title 18 of the United States Code, upon a satisfactory showing by the claimant that his information does indeed warrant confidential treatment. The provisions of the Freedom of Information Act concerning the availability of information do not apply to confidential

trade secrets and commercial or financial information (Section 552(b)(4)).

Because of this provision in RCRA, the Agency cannot impose a blanket requirement in the regulations that specific information must be released to the public in all cases. However, the public may obtain information on the type of process producing the wastes listed in the Section 3001 rules from the background documents supporting the Section 3001 regulations. In addition, the Subpart D rules require owners or operators to notify local authorities of fires, explosions, or discharges of hazardous waste which have the potential for adversely affecting human health and the environment outside the facility. Thus, information of this type may also be available to the public.

Several commenters suggested that EPA should clearly state that the confidentiality provisions of proposed § 250.27 apply to the information required in the Section 3004 rules. The Agency agrees, and has therefore placed the provisions concerning confidentiality in Part 260 of the final rules. Section 260.1 of this Part makes it clear that the § 260.2 confidentiality provisions apply to all information required to be submitted under the final Sections 3001 through 3004 standards.

3. *Section 260.3 (Use of number and gender)*. This section establishes simple rules of grammatical construction concerning number and gender. It has been added to allow EPA to simplify the drafting of its final Part 261 through 265 regulations by eliminating the need for such awkward phrases as "he/she/it" or "the owner (or in event there is more than one owner, the owners)". It is self-explanatory.

Although there is no direct counterpart to this section in the proposed Subtitle C rules, the Agency is issuing it as a final, rather than interim final standard. This is simply a rule of usage and, therefore, it is unnecessary to solicit comments on it.

IV. Subpart B

In EPA's proposed regulations, each regulation had its own set of definitions (see §§ 250.11, 250.21, 250.31, and 250.41). To eliminate the unnecessary repetition this produced, all the definitions which are applicable to more than one of EPA's final regulations have been consolidated into this subpart. Definitions of terms which are used only once, or only in conjunction with a single section or subpart, will generally be defined in the section or subpart in which they are used. We hope this reorganization will make the regulations less cumbersome and easier to follow.

produced by a particular generating facility does not meet any of the criteria under which the waste was listed as a hazardous waste and, in the case of an acutely hazardous waste listed under § 261.11(a)(2), that it also does not meet the criterion of § 261.11(a)(3). A waste which is so excluded may still, however, be a hazardous waste by operation of Subpart C of Part 261.

(b) The procedures in this section and § 260.20 may also be used to petition the Administrator for a regulatory amendment to exclude from § 261.3(a)(2)(ii) or (c), a waste which is described in those sections and is either a waste listed in Subpart D, contains a waste listed in Subpart D, or is derived from a waste listed in Subpart D. This exclusion may only be issued for a particular generating, storage, treatment, or disposal facility. The petitioner must make the same demonstration as required by paragraph (a) of this section, except that where the waste is a mixture of solid waste and one or more listed hazardous wastes or is derived from one or more hazardous wastes, his demonstration may be made with respect to each constituent listed waste or the waste mixture as a whole. A waste which is so excluded may still be a hazardous waste by operation of Subpart C of Part 261.

(c) If the waste is listed with codes "I", "C", "R", or "E" in Subpart D, the petitioner must show that demonstration samples of the waste do not exhibit the relevant characteristic defined in §§ 261.21, 261.22, 261.23, or 261.24 using any applicable test methods prescribed therein.

(d) If the waste is listed with code "T" in Subpart D, the petitioner must demonstrate that:

- (1) Demonstration samples of the waste do not contain the constituent (as defined in Appendix VII) that caused the Administrator to list the waste, using the appropriate test methods prescribed in Appendix III; or
- (2) The waste does not meet the criterion of § 261.11(a)(3) when considering the factors in § 261.11(a)(3) (i) through (xi).

(e) If the waste is listed with the code "H" in Subpart D, the petitioner must demonstrate that the waste does not meet both of the following criteria:

- (1) The criterion of § 261.11(a)(2).
- (2) The criterion of § 261.11(a)(3) when considering the factors listed in § 261.11(a)(3) (i) through (xi).

(f) [Reserved for listing radioactive wastes.]

(g) [Reserved for listed infectious wastes.]

(h) Demonstration samples must consist of enough representative samples, but in no case less than four samples, taken over a period of time sufficient to represent the variability or the uniformity of the waste.

(i) Each petition must include, in addition to the information required by § 260.20(b):

- (1) The name and address of the laboratory facility performing the sampling or tests of the waste;
- (2) The names and qualifications of the persons sampling and testing the waste;
- (3) The dates of sampling and testing;
- (4) The location of the generating facility;
- (5) A description of the manufacturing processes or other operations and feed materials producing the waste and an assessment of whether such processes, operations, or feed materials can or might produce a waste that is not covered by the demonstration;
- (6) A description of the waste and an estimate of the average and maximum monthly and annual quantities of waste covered by the demonstration;
- (7) Pertinent data on and discussion of the factors delineated in the respective criterion for listing a hazardous waste, where the demonstration is based on the factors in § 261.11(a)(3);
- (8) A description of the methodologies and equipment used to obtain the representative samples;
- (9) A description of the sample handling and preparation techniques, including techniques used for extraction, containerization and preservation of the samples;
- (10) A description of the tests performed (including results);
- (11) The names and model numbers of the instruments used in performing the tests; and
- (12) The following statement signed by the generator of the waste or his authorized representative:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this demonstration and all attached documents, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

(j) After receiving a petition for an exclusion, the Administrator may request any additional information which he may reasonably require to evaluate the petition.

(k) An exclusion will only apply to the waste generated at the individual facility covered by the demonstration and will not apply to waste from any other facility.

(l) The Administrator may exclude only part of the waste for which the demonstration is submitted where he has reason to believe that variability of the waste justifies a partial exclusion.

(m) The Administrator may (but shall not be required to) grant a temporary exclusion before making a final decision under § 260.20(d) whenever he finds that there is a substantial likelihood that an exclusion will be finally granted. The Administrator will publish notice of any such temporary exclusion in the **Federal Register**.

Appendix I.—Overview of Subtitle C Regulations

The Agency believes that there are many people who suspect, but are not sure, that their activities are subject to control under the RCRA Subtitle C rules. This appendix is written for these people. It is designed to help those who are unfamiliar with the hazardous waste control program to determine with which, if any, of the regulations they should comply.

Definition of Solid Waste

The first question which such a person should ask himself is: "Is the material I handle a solid waste?" If the answer to this question is "No", then the material is not subject to control under RCRA and, therefore, the person need not worry about whether he should comply with the Subtitle C rules.

Section 261.2 of this Chapter provides a definition of "solid waste" which expands the statutory definition of that term given in section 1004(27) of RCRA. This definition is diagrammed in Figure 1 below.

Figure 1 explains that all materials are either: (1) Garbage refuse, or sludge; (2) solid, liquid, semi-solid or contained gaseous material; or (3) something else. No materials in the third category are solid waste. All materials in the first category are solid waste. Materials in the second category are solid waste unless they are one of the five exclusions specified in § 261.4(a).

Definition of Hazardous Waste

If a person has determined that his material is a "solid waste", the next question he should ask is: "Is the solid waste I handle a hazardous waste?"

Hazardous waste is defined in § 261.3 of this chapter. Section 261.3 provides that, in general, a solid waste is a hazardous waste if: (1) It is, or contains, a hazardous waste listed in Subpart D of

Part 261 of this Chapter, or (2) the waste exhibits any of the characteristics defined in Subpart C of Part 261. However, Parts 260 and 261 also contain provisions which exclude (§§ 261.4(b), 260.20, and 260.22) certain solid wastes from the definition of "hazardous waste", even though they are listed in Subpart D or exhibit one or more of the characteristics defined in Subpart C. Figure 2 depicts the interplay of these special provisions with the definition of "hazardous waste". It presents a series of questions which a person should ask himself concerning his waste. After doing so, the person should be able to determine if the solid waste he handles is a hazardous waste.

Hazardous Waste Regulations

If this is the case, the person should look at Figure 3. Figure 3 depicts the special provisions specified in the final Part 261 rules for hazardous waste which:

1. Is generated by a small quantity generator
2. Is or is intended to be legitimately and beneficially used, re-used, recycled, or reclaimed
3. Is a sludge; is listed in Part 261, Subpart D; or is a mixture containing a waste listed in Part 261, Subpart D.

For each of these Groups, Figure 3 indicates with which Subtitle C regulations (if any) the person handling these wastes must comply. Figure 3 also explains that, if a person handles hazardous waste which is not included in any one of the above three categories, his waste is subject to the Subtitle C regulations diagrammed in Figure 4.

Figure 4 is a flowchart which identifies the three categories of activities regulated under the Subtitle C rules, and the corresponding set of rules with which people in each of these categories must comply. It points out that all people who handle hazardous waste are either: (1) Generators of hazardous waste, (2) transporters of hazardous waste, (3) owners or operators of hazardous waste treatment, storage, or disposal facilities, or (4) a combination of the above. Figure 4 indicates that all of these people must notify EPA of their hazardous waste activities in accordance with the Section 3010 Notification Procedures (see 45 FR 12746 *et seq.*), and obtain an EPA identification number.

It should be noted that people handling wastes listed in Subpart D of Part 261 who have filed, or who intend to file an application to exempt their waste from regulation under the Subtitle C rules, must also comply with the

notification requirements of section 3010.

If a person generates hazardous waste, Figure 4 indicates that he must comply with the Part 262 rules. If he transports it, he must comply with the Part 263 rules. The standards in both these Parts are designed to ensure, among other things, proper recordkeeping and reporting, the use of a manifest system to track shipments of hazardous waste, the use of proper labels and containers, and the delivery of the waste to a permitted treatment, storage, or disposal facility.

If a person owns or operates a facility which treats, stores, or disposes of hazardous waste, the standards with which he must comply depend on a number of factors. First of all, if the owner or operator of a *storage* facility is also the person who generates the waste, and the waste is stored at the facility for less than 90 days for subsequent shipment off-site, then the person must comply with § 262.34 of the Part 262 rules.

All other owners or operators of treatment, storage, or disposal facilities must comply with either the Part 264 or the Part 265 rules. To determine with which of these sets of rules an owner or operator must comply, he must find out whether his facility qualifies for interim status. To qualify, the owner or operator must: (1) Have been treating, storing, or disposing of the hazardous waste, or commenced facility construction on or before October 21, 1976, (2) comply with the Section 3010 notification requirements, and (3) apply for a permit under Part 122 of this Chapter.

If the owner or operator has done all of the above, he qualifies for interim status, and he must comply with the Part 265 rules. These rules contain administrative requirements, monitoring and closure standards, and an abbreviated set of technical and closure and post-closure cost estimate requirements. The owner or operator must comply with these standards until final administrative disposition of his permit application is made. If a permit is issued to the owner or operator, he must then comply with the permit which will be based on the Part 264 rules.

If the owner or operator has not carried out the above three requirements, he does not qualify for interim status. Until he is issued a permit for his facility, the owner or operator must stop waste management operations (if any) at the facility, and send his hazardous waste (if any) to a facility whose owner or operator has interim status or to a storage facility following the Part 262 rules.

In order to apply for a permit, the owner or operator must comply with the procedures specified in Part 122 of this Chapter.

It should be noted that the Agency will be periodically revising the rules depicted in Figures 3 and 4. All persons are encouraged to write to EPA to verify that the regulations which they are reading are up-to-date. To obtain this verification, contact: Solid Waste Information, U.S. Environmental Protection Agency, 26 West St. Clair Street, Cincinnati, Ohio 45268 (513) 684-5362.

[FR Doc. 80-14306 Filed 5-18-80; 8:45 am]

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FIGURE 1

DEFINITION OF A SOLID WASTE

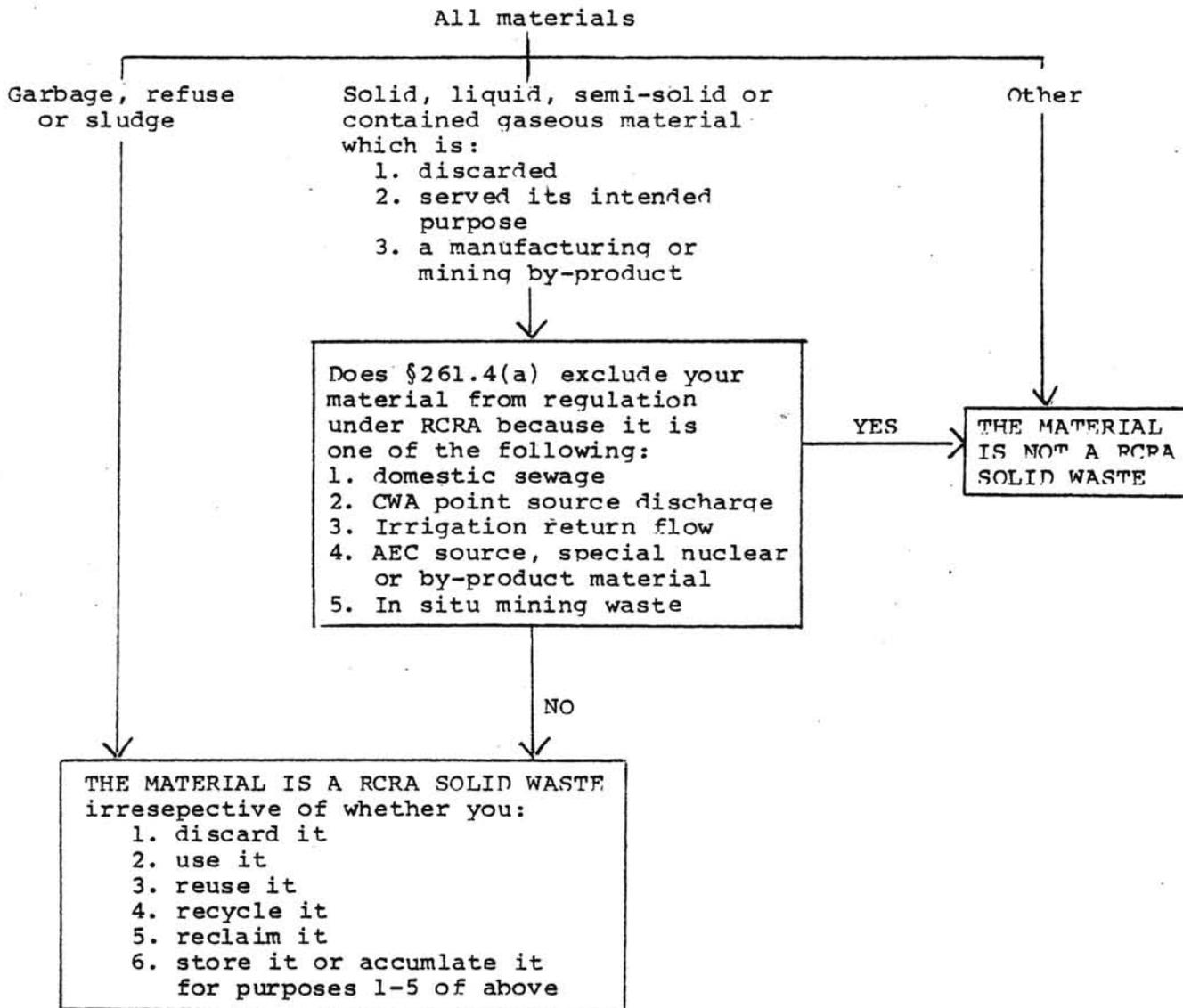


FIGURE 2

DEFINITION OF A HAZARDOUS WASTE

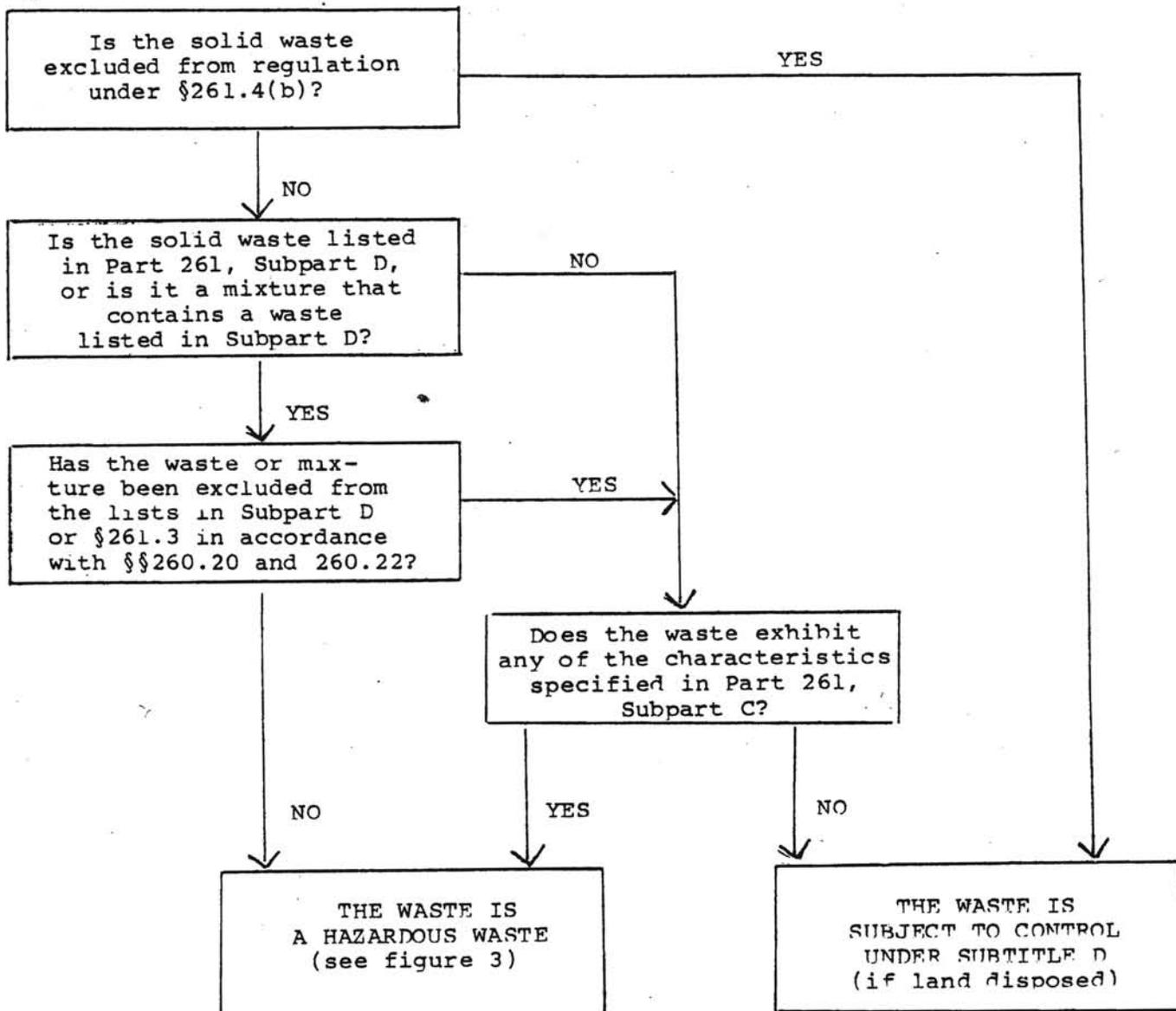
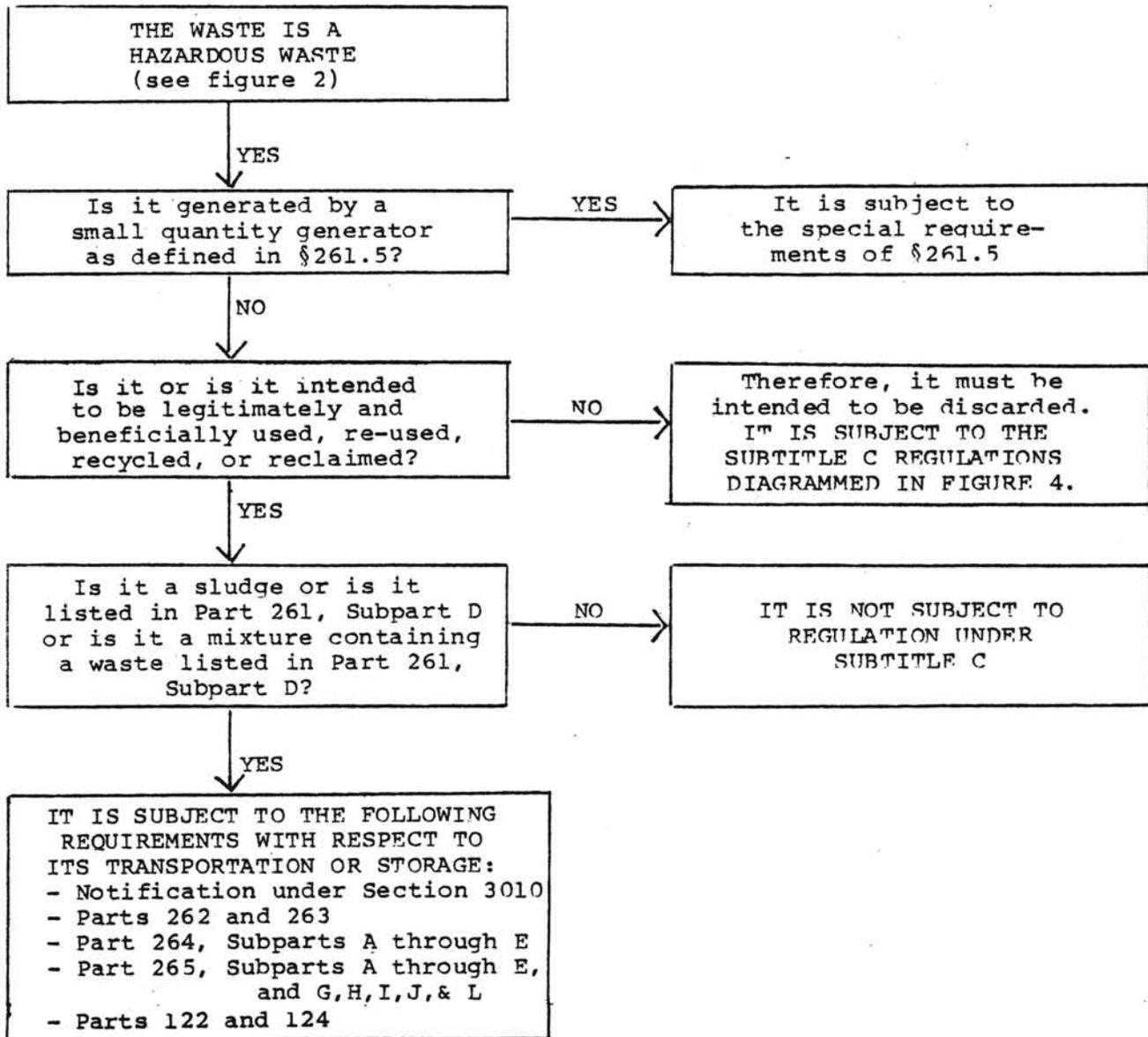


FIGURE 3

SPECIAL PROVISIONS FOR CERTAIN HAZARDOUS WASTE



Federal Register

Monday
May 19, 1980

Part III

Environmental Protection Agency

Hazardous Waste Management System

Identification and Listing of Hazardous
Waste

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or recycled, management practices, environmental emissions that attend use or recycling, health and environmental effects resulting from use and recycling and other specific data are very useful.

We also invite commenters to submit specific proposed standards or suggestions for how standards might be developed. For example, where wastes might be burned as a supplemental fuel in industrial boilers, proposals on fuel ratios, burning temperatures, emission control requirements and residue disposal requirements would be useful. Obviously, the more specific and constructive the suggestions, the more helpful they will be in our rulemaking.

C. Section 261.3 (Definition of Hazardous Waste)

This section is a new provision which does not have a direct counterpart in the proposed regulations. It has been added for purposes of clarification and in response to questions raised during the comment period concerning waste mixtures and when hazardous wastes become subject to and cease to be subject to the Subtitle C hazardous waste management system.

If a material is a hazardous waste within the meaning of this section it must be managed in accordance with EPA's Part 262 through 265 standards and its Part 122 through 124 permitting requirements unless covered by one of the exclusions in those regulations or one of the Part 261 special management provisions (§§ 261.5 and 261.6).

1. What is a Hazardous Waste?

Paragraph (a) of this section defines what a hazardous waste is. It provides that a solid waste is a hazardous waste if it is not excluded under § 261.4(b) and it either (1) is listed as a hazardous waste in Subpart D, (2) is a waste mixture containing one or more hazardous wastes listed in Subpart D or (3) exhibits one or more characteristics of hazardous waste identified in Subpart C. A listed waste or a solid waste mixture containing a listed waste which is generated by a particular facility may be excluded under the rulemaking procedures prescribed in §§ 260.20 and 260.22 (see section VIII.C., below). In that event, it will be considered a hazardous waste only if it exhibits one or more of the characteristics.

Except for waste mixtures, all these provisions were contained in EPA's December 18, 1978 proposal (see §§ 250.10 (b) and (d)(2), 250.13 and 250.14). The waste mixtures provision is a clarification which has been added in response to inquiries about whether mixtures of hazardous and nonhazardous wastes would be subject to Subtitle C requirements. This is a

very real issue in real-world waste management, since many hazardous wastes are mixed with non-hazardous wastes or other hazardous wastes during storage, treatment, or disposal.

Although it was not expressly stated in the proposed regulation, EPA intended waste mixtures containing listed hazardous wastes to be considered a hazardous waste and managed accordingly. Without such a rule, generators could evade Subtitle C requirements simply by commingling listed wastes with nonhazardous solid waste. Most of these waste mixtures would not be caught by the Subpart C characteristics because they would contain wastes which were listed for reasons other than that they exhibit the characteristics (e.g., they contain carcinogens, mutagens or toxic organic materials). Obviously, this would leave a major loophole in the Subtitle C management system and create inconsistencies in how wastes must be managed under that system.

EPA recognizes that designating all waste mixtures containing listed wastes as hazardous wastes under Subtitle C may create some inequities. For example, this approach may result in some waste mixtures which contain only very small amounts of listed hazardous wastes or which commingle waste in a way which renders them nonhazardous (e.g., neutralization) having to be managed under Subtitle C. We have tried to address this problem by establishing provisions for amending this paragraph to exclude waste mixtures produced by individual facilities, if they can show that the mixture (or each constituent listed hazardous waste) is not hazardous, based on the criteria for which the constituent hazardous wastes were listed. Because this is a rulemaking procedure, it will, as a practical matter, only be useful for facilities which routinely mix wastes in relatively constant proportions. With a regulated community potentially numbering in the hundreds of thousands, we simply do not have the resources to process petitions for exempting "one-shot" waste mixtures. Moreover, in most of these one-time cases, it seems likely that the burden of having to manage a waste mixture as a hazardous waste could be easily avoided by carefully segregating hazardous and non-hazardous waste.

We know of no other effective regulatory mechanism for dealing with waste mixtures containing listed hazardous wastes. Because the potential combinations of listed wastes and other wastes are infinite, we have been unable to devise any workable, broadly

applicable formula which would distinguish between those waste mixtures which are and are not hazardous. If any members of the public have suggestions for other approaches, we would appreciate having them brought to our attention for future rulemaking.

Waste mixtures containing only wastes which meet the characteristics are treated just like any other solid waste *i.e.*, they will be considered hazardous only if they exhibit the characteristics. EPA recognizes that this may not be an altogether satisfactory regulatory approach. While it would no doubt encourage some desirable mixing of wastes, it would also allow some wastes (principally wastes caught by EPA's extraction procedure) to escape regulation merely by being mixed with other wastes or other materials. We know of no solution to this problem which does not create major inconsistencies in the way wastes are determined to be hazardous under Subpart C of this regulation. Again, if the public has suggestions for other ways of dealing with this issue, we would like to receive them.

2. When Does a Waste Become a Hazardous Waste?

Paragraph (b) provides three simple rules for determining when a solid waste becomes a hazardous waste and therefore must be managed under Subtitle C. It has been provided in response to comment requesting clarification on this issue.

Paragraph (b) states that a solid waste which is a hazardous waste because it is listed in Subpart D must begin to be managed as a hazardous waste when it first meets the Subpart D listing description. Most of the hazardous wastes listed in §§ 261.31 and 261.32 of Subpart D are process residues, emission control dusts, or wastewater treatment sludges, and the point in time when they are created is generally well-defined. For those used materials which are listed as hazardous wastes in those sections or § 261.33 (e.g., spent solvents), the point at which they meet the listing description is somewhat less well-defined, but generally occurs when their intended use has ceased, and they begin to be accumulated or stored for disposal, re-use or reclamation.

In the case of a waste mixture containing a listed hazardous waste, paragraph (b) requires that the waste mixture be managed as a hazardous waste as soon as the listed waste is added to it. The listed waste, of course, must be handled as a hazardous waste prior to that time.

Finally, paragraph (b) provides that a solid waste is a hazardous waste

whenever it exhibits one or more of the characteristics. As a practical matter, this means that persons handling solid wastes must determine whether they meet the characteristics whenever the management of the solid wastes would potentially be subject to EPA's Part 262 through 265 regulations.

The following examples illustrate how this provision would operate in practice:

- The ABC Company stores waste acid on-site in containers prior to transport off-site for disposal. The company must determine whether the acid meets Subpart C characteristics when it is poured into the containers.

- The DEF Company pipes waste acid into a tank, where it is neutralized by adding lime. The company must determine whether the acid meets Subpart C characteristics when it enters the neutralization tank. The neutralization operation is a treatment process.

- The GHI Company pipes waste acid into a tank truck for transport to an off-site treatment facility. The company must determine whether the acid meets Subpart C characteristics when it enters the tank truck.

- The JKL Company produces a wastewater which is piped into a surface impoundment, for the purposes of treatment prior to point-source discharge into surface waters. During treatment a sludge forms. This sludge is periodically dredged from the impoundment and disposed of. The company must determine (1) whether the wastewater meets Subpart C characteristics when it enters the impoundment and (2) whether the sludge meets Subpart C characteristics when it begins to accumulate on the bottom of the impoundment.

In drafting paragraph (b), EPA has attempted to cover the most common types of waste generation and management scenarios. The Agency recognizes, however, that some companies may generate and handle wastes in ways not contemplated by EPA and for which a strict application of paragraph (b) would make no sense. We would appreciate having those instances brought to our attention so that we can decide whether additional rulemaking or issuing guidance is appropriate for dealing with these situations.

3. *When Does a Hazardous Waste Cease to be a Hazardous Waste?* Paragraphs (c) and (d) of this section explain when a hazardous waste ceases to be a hazardous waste and therefore is no longer subject to Subtitle C requirements. These are new provisions which have been added both in response to comment and as a logical outgrowth of paragraph (b).

Paragraph (c) provides that a hazardous waste remains a hazardous waste unless and until (1) it does not exhibit any of the characteristics identified in Subpart C and (2) where the waste is listed in Subpart D (or is a mixture containing a waste listed in Subpart D), the waste (or each of its constituent listed wastes) is also excluded from paragraph (c) under the rulemaking procedures outlined in §§ 260.20 and 260.22. As a practical matter, this means that facilities which store, dispose of or treat hazardous waste must be considered hazardous waste management facilities for as long as they continue to contain hazardous waste and that any wastes removed from such facilities—including spills, discharges or leaks—must be managed as hazardous wastes.

EPA believes this is a very reasonable and rational rule. Wastes are typically stored for relatively short periods of time. Although solids in the waste may settle and the volume of the waste may be reduced by evaporation during this period, major chemical or biological changes affecting the hazardous character of the waste are unlikely to occur. Hazardous wastes which are disposed of in a landfill are more likely to undergo change (principally through leaching and anaerobic degradation), but only very slowly and over a long period of time.

Hazardous wastes placed in treatment facilities (including incinerators, surface impoundments and land treatment facilities) will, by definition, change character. However, treatment does not necessarily "render [a] waste nonhazardous" (Section 1004(34)). It may only make it "amenable for recovery, amenable for storage or reduced in volume"; or it may only eliminate one of several hazardous properties. Moreover, even in those cases where treatment does ultimately render a waste "nonhazardous", the waste will generally have been hazardous during part or all of the treatment process.

Paragraph (c) establishes a similar rule with respect to solid wastes generated by storage, disposal and treatment—including leachate and treatment residues such as sludges and incinerator ash. Here, too, it is reasonable to assume that these wastes, which are derived from hazardous wastes, are themselves hazardous.

Leachate is produced by the percolation of liquid through wastes; it typically contains solubilized heavy metals and organic materials and is virtually always highly toxic. Treatment residues, by definition, contain waste constituents which were removed during

treatment or which were not completely destroyed by treatment. Sludges from wastewater treatment typically contain concentrated amounts of the toxic substances which were in the wastewater. Ash from the incineration of hazardous wastes often contains heavy metals and, if combustion is not complete, undestroyed toxic organic materials.

This is the best regulatory approach we can devise at this time for dealing with solid wastes generated by hazardous waste management facilities. We are not now in a position to prescribe waste-specific treatment standards which would identify those processes which do and do not render wastes or treatment residues nonhazardous. To list treatment residues on case-by-case basis would be an enormous job, and one which we think, given the reasons outlined above, is unnecessary.

This approach obviously is not without deficiencies. For example, one effect of treating wastes containing synthetic organic materials may be to create new hazardous constituents in the waste or treatment residue. This regulation obviously does not deal with those new constituents. It also does not cover run-off from hazardous waste facilities on the theory that the water in precipitation run-off in many cases may not have had sufficient contact with the waste to solubilize waste constituents. (Of course if collected, run-off would be a solid waste and, if it exhibited any of the characteristics, would have to be managed as a hazardous waste). For purposes of future rulemaking, we would be interested in any suggestions the public has for dealing with these issues.

D. Section 261.4 (Exclusions)

EPA's proposed Section 3001 regulations identified a number of wastes which would not be subject to Subtitle C requirements because they were either excluded from the statutory definition of solid waste (§ 250.11(a)(7)), not intended by Congress to be regulated under Subtitle C (§ 250.10(d)(2)(i) and (ii)), or subject to regulation under other EPA statutes (§ 250.10(d)(2)(iii)).

EPA received a number of comments on these proposed exclusions. Some commenters simply urged EPA to clarify which wastes were covered by each of the exclusions. Others challenged EPA's justification for some of its proposed exclusions. Still others contended that additional wastes should be exempted from regulation based on legislative history or an alleged lack of demonstrated harm to human health or the environment.

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concluded that none of the degree of hazard systems suggested by commenters, nor any it could itself conceive, is capable of comprehensively distinguishing different degrees of hazard among the myriad of hazardous wastes without application of very subjective judgment. This precluded establishing small quantity exemptions based on a hierarchy of hazard levels.

While the Agency has not found it possible to establish a comprehensive hazard ranking system, the Agency has attempted on a limited basis to make hazard distinctions in establishing small quantity cutoffs. The Agency has established very low exclusion limits for certain very acutely toxic or otherwise hazardous chemical products (if discarded), off-specification derivatives of those products, and the product containers and spill residues. The Agency may in the future establish specific (low) exclusion limits for other highly hazardous wastes on a case-by-case basis.

5. *Limited Administrative Resources Require Setting the Initial Exclusion Level at 1000 kg/mo.* EPA has decided to adopt for the present time, a general exclusion level of 1000 kg/mo. The Agency's basis for this decision is the current lack of sufficient administrative resources to allow the Agency and the States to effectively regulate all hazardous waste. Given that resource constraint, the Agency believes that the overall level of environmental protection which can be provided will be greater if the Agency focuses available resources on fully regulating wastes from large generators during the early years of regulation implementation rather than expanding the scope of regulatory coverage and achieving ineffectual implementation of a more ambitious program.

The primary reason for selecting 1000 kg/mo, i.e., the administrative impossibility of implementing at lower levels, deserves some elaboration. As noted earlier, regulation of all generators of hazardous waste would bring 760,000 persons into the regulatory system. Regulating only those persons who generate more than 100 kg/mo would exclude from the program 560,000 generators, 73.9 percent of the total. If the exclusion level were set at 1000 kg/mo, 695,000 generators or 91.2 percent would be excluded from regulation. At a 5000 kg/mo level, 722,000 generators or 94.7 percent would be excluded.

In 1981, the first full year of implementing the Subtitle C controls, analyses of Agency and State workload requirements and available resources to implement the Subtitle C controls indicate that, if all generators were fully

regulated, workload requirements would exceed resources available by 1100 to 1200 workyears. If generators of less than 100 kg/mo quantities were exempted from full regulation, the shortfall would be much less, but still a substantial 200 to 300 workyears. However, if generators of less than 1000 kg/mo quantities are exempted, the shortfall is projected to be less than 100 workyears, about 5 percent of the total workload requirements.

The resource constraints and shortfalls have direct significance for the operation of the entire regulatory program. To expand the coverage to smaller generators would require direct sacrifices from other elements of the program, most notably regulation and enforcement of large generators, permitting of treatment, storage and disposal facilities, and enforcement and inspection of these facilities. Furthermore, with greater resource demands and projected shortfalls, greater difficulties are likely in the ability of States to obtain authorization to administer the program in lieu of the Federal government.

Given the enormity of the implementation task and the limited administrative resources, EPA has been forced to make difficult allocation decisions. Expanding the coverage of generators would entail direct sacrifices from other essential program components. The determination of the proper exclusion level in the final regulation represents a complicated balancing of a variety of factors. The decision reflects a judgment by the Agency that the overall environmental objectives will be best served by selecting a level which promises full and effective implementation of all elements of the program rather than one that promises ineffective implementation of a more ambitious program.

Accordingly, EPA has decided to establish for the present time a conditioned exclusion of hazardous wastes from generators who produce less than 1000 kilograms a month. This level will enable EPA to direct its attention to the effective regulation of 99 percent of the total wastes generated, and will entail only insignificant, if any, sacrifices in the task of issuing permits to hazardous waste management facilities.

In addition, the exclusion is not unqualified; generators of small quantities of hazardous waste must ensure that their wastes go to facilities that are approved by the State to handle municipal or industrial wastes. For most of these facilities the commingling of small quantities of hazardous waste with large quantities of non-hazardous

waste is likely to minimize environmental problems attributable to the hazardous waste, particularly since dilution levels at a 1000 kg exclusion are generally at least 100 to 1. Importantly, this approach will give State agencies more flexibility in dealing with small quantity generators. If a State determines that certain types of exempted hazardous waste should not be managed in a particular non-hazardous facility, it can deal with that situation directly.

The Agency considered other types of reduced administrative or technical requirements for exempted generators, including various subsets of the full Subtitle C requirements. A limited number of commenters suggested particular reduced requirements which they felt would provide limited but necessary controls. The Agency's analysis of various reduced Subtitle C requirements indicated that they would either provide an insignificant level of additional control, or that they would not substantially reduce the administrative burden of the full Subtitle C requirements. Thus, the Agency decided to impose only the condition stated above.

6. *Phasing Down the Coverage of Small Quantity Generators.* On the basis of information presently available to the Agency, it appears that a general exclusion level of 100 kg/mo would better achieve the environmental protection objectives of Subtitle C. Therefore, EPA intends to initiate rulemaking within 2 to 5 years to expand Subtitle C coverage down to generators of 100 kg/mo. During this process, the Agency will consider the need for any special regulatory requirements to deal with any unique problems associated with these wastes.

A number of commenters argued that phasing regulatory coverage of small generators would significantly benefit the administration of the hazardous waste management program. The Agency believes that because of limited resources, the Agency *must* phase its regulation of small generators to be able to fully implement the Subtitle C controls on large generators, transporters, and waste management facilities.

7. *Environmental Considerations.* The information that the Agency was able to develop on the environmental impacts of different quantity cutoff levels was not fully conclusive. However, the data indicate that an exclusion level of 100 kg/mo, coupled with lower exclusions for certain highly hazardous wastes, and disposal of excluded waste in Subtitle C or State approved facilities will, in most

cases, minimize adverse impacts on human health and the environment.

The review of damage cases tends to support a 100 kg/mo exclusion level. First, there were very few damage cases involving quantities below that level. Second, those few cases involved indiscriminate dumping rather than disposal in managed facilities. This suggested that disposal of quantities less than 100 kilograms in a managed facility might provide sufficient environmental protection, even if the managed facility was not authorized to handle hazardous waste. Of the 11 damage incidents involving the disposal of less than 1000 kg quantities of hazardous waste in managed facilities the environmental damage or personal injury occurred in nine of the incidents because of mismanagement of single containers, i.e., 55 gallon drums of ignitable, corrosive or reactive materials. Setting the exclusion level at 100 kg/mo would in most cases ensure that single, full drums would be properly packaged and labeled, manifested and sent to Subtitle C facilities. A higher exclusion level would not provide this assurance.

Wastes generated by small quantity generators at the 100 kg/mo exclusion level comprise only 0.23 percent of all hazardous waste. The environmental analysis showed that these small generator hazardous wastes are typically mixed by the generator with non-hazardous wastes and subsequently disposed of in waste management facilities for municipal waste. If these mixed wastes were evenly distributed to such facilities, the dilution ratio of non-hazardous to hazardous waste would be roughly 900 to 1 at a 100 kg/mo exclusion limit.

Although even distribution will not occur, EPA believes that very large dilution ratios will result in most situations with a 100 kg/mo exclusion level. This is because 92 percent of the small generators (producing less than 100 kg/mo) are in the non-manufacturing sector and are distributed in reasonable proportion to population and, therefore, in reasonable proportion to quantities of diluting non-hazardous municipal wastes. The effect of even distribution and high dilution is to spread and, thereby, minimize exposure and risk. Although this effect cannot be assessed with great precision, it is not unreasonable to assume that human health exposure and risk is significantly reduced at dilution ratios of several hundred to 1.

8. *Resource Considerations.* Projecting administrative resources into the future is inherently speculative, requiring various assumptions and estimates of State and Agency budgets, and

implementation workloads. The Agency studies assumed constant budgets, and predicted the administrative shortfall to become exacerbated, rather than reduced over time. Other projections, presented in the background document for small generators, also suggest some resource difficulties in phasing-in the coverage of small generators, but these projections show that the resource picture may improve over time. The Agency, however, believes it is appropriate to expand its regulatory coverage of small quantity generators, and will be seeking the budgetary increases necessary to accomplish that phasing. Additionally, once the regulatory apparatus is in place and operating, the Agency will be able to reassess the ability to achieve more comprehensive coverage by means of allocating its resources differently than presently projected.

F. Section 261.6 (Special Requirements for Hazardous Waste Which Is Used, Re-used, Recycled or Reclaimed)

This section sets forth the applicability of the Subtitle C regulations to the storage and transportation of hazardous waste sludges and hazardous wastes listed in Subpart D that are used, re-used, recycled or reclaimed. It also provides for the exclusion from regulation of all other aspects of the use, re-use, recycling or reclamation of hazardous waste until EPA promulgates regulations to the contrary. The content of and rulemaking considerations that went into this section are fully discussed in Section IV. B. of this preamble.

V. Subpart B—Criteria for Identifying Characteristics of Hazardous Waste and for Listing Hazardous Waste

A. Section 261.10 (Criteria for Identifying the Characteristics of Hazardous Wastes)

Section 3001 of the Act requires EPA to develop and promulgate criteria for identifying the characteristics of hazardous waste. The proposed regulations identified two such criteria. The first criterion was that the characteristic be capable of being defined in terms of physical, chemical or other properties which cause the waste to meet the definition of hazardous waste in the Act. This criterion embodied the simple but fundamental notion that a characteristic of hazardous waste must be one which causes the waste to be a hazardous waste within the meaning of the statutory definition. The second criterion was that the properties defining the characteristic be measurable by standardized and

available testing protocols. EPA adopted this second criterion in recognition that the primary responsibility for determining whether wastes exhibit the characteristics rests with generators. It believed that unless generators were provided with widely available and uncomplicated test methods for determining whether their wastes exhibited the characteristics, the system would prove unworkable. Largely in reliance on this second criterion, EPA refrained from adding organic toxicity, carcinogenicity, mutagenicity, teratogenicity, bioaccumulation potential and phytotoxicity to the set of proposed characteristics and instead left it to listing mechanism to capture wastes exhibiting these properties. EPA considered the available test protocols for measuring these characteristics to be either insufficiently developed or too complex and too highly dependent on the use of skilled personnel and special equipment. Additionally, given the current state of the knowledge concerning such properties, EPA did not feel that it could define with any confidence the numerical threshold level at which wastes exhibiting these characteristics would present a substantial hazard. Furthermore, it questioned whether these tests sufficiently took into account the multiple factors which bore on the question of the hazardousness of such wastes.

EPA received a few comments on its proposed criteria for identifying characteristics, the most significant of which addressed the appropriate use of the identified characteristics. A number of commenters contended that EPA did not have authority to require generators to assess their wastes in accordance with the characteristics. These commenters were generally concerned about the burden placed on generators by such a requirement and argued that the characteristics should only be used by the Agency in listing hazardous wastes. Other commenters believed the EPA was fully justified in requiring generators to assess their wastes in accordance with the identified characteristics and felt that this would assure the broadest possible coverage for hazardous wastes.

EPA disagrees with those commenters who argue that EPA has no authority to require generators to determine if their wastes exhibit any of the characteristics. Throughout the statute Congress made reference to two alternative mechanisms for bringing a waste into the hazardous waste system—identification through characteristics, and listing. If Congress

had intended the identified characteristics to be used solely by EPA in listing wastes, then there would have been no point in making a distinction between these two mechanisms. Consequently, since the determination of whether a waste exhibits the characteristics appears to require some action by someone other than EPA, the most reasonable interpretation of the statutory language is that it requires generators to assess their wastes in accordance with the EPA-identified characteristics. This interpretation of the statutory language is substantially reinforced by the provision in Section 3002(4) that generators may be required to furnish information on the general chemical composition of their waste—a requirement which presumes testing.

The final regulation makes a few slight changes in the language of the criteria for identifying characteristics in an attempt to clarify the meaning of the regulation and better reflect EPA's regulatory intent. First, EPA has omitted reference to damage incidents and scientific and technical information as bases for identifying characteristics, out of a conviction that this reference is unnecessary and in partial agreement with those who argued that damage incidents should not be heavily relied on in identifying characteristics. Second, EPA has omitted the redundant phrase "can be defined in terms of specific, physical, chemical, toxic, infectious, or other properties of a solid waste." Third, EPA has expanded the criterion of "measurability" to make clear that any test for measuring characteristics must be within the capability of the generator community and to provide that characteristics such as reactivity need not be accompanied by a testing protocol if the characteristic can be "reasonably detected by generators . . . through their knowledge of the waste."

B. Section 261.11 (Criteria for Listing Hazardous Waste)

In the proposed regulation, EPA specified two criteria for listing hazardous waste. The first criterion was that the waste possess one or more of the identified characteristics. The second criterion was that the waste meet the definition of hazardous waste found in Section 1004(5) of the Act.

The first criterion to a large extent reflected EPA's regulatory strategy at the time of the proposal. Under that strategy, EPA planned to identify and quantitatively define all of the characteristics of hazardous waste, including organic toxicity, carcinogenicity, mutagenicity, teratogenicity, bioaccumulation potential and phytotoxicity. Generators

would be required to assess their wastes in accordance with these characteristics and EPA would list hazardous wastes where it had data indicating the wastes exhibited one of the identified characteristics. Listing would thus play a largely supplementary function and would serve as a device for injecting certainty into the process of hazardous waste determination. As noted above, however, EPA has found it impossible to fully effectuate this strategy because of the lack of suitably uncomplicated test protocols, the difficulty of establishing numerical hazardous threshold levels for these additional characteristics, and the failure of the available test protocols to fully incorporate all of the multiple factors bearing on the hazards presented by such characteristics.

The second criterion was adopted against the backdrop of this inability to capture all hazardous wastes through identified characteristics, and was intended to give the Agency an independent basis for capturing such wastes. Although this proposed criterion was admittedly somewhat general in nature, it implicitly incorporated the more specific criteria embodied in the delisting requirements and the waste codes which accompanied each listing—provisions which made it clear that EPA was specifically concerned with radioactive, mutagenic, bioaccumulative, toxic organic and infectious wastes. Thus, although EPA appeared to have prescribed for itself a very broad and inexact listing standard in the proposed regulation, in actuality the Agency followed a fairly particularized set of criteria in listing wastes.

EPA received a large number of comments in response to its proposed criteria for listing. None of these commenters objected to EPA's first criterion for listing wastes that exhibit one of the characteristics. A large number of commenters, however, objected to the second criterion. Many of these commenters felt that the mere articulation of the statutory definition as the basis for listing was circular and constituted an abrogation of EPA's statutory duty to establish criteria for listing which expand upon the statutory definition. Others argued that the second criterion was inappropriate because it failed to take into consideration such things as concentration, degradation potential and bioaccumulation potential—factors which are specifically mentioned by the Act.

EPA agrees that the proposed criterion for listing wastes which do not exhibit any of the characteristics was as

a general matter, too broad. Accordingly, we have promulgated a considerably expanded and more specific set of criteria to take the place of the proposed criterion. These criteria are broken down into two categories—criteria for listing acutely hazardous waste and criteria for listing toxic waste.

The criteria for listing acutely hazardous waste are intended by EPA to serve as the criteria for identifying wastes which are so hazardous that they can be said to meet part (A) of the statutory definition of hazardous waste—i.e., wastes which may "cause, or significantly contribute to an increase in serious irreversible, or incapacitating reversible, illness", regardless of how they are managed. It is EPA's conviction that most wastes are hazardous only because they "pose a substantial present or potential hazard to human health or the environment *when improperly managed*" and thus meet part (B) of the statutory definition of hazardous waste. Nevertheless, EPA recognizes that there are wastes which are so acutely hazardous that they can be considered to present a substantial hazard whether improperly managed or not. EPA has defined this category of wastes to include those which have been shown to be fatal to humans in low doses or have been shown in mammalian studies to have an oral LD 50 toxicity of less than 50 milligrams per kilogram, (as determined using rats), an inhalation LC 50 toxicity of less than 2000 milligrams per cubic meter (as determined using rats), or a dermal LD 50 toxicity of less than 200 milligrams per kilogram (as determined using rabbits). Numerous government agencies and private organizations, including the Department of Transportation, the Consumer Product Safety Commission and the National Academy of Sciences, recognize that substances exhibiting these LD 50 and LC 50 toxicities are so potentially lethal as to be considered poisonous or acutely toxic. EPA has also defined this category of wastes to include wastes, such as explosives, which otherwise meet part (A) of the statutory definition of hazardous waste. This has been done in recognition that wastes may be acutely hazardous even if they are not toxic. Inasmuch as a waste will meet the acutely hazardous criteria only when the whole waste, rather than just its constituents, presents an acute hazard, EPA has employed and intends to employ these criteria primarily to list the discarded pure chemical substances and associated materials specified in § 261.33. EPA recognizes, however, that there may be

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wastes such as wastes containing substantial concentrations of potent carcinogens which meet these criteria even though they are not pure substances.

The criteria for listing toxic wastes are intended by EPA to identify all those wastes which are toxic, carcinogenic, mutagenic, teratogenic, phytotoxic, or toxic to aquatic species. These criteria provide that a waste will be listed where it contains any of a number of designated toxic constituents—unless, after consideration of certain specified factors, EPA concludes that the waste does not meet part (B) of the statutory definition of hazardous waste. As in the proposed regulation, the ultimate requirement for listing a waste as hazardous is whether it meets the definition of hazardous waste found in the Act. Unlike the proposed regulation, however, the final criteria significantly channel the route the Agency must follow in determining whether a waste meets the statutory definition. The first inquiry which must be made under the final criteria is whether the waste contains any of the toxic constituents listed in Appendix VIII. These constituents are ones which have been shown in reputable scientific studies to have toxic, carcinogenic, mutagenic or teratogenic effects on humans or other life forms and include such substances as those identified by the Agency's Carcinogen Assessment Group. Consequently, the presence of any of these constituents in the waste is presumed to be sufficient to list the waste unless after consideration of the designated multiple factors, EPA concludes the waste is not hazardous. These multiple factors include the type of toxic threat posed, the concentrations of the toxic constituents in the waste, the migration potential, persistence and degradation potential of the toxic constituents, the degree to which the toxic constituents bioaccumulate in ecosystems, the plausible types of improper management to which the waste could be subjected, the quantities of waste generated, and other factors not explicitly designated by the Act, including damage incidents involving wastes containing the toxic constituents and actions taken by other governmental agencies with respect to the waste or its toxic constituents.

EPA has adopted this flexible, multiple factor approach to listing rather than the formulaic approach embodied in the characteristics because it considers this approach to be better able to accommodate itself to complex determinations of hazard. EPA further believes that this multiple factor

approach was to some extent contemplated by Congress. Most of the factors selected are specifically mentioned in Section 3001 of the Act. Additionally, the report which accompanied the Senate bill provided that at a minimum the Administrator should designate as hazardous each mixture of solid waste which contained a toxic or hazardous substance listed in section 112 of the Clean Air Act or section 307(a) and section 311(b) of the Clean Water Act unless he determined that the waste did not meet the criteria for identifying hazardous wastes. Senate Report 94-988, 94th Cong., 2d Sess. at 14. Thus the Senate bill, like EPA's final regulations, envisioned a presumption in favor of listing based on the presence of a toxic constituent in the waste which is rebuttable by a consideration of further factors. Although the Senate version of the bill was not adopted, the concept embodied therein was not specifically rejected in the final statute, providing some further basis for concluding that EPA's approach for listing toxic wastes reflects congressional intent.

As can be seen from the above discussion, the final criteria for listing reflect a change in emphasis in the Agency's regulatory strategy. EPA is not fully confident that it can suitably define and construct testing protocols for the characteristics of organic toxicity, carcinogenicity, mutagenicity, teratogenicity, bioaccumulation potential, phytotoxicity, radioactivity and infectiousness, and is consequently relying on the listing mechanism to bring wastes exhibiting these properties into the system. One negative aspect of this change in approach is that it shifts to EPA the primary burden for identifying, analyzing and evaluating these wastes with the result that it may take longer to achieve full regulatory coverage. This negative aspect is substantially offset, however, by the greater flexibility and assurance which the listing approach provides, especially when accompanied by the delisting procedure.

A notable difference between the approach embodied in the characteristics and the approach embodied in the criteria for listing is that EPA attaches less emphasis to waste constituent migration and subsequent environmental fate in the listing mechanism than in the characteristics. This is nowhere better demonstrated than in the listing of waste which contain primary drinking water standards contaminants. In listing wastes which contain primary drinking water standards contaminants EPA has elected to focus, in the first instance, on the actual presence of the toxic

constituent in the waste and to treat other factors such as migration potential as essentially mitigating considerations which might render the waste non-hazardous. EPA feels justified in concentrating primarily on the composition of the waste because the listing mechanism allows for a more individualized consideration of hazard and because the delisting procedure affords generators an opportunity to demonstrate, through reliance on the specified factors, that their waste is not in fact hazardous. In the case of wastes exhibiting the characteristic of EP toxicity, on the other hand, there is no opportunity to make such a demonstration—since the test prescribed in the characteristic constitutes a final determination of hazard. Consequently, out of concern that the characteristic not be overinclusive, EPA has placed somewhat greater emphasis on migration potential and has rigorously incorporated this consideration into the EP test.

As noted in section III.A.3. of this preamble, EPA intends to supplement the listing criteria to allow listing of radioactive and infectious wastes. We are deferring promulgation of the criteria for listing radioactive wastes because we want to wait until Congress has spoken on this issue and because deferral will give EPA more time to refine its standards for listing these wastes and to coordinate these standards with the regulations governing used, re-used recovered, and reclaimed wastes. We are similarly deferring promulgation of the criteria for listing infectious wastes because we have not finished developing the treatment standards applicable to such wastes.

A few clarifying changes have been added to the final regulation. First, the regulation provides that EPA may list classes or types of wastes if it has reason to believe that all wastes within the class or type typically or frequently are hazardous. Second, the regulation provides that the criteria for listing will be used to establish the exclusion limits for acutely toxic wastes generated by small generators. These exclusion limits are referred to in § 261.5(c).

VI. Subpart C—Characteristics of Hazardous Waste

A. Section 261.20—General

This section is largely self-explanatory. It states that a solid waste is a hazardous waste if it exhibits any of the characteristics of hazardous waste, explains the assignment of EPA Hazardous Waste Numbers, and

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Monday
May 19, 1980

Environmental Protection Agency

Part V

**Environmental
Protection Agency**

Hazardous Waste Management System

**Standards Applicable to Generators of
Hazardous Waste**

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ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 262**

[FRL 1470-7]

Standards for Generators of Hazardous Waste**AGENCY:** Environmental Protection Agency.**ACTION:** Final rule.

SUMMARY: The Resource Conservation and Recovery Act, as amended, seeks to promote the protection of human health and the environment and to conserve valuable material and energy resources. In order to accomplish this, the Act establishes a national program to improve solid waste management, including the control of hazardous waste, the promotion of resource conservation and recovery, and the establishment of environmentally sound solid waste disposal practices.

The EPA promulgated regulations establishing standards for generators of hazardous waste. These regulations were published in the *Federal Register* on February 26, 1980 (45 FR 12722). The amendments published today are both administrative and technical changes to the regulations which are intended to clarify the operation of these regulations. Areas of change include clarification of the effective date and compliance date of the regulation; clarification of the applicability of the regulations to generators which treat, store, or dispose of hazardous waste on-site; a corrected citation to the Part 261 provisions establishing equivalent test methods for determining whether a waste is a hazardous waste; inclusion of a generator's requirement to designate a facility or accept the waste if it cannot be delivered to the designated or alternate facility; a technical correction concerning placarding for rail shipments; expanded requirements for accumulation time in tanks and for contingency plans; addition of the EPA mailing address for generators who are required to notify the Administrator of international shipments; a corrected citation to triple rinsing in the Farmers section; and additions to the Annual Report (EPA Forms 8700-13, 8700-13A and 8700-13B).

DATES: Effective date: November 19, 1980. EPA will accept public comment on these regulations and amendments for administrative errors only (e.g., typographical errors, inaccurate cross references) until July 18, 1980. No extension in the effective date will be made, however, as a result of such comments.

ADDRESSES: The official docket for this regulation is located in Room 2711, U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C., and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays.

For information on implementation of these regulations, contact your EPA Regional Office.

FOR FURTHER INFORMATION CONTACT: For technical assistance on these regulations contact Harry W. Trask or Rolf P. Hill, Office of Solid Waste (WH-563), U.S. Environmental Protection Agency, Washington, D.C. 20460 (202-755-9150). For single copies of the amended Part 262 preamble and regulations published today and for copies of the February 26, 1980 version which contained a more descriptive preamble of this whole Part, contact Edward Cox, Solid Waste Publications, 26 W. St. Claire, Cincinnati, Ohio 45268 (513) 684-5362. Multiple copies will be available from the Superintendent of Documents, Washington, D.C. 20402.

SUPPLEMENTARY INFORMATION:**I. Authority**

These amendments are issued under authority of sections 2002(a), 3001, 3002, 3003, 3004 and 3005 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and as amended by the Quiet Communities Act of 1978 ("RCRA" or "the Act"), 42 U.S.C. 6912(a), 6921, 6922, 6923, 6924, 6925.

II. Background

This regulation was published in the *Federal Register* in proposed form for public review and comment on December 18, 1978 as 40 CFR Part 250, Subpart B (43 FR 58969 *et seq.*). The Agency held five public hearings and received a substantial number of written comments on the proposal. The public comment period closed on March 16, 1979.

After consideration of the views of the public, the Agency promulgated the Part 262 regulations in the *Federal Register* February 26, 1980 and promulgates these amendments today.

These amendments are in two categories, administrative amendments and technical amendments. Administrative amendments are corrections or clarifications which are being made to meet the intent of Part 262 preamble and regulations. The technical amendments address the additions or changes which were specified in the February 26, 1980 preamble to the Part 262 regulations.

III. Amendments**1. Effective Date**

RCRA establishes the effective date of Subtitle C regulations as "the date six months after the date of promulgation thereof . . ." (Section 3010(b)). Regulations implementing Section 3001 (40 CFR Part 261) identify characteristics of hazardous waste and list particular wastes as hazardous. These regulations are essential in determining who must comply with the Subtitle C regulations. Therefore, EPA intends to make the effective date of regulations implementing Sections 3002 and 3003 six months from the date of promulgation of Part 261. Since Part 261 is promulgated today, the effective date is November 19, 1980.

Some confusion developed when in the *Federal Register* EPA stipulated that the "effective date" was August 26, 1980 and that the "compliance date" was six months after the promulgation of 40 CFR Part 261. For determining the date at which generators will be subject to these regulations, the August 26, 1980 date is incorrect. All generators must comply with these regulations as of November 19, 1980.

2. Purpose, Scope and Applicability

The generator's responsibility to comply with these regulations when treating, storing or disposing of hazardous waste on-site has been clarified. Section 262.10(b) of the February 26, 1980 *Federal Register* stated that a generator who "treats, stores, or disposes of hazardous waste . . ." must only comply with certain sections of Part 262.

It was the Agency's intent, as indicated in the note which followed § 262.10, that the provision only applied to generators who treat, store or dispose of hazardous waste on-site. This administrative amendment clarifies § 262.10(b) by specifying that a generator who "treats, stores, or disposes of hazardous waste on-site . . ." must only comply with certain sections of Part 262. If he treats, stores, or disposes of all of his waste on-site, he need only comply with those specific sections of Part 262 which are identified in § 262.10(b). As a treater, storer, or disposer, however, he must comply with 40 CFR Parts 264, 265 and 122. For those portions of hazardous waste that a generator ships off-site, he must comply with all of the Part 262 regulations.

3. Hazardous Waste Determination

Section 262.11(c)(1) identified two ways for a generator to determine by testing whether the waste he generated was a hazardous waste as identified in

Subpart C of 40 CFR Part 261. The first was by using the EPA Part 261 tests. The second was using equivalent testing methods approved by the Administrator. The citation to the equivalent testing methods which appeared in the February 26 rule was incorrect. Equivalent methods are now described in 40 CFR 260.21.

4. Designated Facility

In the preamble to the final rules promulgated February 26, 1980, the Agency discussed the generator's responsibility to either "designate another facility or instruct the transporter to return the waste" if the transporter was unable to deliver the hazardous waste to the designated facility or the alternate facility. The text of the regulation inadvertently omitted this requirement. A new subparagraph, § 262.20(d), is added today which includes this requirement and makes these regulations consistent with the preamble to the final rules for this Part and the requirements of § 263.21(b).

5. Placarding

Placarding requirements are described in § 262.33. The rule promulgated February 26 required generators to offer the appropriate placard to the initial transporter. DOT, however, has a special requirement for placarding of rail shipments (49 CFR 172.508). The shipper (generator) according to DOT is the person responsible for properly placarding a rail shipment rather than simply offering the appropriate placard. EPA recognizes this difference and is applying the same responsibility for shipments of hazardous waste by rail. This administrative amendment clarifies the operation of § 262.33 by requiring generators to placard rail shipments rather than just offering the appropriate placard. It removes an inconsistency which inadvertently occurred between EPA's and DOT's regulations.

6. Accumulation Time

The preamble to the regulations promulgated on February 26 stated that "accumulation of hazardous waste in storage tanks meeting the technical standards of the Part 264 and 265 regulations" would be added when those standards were promulgated. This amendment requires that the accumulation of hazardous waste in tanks meet the interim status standards in Part 265, Subpart J (except for the waste analysis and trial tests required for treatment tanks). Part 262 may be amended again to include the Part 264 final standards for tanks when they are promulgated later this year.

The container management section of the 40 CFR Part 265, Subpart I regulations, published elsewhere in today's **Federal Register**, is not cited in its entirety as applicable to the accumulation of wastes in DOT containers. Rather, only the sections requiring inspection of the accumulation area (§ 265.174) and buffer zones between the container storage area and adjacent property lines (as required for ignitable and reactive wastes under § 265.176) are stipulated. Since generators who ship hazardous waste off-site are already required to comply with DOT container standards (e.g., must not leak and must be compatible with the waste), these sections from Subpart I were not cited. The Agency believes that it is unnecessary and potentially confusing to require generators to comply with two very similar standards for containers. Such duplication also would not provide additional protection of human health and the environment.

The proposed rule which appeared in the **Federal Register** December 18, 1978 indicated that the Agency was seeking comments regarding the desirability of requiring contingency plans for generators who accumulated hazardous waste. The preamble to the February 26 Part 262 regulations also indicated that the Agency was considering the inclusion of such provisions for generators who accumulated hazardous waste on-site. This amendment requires that such generators comply not only with the Contingency Plan and Emergency Procedures of 40 CFR Part 265, Subpart D but also with the Preparedness and Prevention requirements of 40 CFR Part 265 Subpart C and the personnel training requirements of § 265.16.

These plans and procedures are required of owners or operators of treatment, storage, or disposal facilities, and the Agency believes that there is little difference between accumulation of hazardous waste for shipment off-site and storage so far as potential damage to human health and the environment is concerned. Therefore, the same standards for protection of human health and the environment should apply. (The February 26 preamble and the Background Document discuss the rationale for the accumulation provisions in more detail.)

Similarly, the rationale for requiring all the Part 265, Subpart J requirements for generators who accumulate hazardous waste on-site for 90 days or less (without obtaining a permit) and for requiring certain standards for managing containers and personnel training is

based on the belief that less stringent standards could jeopardize human health and the environment.

7. Recordkeeping

Section 262.40(b) which appeared in the February 26, 1980 **Federal Register** did not specify the date from which copies of the Annual and Exception Report were to be kept for three years. This amendment initiates the three year retention period from the due date of the report (March 1).

8. International Shipments

The rule which was promulgated February 26, 1980 required that generators who ship hazardous waste outside the jurisdiction of the United States notify the Administrator prior to the first shipment of each different hazardous waste in each calendar year. This amendment includes a specific address as a means to expedite EPA's handling of this information. In addition, the generator is specifically required to include the name and address of the foreign consignee.

The regulations published elsewhere in today's **Federal Register** under 40 CFR Part 123 do not permit States to be authorized to receive the generator's notice of international shipment. This amendment includes a note reminding generators that they are required to notify the Administrator, rather than the local State authority.

9. Triple Rinsing

The citation for triple rinsing of containers which appeared in the February 26, 1980 **Federal Register** referenced Part 260 of the regulation. The Agency decided to include the triple rinsing provisions in Part 261 rather than in the Part 260 definitions. This amendment corrects the citation for the triple rinsing provisions.

10. Annual Reporting

The Annual Report for generators was promulgated in § 262.41 of the February 26, 1980 **Federal Register**. It consisted of a cover form (8700-13) and a type A form (8700-13A). Each part of this Report had associated instructions. This report was intended for use by generators who shipped hazardous waste to an off-site treatment, storage, or disposal facility. Annual Reports are also required for owners or operators of treatment, storage, or disposal facilities. In an effort to simplify the reporting requirements for the regulated community, the Agency has combined both reports into a single report with similar instructions for each part. Accordingly, the form and instructions which were promulgated in the February

1980 Federal Register are amended in Part 262. A Facility Annual Report form (8700-13B) and the related instructions are also amended today in Parts 264 and 265. Changes which appear on the first of the Hazardous Waste Report form 8700-13) are not extensive. On I, (Type of Report), has been amended to include Part A for Generator Annual Reports, Part B for Facility Annual Reports, and Part C for Manifested Waste Reports.

A major change which occurred on Form 8700-13 is the addition of a new section VIII entitled Cost Estimates for Treatment, Storage, or Disposal. Both closure and post-closure activities must now be included as required by Parts 264 and 265 amended today.

In the Part A report, only minor editing changes have occurred (e.g., to Waste Identification section) and a general renumbering of all sections due to the addition of the Cost Estimates for Treatment, Storage, or Disposal section. Also, the applicability of Part A reports to generators who ship hazardous waste off-site to facilities they do not own or operate is amended. Since facility owners or operators are required to file Annual Reports by Part 264, the Agency found it necessary to burden generators who store, or dispose of hazardous waste on-site by requiring them to file early identical reports on the same day. Therefore, generators who ship hazardous waste off-site to a facility they own or operate or who treat, store, or dispose of hazardous waste on-site are not required to file the Part A report. Rather, they are required to file a Part B report for those wastes.

The amended instructions for Generator Annual Report (Part A) are amended in Part 262 in today's Federal Register. The instructions for Facility Annual Reports (Part B) and Manifested Waste Reports (Part C) are published in Parts 264 and 265 here in today's Federal Register.

State Programs

The preamble to the February 26, 1980 edition did not discuss the effect of authorization of State programs on applicability of these regulations. Part applies in States which have received interim or final authorization to operate the hazardous waste management system in lieu of the Federal program. With two exceptions, provisions of these regulations do not apply in States which have been authorized under the provisions of 40 CFR Part 123. Section 40 CFR 123.128(d), requires States to obtain interim authorization while allowing EPA to

administer and enforce the Federal manifest system as established in 40 CFR Parts 262 and 263. Further, EPA will not authorize States to receive the notice of international shipment required in § 262.50. Even in States whose programs are authorized, generators shipping their hazardous waste to a foreign country will be required to notify EPA four weeks prior to the initial shipment.

IV. OMB Review

The preamble to the February 26, 1980 regulations indicated that OMB had not completed its review of the recordkeeping and reporting provisions of the section 3002, 3003 and 3010 standards. OMB has now completed its review and has approved all of those provisions. EPA has developed an evaluation plan for the entire hazardous waste regulatory program. The plan commits EPA to an evaluation of each of those provisions and to modifying them, if necessary, based on the practical experience gained during implementation.

The provisions of § 262.34(a)(5) of this amendment pertaining to recordkeeping and reporting have been submitted to the Office of Management and Budget for review in light of the requirements of the Federal Reports Act, 44 U.S.C. 3501, *et seq.* Time has not permitted completion of this review.

Dated: May 8, 1980.
Douglas M. Costle,
Administrator.

Title 40 CFR Part 262 is revised to read as follows:

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

Subpart A—General

- Sec.
- 262.10 Purpose, scope, and applicability.
- 262.11 Hazardous waste determination.
- 262.12 EPA identification numbers.

Subpart B—The Manifest

- 262.20 General requirements.
- 262.21 Required information.
- 262.22 Number of copies.
- 262.23 Use of the manifest.

Subpart C—Pre-Transport Requirements

- 262.30 Packaging.
- 262.31 Labeling.
- 262.32 Marking.
- 262.33 Placarding.
- 262.34 Accumulation time.

Subpart D—Recordkeeping and Reporting

- 262.40 Recordkeeping.
- 262.41 Annual reporting.
- 262.42 Exception reporting.
- 262.43 Additional reporting.

Subpart E—Special Conditions

- 262.50 International shipments.
- 262.51 Farmers.

Appendix—Form

Annual Report (EPA Form 8700-13).

Authority: Secs. 2002(a), 3001, 3002, 3003, 3004; and 3005 of the Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act of 1976 and as amended by the Quiet Communities Act of 1978, (42 U.S.C. 6912(a), 6921, 6922, 6923, 6924, 6925)

Subpart A—General

§ 262.10 Purpose, scope, and applicability.

(a) These regulations establish standards for generators of hazardous waste.

(b) A generator who treats, stores, or disposes of hazardous waste on-site must only comply with the following sections of this Part with respect to that waste: Section 262.11 for determining whether or not he has a hazardous waste, § 262.12 for obtaining an EPA identification number, § 262.40(c) and (d) for Recordkeeping, § 262.43 for additional reporting and if applicable, § 262.51 for Farmers.

(c) Any person who imports hazardous waste into the United States must comply with the standards applicable to generators established in this Part.

(d) A farmer who generates waste pesticides which are hazardous waste and who complies with all of the requirements of § 262.51 is not required to comply with other standards in this Part or 40 CFR Parts 122, 264, or 265 with respect to such pesticides.

(e) A person who generates a hazardous waste as defined by 40 CFR Part 261 is subject to the compliance requirements and penalties prescribed in Section 3008 of the Act if he does not comply with the requirements of this Part.

Note.— A generator who treats, stores, or disposes of hazardous waste on-site must comply with the applicable standards and permit requirements set forth in 40 CFR Parts 264, 265, and 266 and Part 122.

§ 262.11 Hazardous waste determination.

A person who generates a solid waste, as defined in 40 CFR 261.2, must determine if that waste is a hazardous waste using the following method:

(a) He should first determine if the waste is excluded from regulation under 40 CFR 261.4 and 261.5.

(b) He must then determine if the waste is listed as a hazardous waste in Subpart D of 40 CFR Part 261.

Note.— Even if the waste is listed, the generator still has an opportunity under 40 CFR 260.22 to demonstrate to the Administrator that the waste from his

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particular facility or operation is not a hazardous waste.

(c) If the waste is not listed as a hazardous waste in Subpart D of 40 CFR Part 261, he must determine whether the waste is identified in Subpart C of 40 CFR Part 261 by either:

- (1) Testing the waste according to the methods set forth in Subpart C of 40 CFR Part 261, or according to an equivalent method approved by the Administrator under 40 CFR 260.21; or
- (2) Applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used.

§ 262.12 EPA identification numbers.

(a) A generator must not treat, store, dispose of, transport, or offer for transportation, hazardous waste without having received an EPA identification number from the Administrator.

(b) A generator who has not received an EPA identification number may obtain one by applying to the Administrator using EPA form 8700-12. Upon receiving the request the Administrator will assign an EPA identification number to the generator.

(c) A generator must not offer his hazardous waste to transporters or to treatment, storage, or disposal facilities that have not received an EPA identification number.

Subpart B—The Manifest

§ 262.20 General requirements.

(a) A generator who transports, or offers for transportation, hazardous waste for off-site treatment, storage, or disposal must prepare a manifest before transporting the waste off-site.

(b) A generator must designate on the manifest one facility which is permitted to handle the waste described on the manifest.

(c) A generator may also designate on the manifest one alternate facility which is permitted to handle his waste in the event an emergency prevents delivery of the waste to the primary designated facility.

(d) If the transporter is unable to deliver the hazardous waste to the designated facility or the alternate facility, the generator must either designate another facility or instruct the transporter to return the waste.

§ 262.21 Required information.

(a) the manifest must contain all of the following information:

- (1) A manifest document number;
- (2) The generator's name, mailing address, telephone number, and EPA identification number;
- (3) The name and EPA identification number of each transporter;

(4) The name, address and EPA identification number of the designated facility and an alternate facility, if any;

(5) The description of the waste(s) (e.g., proper shipping name, etc.) required by regulations of the U.S. Department of Transportation in 49 CFR 172.101, 172.202, and 172.203;

(6) The total quantity of each hazardous waste by units of weight or volume, and the type and number of containers as loaded into or onto the transport vehicle.

(b) The following certification must appear on the manifest: "This is to certify that the above named materials are properly classified, described, packaged, marked, and labeled and are in proper condition for transportation according to the applicable regulations of the Department of Transportation and the EPA."

§ 262.22 Number of copies.

The manifest consists of at least the number of copies which will provide the generator, each transporter, and the owner or operator of the designated facility with one copy each for their records and another copy to be returned to the generator.

§ 262.23 Use of the manifest.

(a) The generator must:

- (1) Sign the manifest certification by hand; and

(2) Obtain the handwritten signature of the initial transporter and date of acceptance on the manifest; and

(3) Retain one copy, in accordance with § 262.40(a).

(b) The generator must give the transporter the remaining copies of the manifest.

(c) For shipment of hazardous waste within the United States solely by railroad or solely by water (bulk shipments only), the generator must send three copies of the manifest dated and signed in accordance with this section to the owner or operator of the designated facility. Copies of the manifest are not required for each transporter.

Note.—See § 263.20(e) for special provisions for rail or water (bulk shipment) transporters who deliver hazardous waste by rail or water to the designated facility.

Subpart C—Pre-Transport Requirements

§ 262.30 Packaging.

Before transporting hazardous waste or offering hazardous waste for transportation off-site, a generator must package the waste in accordance with the applicable Department of Transportation regulations on packaging under 49 CFR Parts 173, 178, and 179.

§ 262.31 Labeling.

Before transporting or offering hazardous waste for transportation off-site, a generator must label each package in accordance with the applicable Department of Transportation regulations on hazardous materials under 49 CFR Part 172.

§ 262.32 Marking.

(a) Before transporting or offering hazardous waste for transportation off-site, a generator must mark each package of hazardous waste in accordance with the applicable Department of Transportation regulations on hazardous materials under 49 CFR Part 172;

(b) Before transporting hazardous waste or offering hazardous waste for transportation off-site, a generator must mark each container of 110 gallons or less used in such transportation with the following words and information displayed in accordance with the requirements of 49 CFR 172.304:

HAZARDOUS WASTE—Federal Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the U.S. Environmental Protection Agency. Generator's Name and Address _____ Manifest Document Number _____

§ 262.33 Placarding.

Before transporting hazardous waste or offering hazardous waste for transportation off-site, a generator must placard or offer the initial transporter the appropriate placards according to Department of Transportation regulations for hazardous materials under 49 CFR Part 172, Subpart F.

§ 262.34 Accumulation time.

(a) A generator may accumulate hazardous waste on-site without a permit for 90 days or less, provided that:

(1) All such waste is shipped off-site in 90 days or less;

(2) The waste is placed in containers which meet the standards of § 262.30 and are managed in accordance with 40 CFR 265.174 and 265.176 or in tanks, provided the generator complies with the requirements of Subpart J of 40 CFR Part 265 except § 265.193;

(3) The date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

(4) Each container is properly labeled and marked according to § 262.31 and § 262.32; and

(5) The generator complies with the requirements for owners or operators in Subparts C and D in 40 CFR Part 265 and with § 265.16.

(b) A generator who accumulates hazardous waste for more than 90 days

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23 Env'tl. L. Rep. 21,301
UNITED STATES of America, Plaintiff-Appellee,
v.
Steven M. SELF, Defendant-Appellant.
No. 92-4111.
United States Court of Appeals,
Tenth Circuit.
Aug. 24, 1993.

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Christopher Harris of McCutchen, Doyle, Brown & Enersen, Washington, DC (William F. Hughes of Howrey & Simon, Washington, DC, with him on the brief), for defendant-appellant.

J. Carol Williams, U.S. Dept. of Justice, Environment & Natural Resources Div., Washington, DC (David J. Jordan, U.S. Atty., and Gordon W. Campbell, Asst. U.S. Atty., Salt Lake City, UT, Myles E. Flint, Acting Asst. Atty. Gen., and David C. Shilton, U.S. Dept. of Justice, Environment & Natural Resources Div., Washington, DC, with her on the brief), for plaintiff-appellee.

Before LOGAN, SEYMOUR and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

Defendant Steven M. Self appeals his convictions on four counts of violating the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. Sec. 6928(d), one count of mail fraud, 18 U.S.C. Sec. 1341, and one count of conspiracy to violate RCRA, the Clean Air Act ("CAA"), and the Clean Water Act ("CWA"). 18 U.S.C. Sec. 371. Three of the four substantive RCRA counts (counts 2, 3 and 4) and the mail fraud count (count 7) relate to the diversion of a shipment of natural gas condensate destined for a hazardous waste treatment, storage and disposal facility to a gas station, blending it with gasoline and selling it to the public as automotive fuel. The remaining substantive RCRA count (count 8) relates to the storage of twenty-nine drums of waste material

in violation of a RCRA permit. The conspiracy count (count 1) relates to the activity supporting the other counts as well as unpermitted burning of waste and unpermitted dumping of waste water. Defendant raises a number of issues on appeal, and we have jurisdiction under 28 U.S.C. Sec. 1291.

I.

The record reveals the following facts. In 1981, Defendant and Steven Miller formed EkoTek, Inc. Defendant provided most of the capital and became an 85% shareholder and EkoTek's President. Miller held the remaining 15% of the stock and became Vice-President. EkoTek purchased an industrial facility in Salt Lake City, Utah. Using

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Miller's technical expertise, EkoTek began re-refining used oil into marketable products. Defendant and Miller managed EkoTek on a day-to-day basis with Defendant primarily responsible for the financial aspects of the business, and Miller primarily responsible for the technical aspects.

The facility purchased by EkoTek was an authorized RCRA interim status treatment, storage and disposal facility. See 42 U.S.C. Sec. 6925(e)(1). In 1981 and again in 1982, Defendant signed and submitted an updated part A RCRA permit application. See 40 C.F.R. Sec.

270.13 (1992). In 1983, Defendant signed and submitted a part B RCRA permit application. See *id.* Sec. 270.14. By submitting the permit applications, EkoTek could continue operating as a treatment, storage and disposal facility under RCRA interim status, pending its RCRA permit approval. See 42 U.S.C. Sec. 6925(e)(1). In November 1986, EkoTek began marketing itself as a hazardous waste recycling facility. Defendant and Miller prepared a letter and sent it to hazardous waste brokers and generators which indicated that EkoTek was licensed and prepared to accept a variety of hazardous wastes for recycling at its facility.

In April 1987, a representative of Southern California Gas Company ("SCGC"), met with Miller at EkoTek and discussed EkoTek disposing of SCGC's natural gas pipeline condensate. The parties agreed that the condensate was hazardous waste and should, therefore, be transported and handled under a RCRA manifest. Miller indicated that EkoTek could dispose of the natural gas condensate by burning it as fuel in EkoTek's onsite process heaters or boilers. SCGC subsequently contracted with and agreed to pay EkoTek "to transport, burn, and/or dispose of" natural gas condensate for \$2.50 per gallon.

Shortly thereafter, an EkoTek tanker truck driver picked up a shipment of natural gas condensate from a SCGC facility in Los Angeles, California. The driver had been instructed by his supervisor to pick up the shipment and bring it back to EkoTek. As was his routine practice, the driver stopped at a gas station in Barstow, California, which was owned by Defendant, and telephoned his supervisor. On instructions from Defendant, the supervisor told the driver to leave the trailers containing the natural gas condensate at the gas station and return to Los Angeles to pick up an unrelated shipment. Defendant telephoned the gas station manager and instructed him to blend the natural gas condensate with gasoline in a 5-10% mixture and add an octane booster. The gasoline and condensate mixture was then sold to the public as automotive fuel. On Defendant's instructions, Miller told EkoTek's Refinery Operations

Manager to sign the manifest to indicate that the natural gas condensate shipment had been received at EkoTek and to falsify EkoTek's operating log accordingly. A copy of the manifest was mailed to SCGC.

In early 1987, EkoTek began receiving fifty-five gallon drums of waste material from different sources. Defendant instructed an employee to store the drums in the south warehouse. When the south warehouse filled up, Defendant instructed the employee to store the drums in the east warehouse. The employee was also instructed by his immediate supervisor to scrape the "hazardous waste" label off of each drum, paint a number on the drum, and list it on an inventory sheet. In July 1987, the State of Utah, pursuant to its delegated RCRA authority, see 42 U.S.C. Sec. 6926(b), granted EkoTek a RCRA permit which prohibited EkoTek from storing hazardous waste in the east warehouse. Defendant discussed this illegal storage practice with Miller. Defendant's office at EkoTek had a view of the doors to the east warehouse which were usually left open and through which stored fifty-five gallon drums were visible. On several occasions, Defendant ordered the doors to the east warehouse closed after being informed that inspectors would be at the facility.

Among the drums stored in the east warehouse were seventeen drums of waste from Avery Label and twelve drums of waste from Reynolds Metals both of which were shipped to EkoTek under RCRA manifests identifying the materials as hazardous wastes. Avery Label's manager of safety and environmental affairs testified that the waste sent to EkoTek was a mixture of ultraviolet

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curer ink waste, solvent ink waste, and cleaning solvent. Ultraviolet curer ink has a flash point exceeding 200° F and is, therefore, not considered hazardous due to ignitability. See 40 C.F.R. Sec. 261.21(a) (1992). Solvent ink, on the other hand, has a flash point well below 140°

F and is, therefore, considered hazardous due to ignitability. See *id.* The Material Safety Data Sheets ("MSDS") for the type of solvent inks that Avery Label used in 1987 indicated that the solvent inks had a flash point of between 16° F and 116° F. According to the Avery Label representative, mixing solvent ink waste with ultraviolet curer ink waste does not raise the flash point because the vapors of the solvent ink waste, which determine its ignitability, rise to the top. In his opinion, the waste sent to EkoTek had a flash point of between 70° F to 100° F. The hazardous waste broker who had arranged for the disposal of the Avery Label waste personally observed the waste sent to EkoTek and recognized it as a solvent-based ink due to its smell.

The RCRA manifest which accompanied the shipment of the Reynolds Metals waste to EkoTek indicated that the material was a mixture of "MEK" (methyl ethyl ketone) and a spray residue. MEK is a listed hazardous waste, see 40 C.F.R. Sec. 261.33(f) (1992), and it has a flash point of 23° F. The spray residue has a flash point of 100° F.

In April 1988, the hazardous waste broker responsible for shipping both the Avery Label and Reynolds Metals wastes to EkoTek visited the EkoTek facility after having been informed that drums of waste which he brokered had never been processed and were being illegally stored at the facility. By this time, EkoTek was no longer in business, and Petro Chemical Recycling, with which Defendant had no affiliation, had taken over operation of the facility. The broker observed "a lot of drums" being stored in the east warehouse, none of which were labeled but were crudely marked with a number. Using EkoTek's inventory sheet and recognizing the drums by their distinctive color, the broker identified the seventeen drums of Avery Label waste and the twelve drums of Reynolds Metals waste. He subsequently arranged for Marine Shale Processors to dispose of these as well as several other drums of waste. On documentation submitted to Marine Shale Processors, the broker indicated that the materials were from four types of waste streams,

and he identified the material in twenty-four of the 128 barrels as "UV ink waste." Marine Shale Processors tested a sample from each of the four types of waste streams and determined that each type of identified waste had a flash point below 70° F.

II.

With regard to the substantive RCRA counts and the mail fraud count relating to the diversion of the natural gas condensate to the Barstow gas station (counts 2, 3, 4 and 7), Defendant argues that natural gas condensate, when burned for energy recovery, is not a hazardous waste subject to regulation under RCRA. Therefore, Defendant claims the district court erred by denying Defendant's pretrial motion to dismiss, by denying Defendant's motion for a judgment of acquittal, and in its instruction to the jury defining hazardous waste. Because this issue is a question of law, our review is *de novo*. *United States v. Deffenbaugh Indus., Inc.*, 957 F.2d 749, 751 (10th Cir.1992).

A.

RCRA defines "hazardous waste," in relevant part as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may ... pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. Sec. 6903(5)(B). Natural gas condensate is a relatively volatile substance, having a flash point of less than 140° F and, therefore, is "hazardous" as contemplated by RCRA. See 40 C.F.R. Secs. 261.3(a)(2)(i), 261.21(a)(1) (1992). Nonetheless, "for a waste to be classified as hazardous, it must first qualify as a solid waste under RCRA." *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1313 (2d Cir.1993) (citing *United Technologies Corp. v. EPA*, 821 F.2d 714, 716 n. 1 (D.C.Cir.1987)).

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See also *United States v. Dean*, 969 F.2d 187, 194 (6th Cir.1992), cert. denied, --- U.S. ---, 113 S.Ct. 1852, 123 L.Ed.2d 475 (1993); *American Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C.Cir.1987).

RCRA defines "solid waste" to include "any ... discarded material, including ... liquid ... material resulting from industrial, commercial, mining, and agricultural operations, and from community activities..."¹ 42 U.S.C. Sec. 6903(27). RCRA regulations narrow the definition of "solid waste" to "any discarded material that is not excluded by Sec. 261.4(a) or that is not excluded by a variance granted under Secs. 260.30 and 260.31." 40 C.F.R. Sec. 261.2(a)(1) (1992). As there is no contention that natural gas condensate is subject to the Sec. 261.4(a) exclusion, or that it has been granted a variance under Sec. 260.30 and 260.31, whether natural gas condensate is a solid waste turns on whether it is a discarded material.

RCRA regulations define "discarded material" to include material which is "[a]bandoned" or "[r]ecycled."² Id. Sec. 261.2(a)(2). A material is abandoned, inter alia, by being "[b]urned or incinerated."³ Id. Sec. 261.2(b)(2). A material is recycled, inter alia, by being "[b]urn[ed] for energy recovery" or "[u]sed to produce a fuel or are otherwise contained in fuels."⁴ Id. Sec. 261.2(c)(2). Any material that is abandoned by being burned or incinerated is considered a solid waste. See id. Sec. 261.2(b). However, we note only certain types of materials that are recycled by being burned for energy recovery are considered solid wastes. See id. Sec. 261.2(c). See also *American Mining*, 824 F.2d at 1180 ("EPA determines whether a material is a RCRA solid waste when it is recycled by examining both the material or substance itself and the recycling activity involved.").

The only type of material which is considered solid waste when it is recycled by being burned for energy recovery and which might encompass natural gas condensate is a

"[b]y-product exhibiting a characteristic of hazardous waste."⁵ See 40 C.F.R. Sec. 261.2 (Table

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1) (1992). As noted earlier, natural gas condensate exhibits the ignitability characteristic of hazardous waste; thus, the issue turns on whether natural gas condensate is a "by-product" as defined by RCRA regulations. RCRA regulations define "by-product" as "a material that is not one of the primary products of a production process and is not solely or separately produced by the production process" exclusive of "co-product[s]." 40 C.F.R. Sec. 261.1(c)(3) (1992). While RCRA's definition of "by-product" is certainly subject to reasonable interpretation, the EPA directly addressed the issue of whether natural gas condensate is a by-product in its 1985 comment to its current regulatory definition of "solid waste":

Off-specification fuels burned for energy recovery ... are not by-products, and so would not be considered to be wastes under this provision. An example [is] natural gas pipeline condensate. The condensate contains many of the same hydrocarbons found in liquefied natural gas, and certain higher hydrocarbons that also have energy value. It is generated in the pipeline transmission of natural gas. This condensate is not considered to be waste when burned for energy recovery.⁶

50 Fed.Reg. 630 n. 18 (Jan. 4, 1985). Relying on this EPA statement, Defendant argues that so long as natural gas condensate is burned for energy recovery, it is not a by-product and, therefore, not a discarded material by virtue of being recycled, and, therefore, not a solid waste, and, therefore, not a hazardous waste under RCRA.

The government argued below and continues to argue on appeal that natural gas condensate is hazardous waste if it is used in a manner which was not the original intended

manner or normal intended use for that material within the industry.⁷ In support of this argument, the government first directs us to the EPA's long-standing distinction between legitimate and sham burning for energy recovery. See 50 Fed.Reg. 630 (Jan. 4, 1985); 48 Fed.Reg. 14,482 (Apr. 4, 1983); 48 Fed.Reg. 11,157-58 (Mar. 16, 1983); 45 Fed.Reg. 33,093 (May 19, 1980). The government then points to an EPA comment stating that commercial chemical products when burned for energy recovery are considered solid wastes because this is a manner of recycling which differs from their normal manner of use. See 50 Fed.Reg. 618 (Jan. 4, 1985). Next, the government relies on an EPA statement that the status of "non-listed commercial chemical products ... would be the same as those listed in Sec. 261.33--[t]hat is, they are not considered solid wastes when recycled except when they are recycled in ways that differ from their normal manner of use." 50 Fed.Reg. 14,216, 14,219 (Apr. 11, 1985).

By focusing on the EPA distinction between legitimate and sham burning for energy recovery, the government appears to be arguing that the natural gas condensate was not recycled within the meaning of the regulations and, therefore, was abandoned by being burned or incinerated. This distinction would undermine Defendant's argument because

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any abandoned material is considered solid waste. See 40 C.F.R. Sec. 261.2(b) (1992). On the other hand, by focusing on the EPA's rationale for classifying commercial chemical products which are burned for energy recovery as solid waste, the government's argument also suggests that natural gas condensate is a non-listed commercial chemical product, see generally supra note 5, and, therefore, must be recycled in a normal manner in order to not be considered a hazardous waste. This argument would also undermine Defendant's argument because recycling commercial chemical products by burning them for energy recovery is

not a normal manner of use and, therefore, the natural gas condensate, to the extent it is a commercial chemical product, is a solid waste. The government does not distinguish between these two alternative arguments but rather collapses the EPA's distinction between legitimate and sham burning for energy recovery with the EPA's rationale for classifying commercial chemical products which are burned for energy recovery as solid wastes. In doing so, the government combines otherwise unrelated EPA comments concerning distinct provisions within the regulatory definition of "solid waste" and misapplies these EPA comments to the facts of this case, as we discuss below.

1.

The legitimate versus sham distinction first arose in 1980 when the EPA defined "solid waste" to include "materials which have served their original intended purpose and are sometimes discarded." 45 Fed.Reg. 33,093 (May 19, 1980). See also 48 Fed.Reg. 14,475 (Apr. 4, 1983). Under this definition, "virtually all ... secondary materials" were considered solid wastes. 50 Fed.Reg. 618 (Jan. 4, 1985). However, the EPA exempted from regulation all recycling activity and the transportation and storage of non-sludges and non-listed hazardous waste which were recycled, see 48 Fed.Reg. 11,157 (Mar. 16, 1983); 45 Fed.Reg. 33,105 (May 19, 1980), and recognized that "burning of hazardous wastes as fuels can be a type of recycling activity exempted from regulation." 48 Fed.Reg. 11, 157-58 (Mar. 16, 1983). Expressing concern about, inter alia, the "burning of organic wastes that have little or no heat value in industrial boilers under the guise of energy recovery," 45 Fed.Reg. 33,093 (May 19, 1980), the EPA adopted a policy that in order to fall within the exemption, the burning must "constitute legitimate, and not sham, recycling." 48 Fed.Reg. 11,158 (Mar. 16, 1983); see also 45 Fed.Reg. 33,093 (May 19, 1980) (recognizing exemption as "temporary deferral" and noting that it "is confined to bona fide 'legitimate' and 'beneficial' uses and recycling of hazardous wastes").

In 1985, the EPA amended its regulatory definition of "solid waste" to substantially its present form which asks "both what a material is and how it is being recycled before knowing whether it is a solid waste." 50 Fed.Reg. 616 (Jan. 4, 1985). Following the 1985 amendment, the EPA's distinction between legitimate and sham burning became significant, not only by continuing to determine the applicability of the recycling exemption, but also by determining whether a material is being burned or incinerated--i.e. burned for destruction--and, therefore, abandoned, or is being burned for energy recovery and, therefore, recycled. See *id.* at 630.

Contrary to the government's argument, the EPA has never distinguished legitimate from sham burning for energy recovery based on whether the burning was the original intended use or normal manner of use of the material within the industry. The "primary" factor in distinguishing legitimate from sham burning for energy recovery is "the energy value of the hazardous waste being ... burned." 48 Fed.Reg. 11,158 (Mar. 16, 1983); see also 56 Fed.Reg. 7183 (Feb. 21, 1991) ("5,000 BTU/lb limit generally considered heretofore to be the minimum for a legitimate hazardous waste fuel"); 50 Fed.Reg. 630 (Jan. 4, 1985) ("burning of low energy hazardous wastes as alleged fuels is not considered to be burning for legitimate energy recovery"). As the EPA stated, "[i]f the wastes being burned have only de minimus energy value, the burning cannot recover sufficient energy to characterize the practice as legitimate recycling.... [T]he wastes, for practical purposes are being burned to be destroyed." 48 Fed.Reg. 11,158

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(Mar. 10, 1983). Natural gas condensate has a relatively high energy value, and the government conceded at oral argument that the natural gas condensate could have been burned for legitimate energy recovery in the boiler or industrial furnace at EkoTek.⁸

The government's reliance on the EPA statement that commercial chemical products, when burned for energy recovery, are solid wastes because this manner of recycling differs from their normal manner of use is completely misplaced. In this statement, the EPA was not distinguishing legitimate from sham recycling methods. Rather, the EPA was explaining its rationale for classifying commercial chemical products as solid waste when they are recycled by being burned for energy recovery. Specifically, the EPA stated that

Although [commercial chemical products] ... ordinarily are not wastes when recycled ... we are including them as wastes when they are recycled in ways that differ from their normal manner of use, namely, when they are used in a manner constituting disposal, or when they are burned for energy recovery (assuming these materials are neither a pesticide nor a commercial fuel).

50 Fed.Reg. 618 (Jan. 4, 1985) (internal citation omitted). This EPA comment merely explains why the EPA considers commercial chemical products which are legitimately recycled by being burned for energy recovery to be solid wastes even though commercial chemical products which are recycled by other methods, namely reclamation and speculative accumulation, are not considered solid wastes. See 40 C.F.R. Sec. 261.2 (1992); see also *id.* Sec. 261.33 (listed commercial chemical products are "hazardous wastes if and when ... in lieu of their original intended use, they are produced for use as (or as a component of) a fuel, distributed for use as a fuel, or burned as a fuel"). Indeed, it is implicit in this EPA statement of why commercial chemical products are solid wastes when burned for energy recovery that the commercial chemical product has been legitimately recycled. Contrary to the government's argument, this EPA comment has nothing to do with whether a particular manner of burning for energy recovery is legitimate or sham.

2.

Alternatively, the government suggests that natural gas condensate is a commercial chemical product (albeit an unlisted one), and, under the EPA's policy treating unlisted commercial chemical products like listed commercial chemical products, is a solid waste even if it is legitimately burned for

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energy recovery. This argument fails for several reasons.

First, only listed commercial chemical products are considered solid wastes when burned to recover energy, see 40 C.F.R. Sec. 261.2 (Table 1) (1992), and natural gas condensate is not listed. See *id.* Sec. 261.33. We recognize that the EPA has stated that it is "implicit" in the statutory and regulatory scheme that the "status" of "non-listed commercial chemical products ... would be the same as those listed in Sec. 261.33--[t]hat is, they are not considered solid wastes when recycled except when they are recycled in ways that differ from their normal manner of use." 50 Fed.Reg. 14,216, 14,219 (Apr. 11, 1985). However, such an implicit construction of the regulations is certainly not clear from the regulations themselves. To the contrary, the regulations define "commercial chemical products" by reference to a specific list of materials, see 40 C.F.R. Sec. 261.33 (1992), which suggests that non-listed materials are not subject to regulation as commercial chemical products.

In addition to natural gas condensate not being listed as a commercial chemical product, the government's own expert testimony at trial belies the government's contention on appeal that natural gas condensate is a commercial chemical product. The EPA has defined "commercial chemical product" as "a chemical substance which is manufactured or formulated for commercial or manufacturing use which consists of the commercially pure grade of the chemical, any technical grades of the chemical that are produced or marketed, and all

formulations in which the chemical is the sole active ingredient." 40 C.F.R. Sec. 261.33(d) (comment) (1992). The government's expert testified that natural gas condensate is an unintended by-product of the transportation of natural gas through pipelines. Notably, the government never asserted below that natural gas condensate was a commercial chemical product; rather, the government responded to Defendant's motion to dismiss by claiming that natural gas condensate "is a by-product of a manufacturing process." In light of the government expert's description of natural gas condensate and the government's contention below that natural gas condensate is a by-product, the government cannot seriously argue that natural gas condensate is manufactured or formulated for commercial or manufacturing use.

The government's characterization of natural gas condensate as a commercial chemical product cannot be reconciled with other EPA interpretations of the regulatory definition of solid waste. Notably, the EPA stated that burning commercial chemical products for energy recovery is never the normal use of such products. 50 Fed.Reg. 618 (Jan. 4, 1985). Accordingly, commercial chemical products which are burned for energy recovery are always considered solid wastes. See 40 C.F.R. Sec. 261.2 (Table 1) (1992). If natural gas condensate is a commercial chemical product, as the government's argument suggests, it would always be a solid waste when burned for energy recovery. Yet, this very same EPA comment cites natural gas condensate as an example of an off-specification fuel which is not considered to be a waste when burned for energy recovery. *Id.* at 630 n. 18. The EPA specifically qualified its statement that burning commercial chemical products for energy recovery is never their normal manner of use by "assuming [that] these materials are [not] a commercial fuel." *Id.* at 618. Thus, the government's construction is inconsistent with the EPA's interpretation.

Finally, to support its suggestion that natural gas condensate is an unlisted commercial chemical product, the government directs us to a

1991 EPA comment which characterizes natural gas condensate as an "off-specification commercial chemical product that has some BTU value." 56 Fed.Reg. 7184 (Feb. 21, 1991). In this comment, the EPA specifically stated that "if ignitable off-specification natural gas condensate is burned as motor fuel ... such material[] [is] solid and hazardous waste[] and subject to subtitle C controls ... because the mode of burning is not at all like these materials' original intended use." *Id.* According to the government, this statement "simply added further clarification to

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the distinction already in the regulations and accompanying Federal Register notices." ⁹

We do not read the 1991 comment as a mere clarification of an already existing EPA regulatory policy. For reasons already stated, the classification of natural gas condensate as an unlisted commercial chemical product is inconsistent with the EPA's earlier statement concerning the status of natural gas condensate. See 50 Fed.Reg. 630 n. 18 (Jan. 4, 1985). The 1991 comment clearly amended the EPA's policy with respect to natural gas condensate so as to bring Defendant's conduct within the purview of the regulatory scheme underlying the instant criminal charges. Given that the conduct at issue occurred in 1987, to permit the government to rely on the 1991 comment would run afoul of the Due Process Clause. See *Cox v. Louisiana*, 379 U.S. 559, 568-72, 85 S.Ct. 476, 482-85, 13 L.Ed.2d 487 (1965).

In short, other than a 1991 EPA comment which we view as inapplicable to this case because it substantively amended the EPA's interpretation of the regulations well after the date of the charged offense, the government's argument that natural gas condensate is a solid waste if it is "used in a manner which was not the original intended manner or normal intended use for that material within the industry" has no support in the statutory or regulatory scheme.

On the other hand, Defendant's argument is consistent with the statutory and regulatory scheme, and is clearly supported by the EPA's statement that natural gas condensate when burned for energy recovery is not a solid waste. In light of this construction of the regulatory scheme by the EPA, we agree with Defendant that, under the EPA's interpretation of the regulations in effect as of 1987, natural gas condensate is not a hazardous waste subject to RCRA regulation when it is burned for energy recovery, which includes burning it as automotive fuel. ¹⁰

B.

Defendant claims that, because natural gas condensate burned for energy recovery is not a RCRA hazardous waste, counts 2, 3, 4 and 7 were "fatally defective as a matter of law" and "should have been dismissed before trial." We disagree. Each of these counts alleged that the natural gas condensate was a hazardous waste. Whether the natural gas condensate was a RCRA hazardous waste was dependant on the factual question of whether the natural gas condensate was burned for energy recovery. A district court may not resolve evidentiary issues on a motion to dismiss. See *United States v. Knox*, 396 U.S. 77, 83 n. 7, 90 S.Ct. 363, 367 n. 7, 24 L.Ed.2d 275 (1969); *United States v. Kilpatrick*, 821 F.2d 1456, 1462 n. 2 (10th Cir.1987), *aff'd sub nom. Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988). Therefore, the district court did not err in denying Defendant's pre-trial motion to dismiss these counts.

C.

Defendant also argues that the district court erred by denying his motion for a judgment of acquittal on counts 2, 3, 4 and 7, due to the government's failure to prove that the natural gas condensate was RCRA hazardous waste. The government's theory at trial was that the natural gas condensate was

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sold as automotive fuel--i.e. burned for energy recovery--and the government even presented evidence to this effect. There is no evidence in the record before us that the natural gas condensate was used or disposed of in any manner other than for energy recovery. In light of our reasoning that natural gas condensate is not a RCRA hazardous waste when burned for energy recovery, to the extent that counts 2, 3, 4 and 7 required the government to prove that the natural gas condensate was hazardous waste, the evidence is insufficient as a matter of law.

1.

Count 2 charged a violation of 42 U.S.C. Sec. 6928(d)(1) which prohibits "knowingly transport[ing] or caus[ing] to be transported any hazardous waste identified or listed under ... subchapter [III of RCRA] to a facility which does not have a permit...." (emphasis added). Clearly, this count required the government to prove that the natural gas condensate was a RCRA hazardous waste, and the district court instructed the jury to this effect. Because the government failed to prove that the natural gas condensate was a RCRA hazardous waste, the government's proof with respect to count 2 was insufficient as a matter of law.

2.

Count 3 charged a violation of 42 U.S.C. Sec. 6928(d)(3) which prohibits "knowingly ... mak[ing] any false material statement or representation in any ... record, report ... or other document filed, maintained, or used for purposes of compliance with [RCRA] regulations...." 42 U.S.C. Sec. 6928(d)(3). The government relied upon the falsification of the manifest accompanying the natural gas condensate shipment to support count 3. The district court did not instruct the jury that it had to find that natural gas condensate was a hazardous waste to convict on this count, but did instruct the jury that the manifest is a "document[] used for purposes of compliance with applicable laws."

SCGC erroneously believed (which we understand) that the natural gas condensate was a hazardous waste and, therefore, prepared a manifest for the shipment. SCGC was only required to ship the natural gas condensate under a RCRA manifest if it was, in fact, hazardous waste. See 40 C.F.R. Sec. 262.20(a) (1992) ("[a] generator who transports, or offers for transportation, hazardous waste for offsite treatment must prepare a [m]anifest"). Similarly, EkoTek was only required to ensure compliance with the manifest if the natural gas condensate was hazardous waste. See *id.* Sec. 263.20(a) ("[a] transporter may not accept hazardous waste from a generator unless it is accompanied by a manifest"); *id.* Sec. 265.71(a) (interim status treatment, storage and disposal facilities must certify receipt of "hazardous waste accompanied by a manifest"). Because the natural gas condensate was not a hazardous waste, the manifest was not required "for purposes of compliance with [RCRA] regulations." 42 U.S.C. Sec. 6928(d)(3). Therefore, the government's failure to prove that natural gas condensate was a hazardous waste renders its proof on count 3 insufficient as a matter of law.

3.

Count 4 was also charged under 42 U.S.C. Sec. 6928(d)(3), and it was based on the falsification of EkoTek's operating log to indicate that the natural gas condensate had been received at EkoTek when, in fact, it had been diverted to the Barstow gas station. As an interim status treatment, storage, and disposal facility, EkoTek was required to keep a written operating log. See 40 C.F.R. Sec. 265.73(a) (1992). Thus, unlike the manifest at issue in count 3, the operating log at issue in count 4 was a document "maintained ... for purposes of compliance with [RCRA] regulations." 42 U.S.C. Sec. 6928(d)(3).

To convict Defendant under Sec. 6928(d)(3), the government was required to prove that the false entry into EkoTek's operating log was "material." 42 U.S.C. Sec. 6928(d)(3). Materiality is a question of law. See *Kungys v. United States*, 485 U.S. 759, 772, 108

S.Ct. 1537, 1547, 99 L.Ed.2d 839 (1988) (construing 8 U.S.C. Sec. 1451(a)); *United States v. Harrod*, 981 F.2d 1171, 1176 (10th Cir.1992) (construing 18 U.S.C. Sec. 1001), cert. denied, --- U.S. ---, 113 S.Ct. 2350, 124 L.Ed.2d 259

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(1993). For purposes of Sec. 6928(d)(3), materiality depends on whether the statement or omission "will have a tendency to influence Agency action." H.R.Rep. No. 198, 98th Cong., 2d Sess. 55 (1983), reprinted in 1984 U.S.C.C.A.N. 5576, 5614; see also *United States v. Brittain*, 931 F.2d 1413, 1415 (10th Cir.1991) (applying similar standard to 18 U.S.C. Sec. 1001).

While EkoTek was required to keep an operating log, it was only required to record receipt of hazardous wastes in the log. See 40 C.F.R. Sec. 265.73(b) (1992). However, whether the natural gas condensate was hazardous waste depended on how it was ultimately disposed, and regulatory authorities would not necessarily know that the natural gas condensate was to be burned for energy recovery and, therefore, not a hazardous waste. Indeed, SCGC treated the natural gas condensate as a RCRA hazardous waste, albeit erroneously, by accompanying the shipment with a RCRA manifest. Because of the false entry made in the EkoTek operating log, regulatory authorities may not have been alerted to an unaccounted for shipment of material with the potential to be hazardous waste thereby preventing an investigation into the matter. The false statement in the operating log concealed the actual disposition of the natural gas condensate and, therefore, had a tendency to forestall any regulatory agency investigation. Thus, the government's failure to prove that the natural gas condensate was hazardous waste does not render the false statement immaterial.¹¹

4.

Count 7 charged a violation of 18 U.S.C. Sec. 1341, which prohibits using the mail for the purpose of executing "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises...." 18 U.S.C. Sec. 1341. While the elements of this crime certainly did not require the government to prove that the natural gas condensate was RCRA hazardous waste, the government's theory, as charged in the indictment, was that Defendant devised a scheme to defraud SCGC of money by contracting to "properly transport, store, treat and dispose of, hazardous waste" in consideration of payment by SCGC and then failing to provide for the proper transportation, storage, treatment, and disposal of the hazardous waste. The government's theory necessarily depended on proof that the natural gas condensate was hazardous waste. Accordingly, the evidence supporting count 7 is insufficient as a matter of law.¹²

D.

With respect to counts 2, 3, 4 and 7 Defendant also claims that the district court's instruction to the jury concerning whether natural gas condensate was hazardous waste was erroneous, and that the district court erred by not allowing him to present expert testimony concerning the regulatory status of natural gas condensate in order to refute the government's expert. In light of our holding that counts 2, 3 and 7 must be reversed due to the government's failure to prove that the natural gas condensate was hazardous waste,

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we address this argument only with respect to count 4.

As our earlier discussion indicates, the district court's instruction was erroneous because it defined natural gas condensate as hazardous waste unless used in its originally intended manner or in a manner normally intended in the

industry. Moreover, in light of our construction of the regulatory definition of hazardous waste, there was no need for either the government or Defendant to present expert testimony concerning natural gas condensate's normal manner of use within the petroleum industry. Nonetheless, an erroneous jury instruction or an erroneous evidentiary ruling requires reversal only if the error is prejudicial. See *United States v. Caro*, 965 F.2d 1548, 1555 (10th Cir.1992) (jury instruction); *United States v. Jefferson*, 925 F.2d 1242, 1255 (10th Cir.) (evidentiary ruling), cert. denied, --- U.S. ---, 112 S.Ct. 238, 116 L.Ed.2d 194 (1991). See generally *Fed.R.Crim.P.* 52 ("[a]ny error ... which does not affect substantial rights shall be disregarded"). Given our earlier reasoning that count 4 did not require the government to prove that the natural gas condensate was hazardous waste, the district's court's erroneous instruction and any error in allowing the government's expert testimony did not prejudice Defendant.

III.

Count 8 stems from the storage of the seventeen drums of Avery Label waste and the twelve drums of Reynolds Metals waste in the EkoTek's east warehouse. This count charged a violation of 42 U.S.C. Sec. 6928(d)(2)(B) which prohibits "knowingly ... stor[ing] ... hazardous waste ... in knowing violation of any material condition or requirement of [a RCRA] permit." 42 U.S.C. Sec. 6928(d)(2)(B). This count was also charged and the jury was instructed under an aiding and abetting theory. 18 U.S.C. Sec. 2. On appeal, Defendant contends that the evidence was insufficient to prove that the material in the twenty-nine drums was hazardous waste and that he possessed the requisite knowledge.¹³ Defendant also contends that the jury instruction concerning knowledge was erroneous.

A.

In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the government to determine whether "any rational trier of fact could have found the essential elements of the crime beyond

a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Brittain*, 931 F.2d 1413, 1420 (10th Cir.1991). The jury may draw reasonable inferences from the proven facts, and credibility determinations are properly within the jury's province. *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789; *United States v. Garcia*, 994 F.2d 1499, 1504 (10th Cir.1993).

1.

Count 8 required the government to prove that the material was hazardous waste identified or listed under subchapter III of RCRA. See 42 U.S.C. Sec. 6928(d)(2)(B). RCRA regulations define "hazardous waste" as solid waste which either exhibits a characteristic of hazardous waste or is listed in the regulations.¹⁴ 40 C.F.R. Sec. 261.3 (1992). The government's theory at trial was that the Avery Label waste was characteristic waste because it had a flash point of less than 140° F, see *id.* Sec. 261.21(a)(1), and that the Reynolds Metals waste was both characteristic waste due to its ignitability, see *id.*, and listed waste--i.e. MEK. See *id.* Sec. 261.33(f).

Defendant's primary contention is that the government failed to present any reliable test data concerning the Avery Label or Reynolds Metals waste. As to the test results from Marine Shale Processors which indicated a flash point of below 140° F, Defendant accurately points out that they were not based on an EPA-approved test method

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for ignitability¹⁵ and the samples were taken from a composite of the material sent to it by the broker. Defendant also notes that the test results from Marine Shale Processors describe the Reynolds Metals material as "paint" and as a liquefied mixture containing water and MEK, while the manifest that originally accompanied the Reynolds Metals waste described the material as "non-pumpable sludge." Defendant

points to evidence of a test conducted in February 1988 by Gray Laboratories which indicated that the spray material contained in the Reynolds Metals waste had a flash point of 179? F. Finally, with respect to the Avery Label waste, Defendant points to a document prepared in April 1988 by the broker in which he refers to the material as "UV ink waste" and a Waste Profile Sheet for "waste ink" prepared by an Avery Label employee which indicates a flash point of 150? F.

While an EPA-approved test of the material would have been persuasive evidence as to whether the material was hazardous waste, the government was not required to prove this element through test data. See *United States v. Baytank, Inc.*, 934 F.2d 599, 614 (5th Cir.1991) (evidence was sufficient to prove drums contained hazardous waste even though the government took no drum samples). Moreover, whether the material tested by Gray was the same material in the Reynolds Metals waste was contested at trial as the government presented test results for the spray material which indicated that it had a flash point of 100? F. See *United States v. Dee*, 912 F.2d 741, 746 (4th Cir.1990) (defendant's test results indicating that material had flash point exceeding 140? F were not conclusive as there was evidence of irregularity of testing procedure), cert. denied, 499 U.S. 919, 111 S.Ct. 1307, 113 L.Ed.2d 242 (1991). Regardless of the flash point of the Reynolds Metals waste, there was evidence that it contained MEK which is a listed hazardous waste.¹⁶ See *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 41 (1st Cir.1991) (fact that soil was contaminated with non-hazardous chemicals in addition to listed hazardous waste would not render soil non-hazardous waste). Further, the fact that the broker referred to the Avery Label waste as "UV waste ink," and an Avery Label employee conducted a test on some unknown "waste ink" which indicated a flash point of 150? F does not render the government's evidence insufficient as a matter of law. See *United States v. Greer*, 850 F.2d 1447, 1452 (11th Cir.1988) (evidence was sufficient for jury to find that material was listed

hazardous waste despite manifest indicating that the material was "waste solvent"). In short, the absence of reliable test data and presence of some conflicting evidence in the record does not render the government's proof insufficient as a matter of law.

The government proved that the material was hazardous waste through the testimony of the Avery Label and Reynolds Metals representatives and the hazardous waste broker. Both representatives identified the manifests which indicated that the materials were hazardous wastes. The Reynolds Metals representative testified that the waste included MEK which is a hazardous waste regardless of its ignitability when combined with other materials. The Avery Label representative identified the specific composition of the waste as solvent ink, ultraviolet curer ink and cleaning solvent. The Material Data Safety Sheets for solvent inks used by Avery Labels in 1987 indicated a flash point of well below 140? F. See *Dee*, 912 F.2d at 746-47 (evidence was sufficient for jury to find that material was characteristic hazardous waste where Material Safety Data Sheet and another document prepared by defendant indicated a flash point of below 140? F). Moreover, the Avery Label representative testified that the fact that it was mixed with the relatively

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involatile ultraviolet curer ink would have little effect on the waste material's ignitability. The broker testified that he recognized the Avery Label waste as solvent ink due to its smell. This evidence is sufficient for a reasonable jury to find that the material at issue in count 8 was RCRA hazardous waste. See *Baytank*, 934 F.2d at 614 ("documents, including drum inventories, a hazardous waste log, and internal memoranda, as well as the testimony at trial, all amply demonstrate" that drums contained hazardous waste); *Greer*, 850 F.2d at 1452 (bill of lading identifying material as listed waste, testimony that material smelled like waste, and evidence

that traces of the chemical had been found at the dump site was sufficient for the jury to find that the material was the listed hazardous waste). The fact that there may have been other conflicting evidence does not render the evidence insufficient as the jury's very function is to resolve conflicting evidence.

2.

Defendant also claims that the evidence was insufficient to establish that he had the requisite knowledge for a criminal violation under Sec. 6928(d)(3). Specifically, Defendant argues that there was no evidence that he knew the twenty-nine drums of Avery Label and Reynolds Metals waste were stored in the east warehouse or that they contained RCRA hazardous waste, nor did the evidence show that he knew that storage of these wastes in the east warehouse violated EkoTek's RCRA permit.

There was substantial evidence that Defendant knew hazardous waste was being stored in the east warehouse in violation of EkoTek's RCRA permit. Testimony from both Miller and the EkoTek employee responsible for unloading and storing drums of hazardous waste and keeping the inventory clearly established that Defendant directed the storage of hazardous waste in the east warehouse. Miller also testified that he specifically discussed this illegal storage practice with Defendant. Defendant signed the RCRA permit applications which did not seek authorization to store hazardous waste in the east warehouse. Furthermore, in a RCRA criminal prosecution, "[t]he government may prove guilty knowledge by circumstantial evidence." *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504 (11th Cir.1986). See also *United States v. Speech*, 968 F.2d 795, 797 (9th Cir.1992). In the present case, Defendant was responsible for the day-to-day management of EkoTek and oversaw all the bills. There was evidence that Defendant helped prepare the letter soliciting hazardous waste from generators and brokers and that from his office he could see drums of waste being stored in the east warehouse. Moreover, testimony established that Defendant ordered the doors closed, and in one instance assisted in

closing the doors to the east warehouse after being informed that inspectors were visiting EkoTek. See *United States v. Morehead*, 959 F.2d 1489, 1503 (evidence that defendant attempted to evade police supported inference of defendant's knowledge of illegal activity), *aff'd sub nom. United States v. Hill*, 971 F.2d 1461 (10th Cir.1992) (en banc). This evidence is sufficient to prove that Defendant knew hazardous waste was being stored in the east warehouse and knew that such storage violated EkoTek's RCRA permit.

Nevertheless, Defendant argues that the evidence is insufficient for the jury to infer that Defendant knew of the east warehouse storage of the specific twenty-nine drums at issue in count 8. Defendant relies on the First Circuit's language in *MacDonald & Watson*, to support his claim that the evidence regarding his knowledge of the specific twenty-nine drums was insufficient. In *MacDonald & Watson*, the court recognized that "[s]imply because a responsible corporate officer believed that on a prior occasion illegal transportation occurred, he did not necessarily possess knowledge of the violation charged." 933 F.2d at 55. However, the *MacDonald & Watson* court was not addressing the sufficiency of the evidence. Rather, the court was addressing the propriety of a particular jury instruction which allowed the jury to find that the defendant had the requisite knowledge of the illegal transportation of hazardous waste solely by virtue of his position as a responsible corporate officer. *Id.* at 50-55. While the *MacDonald & Watson* court reversed a conviction

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for knowingly transporting hazardous waste to an unpermitted facility because of the erroneous "responsible corporate officer" instruction, the court expressly recognized in a RCRA criminal prosecution that "knowledge may be inferred from circumstantial evidence, including position and responsibility of defendants ... as well as information provided to those defendants on

prior occasions." *Id.* at 55. Accord *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir.1984) ("knowledge" in a RCRA criminal prosecution "may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant"), cert. denied, 469 U.S. 1208, 105 S.Ct. 1171, 84 L.Ed.2d 321 (1985). Thus, while knowledge of prior illegal activity is not conclusive as to whether a defendant possessed the requisite knowledge of later illegal activity, it most certainly provides circumstantial evidence of the defendant's later knowledge from which the jury may draw the necessary inference. Cf. Fed.R.Evid. 404(b) (prior bad act evidence admissible to prove knowledge).

In *Greer*, the Eleventh Circuit held that the evidence was sufficient to prove that the defendant knowingly disposed of hazardous waste despite the fact that there was no evidence that the defendant told his employee to dump the particular load of hazardous waste at issue. 850 F.2d at 1451-52. Rather, the evidence showed that the defendant told the employee to "handle" the load of waste, and the defendant had approved of dumping the waste in the past. *Id.* Similarly, in *Dee*, the Fourth Circuit held that evidence that the defendant was in charge of operations at the facility, had originally ordered hazardous waste to be stored in an unpermitted area of the facility, and repeatedly ignored warnings about the hazardous condition of the materials and the improper storage yet took no action to comply with the RCRA was sufficient to show that Defendant directed the illegal storage. 912 F.2d at 747.

In our view, the evidence in this case was sufficient for the jury to infer that Defendant knew of the storage of the Avery Label and Reynolds Metals waste in the east warehouse and knew that such storage violated EkoTek's RCRA permit. There was direct evidence that Defendant had knowledge of prior illegal storage, and Defendant directed his employee to store hazardous waste in the east warehouse. The jury could infer from Defendant's overseeing of the bills that he knew about the particular waste at issue in count 8. Certainly,

the government may "prove a defendant had actual knowledge of a material and operative fact by proving deliberate acts committed by the defendant from which actual knowledge can be logically inferred." *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1046 (10th Cir.1992); see, e.g., *United States v. Langston*, 970 F.2d 692, 706 (10th Cir.), cert. denied, --- U.S. ---, 113 S.Ct. 439, 121 L.Ed.2d 358 (1992); cf. *United States v. Ochoa-Fabian*, 935 F.2d 1139, 1141-42 (10th Cir.1991) (approving of deliberate ignorance instruction which permits jury to infer guilty knowledge based on proof "beyond a reasonable doubt of a conscious purpose to avoid enlightenment"), cert. denied, -- U.S. ---, 112 S.Ct. 1565, 118 L.Ed.2d 211 (1992).

Even if we were not convinced that there was sufficient evidence for the jury to infer that Defendant actually knew about the illegal storage of the Avery Label and Reynolds Metals waste, we can affirm Defendant's conviction on an alternative ground. Defendant overlooks the fact that count 8 was charged, and the jury was instructed, under an aiding and abetting theory, and the jury was also instructed on a Pinkerton theory. See *Pinkerton v. United States*, 328 U.S. 640, 647-48, 66 S.Ct. 1180, 1184, 90 L.Ed. 1489 (1946) (criminal conspirator is criminally responsible for substantive crimes of coconspirators committed during the course of and in furtherance of the conspiracy which are reasonably foreseeable). See also *United States v. Russell*, 963 F.2d 1320, 1322 (10th Cir.), cert. denied, --- U.S. ---, 113 S.Ct. 280, 121 L.Ed.2d 207 (1992). Defendant's conviction on count 8 can be alternatively affirmed under either of these theories.

To prove that Defendant aided and abetted the illegal storage charged in count 8, the government is required to prove that someone committed the underlying substantive

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offense, Langston, 970 F.2d at 705 n. 12; United States v. Rodgers, 419 F.2d 1315, 1317 (10th Cir.1969), and that Defendant "share[d] in the intent to commit the offense ... [and] participated in some manner to assist its commission." United States v. Smith, 838 F.2d 436, 441 (10th Cir.1988) (citing United States v. Fischel, 686 F.2d 1082, 1087 (5th Cir.1982)), cert. denied, 490 U.S. 1036, 109 S.Ct. 1935, 104 L.Ed.2d 407 (1989). Miller admitted at trial that EkoTek received the waste from Avery Label and Reynolds Metals, and that he understood it to be "manifested hazardous waste." Miller further admitted that it was EkoTek's standard practice at this time to store drums of hazardous waste in the east warehouse. Testimony from an EkoTek employee established that Miller, like Defendant, had specifically directed the employee to store hazardous waste in the east warehouse. Finally, Miller admitted knowing that storage of hazardous waste in the east warehouse violated EkoTek's RCRA permit. This evidence is sufficient to establish that Miller violated Sec. 6928(d)(2)(B) by storing the Avery Label and Reynolds Metals waste in the east warehouse. Defendant's direction to his employee to store hazardous waste in the east warehouse and his specific discussion with Miller about the illegality of this practice is sufficient evidence to establish that Defendant shared the requisite intent. Moreover, Defendant participated in the offense, not only by directing the illegal storage, but by personally attempting to avoid its detection by the inspectors. Thus, regardless of whether the evidence would be sufficient for the jury to infer that Defendant had knowledge of the illegal storage of the twenty-nine drums at issue in count 8, the evidence is abundantly sufficient to find that Defendant aided and abetted Miller's commission of the offense.

The evidence of Miller's commission of the substantive offense also supports Defendant's conviction under a Pinkerton theory. The indictment clearly indicated that Miller was a coconspirator, albeit an unindicted one, and clearly charged that the illegal storage of hazardous waste in the east warehouse as an

object of the conspiracy. Defendant does not even challenge on appeal the sufficiency of the evidence to support his conspiracy conviction. Accordingly, given that Miller's acts relating to the storage of the Avery Label and Reynolds Metals waste were in the course of and in furtherance of the conspiracy, Defendant can be held criminally responsible for these acts.

B.

Defendant also claims that the district court's jury instruction concerning Defendant's knowledge that the material was hazardous waste was erroneous. The district court instructed the jury as follows:

That on or about the dates alleged in the Indictment, the defendant knowingly stored or commanded and caused others to store hazardous waste. The defendant need have no specific knowledge of the particular hazardous characteristics of the material in question, only that it was hazardous waste and not a benign or innocuous material such as water.

Defendant objected to this instruction claiming that the instruction should require the jury to find that Defendant knew the waste was an identified or listed hazardous waste under RCRA. Defendant reasserts this same argument before us.

We review the propriety of tendering an individual jury instruction de novo. United States v. Harmon, 996 F.2d 256, 257 (10th Cir.1993) (citations omitted). We examine the jury instructions as a whole to determine whether the jury was provided with an accurate statement of the applicable law. *Id.* (citations omitted). We will only reverse a conviction due to an erroneous instruction if the error was prejudicial when viewed in light of the entire record. United States v. Caro, 965 F.2d 1548, 1555 (10th Cir.1992).

Defendant points to the language of the statute which proscribes "knowingly ... stor[ing] ... any hazardous waste identified or listed under this subchapter ... in knowing violation of any

material condition or requirement of [a RCRA] permit." 42 U.S.C. Sec. 6928(d)(2)(B) (emphasis added). According to Defendant, because the statute expressly requires knowledge that the storage violates the permit, and the permit only

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regulates RCRA hazardous waste, the statute necessarily requires proof of the defendant's knowledge that the material is hazardous waste identified or listed under RCRA.

Whether 42 U.S.C. Sec. 6928(d)(2)(B) requires proof that the defendant knew the substance at issue was identified or listed hazardous waste under RCRA appears to be an issue of first impression. However, several circuits have given narrower constructions of the knowing requirement in other RCRA criminal provisions. The Fourth, Fifth and Eleventh Circuits have held that Sec. 6928(d)(2)(A), which prohibits knowingly treating, storing or disposing of hazardous waste without a permit, does not require proof of the defendant's knowledge that the materials are listed or identified as hazardous waste under RCRA regulations. See *United States v. Goldsmith*, 978 F.2d 643, 645 (11th Cir.1992); *Baytank*, 934 F.2d at 613; *Dee*, 912 F.2d at 745. Similarly, the Eleventh Circuit has also held that Sec. 6928(d)(1), which prohibits knowingly transporting hazardous waste to an unpermitted facility, does not require proof of the defendant's knowledge that the material was hazardous waste within the meaning of RCRA regulations. See *Goldsmith*, 978 F.2d at 645; *Hayes*, 786 F.2d at 1503. These circuits, as well as the Third and Ninth Circuits in the context of Sec. 6928(d)(2)(A), have held that the government need only prove that Defendant knew the material was hazardous in that it was potentially harmful to persons or the environment. See *Goldsmith*, 978 F.2d at 646; *Baytank*, 934 F.2d at 613; *Dee*, 912 F.2d at 745; *United States v. Hoflin*, 880 F.2d 1033, 1039 (9th Cir.1989), cert. denied, 493 U.S. 1083, 110 S.Ct. 1143, 107 L.Ed.2d 1047 (1990); *Greer*, 850 F.2d at 1450;

Johnson & Towers, 741 F.2d at 666 (construing Sec. 6928(d)(2)(A)).

These courts have generally relied on the Supreme Court's reasoning in *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971). *International Minerals* involved a prosecution under 18 U.S.C. Sec. 834(f) (repealed 1979) for knowingly violating an Interstate Commerce Commission regulation which required shipping papers to describe hazardous materials. The defendant argued that, because he was not aware of the particular regulation, he could not have knowingly violated it as required under the terms of the criminal statute. *Id.* at 560, 91 S.Ct. at 1699. The Court held that the defendant's lack of knowledge of the regulation was no defense. See *id.* at 562, 91 S.Ct. at 1700. ("[t]he Act ... does not signal an exception to the rule that ignorance of the law is no excuse"). The Court reasoned that "where ... obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 565, 91 S.Ct. at 1701-02. Courts which have applied *International Minerals'* reasoning to the knowing requirement of RCRA's criminal provisions have generally reasoned that persons dealing with materials, which by their very nature are potentially dangerous, are presumed to know the regulatory status of the material, see *United States v. Sellers*, 926 F.2d 410, 416 (5th Cir.1991); *Dee*, 912 F.2d at 745, or that to permit a defendant to claim that he or she did not know the material was identified or listed as a RCRA hazardous waste would effectively approve of a mistake of law defense which is generally not viable in a criminal prosecution. See *Baytank*, 934 F.2d at 612; *Dee*, 912 F.2d at 745.

Notwithstanding *International Minerals'* reasoning and the application of this reasoning to the knowing requirement of RCRA's criminal provisions by every circuit that has addressed the issue, Defendant argues that we should follow the Supreme Court's reasoning in *Liparota v. United States*, 471 U.S. 419, 105

S.Ct. 2084, 85 L.Ed.2d 434 (1985). In *Liparota*, the Supreme Court held that 7 U.S.C. Sec. 2024(b)(1), which prohibited the knowing acquisition or possession of food stamps in any manner not authorized by the statute or regulations, required proof, not only of the defendant's knowledge of his acquisition or possession of the food stamps, but also of the defendant's knowledge that his possession or acquisition of the food stamps was not authorized by the regulation. *Id.* at 425, 105 S.Ct. at 2088; accord *United States v. O'Brien*, 686 F.2d 850, 853 (10th Cir.1982). *Liparota* does not control this

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case. The *Liparota* Court distinguished *International Minerals* because the statute at issue in *Liparota* did not involve "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health and safety." 471 U.S. at 433, 105 S.Ct. at 2092. Given that RCRA is a public welfare statute which was designed "to protect human health and the environment," see 42 U.S.C. Sec. 6924(a) (West Supp.1993); *United States v. Colorado*, 990 F.2d 1565, 1569-70 (10th Cir.1993), the *Liparota* Court's reasoning, in light of its recognized distinction of *International Minerals*, is inapposite. See *Baytank*, 934 F.2d at 613; *Hayes*, 786 F.2d at 1503.

We recognize that Sec. 6928(d)(2)(B) requires proof that the storage was "in knowing violation" of the RCRA permit, and the RCRA permit only governs storage of RCRA hazardous waste. We do not believe, however, that this particular knowing requirement makes knowledge of the regulatory status of the material a prerequisite to conviction under Sec. 6928(d)(2)(B). Rather, the second "knowing" requirement of Sec. 6928(d)(2)(B) ensures that a good faith belief that a permit allows a particular manner of treatment, storage or disposal of hazardous waste, when in fact it does not, is a

defense to a criminal charge. See H.R.Conf.Rep. No. 1444, 96th Cong., 2d Sess. 37 (1980), reprinted in 1980 U.S.C.C.A.N. 5019, 5036 ("This section is intended to prevent abuses of the permit system by those who obtain and then knowingly disregard them.") It does not eliminate the presumption, applicable to every other RCRA criminal provision and to regulatory statutes in general which concern dangerous substances, that persons handling such materials know of their regulatory status. Accordingly, Defendant's claim that the district court should have instructed the jury that it must find that Defendant knew the material at issue in count 8 was identified or listed as hazardous waste under RCRA regulations is not persuasive.

On appeal, Defendant broadens his contention that the instruction was erroneous by arguing, not only that the instruction failed to require the government to prove that Defendant knew the material was RCRA hazardous waste, but also that it allowed the jury to convict merely by finding that Defendant knew the material was "not a benign or innocuous material such as water." Because Defendant did not raise this particular objection below, we review only for plain error. See *Sellers*, 926 F.2d at 417.

While the government was not required to prove that Defendant knew that the material was identified or listed as hazardous waste under RCRA regulations, the government was required to prove that Defendant knew the material was hazardous in that it had the potential to be harmful to persons or the environment. See *Goldsmith*, 978 F.2d at 645-46; *Baytank*, 934 F.2d at 613; *Hoflin*, 880 F.2d at 1039; *Greer*, 850 F.2d at 1450. Here, the district court's instruction specifically required the jury to find that Defendant knew the material was hazardous. However, the instruction did not define hazardous as having the potential to harm other persons or the environment, but merely told the jury that it meant a non-benign or non-innocuous material, and gave water as an example of a benign or innocuous material.

The Eleventh and Ninth Circuits have approved of an instruction regarding knowledge which requires the jury to find that "the defendant knew that the stored material had the potential to be harmful to others or to the environment, in other words, that it was not an innocuous substance like water." See Goldsmith, 978 F.2d at 645; Hoflin, 880 F.2d at 1039. While we agree with this instruction and find it preferable to the instruction given in this case, the instruction here was not an erroneous statement of the law. The instruction specifically required the jury to find that Defendant knew the material was hazardous waste. Thus, it is unlike the erroneous instruction in *Dee* which required the jury to find only that Defendant knew the materials were chemicals without also requiring a finding that Defendant knew the materials were hazardous. 912 F.2d at 745. As a result, even though the instruction in this case may have been incomplete by failing to inform the jury that Defendant must know the material had the potential to be harmful to others or the

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environment, this omission was not so obvious as to rise to the level of plain error. See *Sellers*, 926 F.2d at 417 (no plain error in failing to instruct the jury that the government was required to prove that the defendant knew that the substance he disposed of was potentially hazardous or dangerous to persons or the environment).

IV.

Finally, Defendant argues that his conviction on count 1 for conspiracy to violate CAA, RCRA and CWA must be set aside because the verdict may have been based upon a legally insufficient overt act or means. Count 1 charged Defendant with conspiring with EkoTek, Inc. and other unidentified coconspirators (1) to violate CAA, specifically 42 U.S.C. Sec. 7413(c)(1), by burning solvents, used oil and hazardous waste in violation of EkoTek's state air permit; (2) to violate RCRA,

specifically 42 U.S.C. Secs. 6928(d)(1), 6928(d)(2), 6928(d)(3), by storing the Avery Label and Reynolds Metals waste in unpermitted areas of the facility, by transporting the natural gas condensate to an unpermitted facility and falsifying the manifest and the operating log, and by illegally storing and treating 5,000 gallons of corrosive waste in March 1987; and (3) to violate the CWA, specifically 33 U.S.C. Secs. 1317(d), 1319(c)(1), 1319(c)(2), by discharging pollutants from the EkoTek facility into the public sewer system. We have already determined that the government's theory with respect to the natural gas condensate charges was erroneous, and, therefore, the government failed to meet its burden of proof with respect to two of the four substantive RCRA counts. Additionally, the district court granted Defendant's motion for a judgement of acquittal with respect to substantive counts which related to the improper storage and treatment of the corrosive wastes. Defendant claims on appeal that because the jury could have based his conviction on one of these acts his conspiracy conviction must be reversed.

In *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), the defendants were convicted of conspiracy to violate the Smith Act, 18 U.S.C. Sec. 2385, by advocating the overthrow of the government and by organizing persons to advocate the overthrow of the government. The Supreme Court held that the allegation that the defendants conspired to organize persons was barred by the statute of limitations. *Id.* at 312, 77 S.Ct. at 1073. The Court specifically rejected the government's argument that the conspiracy conviction could be affirmed on the basis of the advocating allegation. *Id.* at 311, 77 S.Ct. at 1073. The Court observed that the jury instructions did not clearly require the jury to find that the defendants conspired to both advocate and organize. *Id.* Moreover, the Court noted that the jury was required to find an overt act, and there was "no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged

conspiracy." Id. at 311-12, 77 S.Ct. at 1073. As the Court stated, "[i]n these circumstances ... the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected." Id. at 312, 77 S.Ct. at 1073 (citations omitted). See also *Zant v. Stephens*, 462 U.S. 862, 881, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235 (1983) ("a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground").

In *Griffin v. United States*, --- U.S. ----, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), the Supreme Court limited *Yates'* holding to situations in which one of the possible bases of conviction was legally insufficient as opposed to factually insufficient. Id. at ---- - ----, 112 S.Ct. at 470-72. See also *United States v. Pace*, 981 F.2d 1123, 1130 (10th Cir.1992), cert. denied, --- U.S. ----, 113 S.Ct. 1401, 122 L.Ed.2d 774 (1993). In *Griffin*, the jury returned a general verdict finding the defendant guilty of conspiracy to defraud the United States by impairing the efforts of the Internal Revenue Service to ascertain income taxes and impairing the efforts of the Drug Enforcement Administration to ascertain forfeitable assets. --- U.S.

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at ----, 112 S.Ct. at 468. While there was sufficient evidence to prove that the defendant conspired to defraud the IRS, the government conceded that the evidence was insufficient to prove that the defendant conspired to defraud the DEA. Id. at ----, 112 S.Ct. at 468. The *Griffin* Court distinguished *Yates* on the grounds noted above and recognized the precedent on which *Yates* relied was limited to cases in which one of the grounds which the jury might have based the conviction was constitutionally prohibited. Id. at ---- - ----, 112 S.Ct. at 470-72. See *Cramer v. United States*, 325 U.S. 1, 65 S.Ct. 918, 89 L.Ed.

1441 (1945) (possible ground of conviction violated Article III, Sec. 3 requirement of "two Witnesses to the same overt Act" for conviction of treason); *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942) (possible ground of conviction violated Full Faith and Credit Clause); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) (possible ground of conviction violated First Amendment). The *Griffin* Court held that the government's failure to prove one of the unlawful objectives of the conspiracy did not require reversal of the defendant's conspiracy conviction. --- U.S. at ---- - ----, 112 S.Ct. at 472-73. Thus, after *Griffin*, a general verdict on a conspiracy count charging disjunctive objectives must be reversed if the jury could have based its verdict on a legally or constitutionally infirm objective; however, factual insufficiency of one or more of the objectives does not require reversal as we will presume that the jury rejected the factually inadequate theory and convicted on an alternative ground for which the evidence was sufficient. See *Pace*, 981 F.2d at 1130 (affirming conviction for distributing methamphetamine or amphetamine even though there was a "total lack of evidence" that defendant distributed amphetamine). Accordingly, we must reverse Defendant's conspiracy conviction if any of the objectives were legally insufficient. See *United States v. Garcia*, 992 F.2d 409, 416 (2d Cir.1993).

We need go no further than consider the objectives relating to the diversion of the natural gas condensate as two of them--i.e. transporting natural gas condensate to an unpermitted facility and falsifying the manifest--are legally insufficient. We recognize that we have already held that these counts were not legally insufficient in the sense that Defendant's pretrial motion to dismiss should have been granted. However, our reasoning was based on the fact that the counts properly charged all the elements of the crimes and the issue of whether natural gas condensate was a hazardous waste depended on the factual issue of how the natural gas condensate was ultimately disposed. The

government proceeded to trial on an erroneous theory that the natural gas condensate was hazardous waste unless it was used in a manner normally intended by the industry or in its original intended manner. The district court instructed the jury on this erroneous theory. Because the government proceeded on an erroneous theory, the government case with respect to these counts suffered from a failure of proof. Nonetheless, because of the government's erroneous theory and the district court's erroneous instruction, these objectives were legally insufficient as well.

The Griffin Court recognized this very distinction. As the Court stated, "the term 'legal error' means a mistake about the law, as opposed to a mistake concerning the weight or factual import of the evidence." Here, both the government and the district court were mistaken about the law, as burning natural gas condensate as automotive fuel does not fit within the regulatory definition of hazardous waste and, therefore, Defendant's actions were not within the statutory definition of the crime. This renders two of the three RCRA objectives of the conspiracy legally insufficient. "[W]hether ... the action fails to come within the statutory definition of the crime" constitutes "legal error" and is controlled by Yates. See Griffin, --- U.S. at ---, 112 S.Ct. at 474. Because the jury was erroneously instructed on the question of whether the natural gas condensate was hazardous waste, this is not the case where we can "assume that jurors ... reject[ed] the 'factually inadequate theory.'" Pace, 981 F.2d at 1130 (citing Griffin, --- U.S. at ---, 112 S.Ct. at 474). Cf. Walther v. Lone Star Gas Co., 952 F.2d 119, 126 (5th Cir.1992) (applying Griffin and holding that "[b]ecause the district court's instruction on

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statistical proof was legally correct, although not factually supported, there was not reversible error"). Rather, this is the case in which "a particular theory of conviction ... is contrary to

law." Griffin, --- U.S. at ---, 112 S.Ct. at 474. Therefore, Defendant's count 1 conspiracy conviction must be reversed. See *id.*; Yates, 354 U.S. at 312, 77 S.Ct. at 1073. See also Pace, 981 F.2d at 1130 ("[a] disjunctive charge may result in jury error when one of the alternatives is legally inadequate").

V.

Defendant's convictions on counts 1, 2, 3 and 7 are REVERSED. Defendant's convictions on counts 4 and 8 are AFFIRMED. The case is REMANDED to the district court for proceedings consistent with this opinion.

1 RCRA also defines "solid waste" to include "any garbage, refuse, [and] sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility...." 42 U.S.C. Sec. 6903(27). There is no contention that natural gas condensate is any of these types of materials.

2 The regulations also define "discarded material" to include "any material which is ... [c]onsidered inherently wastelike." 40 C.F.R. Sec. 261.2(a)(2)(iii) (1992). It is undisputed that natural gas condensate is not an inherently wastelike material.

3 A material is also abandoned if it is "[d]isposed of," 40 C.F.R. Sec. 261.2(b)(1) (1992), or "[a]ccumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated." *Id.* Sec. 261.2(b)(3). The determination of whether a material is a solid waste by virtue of being disposed of leads us in circles in that the statutory and regulatory definitions of "disposal" depend in part on whether the material is a solid waste. See 42 U.S.C. Sec. 6903(3); 40 C.F.R. Sec. 260.10 (1992); see also Reading Co. v. City of Philadelphia, 823 F.Supp. 1218, 1235-37 (E.D.Pa.1993); Zands v. Nelson, 779 F.Supp. 1254, 1261-62 (S.D.Cal.1991). Nevertheless, it is undisputed that Defendant did not cause the natural gas condensate to be "discharge[d], deposit[ed], inject[ed], dump[ed], spill[ed], leak[ed], or plac[ed] ... into or on any land or water." See 42 U.S.C. Sec. 6903(3); 40 C.F.R. Sec. 260.10 (1992). Therefore, Defendant did not dispose of the natural gas condensate. Similarly, there is no contention that the natural gas condensate was "[a]ccumulated, stored, or

treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated." Id. Sec. 261.2(b)(3).

4 The regulations also consider certain materials recycled when the material is "[u]sed in a manner constituting disposal," 40 C.F.R. Sec. 261.2(c)(1) (1992), "[r]eclaimed," id. Sec. 261.2(c)(3), or "[a]ccumulated speculatively." Id. Sec. 261.2(c)(4). It is undisputed that the natural gas condensate was not used in a manner constituting disposal, see supra note 3, reclaimed, see 40 C.F.R. Sec. 261.1(c)(4) (1992), or accumulated speculatively, see id. Sec. 261.1(c)(8).

5 The remaining types of materials which, when they are recycled by being burned for energy recovery, are considered solid wastes are "[s]pent materials," listed or characteristic "[s]ludges," listed "[b]y-products," listed "[c]ommercial chemical products," and "[s]crap metal." 40 C.F.R. Sec. 261.2 (Table 1) (1992). Natural gas condensate is clearly not a spent material, sludge, or scrap metal as defined by the regulations. See id. Sec. 261.1(c)(1) (defining "spent material" as "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing"); id. Sec. 260.10 (defining "sludge" as "any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant"); id. Sec. 261.1(c)(6) (defining "scrap metal" as "bits and pieces of metal parts ... which when worn or superfluous can be recycled"). Moreover, the government, in this case, has never relied on, nor does it direct us to, anything in the regulations indicating that natural gas condensate is either a listed commercial chemical product, see id. 261.33, or a listed by-product, see id. Secs. 261.31, 261.32.

6 In its 1983 proposed rule defining "solid waste," only listed by-products were considered solid wastes when recycled. See 48 Fed.Reg. 14,481 (Figure 4) (Apr. 4, 1983); see also 50 Fed.Reg. 629 (Jan. 4, 1985). However, the 1985 final rule "determined that all by-products ... are solid wastes when burned as fuels or used to produce a fuel." 50 Fed.Reg. 629 (Jan. 4, 1985). In adopting this final rule, the EPA stated that by-products are "unlike commercial fuels" and are "significantly different in composition from fossil fuels." Id. Distinguishing between by-products and fossil fuels, the EPA noted that by-products "are waste-like because they are residual materials

containing toxic constituents not ordinarily found in fossil fuels." Id. It was in this context that the EPA singled out natural gas condensate as an example of an off-specification fuel that is not a by-product. Id. at 630 n. 18.

7 At the government's request, the district court gave an instruction defining hazardous waste in this manner. At trial, the government offered expert testimony that natural gas condensate does not have a normal intended use within the petroleum industry, and the district court did not allow Defendant to present expert testimony to the contrary.

8 The EPA has recognized that the "nature of the device in which the wastes are being burned ... could be significant" to whether "particular burning operations are within the scope of the recycling exemption." Id. However, the question here is not whether the natural gas condensate was exempted from regulation as a "recyclable material," see 40 C.F.R. Sec. 261.6(a)(2)(ii) (1992), but whether the natural gas condensate was a solid waste as defined under 40 C.F.R. Sec. 261.2 (1992) and, therefore, subject to regulation in the first place. Section 261.6(a)(2)(ii), setting forth the recycling exemption, specifically limits the exemption to "[h]azardous wastes burned for energy recovery in boilers and industrial furnaces that are not regulated under subpart O of part 264 or 265 of this chapter...." Id. Sec. 261.6(a)(2)(ii). Notably, Sec. 261.2, which defines solid waste, does not require that material be burned in a boiler or industrial furnace to be burned for energy recovery and, therefore, recycled. Moreover, when the EPA noted that its 1983 sham recycling policy would control the question of whether a material was burned or incinerated and, therefore, abandoned or burned for energy recovery and, therefore, recycled, the EPA specifically characterized the policy as being based on the energy level of the waste being burned. See 50 Fed.Reg. 630 (Jan. 4, 1985).

This is not to say that the nature of the device in which the material is burned is completely irrelevant to whether the material is recycled by being burned for energy recovery or abandoned by being burned or incinerated. High energy materials burned in an incinerator may not be considered to be recycled because an incinerator's capacity to retrieve the energy from the material is limited. Alternatively, low-energy materials burned in a boiler or industrial furnace may not be considered to be recycled due to their limited energy value. In either case, the EPA

considers such materials to be burned for destruction. In this case however, we have a high energy material--natural gas condensate--burned in the internal combustion engines of automobiles. While some internal combustion engines are better than others at retrieving the energy value from fuel to power vehicles, no one can seriously argue that an internal combustion engine does not have the capacity to recover energy from fuel.

9 In the district court, Defendant sought to offer the testimony of Marcia Williams, former Director of the EPA's Office of Solid Waste, that this language was added to the 1991 comment at the behest of the prosecutors in this case and for the sole purpose of undermining the defense. Ms. Williams testimony was not offered, however, after the government agreed not to rely on the language in the 1991 comment. Although the government's argument on appeal does not directly rely on the 1991 comment, the government's claim that the 1991 comment "simply added further clarification to the distinction already in the regulations and accompanying Federal Register notices," indirectly relies on the comment in an attempt to give credence to the government's otherwise meritless argument.

10 Defendant also argues that the government's construction of the statute and regulations fail to provide fair warning of criminal conduct, and SCGC and the industry generally treat natural gas condensate as a product rather than a waste. We construe both of these arguments as alternative grounds for reversal which Defendant raises in the event that we agree with the government's construction of the regulatory definition of solid waste. Because we agree with Defendant's construction of the statute and regulations, we do not address either of these arguments.

11 In *United States v. Radetsky*, 535 F.2d 556 (10th Cir.), cert. denied, 429 U.S. 820, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976), overruled in part by *United States v. Daily*, 921 F.2d 994, 1004 (10th Cir.1990), cert. denied, --- U.S. ---, 112 S.Ct. 405, 116 L.Ed.2d 354 (1991), we held that a physician's false claims for Medicare reimbursement were not "material" because

the claims were for drugs that were not compensable under medicare and, therefore, were "incapable of inducing payments." 535 F.2d at 571. RCRA's regulatory scheme is very different from the Medicare scheme at issue in *Radetsky*. Unlike the drugs at issue in *Radetsky*, whether the natural gas condensate was subject to RCRA regulation was dependant on the ultimate disposition of the natural gas condensate, and Defendant, as well as SCGC, treated the natural gas condensate as if it was within RCRA's regulatory authority. Thus, unlike the physician's false statement in *Radetsky*, Defendant's false statement here had a tendency to influence the agency's action.

12 Defendant also claims with respect to count 7 that the indictment failed to properly charge and the government failed to prove a deprivation of a tangible property right as required under *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). Given our holding that count 7 must be reversed due to insufficient evidence of the scheme to defraud as alleged in the indictment, we need not address this argument.

13 It is undisputed that EkoTek's RCRA permit did not authorize it to store hazardous waste in the east warehouse and that this is a material condition of the permit.

14 Unlike Defendant's argument with respect to the natural gas condensate, there is no dispute that these substances were solid wastes as defined under 40 C.F.R. Sec. 261.2 (1992).

15 RCRA's definition of ignitable characteristic waste, with respect to liquid, is based on whether the waste has a flash point of less than 140° F "as determined by a Pensky-Martens Closed Cup Tester ... or a Setaflash Closed Cup Tester ... or as determined by an equivalent test method approved by the Administrator...." 40 C.F.R. Sec. 261.21(a)(1) (1992).

16 Defendant's own witness who performed the test on the spray material admitted that, if it were mixed with MEK, it would have a "very low flash point."

C

1986 WL 69020 (E.P.A.)

United States Environmental Protection Agency (E.P.A.)
Office of the Administrator

IN RE QUAKER
STATE
OIL
REFINING CORP., RESPONDENT

Resource Conservation and Recovery Act

RCRA

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III

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116

February 6, 1986

Martin Harrell, Esquire
U.S. Environmental Protection Agency, Region III
Philadelphia, Pennsylvania
For the Complainant

Mary Ransford White,
Manager, Administrative Operations, Production Division
Quaker **State Oil** Refining Corporation
Oil City, Pennsylvania
For the Respondent

RESOURCE CONSERVATION AND RECOVERY ACT - Liability under the Act - Where a facility, in good faith, advises the Agency that it is managing a particular hazardous waste and later determines, based upon laboratory analysis and legal investigation, that the waste is not and never was the listed waste previously identified, is not liable for the imposition of a civil penalty for its failure to comply with the requirements of the act relative to such waste.

INITIAL DECISION

introduction

As evidenced by the attached Accelerated Decision which is hereby incorporated and made a part of this Initial Decision based upon stipulations of fact and briefs filed in regard thereto, an Accelerated Decision on the question of liability of the Respondent for two of the four violations set forth in the original complaint was made on

July 11, 1985. Following the issuance of that decision, the parties were unable to agree on the amount an appropriate penalty to be assessed and therefore a hearing on the sole issue of the amount of the penalty to be assessed, if any, was held in Pittsburgh, Pennsylvania on November 14, 1985.

Based upon testimony produced at that hearing and as amplified in its post-hearing briefs, the Respondent raises for the first time a threshold issue of liability under the Act which must be addressed before proceeding with a determination of the appropriate penalty, if any, to be assessed in this matter.

The Respondent takes the position that the hazardous waste which is the subject of this proceeding is not, in fact, a hazardous waste and that when it identified it as such in its Part A application and revised Part A application, was operating under an honest belief that the waste in question was a hazardous waste. Subsequent investigations have now convinced it that the waste is not a hazardous waste and, therefore, its management is not subject to the provisions of the Act nor the regulations promulgated pursuant thereto.

The waste in question is identified in the regulations as K049 which is described as "slop oil emulsion solids from the petroleum refining industry". Obviously this definition, which appears in the table associated with 40 C.F.R. 261.32, is not particularly illuminating and in order to discover exactly what this waste is one must refer to the listing background document for the petroleum refining industry. A copy of this document was provided to the Court by the Respondent. Reference thereto reveals that "slop oil emulsion solids" are the skimmings from an API separator. It generally consists of a three-phase mixture of oil, water and a third emulsified layer. The oil is returned to crude storage, the water discharged to the wastewater treatment system, while the emulsion (oil, water and solids) becomes a process waste stream. A typical combination of the waste stream by weight is 40 per cent water, 43 per cent oil, and 12 per cent solids. Among the solids are the heavy metals chromium and lead, for which the waste is listed.

Reference to the appropriate regulations reveals that a solid waste can become a hazardous waste in one of two ways. One, the waste may be a "listed hazardous waste" and by that it is meant that the source of the waste is described and any waste generated by that particular industrial or manufacturing process is deemed by the Agency to be a hazardous waste because of the constituents traditionally contained therein, which are considered by the Agency to be hazardous for some reason. The other way in which a solid waste may be deemed to be hazardous is if it is a "characteristic waste" and by that it is meant that the waste exhibits one of the described characteristics set forth in the regulations, such as ignitability, corrosivity, reactivity and toxicity. As indicated above, the hazardous waste in question is a listed hazardous waste because of the manufacturing process from which it is generated. In this case, it is the skimmings from an API separator. The waste in this case did not come from that source but rather came from settled material which accumulated in the bottom of oil storage tanks owned by the Respondent. This material consists of oily debris, such as, sand, grass, dirt, and organic material settling to the bottom of the tank. The debris in question is only generated when the process tanks are cleaned and this only occurs when the tanks are taken out of service for some reason.

Why the Respondent ever assumed that the waste in question was slop oil emulsion solids certainly escapes this writer since its source is no way related to the skimmings from an API separator. As indicated from a reading of the listing document, the primary reason why this material is considered by the Agency to be a hazardous waste is that it is assumed to contain the constituents of chromium and lead. Prior to the institution of this action, the Respondent, at the direction of the State of West Virginia, had some of this material analyzed and it was determined that it did not contain either hexavalent chromium or lead in sufficient concentrations as to render it hazardous for any purpose. This result is not unexpected when one realizes that the Respondent does not use either

hexavalent chromium or lead in its processes, unlike a refiner whose end product is gasoline. In this case, the Respondent only manufactures motor oil and lubricants from crude oil and does not manufacture gasoline.

In any event, the Respondent identified this material as the listed hazardous waste KO49 and for all practical purposes treated it as such in its operation. The Complainant's answer to this allegation is that: "Therefore, whether the material generated by Quaker State in November 1982 is a hazardous waste is not relevant to the violations or the imposition of civil penalties. The Respondent chose this course of action when it decided to add the storage tanks as part of its RCRA-regulated facility. It must face the consequences of that decision and should not be allowed to shift the focus of this proceeding from the tanks to their contents." (Complainant's reply brief at p. 2.) The Complainant also take, the position that if the Respondent doesn't think the material in question is a hazardous waste it should file a de-listing petition and have it removed as a hazardous waste to be managed at its facility and until such a petition is filed and acted upon favorably by the Agency, the material must be considered, for all purposes, to be a hazardous waste. As to that last argument, the Respondent testified that in the course of filing a de-listing petition for some of its other hazardous wastes, it, upon further inquiry and advice, decided to remove the KO49 waste from its de-listing petition since it takes the posture that the material never was KO49 in the first place and, therefore, it is not necessary to file a de-listing petition for it.

I am of the opinion that the Complainant's arguments in regard to this threshold issue are rather circuitous and do not focus on the end result that must necessarily follow if this Court should rule that the material in question is not, in fact, a hazardous waste. The Complainant apparently takes the position that if a facility operator mistakenly designates a waste on its property as a hazardous waste, it must forever live with that decision even though subsequent facts reveal that identifying it as such was an honest mistake and that the material is not and never was a hazardous waste as defined by the regulations.

The purpose of filing a de-listing petition is an attempt by a facility operator to convince the Agency that the constituents contained in its listed waste, although coming from the type of process which the regulations describe, does not, in fact, contain the toxic or hazardous constituents which caused the Agency to list the material as hazardous in the first place. A de-listing petition, as I understand the regulations, is only appropriate where the listed waste is generated by the type of process that the regulations identify, but that due to the particular manufacturing or operating methods employed by the facility they do not contain the constituents which caused the waste to be listed. In this case, the material does not have as its source of generation the process which the regulations describe, i.e., the skimmings from an API separator. This material is not and was never generated from that source and its inclusion as an identified listed waste by the Respondent was an obvious error. The record is silent as to why the Respondent chose to identify its waste in that fashion, but testimony elicited at the hearing seems to suggest that in making these notifications, the plant managers, who are not trained environmental specialists, elected to identify them as such without consulting corporate Headquarters personnel or any national trade association which has at its disposal significant resources to aid people in the refining industry. In any event, the Respondent identified this material as KO49 and made a good-faith effort, as the record reveals to handle it as required by the hazardous waste regulations. Complainant's arguments missed the point that if, in fact, this material is not and never was a listed hazardous waste, no possible violations of RCRA could stand since the material is not subject to any regulation.

The Complainant's position seems to be that if a facility mistakenly identifies a waste managed by its facility as a hazardous waste, it must live with that decision forever more even though subsequent evaluations determine that the material should never have been listed in the first place. The Complainant would require that once such an honest mistake was made, the facility operator must go through some formal Agency process in order to have

its handling of that particular material excluded from the operation of the Act and its regulations. I find this approach to be unduly rigid and illogical.

40 C.F.R. 262.11 provides an alternative way of dealing with situations such as this and it seems to be particularly applicable here. The section states that the person who generates a solid waste, as defined in the Act, must determine if that waste is a hazardous waste by using the described methods. The section then goes on to describe some things that the generator must do and Part C states that "if the waste is not listed as a hazardous waste in Subpart D of 40 C.F.R. Part 61, he must determine whether the waste is identified in Subpart C of 40 C.F.R. Part 61 by either; 1) testing the material according to described methods, or 2) "applying knowledge of the hazardous characteristics of the waste in light of the materials or the processes used". Since the waste in question does not appear to fit any of the defined listed hazardous wastes associated with the petroleum industry, the facility owner may take the position that it is not a hazardous waste based on his knowledge of the material and the processes used. If a facility owner decides to utilize that methodology, which seems appropriate here, he takes the risk that subsequent analysis of the waste may prove that his threshold determination was in error and he would then be subject to substantial penalties for failing to handle and manage the material as a hazardous waste. If, however, subsequent analysis of the material in question substantiates the facility owner's original contention, then it is excluded as a hazardous waste for purposes of RCRA. That situation seems to precisely fit the circumstances as they have developed in this case. Given the fact that this Respondent processes Pennsylvania crude oil, which by its nature contains very few impurities or hazardous constituents, and further given the fact that the facility uses neither lead nor hexavalent chromium in its processing could have allowed the Respondent to make a determination that the material was not hazardous and treated it as such. In this case, subsequent analysis of this material did demonstrate that it does not contain the identified toxic constituents in sufficient concentrations to make it subject to regulation under RCRA. Despite the above, the Respondent in this case, out of caution and perhaps a lack of specialized knowledge of the inner workings of the regulations, chose to treat this material as if it were a hazardous waste and placed it in secure containers with the ultimate intention of having it shipped off site for disposal in a regulated waste storage facility.

Under the circumstances in this case, it occurs to me that the Respondent's conduct in regard to this material was certainly consistent with one who wanted to take every precaution to assure itself that no harm to man or the environment would occur and chose to take the conservative approach and handle this material in a way which is mandated by the regulations as though it were, in fact, a hazardous waste. Certainly, the Respondent should not be punished for its honest mistake and its zeal in electing to abide by what it perceived to be applicable regulations and requirements in regard to the material in question.

Based on the entire record before me, I am of the opinion that the solid waste in question is not, in fact, a hazardous waste as defined by the regulations either as to its source of generation under the listing requirements nor as to its constituents by their characteristics. Having determined that the material in question is not KO49 and is not, in fact, a hazardous waste of any description, there is no necessity to make a determination as to what penalty would be appropriate since there is no violation of RCRA.

Conclusion

Based on the record before me, I am of the opinion that a proposed order in the form and substance set forth below should issue.

ORDER ^[ENI]

1. The complaint in this matter is hereby dismissed.
2. The Respondent is directed to amend its Part A application in regard to KO49 in a manner consistent with this opinion.

Thomas B. Yost
Administrative Law Judge

FN1 40 C.F.R. 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon the parties unless (1) an Appeal is taken by a party to the proceedings, or (2) the Administrator elects, suasponte, to review the Initial Decision. 40 C.F.R. 22.30(a) provides that such Appeal may be taken by filing a Notice of Appeal within twenty (20) days after service of this Decision.

Attachment 1

ACCELERATED DECISION

This matter was instituted by the issuance of the Complaint and Compliance Order on September 28, 1984. Following attempts to settle and the exchange of the pre-hearing information, the parties advised that they had prepared a stipulation of relevant facts and wished to submit the question of liability to the Court on briefs pursuant to 40 CFR § 22.20. If liability is found, a hearing on the question of the amount of the penalty would be held later. The above-mentioned stipulation is attached hereto as Exhibit A and is incorporated herein as findings of fact.

The Complaint assessed penalties for four (4) violations, but in its brief, the Agency advised that it was not pursuing the violation concerning storing a hazardous waste not identified in Respondent's initial Part A application, to wit: slop oil emulsion solids (waste # KO49). The Agency's position on this violation apparently stems from the fact that the revised Part A application filed by the Respondent, relative to this waste, was misplaced by the Agency and did not reach the specific office which deals with such matters.

Discussion of Violations

The first violation alleged cites the Respondent with increasing its design capacity without first receiving approval therefor from the Regional Administrator, in violation of 40 CFR § 270.72(b).

As described in the stipulation, due to an industry slump, the Respondent shut down its refinery in November of 1982 and decided that this would be a good time to clean out its tanks. This exercise generated a larger amount of KO49 than usual and the Respondent was forced to increase its storage capacity of the material since it could not dispose of it within the 90-day exemption period allowed by the regulations. The misplaced revised application advised the Agency of this fact and not only added KO49 as a stored waste, but also indicated that it was increasing its storage capacity from 20,000 gallons to 50,000 gallons.

The Agency takes the position that such activity violates 40 CFR § 270.72(b) which requires that no such increase be instituted without prior approval of the Regional Administrator. The Respondent argues that its activities in regard to KO49 are governed by § 270.72(a) which only required that a facility file a revised application and no prior approval is required by that subsection. The Respondent points out that the provisions of § 270.72(b) only applies to "increases in the design capacity of processes used at the facility" and that its actions in this matter did not involve any increases in the capacity of processes used at the facility. Respondent further

argues that if the Agency's position is correct than any time a new waste is added to a facility's list of handled materials, some new capacity must also be added and thus subsection (b) would always apply. If this were so, then such prior approval should have been included in subsection (a). Since it was not, the intent of the regulations obviously was not to require prior approval for the storage of a new hazardous waste (see Respondent's initial brief at pp. 5 and 6). This argument is not valid. One can easily envision situations where new wastes are to be handled which involve no increase in storage or treatment capacity. For example, a metal plater who chooses to change from a cadmium to a nickle process. He must file a revised Part A application, but since this change involves no capacity increases, prior approval is not required. Another analogy is where the operator of an incinerator decides to accept a new waste which is compatible with his existing equipment. He must notify under § 270.72(a), but since no increase in capacity is involved, no prior approval is required.

The regulations do not define "processes", but reading all of § 270.72 together one sees that increasing storage capacity is an increase in the capacity of a process. See § 270.72(c) which states that "changes in the processes for the treatment, storage, or disposal of hazardous waste..." need prior approval. (Emphasis supplied.) Clearly, the definition of "processes", as used in the RCRA regulations, is substantially broader than that which is traditionally used in other environmental applications.

Accordingly, I am of the opinion that the Respondent did violate 40 CFR § 270.72(b) by not getting prior approval when it increased its storage capacity for KO49.

The next violation cited has to do with the Respondent's failure to amend its closure plan within 60 days of the submission of the revised Part A application in contravention of 40 CFR § 265.112(b). That subsection states that:

"The owner or operator may amend his closure plan at any time during the active life of the facility. (The active life of the facility is that period during which wastes are periodically received.) The owner or operator must amend the plan whenever changes in operating plans or facility design affect the closure plan, or whenever there is a change in the expected year of closure of the facility. The plan must be amended within 60 days of the changes."

It is admitted that no revision to the closure plan was made by the Respondent until some 256 days after the change and then only when advised to do so by state officials.

The Respondent argues that no revision was necessary since its original closure plan adequately dealt with KO49. The language in the original plan to which Respondent refers is as follows:

"All slop oil emulsion solids which are generated during closure of the facility will be disposed of off-site at an EPA-approved disposal site."

As they say in West Virginia, "That dog won't hunt!" As the Agency correctly points out, it is the storage facility itself, i.e., the tanks, which must be addressed in the closure plan. The disposition of their contents is another matter. Clearly, the above-quoted language utterly fails to discuss how the tanks will be handled during closure.

I am, therefore, of the opinion that the Respondent violated 40 CFR § 270.72(b) by failing to amend its closure plan.

The last violation in issue here involves the failure of the Respondent to submit a closure plan to the Agency for review and public comment prior to transferring KO49 from three tanks to three other tanks in contravention of 40 CFR § 265.112(c).

This issue can be re-stated as follows: Did the transfer of KO49 from three tanks to three other tanks constitute

"partial closure" thus triggering the requirements of the above-cited regulation? I think not. In its revised Part A application, the Respondent identified six tanks as constituting its storage facility for KO49. When an inspection revealed a valve on one of the three tanks then being used to store the waste had a hair line crack which caused a small leak, the Respondent transferred the contents of that tank along with two others, to three of the other tanks. Why the contents of three tanks were transferred rather than only that from the leaking tank is not explained. The three old tanks were cleaned and the rinse material was also placed in the new tanks. The three "old" tanks remain on the Respondent's premises for future use.

40 CFR § 260.10 defines partial closure as the closure of a discrete part of a facility. As an example, the regulation cites the closure of a trench, a unit operation, a landfill cell, or a pit while other parts of the same facility continue in operation. The failure of the regulation to mention tanks or similar containers is, in my opinion, not a mere oversight but rather a conscious recognition that mobile and secure containers, such as tanks or drums, should be viewed in a different fashion than that accorded trenches, pits or landfills where the hazardous waste is placed in the earth thus providing the substantial likelihood of contamination of the environment. This is not to say that tanks and similar containers are exempt from closure requirements, rather, I am saying that one must exercise some modicum of common sense and judgement when dealing with them in the regulatory sense.

Under the circumstances of this case, I am of the opinion that the transfer of the waste from one set of tanks to another does not constitute partial closure of the emptied tanks. In this case, such action constituted merely good maintenance practice. The fact that the Respondent revised his Part A application to eliminate the three old tanks from service, at the insistence of a state official does not alter my opinion. It may be that at some time in the future one of the "new" tanks might spring a leak and one of the old tanks be brought back into use. Must a closure plan be filed to commemorate this event? I think not.

I am, therefore, of the opinion that under the facts of this case, and this case only, the act of transferring the contents of a waste from one set of tank(s) to another does not constitute closure of the emptied tanks.

Conclusion

Based upon the preceding discussion, I find that the Respondent: (1) violated 40 CFR § 265.112(a)(3) by increasing its designed storage capacity without receiving prior approval; and (2) violated 40 CFR § 265.112(b) by failing to amend its closure plan to include provisions for the tank storage facility. I find no violation in regard to the transfer of the contents of the waste KO49 from one set of tanks to another without filing a closure plan relative to such action.

ORDER

The parties will have until July 26, 1985 to attempt to settle this matter. Counsel for the Complainant shall file a report on that date which advises the Court as to whether or not the matter has been settled, whether settlement is likely and, if not, suggest dates and places for the holding of the Hearing on the question of the amount of the penalty to be assessed.

Thomas B. Yost

Administrative Law Judge

Attachment 2

Stipulation of Facts

1. Respondent is a Delaware corporation doing business in the State of West Virginia and is a "person" under Section 2 of Chapter 20, Article E, of the Code of West Virginia (hereinafter referred to as the West Virginia Code and by Section only), Section 1004(15) of the Resource, Conservation and Recovery Act ("the Act"), 42 U.S.C. §6903(15), and regulation 40 C.F.R. §260.10.
2. Respondent owns and operates an oil refinery located at 201 Barkwill Street, St. Marys, West Virginia. Respondent's principal product at this refinery is motor oil.
3. As part of its business, Respondent is an "owner" and "operator" of an "existing hazardous waste management facility" and engages in the "storage" of "hazardous waste" as those terms are defined in 40 C.F.R. §260.10.
4. Respondent submitted to the United States Environmental Protection Agency ("EPA"), in a timely manner, a Notification of Hazardous Waste Activity, as required by Section 3010(a) of the Act, 42 U.S.C. §6930(a). Respondent's Notification stated that the Respondent's facility handled hazardous wastes, including KO49, slop oil emulsion solids.
5. Respondent has considered oily wastes accumulated at the bottom of process tanks to be slop oil emulsion solids, a listed hazardous waste. This waste is generated only when process tanks are cleaned and the residue is removed from the bottom of the tanks.
6. Respondent submitted to EPA, in a timely manner, a Part A permit Application for its hazardous waste facilities (the facility), as required by 40 C.F.R. §270.10. Respondent was assigned EPA I.D. No. WVD004337135.
7. The facility qualified for interim status as defined by Section 3005(e) of the Act, 42 U.S.C. §6925(e), and regulation 40 C.F.R. §270.70. EPA sent the Respondent an acknowledgement of this status on August 6, 1981.
8. Respondent's initial Part A permit Application, dated November 17, 1980, indicated that the facility included storage tanks (process code SO2) with a total design capacity of 20,000 gallons. EPA's August 6, 1981 letter acknowledged this information.
9. The initial Part A permit Application did not list KO49, slop oil emulsion solids, as a hazardous waste stored or treated at the St. Marys facility since no slop oil emulsion solids were being generated at that time and plans were to properly manifest and dispose of this waste in less than 90 days.
10. In November, 1982, an extensive tank cleaning project resulted in the collection of a large amount of slop oil emulsion solids at Respondent's facility.
11. It became apparent to Respondent that this material would not be disposed of within the permissible 90 days storage period, and on January 20, 1983 Respondent contacted Paul Montney, an employee of the EPA, for advice on handling the waste.
12. Acting on this advice, Respondent submitted a revised Part A permit Application to the EPA Region III, on February 7, 1983 adding KO49, slop oil emulsion solids, as a new hazardous waste not previously identified in Part A of the permit Application.

13. The Respondent sent the revised Part A permit Application by certified mail to the West Virginia Department of Natural Resources (DNR) and the U. S. EPA. The Respondent sent EPA's letter to P. O. Box 1460, Philadelphia, PA, the address established for Part A submissions in 1980. The Respondent received certified mail receipt No. 9333242538, which showed that the Region III EPA mail room received the letter February 16, 1983.
14. The revised Part A permit Application added KO49 to the wastes handled by Respondent's facility and amended the facility drawing to identify the location of 6 new storage tanks. The addition of these tanks raised the facility's total design capacity from 20,000 to 50,000 gallons.
15. The Facility's Management Section, Waste Management Branch, Hazardous Waste Management Division of EPA, did not receive Respondent's February 7, 1983, Part A revision. That Section would have processed and acted upon the amended Part A Application had it been received.
16. From the time of the Respondent's submittal of its Part A revision in February, 1983, to the filing of EPA's complaint on September 28, 1984, the parties had no communication concerning the Part A revision or any other aspect of Respondent's hazardous waste activities at the St. Marys facility.
17. The Respondent used the additional tanks to store slop oil emulsion solids at the facility beginning in late 1982 or early 1983.
18. During an inspection November 21, 1983, Richard Mirth, the Respondent's Plant Engineer, and an Inspector with the West Virginia DNR, Division of Water Resources, discovered that a valve on one of the tanks used to store slop oil emulsion solids had leaked. This was reported to Don Stanley, a West Virginia DNR RCRA Inspector.
19. Mr. Stanley inspected the facility on November 23, 1983 and again on December 12, 1983 as part of West Virginia's RCRA Program.
20. During his November 23, 1983 inspection, Mr. Stanley observed that a container holding approximately one gallon of amber liquid was located directly below a four-inch valve one of three tanks marked "Hazardous Waste." He observed that the soil adjacent and under the valve was stained. He did not observe any leakage during the inspection.
21. During his November 23, 1983 inspection, Mr. Stanley was advised of Respondent's intent to transfer the slop oil emulsion solids from 3 tanks marked "Hazardous Waste" to the 3 other tanks also on the premises, and that the tanks would be emptied, rinsed, and the rinse liquids placed with the slop oil emulsion solids. Mr. Stanley voiced his approval of these actions.
22. During his December 12, 1983 inspection, Mr. Stanley asked Richard Mirth, Respondent's Plant Engineer, to have the stained soil sampled and analyzed to determine whether it had been contaminated by the leaking fluid.
23. Mr. Mirth took a soil sample and had it analyzed by IHI Kemron of Williamstown, West Virginia. The analysis showed the chromium content to be 1,000 mg/kg and the lead content to be 49 mg/kg. The extractable level for those substances was less than 0.01 mg/l for chromium and less than 0.05 mg/l for lead, below the E. P. toxicity levels specified in the RCRA regulations. Mr. Mirth provided the laboratory results to Mr. Stanley via telephone and to Robert L. Jelacic of the West Virginia DNR's Hazardous Waste/Ground Water Branch by letter dated February 27, 1984.

24. On December 21, 1983, Mr. Stanley informed Mr. Mirth that Quaker State had failed to amend its closure plan within 60 days of February 7, 1983, the date on which it submitted its revised Part A permit Application adding the six tanks for the storage of KO49 slop oil emulsion solids.
25. Quaker State's closure plan, as it existed prior to the submission of the revised Part A permit Application on February 7, 1983 contained the statement, "All slop oil emulsion solids which are generated during closure of the facility will be disposed of off-site at an EPA approved disposal site."
26. On December 22, 1983, acting on Mr. Stanley's advice, Respondent amended its closure plan to make specific reference to the addition of the 6 tanks used to store KO49 slop oil emulsion solids.
27. Mr. Stanley also advised Respondent that the 3 tanks being removed from immediate service should be deleted from Respondent's revised Part A permit Application. On March 8, 1984, EPA received a letter from Respondent dated February 27, 1984 removing 3 of the 6 tanks used to store slop oil emulsion solids from the Part A Application.
28. The 3 tanks deleted from the revised Part A permit Application remain on the facility premises.
29. At no time did Mr. Stanley advise Respondent to submit its closure plan to the EPA.
30. The Regional Administrator, EPA Region III, did not approve the Respondent's increase in design capacity reflected in Quaker State's February 2, 1983, Part A revision since the appropriate Agency employees never received it.
31. Slop oil emulsion solids is a listed hazardous waste pursuant to 40 C.F.R. §261.32. Laboratory analysis of Respondent's slop oil emulsion solids indicates that it does not contain hexavalent chromium and contains a minimum amount of lead.
32. The Respondent did not submit its closure plan to EPA for review and public comment 180 days prior to removing the 3 tanks as part of the regulated facility.
33. Since November, 1982 Respondent has made no change in its operations at the St. Mary's facility that would affect the quantity or types of hazardous wastes generated, handled or stored at that facility.

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1986 WL 69020 (E.P.A.)

END OF DOCUMENT



Federal Register

Friday,
March 4, 2005

Part III

Environmental Protection Agency

40 CFR Parts 260, 261, et al.
**Hazardous Waste Management System;
Modification of the Hazardous Waste
Manifest System; Final Rule**

EXHIBIT 6
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addition, the requirement provides that instructions cannot show through the front of the forms when scanned, photocopied or faxed. If the paper weight is too light and/or the ink color of the instructions is too dark, the instructions might bleed through the front of the copies. If the ink color is too light, it may not be legible to waste handlers that may be filling out the manifest in dimly lit situations (e.g., inside of a truck). Registrants must determine the appropriate ink color and the extent of screening of the ink, if needed, to minimize bleed through but ensure legibility.

The specifications at § 262.21(f) leave a number of decisions to the registrants' discretion that should be further clarified. These include the following:

Paper type. Registrants may select the appropriate type of paper to use for their manifest. As provided at § 262.21(d)(2)(i), EPA defines "paper type" to include the manufacturer of the paper and grade of paper. EPA has found that paper manufacturers generally provide a range of paper grades. These grades may be more or less appropriate for a six-part form. For example, the highest quality papers are generally the brightest (whitest), and hence, handwritten and typed imprints are generally most legible on them. In addition, the highest quality carbonless papers normally contain the highest amount of coating, which results in a more effective transmission of imprint from copy to copy. EPA believes it is important to hold registrants to their paper type selection, as provided under § 262.21(e), so that they do not switch paper types subsequent to approval of their forms, unless they seek EPA approval of the changes under § 262.21(h)(3).

In addition, some papers may contain a range of recycled content. All commenters on the proposed rule believed EPA should take the lead on encouraging the use of recycled paper. In fact, one commenter recommended that EPA require registrants to use recycled paper for manifest forms. EPA has not taken this recommendation, which goes beyond the scope of today's rulemaking. EPA notes, however, that it has developed guidelines for federal procurement of recycled-content paper under section 6002 of RCRA and section 505 of Executive Order 13101. Under these guidelines, EPA requires procuring agencies to buy uncoated printing and writing grade papers, such as those used for manifest forms, containing 30% post-consumer fiber. The agency urges registrants to consider

for the manifest recycled paper that meets the specifications at § 262.21(f).

Paper weight. Paper weight has several implications for the manifest. Lighter paper is generally thinner, and therefore, it is easier to make impressions copy-to-copy. However, if paper is too light, it is prone to tearing in normal use (e.g., tearing in an automatic-feed copier or when detaching a copy from the manifest). Registrants must select a paper weight for each copy of the form that conveys handwritten and typed impressions onto all six copies, but that is also durable enough to withstand normal use. In evaluating existing manifest forms, EPA has found a number of forms with varying paper weights that transmit impressions effectively. Other forms consist of paper that is too heavy to produce legible bottom copies. We also have found forms with paper that is too fragile and tears easily. Because of the wide range of paper weights that result in legible bottom copies of the manifest, EPA has refrained from prescribing a paper weight and leaves this decision to the registrant. However, EPA believes it is important to hold registrants to their paper weight selection, as provided under § 262.21(e), so that they do not switch paper weights subsequent to approval of their forms, unless they seek EPA approval of the changes under § 262.21(h)(3).

Ink color of the manifest instructions. As described earlier, the instructions on the back of the manifest must be light enough so that they do not: (1) Show through on the front (e.g., printed in black ink in a light enough screen to appear as light gray so that photocopiers and scanners do not pick up the text); or, (2) interfere with the transmission of the image from copy to copy (e.g., from copy 4 to copy 5) when the manifest is filled out. The instructions also must be legible.

EPA has not prescribed an ink color or ink darkness. We recognize that the appropriate ink color and darkness will depend on, at the least, the paper weight of each copy. Because we do not prescribe paper weight, we do not prescribe ink color or darkness. However, we hold registrants to their ink color, as provided under § 262.21(e), so that they do not switch ink colors subsequent to approval of their forms, unless they seek EPA approval of the changes under § 262.21(h)(3).

Binding method of manifest copies. Some manifest forms are currently printed on continuous forms with side perforations. Others are printed on individual forms (unit sets), which are typically bound on top. Continuous forms generally are intended for use

with continuous feed printers (such as impact printers), whereas unit sets are appropriate for typewriters and manual completion. Because some users prefer one type of binding or the other, we believe it would be too constraining to require only one type. Therefore, we leave the binding of the form to registrant discretion. However, we are concerned that some registrants might choose to crimp the sheets together but not glue them, thereby increasing the likelihood of the pages inadvertently separating during normal use. In addition, some registrants might bind top bound forms without a stub by "edge gluing." The edge gluing method is typically used for forms that have few pages, but could conceivably be tried for a six-part form. Edge-glued forms are unacceptable for manifest purposes and are not allowed because the sheets become loose when one ply is removed. Therefore, the rule provides that "copies must be bound together by one or more common stubs that reasonably ensure that they will not become detached inadvertently during normal use." Although we do not prescribe a binding method, we hold registrants to the binding method of their approved forms, as provided under § 262.21(e), so that they do not switch methods subsequent to EPA approval, unless they seek EPA approval of the changes under § 262.21(h)(3).

IV. Rejected Load and Container Residue Shipments

A.1. Rejected Load and Container Residue Shipments—Introduction. In the May 2001 NPRM, we proposed to improve the tracking of certain problematic hazardous waste shipments known as "rejected loads" or "container residues" by adding data elements to the manifest form for identifying rejected wastes and residues and by clarifying the manifest requirements and procedures for tracking these wastes. In the proposal, we discussed container residue as "the hazardous waste that remains in containers such as drums and in vehicles used for transport (such as tanker cars or box cars) after most of the contents of the container have been removed." These residues may be difficult to remove because the contents may have congealed and the receiving facility may not have the equipment to completely empty the container. As a result, the container may contain more waste than the regulatory threshold allows for meeting the RCRA definition of "empty," that is, more than 3% of a hazardous waste in a container less than or equal to 119 gallons, or more than 0.3% of a hazardous waste in a container greater than 119 gallons, and

additional 90/180 days to locate an alternate facility. First, the 90/180 day timeframe already exists under the existing 40 CFR 262.34 accumulation provisions, and we do not believe we have sufficient record to support a shorter time frame. Second, given that the generator will have to make new arrangements with a hauler to transport the waste off-site and arrange with an alternate facility to receive the shipment, it has essentially begun a new event. Therefore, the contingencies and timing affecting the original time frame no longer applies to the returned shipment. Based on these factors, today's rule grants generators an additional 90/180 days to send the waste shipment to an alternate facility.

5. *Comment Analysis and Final Staging of Waste at the Rejecting Facility.* In general, commenters supported our proposal, but some expressed concern that the qualitative term "timely manner" has too broad a range of interpretation, since the term is not clearly defined. EPA agrees with these commenters and has thus revised § 264.72(d)(1) to include a default timeframe of 60 days. Commenters differed on the length of time that EPA should grant a rejecting facility to stage the rejected load or container residue shipment. Several commenters suggested that EPA grant the rejecting facility 90 days to stage the rejected waste or container residue so that they could reconcile the problem shipment with the generator, forward it to an alternate facility or return it to the generator. These commenters stated that without adequate time, the rejecting facility would have no choice but to return the shipment to the generator. Other commenters suggested shorter timeframes, ranging from 10 to 30 days, pointing out that the TSDF can return the waste to the generator if they can not locate an alternate facility.

After analyzing comments, EPA believes 60 days is sufficient time for the rejecting TSDF to consult with the generator, locate an alternate facility and forward the shipment or return it to the generator. While we understand that there is some precedent for a 90-day accumulation period for generators when they initially accumulate their wastes on-site, we believe that there are distinguishing features which we believe support a 60-day limit on staging by a rejecting TSDF. First, there are very few management controls on temporary staging of rejected wastes by TSDFs, as opposed to the detailed technical requirements that apply to generator accumulation under 40 CFR 262.34(a). Since there are few requirements imposed on TSDF staging,

we believe that a shorter time period for temporary staging of rejected wastes is appropriate, particularly given that such wastes may be rejected because the TSDF lacks authorization to manage them under its RCRA permit. Second, TSDFs rejecting waste are usually much more familiar with the waste management industry than are generators. TSDFs deal with waste transporters and other waste management facilities as a matter of course, so the logistics of arranging the forwarding or return of temporarily staged wastes should not raise difficult issues for the TSDF. Finally, in most cases, the rejecting TSDF can return the staged waste to the generator, if it is not able to find an alternate facility. We have also revised the regulation to clarify that the TSDF does not need permission to return the shipment to the generator.

We are aware that some states currently allow TSDFs to stage rejected waste shipments at their facility, but by regulation or by permit restrict the staging times to significantly less than 60 days. We acknowledge that a staging timeframe of less than 60 days (e.g., 10 or 30 days) may be adequate time in some instances. However, based on comments, we believe that scheduling difficulties, preparation of new waste profiles, or other unforeseen circumstances may arise that could require TSDFs to stage a rejected waste or residue for a number of weeks. In such instances, a shorter timeframe would not afford the TSDF adequate time to reconcile the rejected shipment or residue. We believe the default 60-day time limit will provide rejecting facilities sufficient time to reconcile such shipments and forward them to an alternate facility.

V. Final Unmanifested Waste Reporting Requirements

In the May 2001 NPRM, EPA proposed to revise the unmanifested waste reporting requirement at §§ 264.76 for permitted facilities and 265.76 for interim status facilities. Sections 264.76 and 265.76 currently require TSDFs to submit an unmanifested waste report to the Regional Administrator on EPA form 8700-13B within 15 days after they have received a waste shipment without a manifest. Specifically, the proposal removed the requirement that the TSDF use EPA form 8700-13B to submit its unmanifested report, and proposed that the TSDF submit either a typed, handwritten or electronic note. The typed, handwritten or electronic note must be legible, and must contain the following information: (a) The EPA ID

Number, name and address of the facility; (b) The date the facility received the waste; (c) The EPA ID Number, name, and address of the generator and the transporter, if available; (d) A description and the quantity of each unmanifested hazardous waste the facility received; (e) The method of treatment, storage, or disposal for each hazardous waste; (f) The certification signed by the owner or operator of the facility or his authorized representative; and (g) A brief explanation of why the waste was unmanifested, if known.

We explained in the proposal that the unmanifested requirements the Agency announced in the January 28, 1983 FR that it was deleting EPA form 8700-13B and its predecessor, EPA form 8700-13, which had appeared in the May 19, 1980 FR. Although both forms were linked to annual reporting requirements at that time and were supposed to be adapted for unmanifested waste reporting, we deleted them due to the change from annual to biennial reporting. We never published a new form for unmanifested waste reporting and the form now required for biennial reporting, EPA form 1300-A/B, "Hazardous Waste Report Instructions and Forms," is not adaptable for unmanifested waste reporting. Although we never published a replacement form for reporting unmanifested waste, the regulations still required this form which is generally unavailable to those seeking a copy.

The final rule retains the proposed unmanifested reporting requirements at 40 CFR 264.76 and 265.76. Commenters generally supported our unmanifested reporting approach. However, several commenters expressed concern or raised suggestions on the proposed procedures for unmanifested wastes reports. A number of commenters suggested that EPA revise the manifest so that an unmanifested report could be "unsubmitted" using a manifest (e.g., using a check box). While we appreciate this suggestion, EPA does not believe that it is a workable option. One commenter expressed concern that the proposed procedures did not offer a standard reporting approach, which could lead to data quality problems. The commenter suggested that TSDFs provide a report using company letterhead and signed by a company official. We do not agree with the suggestion and are not convinced that data entry problems may result from the proposed approach.

VI. Administration and Enforcement of These Regulatory Changes in the States

A. *Uniform Applicability of Revised Manifest Requirements in All States.* In

AMENDATORY SECTION (Amending Order 97-03, filed 1/12/98, effective 2/12/98)

WAC 173-303-017 Recycling processes involving solid waste.

(1) The purpose of this section is to identify those materials that are and are not solid wastes when recycled. Certain materials, as described in subsection (2) of this section, would not typically be considered to involve waste management and are exempt from the requirements of this chapter. All recycling processes not exempted by subsection (2) of this section are subject to the recycling requirements of WAC 173-303-120.

(2) General categories of materials that are not solid waste when recycled.

(a) Except as provided in subsection (3) of this section, materials are not solid wastes when they can be shown to be recycled by being:

(i) Used or reused as ingredients in an industrial process to make a product provided the materials are not being reclaimed; or

(ii) Used or reused as effective substitutes for commercial products; or

(iii) Returned to the original process from which they are generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land.

(b) Except as provided in subsection (3) of this section, the department has determined that the following materials when used as described are not solid wastes:

(i) Pulping liquors (e.g., black liquor) that are reclaimed in a pulping liquor recovery furnace and then reused in the pulping process;

(ii) Spent pickle liquor which is reused in wastewater treatment at a facility holding a national pollutant discharge elimination system (NPDES) permit, or which is being accumulated, stored, or treated before such reuse;

(iii) Spent sulfuric acid used to produce virgin sulfuric acid.

(3) The following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process (as described in subsection (2) (a) of this section):

(a) Materials used in a manner constituting disposal, or used to produce products that are applied to the land; or

(b) Materials burned for energy recovery, used to produce a fuel, or contained in fuels; or

(c) Materials accumulated speculatively as defined in WAC 173-303-016 (5) (d) (ii); or

describe the signal(s) to be used to begin evacuation, evacuation routes, and alternate evacuation routes.

(4) Copies of contingency plan. A copy of the contingency plan and all revisions to the plan must be:

(a) Maintained at the facility; and

(b) Submitted to all local police departments, fire departments, hospitals, and state and local emergency response teams that may be called upon to provide emergency services.

(5) Amendments. The owner or operator must review and immediately amend the contingency plan, if necessary, whenever:

(a) Applicable regulations or the facility permit are revised;

(b) The plan fails in an emergency;

(c) The facility changes (in its design, construction, operation, maintenance, or other circumstances) in a way that materially increases the potential for fires, explosions, or releases of dangerous waste or dangerous waste constituents, or in a way that changes the response necessary in an emergency;

(d) The list of emergency coordinators changes; or

(e) The list of emergency equipment changes.

AMENDATORY SECTION (Amending Order 03-10, filed 11/30/04, effective 1/1/05)

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. If a facility receives dangerous waste accompanied by a manifest, the owner, operator, or his/her agent must sign and date the manifest as indicated in subsection (2) of this section to certify that the dangerous waste covered by the manifest was received, that the dangerous waste was received except as noted in the discrepancy space of the manifest, or that the dangerous waste was rejected as noted in the manifest discrepancy space.

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

(a) Sign and date, by hand, 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)) defined in subsection ((4)) (5)(a) of this section((7)) 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))~~ of 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 hazardous waste imported from a foreign source, the receiving facility must mail a copy of the manifest to the following address within thirty days of delivery: International Compliance Assurance Division, OFA/OECA (2254A), U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

(4) 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 signatures), the owner or operator, or his or her 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))~~ (5) 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 a signed and dated copy of the shipping paper (if the manifest has not been received within thirty days after delivery) 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))~~ (5) Manifest discrepancies.

(a) Manifest discrepancies are:

(i) Significant ((discrepancies)) differences (as defined in (b) of this subsection) between the quantity or type of dangerous waste designated on the manifest or shipping paper, and the quantity ((or)) and type of dangerous waste a facility actually receives;

(ii) Rejected wastes, which may be a full or partial shipment of dangerous waste that the TSDF cannot accept; or

(iii) Container residues, which are residues that exceed the quantity limits for "empty" containers set forth in WAC 173-303-160(2).

(b) Significant ((discrepancies)) differences in quantity are: For bulk waste, variations greater than ten percent in weight ((for bulk quantities)) ((e.g.)) for example, tanker trucks, railroad tank cars, etc.) ((, or)); for batch waste, any variations in piece count ((for nonbulk quantities (i.e., any missing container or package would be a significant discrepancy)), such as a discrepancy of one drum in a truckload. Significant ((discrepancies)) differences in type are obvious ((physical or chemical)) differences which can be discovered by inspection or waste analysis ((e.g.,)) such as waste solvent substituted for waste acid((+)), or toxic constituents not reported on the manifest

or shipping paper.

((b)) (c) Upon discovering a significant ((discrepancy)) difference in quantity or type, the owner or operator must attempt to reconcile the discrepancy with the waste generator ((and)) or 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)) (d) (i) Upon rejecting waste or identifying a container residue that exceeds the quantity limits for "empty" containers set forth in WAC 173-303-160(2), the facility must consult with the generator prior to forwarding the waste to another facility that can manage the waste. If it is impossible to locate an alternative facility that can receive the waste, the facility may return the rejected waste or residue to the generator. The facility must send the waste to the alternative facility or to the generator within sixty days of the rejection or the container residue identification.

(ii) While the facility is making arrangements for forwarding rejected wastes or residues to another facility under this section, it must ensure that either the delivering transporter retains custody of the waste, or the facility must provide for secure, temporary custody of the waste, pending delivery of the waste to the first transporter designated on the manifest prepared under (e) or (f) of this subsection.

(e) Except as provided in (e) (vii) of this section, for full or partial load rejections and residues that are to be sent off-site to an alternate facility, the facility is required to prepare a new manifest in accordance with WAC 173-303-180 and the following instructions:

(i) Write the generator's U.S. EPA/state ID number in Item 1 of the new manifest. Write the generator's name and mailing address in Item 5 of the new manifest. If the mailing address is different from the generator's site address, then write the generator's site address in the designated space for Item 5.

(ii) Write the name of the alternate designated facility and the facility's U.S. EPA ID number in the designated facility block (Item 8) of the new manifest.

(iii) Copy the manifest tracking number found in Item 4 of the old manifest to the special handling and additional information block of the new manifest, and indicate that the shipment is a residue or rejected waste from the previous shipment.

(iv) Copy the manifest tracking number found in Item 4 of the new manifest to the manifest reference number line in the discrepancy block of the old manifest (Item 18a).

(v) Write the DOT description for the rejected load or the residue in Item 9 (U.S. DOT Description) of the new manifest and write the container types, quantity, and volume(s) of waste.

(vi) Sign the generator's/offerer's certification to certify, as the offeror of the shipment, that the waste has been properly packaged, marked and labeled and is in proper condition for

transportation.

(vii) For full load rejections that are made while the transporter remains present at the facility, the facility may forward the rejected shipment to the alternate facility by completing Item 18b of the original manifest and supplying the information on the next destination facility in the alternate facility space. The facility must retain a copy of this manifest for its records, and then give the remaining copies of the manifest to the transporter to accompany the shipment. If the original manifest is not used, then the facility must use a new manifest and comply with (e)(i), (ii), (iii), (iv), (v), and (vi) of this subsection.

(f) Except as provided in (f)(vii) of this subsection, for rejected wastes and residues that must be sent back to the generator, the facility is required to prepare a new manifest in accordance with WAC 173-303-180 and the following instructions:

(i) Write the facility's U.S. EPA ID number in Item 1 of the new manifest. Write the generator's name and mailing address in Item 5 of the new manifest. If the mailing address is different from the generator's site address, then write the generator's site address in the designated space for Item 5.

(ii) Write the name of the initial generator and the generator's U.S. EPA ID number in the designated facility block (Item 8) of the new manifest.

(iii) Copy the manifest tracking number found in Item 4 of the old manifest to the special handling and additional information block of the new manifest, and indicate that the shipment is a residue or rejected waste from the previous shipment.

(iv) Copy the manifest tracking number found in Item 4 of the new manifest to the manifest reference number line in the discrepancy block of the old manifest (Item 18a).

(v) Write the DOT description for the rejected load or the residue in Item 9 (U.S. DOT Description) of the new manifest and write the container types, quantity, and volume(s) of waste.

(vi) Sign the generator's/offerer's certification to certify, as offeror of the shipment, that the waste has been properly packaged, marked and labeled and is in proper condition for transportation.

(vii) For full load rejections that are made while the transporter remains at the facility, the facility may return the shipment to the generator with the original manifest by completing Item 18a and 18b of the manifest and supplying the generator's information in the alternate facility space. The facility must retain a copy for its records and then give the remaining copies of the manifest to the transporter to accompany the shipment. If the original manifest is not used, then the facility must use a new manifest and comply with (f)(i), (ii), (iii), (iv), (v), and (vi) of this subsection.

(g) If a facility rejects a waste or identifies a container residue that exceeds the quantity limits for "empty" containers set forth in WAC 173-303-160(2) after it has signed, dated, and returned a copy of the manifest to the delivering transporter or to

the generator, the facility must amend its copy of the manifest to indicate the rejected wastes or residues in the discrepancy space of the amended manifest. The facility must also copy the manifest tracking number from Item 4 of the new manifest to the discrepancy space of the amended manifest, and must re-sign and date the manifest to certify to the information as amended. The facility must retain the amended manifest for at least three years from the date of amendment, and must within thirty days, send a copy of the amended manifest to the transporter and generator that received copies prior to their being amended.

(6) 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 ((+)) (5) 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).

((+)) (7) 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.

(8) A facility must determine whether the consignment state for a shipment regulates any additional wastes (beyond those regulated federally) as hazardous wastes under its state hazardous

waste program. Facilities must also determine whether the consignment state or generator state requires the facility to submit any copies of the manifest to these states.

AMENDATORY SECTION (Amending Order 03-10, filed 11/30/04, effective 1/1/05)

WAC 173-303-380 Facility recordkeeping. (1) Operating record. The owner or operator of a facility must keep a written operating record at their facility. The following information must be recorded, as it becomes available, and maintained in the operating record until closure of the facility:

(a) A description of and the quantity of each dangerous waste received or managed on-site, and the method(s) and date(s) of its treatment, storage, or disposal at the facility as required by subsection (2) of this section, recordkeeping instructions;

(b) The location of each dangerous waste within the facility and the quantity at each location. For disposal facilities, the location and quantity of each dangerous waste must be recorded on a map or diagram of each cell or disposal area. For all facilities, this information must include cross-references to specific manifest document numbers, if the waste was accompanied by a manifest;

(c) Records and results of waste analyses, waste determinations (as required by 40 CFR Parts 264 and 265, Subpart CC), and trial tests required by WAC 173-303-300, General waste analysis, and by 40 CFR sections 264.1034, 264.1063, 264.1083, 265.1034, 265.1063, 265.1084, 268.4(a), and 268.7. Note that data from laboratory analyses for 40 CFR 268.4(a) and 268.7 must meet the requirements of WAC 173-303-110;

(d) Summary reports and details of all incidents that require implementing the contingency plan, as specified in WAC 173-303-360 (2) (k);

(e) Records and results of inspections as required by WAC 173-303-320 (2) (d), General inspection (except such information need be kept only for five years);

(f) Monitoring, testing, or analytical data, and corrective action where required by 40 CFR Part 265 Subparts F through R and sections 265.1034 (c) through (f), 265.1035, 265.1063 (d) through (i), 265.1064, and 265.1083 through 265.1090 for interim status facilities (incorporated by reference at WAC 173-303-400(3)), and by WAC 173-303-630 through 173-303-695 and 40 CFR sections 264.1034 (c) through (f), 264.1035, 264.1063 (d) through (i), 264.1064, and 264.1082 through 264.1090 for final status facilities (incorporated by reference at WAC 173-303-690, 173-303-691, and 173-303-692). Note that data provided from laboratory analyses for WAC 173-303-400(3) which incorporates by reference 40 CFR Part 265 Subparts F through R, WAC 173-303-140 (4) (b), 173-303-395(1), 173-303-630