



State of New Mexico
ENVIRONMENT DEPARTMENT
 Harold Runnels Building
 1190 St. Francis Drive
 Santa Fe, New Mexico 87503

JUDITH M. ESPINOSA
 SECRETARY

RON CURRY
 DEPUTY SECRETARY

BRUCE KING
 GOVERNOR

TRANSMITTAL MEMORANDUM



TO: Elizabeth Gordon
 Hazardous Waste Bureau
 Room N2307

DATE: April 1, 1991

RE: United States of America and Regents of the University of California v. State of New Mexico, et al.; USDC No. CIV 90-0276SC

The following documents are enclosed: Copy of Unopposed Motion for Extension of Time in the above matter. This means we only need to file the Answer on April 4, 1991, but we will need to work hard on the summary judgment motion.

PLEASE:

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|---|---|
| <input type="checkbox"/> File | <input type="checkbox"/> Check for \$ _____ enclosed for proper fee |
| <input type="checkbox"/> Record | |
| <input type="checkbox"/> Serve, complete Return of Service and return to us | <input type="checkbox"/> Self-addressed, stamped envelope(s) enclosed |
| <input type="checkbox"/> Per your request | <input checked="" type="checkbox"/> Other: See above. |
| <input checked="" type="checkbox"/> For your information | |
| <input type="checkbox"/> Approve, sign and return | |
| <input type="checkbox"/> Return conformed copies | |

Thank you very much,



 GINI NELSON
 Assistant General Counsel

Enclosure(s)



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IN THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF NEW MEXICO
FOR THE DISTRICT OF NEW MEXICO

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UNITED STATES OF AMERICA and
REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Plaintiffs,

v.

NO. CIV 90-0276SC

STATE OF NEW MEXICO and
HEALTH AND ENVIRONMENT
DEPARTMENT, ENVIRONMENTAL
IMPROVEMENT DIVISION,

Defendants.

UNOPPOSED MOTION FOR EXTENSION OF TIME

Defendants State of New Mexico and New Mexico Health and Environment Department, Environmental Improvement Division, by and through the undersigned attorneys hereby move the Court for an extension of time to respond to Plaintiff United States' Motion for Summary Judgment. Defendants specifically request an extension until and including April 26, 1991. As grounds therefore, Defendants state:

1. On October 3, 1990, Plaintiff United States of America filed its Motion for Summary Judgment.
2. Pending at the same time was Defendants' Motion to Dismiss, filed on April 19, 1990.
3. The court had granted Defendants until the expiration of ten (10) days of the service of the Court's Order on Defendants' Motion to Dismiss to respond to Plaintiff United States' Motion for Summary Judgment.
4. Plaintiff United States' Motion for Summary Judgment

raises significant factual and legal issues of a substantive and procedural nature which will require a substantial investment of time and resources in order to prepare a meaningful response.

5. The Court denied Defendants' Motion to Dismiss on March 22, 1991, and ordered the Regents of the University California to be joined as plaintiffs.

6. Defendants' intend to file a cross-motion for Summary Judgment along with its response to Plaintiff United States' Motion for Summary Judgment.

7. Judicial economy and the preservation of the Court's resources would be served by granting this extension as all summary issues to be decided would be before the Court at the same time. Plaintiffs will not be prejudiced as a result of Defendants' request.

8. Plaintiff United States of America does not oppose the extension of time until April 26, 1991.

9. Plaintiff Regents of the University of California does not oppose the extension of time until April 26, 1991.

10. Defendants agree not to oppose any motion by Plaintiffs United States of America or Regents of the University of California for an extension of time until May 24, 1991, to respond to Defendants' Cross-Motion for Summary Judgment.

WHEREFORE, Defendants pray for an order extending the time in which to respond to Plaintiff United States' Motion for Summary Judgment until April 26, 1991.

Respectfully submitted,

TOM UDALL
Attorney General



RANDALL D. VAN VLECK
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508



GINI NELSON
Special Assistant Attorney General
1190 St. Francis Drive
Santa Fe, New Mexico 87503

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to:
John A. Bannerman, P. O. Box 1945, Albuquerque, NM 87103 and
Karen Egbert, P. O. Box 23986, Washington, D.C. 20026-3986, this
28 day of March, 1991.



Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA and
REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Plaintiff,

v.

No. CIV 90-0276SC

STATE OF NEW MEXICO; and
HEALTH AND ENVIRONMENT
DEPARTMENT, Environmental
Improvement Division,

Defendants.

ORDER

This matter came before the Court on The Motion of Defendants State of New Mexico and New Mexico Health and Environment Department, Environmental Improvement Division for an extension of time until April 26, 1991, to respond to Plaintiff United States' Motion for Summary Judgment. The Court, having reviewed the Motion and being otherwise fully advised in the matter finds the motion is well taken.

IT IS THEREFORE ORDERED that Defendants shall have until April 26, 1991, to respond to Plaintiff United States' Motion for Summary Judgment.

DISTRICT JUDGE

Prepared and approved by:



RANDALL D. VAN VLECK
Assistant Attorney General

Approved as to Form:



GINI NELSON
Special Assistant Attorney General

Telephonic concurrence given on 3/28/91

LETITIA J. GRISHAW
Attorney for United States of America

Telephonic concurrence given by A.
Michael Chapman for J. Bannerman on 3/28/91

JOHN A. BANNERMAN
Attorney for Regents of University of California

March 28, 1991

CERTIFIED MAIL

RECEIVED
APR 03 1991
LEGAL

James W. Black
Assistant Judicial Officer (A-101)
U.S. Environmental Protection Agency
401 M Street Southwest
Room 1145, West Tower
Washington, D.C. 20460

Re: Los Alamos National Laboratory
RCRA Appeal No. 90-12; Second status report in response to
your letter dated January 29, 1991

Dear Mr. Black:

This is the second status report of the U.S. Environmental Protection Agency (EPA) - Region 6 in response to your letter dated January 29, 1991, regarding the above-referenced permit appeal. In EPA's last status report, it was reported that The Department of Energy (DOE) has informed EPA Region 6 that DOE will withdraw its petition for review of the Los Alamos National Laboratory (LANL) permit if the EPA decides not to reject DOE's Class 1 modification of the permit, which modification DOE submitted to EPA Region 6 in a letter dated September 7, 1990.

Region 6 received a request, from the New Mexico Health and Environment Department (NMHED), that the EPA reject or clarify the LANL permit modification pursuant to 40 CFR § 270.42(a)(1)(iii). EPA Region 6 is still in the process of reviewing NMHED's request. No other requests for review of the modification have been received.

Sincerely,


James E. Costello
Assistant Regional Counsel

cc: Joyce Hester Laeser, Esquire
Counsel for Petitioners

Lisa Cummings, Esquire
Counsel for Petitioners

✓ Gini Nelson
Assistant General Counsel
New Mexico Health and Environment Department

Appendix B

State Authorization to Regulate the Hazardous Components of Radioactive Mixed Waste
Under the Resource Conservation and Recovery Act,
July 3, 1986. (51 FR 24504)

**ENVIRONMENTAL PROTECTION
AGENCY**

[FRL-3041-3]

**State Authorization To Regulate the
Hazardous Components of
Radioactive Mixed Wastes Under the
Resource Conservation and Recovery
Act**

AGENCY: Environmental Protection
Agency.

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is today publishing a notice that in order to obtain and maintain authorization to administer and enforce a hazardous waste program pursuant to Subtitle C of the Resource Conservation and Recovery Act (RCRA), States must have authority to regulate the hazardous components of "radioactive mixed wastes". "Radioactive mixed wastes" are wastes that contain hazardous wastes subject to RCRA and radioactive wastes subject to the Atomic Energy Act (AEA).

DATE: States which have received EPA authorization prior to the publicity date of this Notice must, within one year of the publication date of this notice (two years if a State statutory amendment is required) (i.e., by July 3, 1987 and July 5, 1988), demonstrate authority to regulate the hazardous components of radioactive mixed wastes. States initially applying for final authorization after July 3, 1987 must incorporate this provision in their application for final authorization.

FOR FURTHER INFORMATION CONTACT:
Denise Hawkins, Office of Solid Waste
(WH-563-B), U.S. Environmental
Protection Agency, 401 M Street SW.,
Washington, DC 20460, (202) 382-2210.

SUPPLEMENTARY INFORMATION:

**A. Authorization of State Hazardous
Waste Programs**

Section 3006(b) of RCRA provides that States may apply to EPA for authorization to administer and enforce a hazardous waste program pursuant to Subtitle C of RCRA. Authorized State programs are carried out in lieu of the Federal program. However, EPA is authorized to implement the Hazardous

and Solid Waste Amendments to RCRA (HSWA) (Pub. L. 98-616) in authorized States until those States revise their programs to incorporate the HSWA requirements and receive EPA authorization to implement HSWA. Requirements for obtaining authorization are set forth in 40 CFR Part 271. To date, 41 States have received final authorization (not including HSWA).

B. Regulation of Radioactive Wastes

Section 1004(27) of RCRA excludes from the definition of "solid waste", "source, special nuclear or byproduct material as defined by the Atomic Energy Act of 1954, as amended (AEA) (68 Stat. 923)." Since "hazardous waste" is defined by section 1004(5) as a subset of "solid waste", "source, special nuclear and byproduct material" are exempt from the definition of hazardous waste and thus from the Subtitle C program.

While source, special nuclear and byproduct material are clearly exempt from RCRA, the extent of the statute's applicability to wastes containing both hazardous waste and source, special nuclear or byproduct material has been less evident. The question of which wastes are encompassed by the term "byproduct material" has also been the subject of some controversy. We note that the definition of byproduct material is currently the subject of rulemaking by the Department of Energy (DOE). (50 FR 45736, November 1, 1985).

Given the lack of clarity on this issue, EPA did not previously require as a condition of State authorization that the State have regulatory authority over the hazardous components of radioactive mixed wastes. In authorizing States, EPA did not inquire into State authority over the hazardous components of radioactive mixed wastes and made no determination of whether States had authority over such wastes. Accordingly, the Agency has taken the position that currently authorized State programs do not apply to radioactive mixed wastes.

Thus, radioactive mixed wastes are not currently subject to Subtitle C regulations in authorized States.¹ EPA has now determined that wastes

containing both hazardous waste and radioactive waste are subject to the RCRA regulation.

Today, we are hereby publishing notice that, pursuant to 40 CFR 271.9 (which requires State programs to regulate all wastes controlled under 40 CFR Part 261), radioactive mixed wastes are to be part of authorized State programs. States that already have authorized programs must revise their programs (if necessary) and must apply for authorization for hazardous components of radioactive mixed wastes. States must demonstrate to the appropriate EPA Regional Administrator that their program applies to all hazardous waste even if mixed with radioactive waste. This demonstration must be made within one year of the publication date of this notice.² States

¹ The exception to this is in the use of EPA's HSWA authorities in authorized States. EPA can use its HSWA authorities to supplement an authorized State's authority over RCRA-regulated units. Under § 3004(u), EPA can jointly issue a permit with the State and impose corrective action requirements on hazardous waste management units and solid waste management units (swmu's) at facilities that contain units subject to RCRA. Although hazardous components of radioactive mixed wastes are not RCRA-regulated under authorized State RCRA programs, radioactive mixed waste will be considered to be a "solid waste" for purposes of corrective action at solid waste management units. The Federal definition of "solid waste" is to be used in determining what units are swmu's, because State definitions were not scrutinized. Therefore, in order to obtain authorization for corrective action, States must obtain authorization for their definition of solid waste, which may not exclude hazardous components of radioactive mixed wastes. Because radioactive mixed waste is considered a solid waste under the Federal RCRA program, units containing radioactive mixed wastes are swmu's and are subject to corrective action if there is another unit requiring a RCRA permit at the facility. RCRA enforcement activities also apply.

² EPA is not promulgating a regulation today. However, in light of the Agency's previous policy, we believe it is appropriate to provide the time allowed by 40 CFR 271.21(e)(2) for State program modifications to conform to regulatory changes. Note that EPA has proposed to amend 40 CFR 271.21 to allow States until July 1 of each year to incorporate changes to the Federal program that occurred in the preceding 12 months. Where statutory changes are necessary, an additional year would be allowed (51 FR 498-504, January 8, 1986). EPA will allow States to use this "clustering" approach for radioactive mixed wastes if and when the revisions to § 271.21 are finally promulgated.

initially applying for final authorization one year after the publication date of this notice must make this demonstration in their initial application.

In most cases, this will require only an interpretive statement by the State Attorney General, since most States have the same exception to the definition of "solid waste" as that contained in section 1004(27) of RCRA. Some States, however, may require statutory amendments in order to regulate the hazardous components of radioactive mixed wastes. Such States, if already authorized, must revise their programs within two years of the publication date of this notice. States initially applying that need a statutory amendment will have to obtain the amendment before submitting an application for final authorization.

In order to demonstrate regulation of the hazardous components of radioactive mixed wastes, States should submit to the appropriate Regional Administrator a copy of all applicable

statutory and regulatory provisions, plus a statement by the State Attorney General to the effect that the State's hazardous waste program applies to wastes containing both hazardous waste and radioactive waste as defined by the AEA. If an agency other than the authorized hazardous waste agency will implement the radioactive mixed wastes program, the authorization application must include a description of the agency's functions (see 40 CFR 271.6(b)) and a Memorandum of Understanding between that agency and the authorized hazardous waste agency, describing the roles and responsibilities of each.

The DOE has proposed an interpretive definition of the term "byproduct material" (50 FR 45736, November 1, 1985), and is now evaluating public comment. Pending clarification of this issue, this matter will be addressed on a case-by-case basis.

We also note that section 1006 of RCRA precludes any regulation by EPA or a State which is inconsistent with the requirements of the Atomic Energy Act.

EPA and the State may, therefore, on a case-by-case basis use the authority of § 1006 to modify hazardous waste requirements to address radioactive mixed wastes activities, pending issuance of EPA's regulation which will set forth procedures for addressing the inconsistency issue. In addition, EPA, the Nuclear Regulatory Commission (NRC), and DOE will be working together to develop guidance.

Notwithstanding any other provision of law, all requirements of the AEA and all Executive Orders concerning the handling of restricted data and national security information, including "need-to-know" requirements, shall be applicable to any grant of access to classified information under the provisions of RCRA.

Dated: June 30, 1986

J. Winston Porter,

Assistant Administrator for Solid Waste and Emergency Response.

(FR Doc. 86-15250 Filed 7-2-86; 12:10 pm

BILLING CODE 6560-50-M

Appendix C

Radioactive Waste; Byproduct, May 1, 1987. (52 FR 15937)

Rules and Regulations

Federal Register

Vol. 52, No. 84

Friday, May 1, 1987

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510. The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 910

[Lemon Regulation 559]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 559 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 330,000 cartons during the period May 3-9, 1987. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

DATES: Regulation 559 (§ 910.859) is effective for the period May 3-9, 1987.

FOR FURTHER INFORMATION CONTACT: James M. Scanlon, Acting Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Washington, DC 20250, telephone: (202) 447-5097.

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act,

and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their behalf. Thus, both statutes have small entities orientation and compatibility.

This regulation is issued under Marketing Order No. 910, as amended (7 CFR Part 910) regulating the handling of lemons grown in California and Arizona. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). This action is based upon the recommendation and information submitted by the Lemon Administrative Committee and upon other available information. It is found that this action will tend to effectuate the declared policy of the Act.

This regulation is consistent with the marketing policy for 1986-87. The committee met publicly on April 28, 1987, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and recommended by an 11 to 1 vote (with one abstention) a quantity of lemons deemed advisable to be handled during the specified week. The committee reports that the market is good for the larger sizes while the smaller sizes are moving slowly.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the *Federal Register* (5 U.S.C. 553), because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared purposes of the Act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting. It is necessary to effectuate the declared purposes of the Act to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

List of Subjects in 7 CFR Part 910

Marketing agreements and orders, California, Arizona, and Lemons.

For the reasons set forth in the preamble, 7 CFR Part 910 is amended as follows:

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

1. The authority citation for 7 CFR Part 910 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 910.859 is added to read as follows:

§ 910.859 Lemon Regulation 559.

The quantity of lemons grown in California and Arizona which may be handled during the period May 3, 1987, through May 9, 1987, is established at 330,000 cartons.

Dated: April 29, 1987.

Ronald L. Cloffi,

Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 87-10058 Filed 4-30-87; 8:45 am]

BILLING CODE 3410-02-M

DEPARTMENT OF ENERGY

10 CFR Part 962

Radioactive Waste; Byproduct Material

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) today is issuing a final interpretative rule under section 161p of the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*; hereinafter "the AEA") for the purpose of clarifying DOE's obligations under the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*; hereinafter "RCRA"). The purpose of this final rule is to interpret the AEA definition of the term "byproduct material," set forth in section 11e(1) of that Act (42 U.S.C. 2014(e)(1)), as it applies to DOE owned or produced radioactive waste substances which are also "hazardous waste" within the meaning of RCRA. The effect of this rule is that all DOE radioactive waste which is hazardous under RCRA will be subject to regulation under both RCRA and the AEA. This rule does not affect materials that are defined as byproduct material under section 11e(2) of the Atomic Energy Act.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: Henry K. Garson, Esq., Assistant

General Counsel for Environment, GC-11, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, Telephone (202) 506-6947.

Raymond P. Berube, Acting Director, Office of Environmental Guidance and Compliance, EH-23, Department of Energy, 1000 Independence Avenue SW., Washington DC 20585, Telephone (202) 506-5680.

SUPPLEMENTARY INFORMATION:

Background

RCRA establishes a comprehensive regulatory scheme, administered by the Environmental Protection Agency (EPA) and EPA-authorized States, governing the generation, transportation, treatment, storage and disposal of hazardous waste. Federal agencies are required by section 6001 of RCRA (42 U.S.C. 6961) to comply with the requirements of that regulatory scheme in the same manner, and to the same extent, as any private person or entity. Under section 1004 of RCRA (42 U.S.C. 6903), the "hazardous waste" governed by RCRA is a subset of the statute's definition of "solid waste." The definition of "solid waste," however, expressly excludes "source, special nuclear, or byproduct material as defined by the Atomic Energy Act." Those materials, instead, continue to be regulated under the AEA either by the Nuclear Regulatory Commission (NRC) or by DOE.

The AEA's definitions of the terms "source material" and "special nuclear material" are specific in nature, and present no particular difficulty of interpretation. The AEA's definition of "byproduct material," in contrast, speaks only generally of "any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material." AEA section 11e(1), 42 U.S.C. 2014(e)(1). The lack of specificity in this definition, coupled with RCRA's exclusion of byproduct material from its hazardous waste regulatory scheme, has raised a question concerning which DOE radioactive waste streams, if any, should be considered byproduct material not subject to regulation under RCRA.

The Proposed Rule

On November 1, 1985, DOE published a notice of proposed rulemaking (50 FR 45738) in which it proposed to adopt an interpretative rule clarifying RCRA's applicability to DOE radioactive waste. Briefly summarized, that proposed rule would have established a distinction

between "direct process" radioactive waste (*i.e.* waste directly yielded in, or necessary to, the process of producing and utilizing special nuclear material) and other radioactive waste less proximate to the physical process of producing or utilizing special nuclear material. Under the proposed rule, direct process waste, even if it contained hazardous material, would have been regarded as byproduct material, and thus would be regulated exclusively under the AEA. Any radioactive waste other than direct process waste, if it contained hazardous material, would have been considered "mixed waste" subject to regulation under both RCRA and the AEA.

As DOE noted the Federal Register preamble to the proposed rule, the legislative history of the AEA provides little guidance in interpreting the statutory definition of byproduct material, and application of the definition has not been clarified by judicial interpretation. Because the plain words of the definition are keyed to the process for producing and utilizing special nuclear material, however, it seemed that process must be regarded as a critical factor in determining whether particular radioactive materials fell within the definition. Accordingly, one significant feature of the "direct process" approach, as discussed in the preamble to the proposed rule, was its congeniality with the bare text of the statutory definition of byproduct material.

A major consequence of the "direct process" approach was the fact that it would result in the exclusive regulation of all direct process waste under the AEA. Just as the legislative history of the AEA provides little help in interpreting the statutory definition of byproduct material, the legislative history of RCRA is silent on the intended effect of RCRA's exclusion from its coverage of source, special nuclear and byproduct material. Nevertheless, DOE assumed that that exclusion was intended by the Congress to be applied to radioactive wastes in their real-world configuration. Virtually all radioactive waste substances are contained, dissolved or suspended in a nonradioactive medium from which their physical separation is impracticable. Accordingly, DOE noted in proposing the "direct process" approach that unless some radioactive waste streams were considered to be byproduct material *in their entirety*, RCRA's exclusion of byproduct material might reasonably be perceived to have little effect, because RCRA's application to a nuclear waste's nonradioactive medium would appear to entail at least

the indirect regulation of the radionuclides dispersed in the medium.

Such a result, in DOE's view, presented substantial legal questions. Previous court decisions had settled the point that the AEA generally vests in DOE and the NRC exclusive regulatory authority over the radiation hazards associated with source, special nuclear and byproduct material, and generally preempts the States from regulating those materials.¹ It had also been held that when the radiation and nonradiation hazards of a waste containing byproduct material are inseparable, regulatory action under the AEA preempts the incompatible exercise of general state nuisance authority over the waste.² These decisions, read in conjunction with RCRA's affirmation of state regulation as an acceptable, indeed a favored, alternative to EPA regulation, were viewed by DOE as suggesting that an appropriate interpretation of byproduct material would, like the proposed "direct process" approach, exclude certain radioactive waste streams, in their entirety, from regulation under RCRA.

Development of the Final Rule

At the time of its publication of the proposed rule, DOE made available to the public reports provisionally identifying which of the waste streams generated at its facilities would be considered "direct process waste" subject only to AEA regulation under the proposed rule, and which of those waste streams would be considered "mixed waste" subject to regulation under both RCRA and the AEA. DOE sought and received public comments on those reports, and on the proposed rule itself.

During the period since the proposal was made, DOE has had the opportunity further to review the pertinent legal authorities, as well as to consider the comments received, the provisional waste stream identifications, DOE's additional operating experience, and related actions taken by other federal agencies. Based on the review, DOE is today publishing a final rule that adopts a narrower interpretation of byproduct material than the "direct process" approach that was originally proposed. For the reasons set forth below, the final rule provides that only the actual radionuclides in DOE waste streams

¹ See *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). See also *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1 (1976).

² *Brown v. Kerr-McGee Chem. Corp.*, 767 F.2d 1234, 1240 (7th Cir. 1985).

will be considered byproduct material. The nonradioactive components of those waste streams, under the final rule, will be subject to regulation under RCRA to the extent that they contain hazardous components.

Discussion

The overriding question raised by the public comments on the proposed rule was whether RCRA's exclusion of source, special nuclear and byproduct material from regulation under that Act was intended by the Congress to exempt entire waste streams, rather than exempting only the radionuclides dispersed or suspended in a waste stream. As discussed above, the proposed rule would have treated any "direct process" waste as byproduct material in its entirety, even if the waste contained a nonradioactive chemically hazardous component that would otherwise have been subject to regulation under RCRA. Thus, the characterization of a waste stream as "direct process" waste would have foreclosed the application of RCRA to that stream irrespective of whether the associated non-radiological environmental hazard was significant. In the opinion of many commenters, this was a significant disadvantage to the "direct process" approach. In view of this concern, some commenters suggested that DOE instead adopt an alternative interpretative approach that would permit the application of each regulatory regime to the type of hazard that it was designed to control, *i.e.* that would apply the AEA to ensure protection against the radiological hazard of this waste, and apply RCRA to ensure protection against any associated chemical hazard.

DOE's operational experience since the publication of the proposed rule lends support to the concern expressed by these commenters. In its efforts provisionally to apply the "direct process" approach, DOE found a number of instances in which otherwise identical wastes were sometimes found subject to RCRA, and other times were found subject only to the AEA, due solely to the wastes' different proximity to the physical process of producing and utilizing special nuclear material. While distinctions of this type are not entirely incompatible with the process-oriented language employed by the Congress in the AEA to define byproducts material, DOE has concluded after further analysis that the better view of the law is one that avoids such artificial distinctions and that affords the greatest scope to the RCRA regulatory scheme, consistent with the requirements of the AEA. See *Legal Envtl. Assistance Found*

v. Hodel, 586 F. Supp. 1103 (E.D. Tenn. 1984).

As noted in the foregoing discussion and in the preamble to the proposed rule, the legislative histories of both RCRA and the AEA provide little assistance in interpreting either the meaning of the term byproduct material or the intended effect of RCRA's exclusion of byproduct material from the hazardous waste regulatory program. The House Committee on Interstate and Foreign Commerce, in reporting its version of the bill that ultimately was enacted as RCRA, alluded to a 1973 leak of radioactive waste from a DOE underground storage tank at Richland, Washington as an "actual instance [] of damage caused by current hazardous waste disposal practices." H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. 1, at 17-19, reprinted in 1976 U.S. Code Cong. & Admin. News 8238, 8254-57. This reference is a less than certain indication that the Congress viewed such radioactive waste as "hazardous waste" subject to RCRA. Unlike RCRA as finally enacted, the bill which this House Report accompanied contained no provision excluding source, special nuclear and byproduct material, thereby minimizing the probative value of the Committee's Richland reference in construing the statute that was ultimately enacted. Nevertheless, the Committee's reference should not be entirely discounted as evidence that the Congress in considering RCRA was concerned with unregulated hazards presented by radioactive waste, even though the AEA already provided sufficient regulatory control over the radiological hazards associated with such waste.

No court has addressed the specific question whether the entirety of a nuclear waste, or only its radioactive component, is byproduct material.⁴ The decision in *Brown v. Kerr-McGee Chem. Corp.*, supra note 2, clearly holds that the States cannot employ their general authority to abate nuisances to regulate even the nonradiation hazard of a waste incompatibly with regulation done under the AEA where the radiation and nonradiation hazards are inseparable. Nothing in that decision, however, is incompatible with concurrent regulation,

³ H.R. 14408, 94th Cong., 2d Sess. (1976).

⁴ Two decisions have upheld the authority of the NRC's predecessor agency, the Atomic Energy Commission, to license low level radioactive waste as byproduct material. *Harris County v. United States*, 292 F.2d 370 (5th Cir. 1961); *City of New Britain v. Atomic Energy Commission*, 306 F.2d 645 (D.C. Cir. 1962). In neither case, however, did the court reach the specific question whether the entirety of the waste, or only its radioactive component, is byproduct material.

by the States or EPA, of the nonradioactive component of a nuclear waste, subject to paramount requirements of the AEA.⁵

In this context, DOE notes that at the time the Congress was considering RCRA, the Supreme Court very recently had published its decision in *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1 (1976). That case decided whether the Federal Water Pollution Control Act, as amended in 1972, applied to source, special nuclear and byproduct material discharged into navigable waters by government-owned production facilities and commercial power reactors regulated by the AEA. After concluding that the Federal Water Pollution Control Act, properly construed, did not authorize EPA or the States to regulate source, special nuclear and byproduct material, the Court rejected the contention that the Water Act contemplated joint regulation of source, special nuclear or byproduct material effluents. 426 U.S. at 15. The practical effect of the Court's decision, however, was a regime of concurrent regulation, by different authorities, of effluent streams containing both radioactive and nonradioactive components. Specifically, the decision left EPA and the States free to regulate, under the Water Act, the nonradioactive component of liquid effluents from nuclear facilities, while reserving to the NRC and DOE's predecessor agency all regulatory authority over the source, special nuclear and byproduct materials contained in those same effluent streams.

The legislative history of RCRA contains no mention of the *Train* decision. However, the Congress is presumed to be aware of decisions of the Supreme Court,⁶ and in fact employed in RCRA the same AEA terms, including byproduct material, that the Court had extracted from the Water Act's legislative history to emphasize in its analysis in *Train*. Thus it is at least equally logical to infer that the Congress, in selecting the AEA terms emphasized in *Train*, anticipated a similar result under RCRA as it is to posit—as did the proposed rule—that RCRA's exclusion of byproduct material must have been intended to exclude in their entirety some waste streams from regulation under RCRA.

In short, while the specific legal authorities relied upon by DOE in developing the proposed rule appeared consistent with the "direct process"

⁵ See discussion of RCRA section 1006(a), U.S.C. 6005(a), *infra*.

⁶ *Cary v. Curtis*, 44 U.S. (3 How.) 236, 240 (1815).

approach, those authorities are equally consistent with the narrower interpretation of byproduct material that was suggested by the majority of the commenters on the proposed rule. More importantly, DOE is now persuaded after further analysis that the "direct process" approach does not reflect the better view of the law.

RCRA is a remedial statute, and as such must be liberally construed to effectuate the remedial purpose for which it was enacted.⁷ The intended comprehensiveness of RCRA's regulatory scheme is evident from the Act's legislative history. The principal sponsor of the legislation in the Senate emphasized that it represented "a major commitment of federal assistance to state and local government efforts to meet [hazardous and solid waste] problems in a comprehensive and effective manner."⁸ The House Committee on Interstate and Foreign Commerce regarded the legislation as closing the "last remaining loophole"⁹ in a framework of national environmental laws that already included the Clean Air Amendments of 1970, the Federal Water Pollution Control Act Amendments of 1972, and the Safe Drinking Water Act.

Moreover, interpretation of RCRA's exclusion of byproduct material must not focus solely on that exclusion, read in isolation. Instead, the exclusion can be viewed properly only in the context of the whole statute, as well as its object and policy.¹⁰ In this connection, it seems apparent that RCRA was intended to have some applicability to materials that were already regulated under the AEA. Section 1006(a) of RCRA, 42 U.S.C. 6905(a), specifies that as to "any activity or substance" subject to the AEA, RCRA regulation must yield, but only to the extent of "inconsistent" requirements stemming from the AEA. The archetypal "substances" that can fairly be described as "subject to" the AEA are substances containing source, special nuclear and byproduct material, to which the AEA expressly is directed. Thus the language of section 1006(a) seems generally to contemplate complementary regulation under both statutes of substances that under prior law might have been regulated exclusively by the AEA.

⁷ See, e.g., *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575 (9th Cir. 1964).

⁸ 122 Cong. Rec. 21401 (1976) (remarks of Sen. Randolph).

⁹ H.R. Rep. No. 94-1491, 94th Cong., 2d Sess., pt. 1, at 4, reprinted in 1976 U.S. Code Cong. & Ad. News 6230, 6241.

¹⁰ See, e.g., *Richards v. United States*, 369 U.S. 1, 11 (1962).

Viewed in this light, RCRA's definitional exclusion of source, special nuclear and byproduct material assumes a narrower significance than was suggested in the proposed rule. Instead of referring to any waste stream in its entirety, the exclusion appears directed only to the radioactive component of a nuclear waste. The result, however, is a more harmonious view of the statute as a whole. Read together, DOE believes that the definitional exclusion and the language of section 1006(a) are correctly understood to provide for the regulation under RCRA of all hazardous waste, including waste that is also radioactive. RCRA does not apply to the radioactive component of such a waste, however, if it is source, special nuclear or byproduct material. Instead, the AEA applies to that radioactive component. Finally, if the application of both regulatory regimes proves conflicting in specific instances, RCRA yields to the AEA.

In addition to construing the whole of RCRA in harmony, this interpretation results in according both RCRA and the AEA the greatest capacity to regulate effectively the special type of hazard that each statute was designed to control. Since the two statutes are not in irreconcilable conflict, but are capable of co-existence, they should be interpreted such that the operation and objectives of each are facilitated. See *Radzanow v. Touche Ross & Co.*, 428 U.S. 148, 155 (1976). However, in issuing today's final rule, DOE emphasizes the importance of section 1006(a) in resolving any particular inconsistencies that may occur between the requirements of RCRA and those of the AEA. DOE is the federal agency responsible for authoritatively construing the requirements of the AEA, as that Act applies to DOE activities. While DOE does not anticipate that adoption of today's final rule will lead to frequent cases of "inconsistency," section 1006(a) provides critical assurance that the implementation of the final rule will present no impediment to the maintenance of protection from radiological hazards as well as DOE's accomplishment of its other statutory responsibilities under the AEA.

A final consideration in adopting today's final rule is the rule's consistency with the legal position adopted by EPA and the NRC in resolving questions concerning RCRA's application at NRC-licensed commercial nuclear facilities. In a recent guidance document developed jointly by EPA and the NRC,¹¹ the two agencies stated that

¹¹ "Guidance on the Definition and Identification of Commercial Mixed Low Level Radioactive and Hazardous Waste," Jan. 5, 1987.

for commercial low-level radioactive waste containing a hazardous component, they will regard only the actual radionuclides in the waste as being exempt from RCRA. Today's final rule adopts the same approach for all DOE radioactive and chemically hazardous waste.

Accordingly, for purposes of RCRA, DOE interprets the term byproduct material to refer only to the radioactive component of a nuclear waste. The nonradioactive chemically hazardous component of the waste will be subject to regulation under RCRA.

Procedural Matters

A. Executive Order 12291

This rule has been reviewed in accordance with Executive Order 12291. The rule is not classified as a major rule because it does not meet the criteria for major rules established by that Order.

B. National Environmental Policy Act

This rule is an interpretative rule intended only to clarify the meaning of a statutory definition. Issuance of the rule will have no environmental impact.

C. Regulatory Flexibility Act Certification

The rule will not have a significant impact on a substantial number of small entities.

D. Paperwork Reduction Act of 1980

There are no information collection requirements in the rule.

List of Subjects in 10 CFR Part 962

Nuclear materials, Byproduct material.

Issued in Washington, DC, April 27, 1987.
J. Michael Farrell,
General Counsel.

In consideration of the foregoing, Part 962 is added to 10 CFR Chapter III, to read as follows:

PART 962—BYPRODUCT MATERIAL

Sec.
962.1 Scope.
962.2 Purpose.
962.3 Byproduct material.

Authority: The Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*); Energy Reorganization Act of 1974 (42 U.S.C. 5801 *et seq.*); Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*); Nuclear Waste Policy Act (Pub. L. 97-425, 96 Stat. 2201).

§ 962.1 Scope.

This Part applies only to radioactive waste substances which are owned or produced by the Department of Energy at facilities owned or operated by or for

the Department of Energy under the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*). This Part does not apply to substances which are not owned or produced by the Department of Energy.

§ 962.2 Purpose.

The purpose of this Part is to clarify the meaning of the term "byproduct material" under section 11e(1) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(1)) for use only in determining the Department of Energy's obligations under the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*) with regard to radioactive waste substances owned or produced by the Department of Energy pursuant to the exercise of its responsibilities under the Atomic Energy Act of 1954. This Part does not affect materials defined as byproduct material under section 11e(2) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(2)).

§ 962.3 Byproduct material.

(a) For purposes of this Part, the term "byproduct material" means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

(b) For purposes of determining the applicability of the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*) to any radioactive waste substance owned or produced by the Department of Energy pursuant to the exercise of its atomic energy research, development, testing and production responsibilities under the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*), the words "any radioactive material," as used in subsection (a), refer only to the actual radionuclides dispersed or suspended in the waste substance. The nonradioactive hazardous component of the waste substance will be subject to regulation under the Resource Conservation and Recovery Act.

[FR Doc. 87-9085 Filed 4-30-87; 8:45 am]

BILLING CODE 6450-01-M

FEDERAL RESERVE SYSTEM

12 CFR Parts 207, 220, 221 and 224

Regulations G, T, U and X; Securities Credit Transactions; List of Marginable OTC Stocks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule; determination of applicability of regulations.

SUMMARY: The List of Marginable OTC Stocks is comprised of stocks traded over-the-counter (OTC) that have been determined by the Board of Governors of the Federal Reserve System to be subject to the margin requirements under certain Federal Reserve regulations. The List is published four times a year by the Board as a guide for lenders subject to the regulations and the general public. This document sets forth additions to or deletions from the previously published List effective February 10, 1987 and will serve to give notice to the public about the changed status of certain stocks.

EFFECTIVE DATE: May 12, 1987.

FOR FURTHER INFORMATION CONTACT: Peggy Wolfrum, Research Assistant, Division of Banking Supervision and Regulation, (202) 452-2781. For the hearing impaired only, Earnestine Hill or Dorothea Thompson, Telecommunications Device for the Deaf (TDD) (202) 452-3544, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: Set forth below are stocks representing additions to or deletions from the Board's List of Marginable OTC Stocks. A copy of the complete List incorporating these additions and deletions is available from the Federal Reserve Banks. This List supersedes the last complete List which was effective February 10, 1987. (Additions and deletions for that List were published at 52 FR 3217, February 3, 1987). The current List includes those stocks that meet the criteria specified by the Board of Governors in Regulations G, T, U and X (12 CFR Parts 207, 220, 221 and 224, respectively). These stocks have the degree of national investor interest, the depth and breadth of information respecting the stock and its issuer to warrant regulation in the same fashion as exchange-traded securities. The List also includes any stock designated under an SEC rule as qualified for trading in the national market system (NMS Security). Additional OTC stocks may be designated as NMS securities in the interim between the Board's quarterly publications. They will become automatically marginable at broker-dealers upon the effective date of their NMS designation. The names of these stocks are available at the Board and the Securities and Exchange Commission and will be incorporated into the Board's next quarterly List.

The requirements of 5 U.S.C. 553 with respect to notice and public participation were not followed in connection with the issuance of this

amendment due to the objective character of the criteria for inclusion and continued inclusion on the List specified in 12 CFR 207.6 (a) and (b), 220.17 (a) and (b), and 221.7 (a) and (b). No additional useful information would be gained by public participation. The full requirements of 5 U.S.C. section 553 with respect to deferred effective date have not been followed in connection with the issuance of this amendment because the Board finds that it is in the public interest to facilitate investment and credit decisions based in whole or in part upon the composition of this List as soon as possible. The Board has responded to a request by the public and allowed a two-week delay before the List is effective.

List of Subjects

12 CFR Part 207

Banks, Banking, Credit, Federal Reserve System, Margin, Margin requirements, National Market System (NMS Security), Reporting and recordkeeping requirements, Securities.

12 CFR Part 220

Banks, Banking, Brokers, Credit, Federal Reserve System, Margin, Margin requirements, Investments, National Market System (NMS Security), Reporting and recordkeeping requirements, Securities.

12 CFR Part 221

Banks, Banking, Credit, Federal Reserve System, Margin, Margin requirements, Securities, National Market System (NMS Security), Reporting and recordkeeping requirements.

12 CFR Part 224

Banks, Banking, Borrowers, Credit, Federal Reserve System, Margin, Margin requirements, Reporting and recordkeeping requirements, Securities.

Accordingly, pursuant to the authority of sections 7 and 23 of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78g and 78w), and in accordance with 12 CFR 207.2(k) and 207.6(c) (Regulation G), 12 CFR 220.2(s) and 220.17(c) (Regulation T), and 12 CFR 221.2(j) and 221.7(c) (Regulation U), there is set forth below a listing of deletions from and additions to the Board's List:

Deletions From List

Stocks Removed for Failing Continued Listing Requirements

American Aggregates Corporation
No par common
Bio-Medicus, Inc.
Warrants (expire 08-31-88)

Appendix D

Clarification of Interim Status Qualification Requirements for the Hazardous Components of Radioactive Mixed Waste, September 23, 1988. (53 FR 37045)

Chittenden Cos., VT, Due: April 15, 1989, Contact: Ralph Abele, Jr. (617) 965-5100. Published FR 11-13-87—Review period extended.

EIS No. 880152, Draft, USA, PRO, NAT, Nationwide Biological Defense Research Program, Continuation, Implementation, Due: October 4, 1988, Contact: Charles Dasey (301) 663-2732. Published FR 5-20-88—Review period extended.

EIS No. 880287, DSUpl, AFS, OR, ID, Wallowa Whitman National Forest, Land and Resources Management Plan, Additional Alternative, Implementation, Baker, Union, Wallowa, Grant, Malheur and Umatilla Counties, OR and Adams, Nez Perce and Idaho Counties, ID, Due: December 12, 1988, Contact: Bruce McMillan (503) 823-8319.

Published FR 9-9-88—Review period extended, incorrect date published in 9-9-88 FR.

Dated: September 20, 1988.

William D. Dickerson,
Deputy Director, Office of Federal Activities.
[FR Doc. 88-21862 Filed 9-22-88; 8:45 am]
BILLING CODE 6560-60-01

[FRL-3452-6]

Clarification of Interim Status Qualification Requirements for the Hazardous Components of Radioactive Mixed Waste

AGENCY: Environmental Protection Agency (EPA).

ACTION: Clarification notice.

SUMMARY: The Environmental Protection Agency (EPA) is today publishing a notice which clarifies requirements for facilities that treat, store or dispose of radioactive mixed waste to obtain interim status pursuant to Subtitle C of the Resource Conservation and Recovery Act (RCRA). Radioactive mixed wastes are wastes that contain both hazardous waste subject to RCRA and radioactive waste subject to the Atomic Energy Act (AEA). Additionally, this notice addresses "notification" requirements for facilities that treat, store or dispose of radioactive mixed waste.

DATE: Owners and operators of facilities treating, storing, or disposing of radioactive mixed waste in States not authorized by September 23, 1988 to administer the Federal hazardous waste program in lieu of EPA must submit a RCRA Part A permit application to EPA by March 23, 1989 to qualify for interim status. Facilities treating, storing or disposing of radioactive mixed waste in States that received authorization by September 23, 1988 are not subject to RCRA regulations until the State revises

its existing authorized hazardous waste program to include authority to regulate radioactive mixed waste. Owners and operators must then comply with applicable State requirements regarding interim status.

To date, four States (i.e., Colorado, South Carolina, Tennessee, and Washington) have been authorized to regulate radioactive mixed wastes. In those States, owners and operators must comply with the applicable State law governing interim status for radioactive mixed waste facilities if it is more stringent than the otherwise applicable provisions of this notice.

FOR FURTHER INFORMATION CONTACT: Betty Shackleford, Office of Solid Waste (WH-563B), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 382-2221.

SUPPLEMENTARY INFORMATION:

A. Background

In 1976, the Resource Conservation and Recovery Act (RCRA) as amended, was passed to provide for development and implementation of a comprehensive program to protect human health and the environment from the improper management of hazardous waste. Specifically, Subtitle C of RCRA creates a management system intended to ensure that hazardous waste is safely handled from the point of generation to final disposal. To accomplish this, Subtitle C requires the Agency first to define and characterize hazardous waste. Second, a hazardous waste manifest system was implemented to track the movement of hazardous waste from the point of generation to ultimate disposal. Hazardous waste generators and transporters must employ appropriate management practices and procedures to ensure the effective operation of the manifest system. Third, owners and operators of treatment, storage or disposal facilities (TSDF's) must comply with standards the Agency established under section 3004 of RCRA that "may be necessary to protect human health and the environment." These standards include, but are not limited to, design, permits issued to TSDF owners and operators by the Agency or authorized States. Until final permits are issued, treatment, storage, and disposal facilities must comply with the interim status regulations found in 40 CFR Part 265, which were promulgated mostly on May 19, 1980.

Under RCRA interim status, the owner or operator of a TSDF may operate without a final permit if: (1) The facility existed on November 19, 1980 (or existed on the effective date of statutory or regulatory changes under RCRA that

render the facility subject to the requirements to have a permit under section 3005); (2) the owner or operator complies with the notification requirements of section 3010 of RCRA; and (3) the owner or operator submits a RCRA Part A permit application (40 CFR 270.70). Interim status is retained until the Agency or authorized State makes a formal decision to issue or deny the final TSDF permit.

As provided by section 3006(b) of RCRA, States may apply to EPA for authorization to administer and enforce a hazardous waste program pursuant to Subtitle C of RCRA. Authorized State programs are carried out in lieu of EPA. To date, forty-four States have received final authorization to administer the basic hazardous waste program. Of these forty-four States, only four (i.e., Colorado, South Carolina, Tennessee, and Washington) have received the additional authorization needed to regulate radioactive mixed waste. In these States, which had base program authorization by July 3, 1988, the State's regulations on interim status for mixed waste facilities control.

The other forty States with base program authorization must still revise their existing programs to include authority to regulate the hazardous component of radioactive mixed waste. In the twelve States and trust territories (i.e., Alaska, American Samoa, California, Connecticut, Hawaii, Idaho, Iowa, Mariana Islands, Ohio, Puerto Rico, Virgin Islands, and Wyoming) *unauthorized* to carry out their own RCRA hazardous waste program, radioactive mixed waste is subject to Federal hazardous waste regulations administered by EPA.

Historically, substantial confusion and uncertainty have surrounded the applicability of RCRA to hazardous wastes containing certain radioactive materials (i.e., source, special nuclear or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923)). This uncertainty stemmed from a long-standing confusion of source, special nuclear or byproduct material from the definition of solid waste under section 1004(27) of RCRA.

To clarify State responsibilities with regard to the hazardous components of radioactive mixed waste, the EPA published a notice in the Federal Register of July 3, 1988 (51 FR 24504). That notice recognized that States had not previously been authorized under RCRA to regulate radioactive mixed waste because of continuing debate surrounding the extent of RCRA jurisdiction over this category of waste.

Through that notice, EPA clarified its position that the hazardous component(s) of mixed waste was subject to RCRA regulation.

Accordingly, States were required to revise their existing hazardous waste programs and apply for RCRA authorization to regulate radioactive mixed waste in accordance with the deadlines set forth in the July 3, 1986 notice. Similarly, such authority must now be sought by States initially submitting an application for RCRA final authorization.

Since publication of the July 3, 1986 notice, the Agency promulgated new deadlines for State hazardous waste program modifications (the "Cluster Rule," September 22, 1986, 51 FR 33712). This subsequent rulemaking established annual deadlines for States to submit program changes in groups or clusters when seeking Agency authorization. For State program changes occurring after June 1984, the groups or clusters were to correspond to successive twelve-month periods beginning each July 1 and ending June 30 of the following year. In accordance with the schedule established by the Cluster Rule, States which applied for final authorization before July 3, 1986 were required to revise existing hazardous waste programs to include the authority to regulate the hazardous component of radioactive mixed waste by July 1, 1988 (or by July 1, 1989 if a statutory amendment is necessary). States initially seeking final authorization after July 3, 1987 were required to seek authorization for radioactive mixed waste as part of their application for final authorization. Any State applying for HSWA corrective action must concurrently seek authority for radioactive mixed waste. The July 3, 1986 notice addressing RCRA's applicability to TSDF's handling radioactive mixed waste did not, however, address the issue of interim status.

Byproduct Material

At the same time that EPA's rules governing State programs for radioactive mixed waste were being developed and implemented, controversy arose over which wastes are mixed and therefore subject to RCRA and which wastes are pure "byproduct material" and therefore exempt from RCRA regulations as provided by section 1004(27). To delineate RCRA applicability to their byproduct material waste streams, the Department of Energy (DOE) issued an interpretive rule on May 1, 1987 (52 FR 15937). In that rule DOE stated that the

term byproduct material as it applies to DOE-owned wastes (i.e., any radioactive material except special nuclear material yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material) refers only to the actual radionuclides dispersed or suspended in the waste substance. That interpretation is consistent with the position issued on January 8, 1987 by the EPA and the Nuclear Regulatory Commission (NRC) in a document entitled "Guidance on the Definition and Identification of Commercial Mixed Low-Level Radioactive and Hazardous Waste and Answers to Anticipated Questions." Therefore, as DOE clarified in its May 1, 1987 byproduct rule, any matrix containing a RCRA hazardous waste as defined in 40 CFR 261 and a radioactive waste subject to the AEA is a radioactive mixed waste. Such wastes are subject to RCRA hazardous waste regulations regardless of further subclassification of the radioactive waste constituent as high-level, low-level, transuranic, etc.

C. Interim Status

As discussed previously, RCRA section 3005(a) prohibits treatment, storage, or disposal of hazardous waste without a permit after November 19, 1980. However, section 3005(e) of RCRA provides that facilities in existence on November 19, 1980 or on the date of statutory or regulatory changes which subject the facility to RCRA requirements, may continue treatment, storage, or disposal under "interim status" pending a final decision on its permit application.¹ To qualify for interim status under section 3005(e), the owner or operator of a TSDF in existence must submit a Part A permit application and meet applicable notification requirements under section 3010 of RCRA.

EPA has become aware that many TSDF's handling radioactive mixed waste, both in authorized and unauthorized States (EPA-administered hazardous waste programs), have been substantially confused about the regulatory status of their particular mix of hazardous waste. Further, these owners and operators are uncertain about how to qualify for interim status if

¹ However, if a facility has previously had its interim status terminated, the facility is barred by statute from qualifying for interim status for a newly listed waste (RCRA section 3005(e)(1)). If only certain units at the facility have previously had interim status terminated, then the facility may operate newly-regulated units under interim status (see 40 CFR 270.72).

they are handling radioactive mixed waste.

The July 3, 1986 notice addressing RCRA's applicability to TSDF's handling radioactive mixed waste did not address the issue of interim status. Given that omission and subsequent definitional clarifications on which radioactive waste streams are subject to RCRA regulation, EPA has determined that substantial confusion about interim status requirements existed. The primary purpose of this notice, therefore, is to clarify RCRA interim status requirements with respect to TSDF's managing radioactive mixed waste. The requirements are discussed below.

1. Requirement That Facilities Be "In Existence"

Interim status provides temporary authorization to continue hazardous waste management activities at facilities engaging in such activities at the time that they first become subject to RCRA regulation. Without interim status, the activities would have to cease until a permit application was filed and reviewed and final permit issued.

One of the conditions for qualifying for interim status under section 3005(e) is that the facility be "in existence" either on November 19, 1980 or on the date of the regulatory or statutory change which first subjects the facility to RCRA permitting requirements. Under EPA regulations at 40 CFR 260.10 and 270.2, to be "in existence" (i.e., to be an existing hazardous waste management facility or existing facility) means that the facility is either operating or construction of such a facility has commenced on the relevant date.

As applied to facilities handling radioactive mixed waste in States unauthorized to implement a hazardous waste program (i.e., without base program authorization) as of the date of this notice, EPA believes that facilities in operation or under construction as of that date and which have treatment, storage, or disposal facilities on July 3, 1986 may qualify for interim status under section 3005(e)(1)(A)(ii) of RCRA. The Agency interprets this provision as applying to such facilities in existence on July 3, 1986 because the July 3, 1986 notice was EPA's first official pronouncement to the general public that RCRA permitting requirements are applicable to radioactive mixed waste. In view of the level of confusion surrounding regulation of radioactive mixed waste prior to that time, EPA will treat the July 3, 1986 notice as the relevant regulatory change for establishing that facilities in existence

on that date may qualify for interim status if other applicable requirements are met.

Facilities treating, storing, or disposing of radioactive mixed waste but not other hazardous waste in a State with base program authorization are not subject to RCRA regulation until the State program is revised and authorized to issue RCRA permits for radioactive mixed waste. The effective date of the State's receipt of radioactive mixed waste regulatory authorization from EPA will therefore be the regulatory change that subjects these TSDF's to RCRA permitting requirements. Any facility treating, storing, or disposing of radioactive mixed waste, or any such facility at which construction commenced by the effective date of authorization for the State's radioactive mixed waste program revision may qualify for interim status if the other requirements described below are met. However, owners and operators of TSDF's in authorized States are subject to all applicable State laws. A State can establish its own date for qualifying for interim status but, in order to be no less stringent than the Federal program, that date *may not* be after the effective date of EPA's authorization to the State to regulate radioactive mixed waste.

Some facilities in States with base program authorization as of July 3, 1986 may already have interim status under RCRA because they handle other RCRA hazardous wastes. These facilities should submit a revised Part A permit application reflecting their radioactive mixed waste activities within six months of the State's receipt of authorization for radioactive mixed waste.

2. Requirements to File a Permit Application

To qualify for interim status under RCRA section 3005(e)(1), the owner or operator of an "existing" facility must submit a Part A permit application. Under 40 CFR 270.10(e), existing facilities in *unauthorized* States must submit Part A of their permit application within thirty days after the effective date of publication of regulations which first require them to comply with technical standards, or thirty days after they first become subject to the technical standards, whichever is first. Although the July 3, 1986 notice clarified RCRA jurisdiction over radioactive mixed waste, it specifically addressed only the issue of State authorization. Application of the time periods specified in 40 CFR 270.10(e) to facilities located in unauthorized States was not addressed. Furthermore, the July 3, 1986 notice was technically not a regulation,

which is the trigger for § 270.10(e) in normal circumstances. As a result, owners and operators in unauthorized States could legitimately have been confused as to whether (and when) they were required to submit a Part A permit application. Under § 270.10(e)(2), EPA finds that the confusion is substantial and is attributable primarily to (1) ambiguities surrounding the 40 CFR parts 260-265 regulatory status of mixed waste, (2) the narrow scope of the July 3, 1986 notice and (3) uncertainty regarding DOE's final definition of byproduct material which had direct bearing on RCRA applicability to Federally-owned radioactive mixed wastes and indirect bearing on commercial radioactive mixed wastes.

EPA, therefore, is exercising its authority today under § 270.10(e)(2) to extend the Part A permit application filing dates for owners and operators of facilities handling radioactive mixed waste in unauthorized States. Owners and operators of radioactive mixed waste facilities in operation or under construction as of July 3, 1986 (See 45 FR 33066, May 19, 1980) in unauthorized States must submit RCRA Part A permit applications or modifications within six months of the date of publication of today's notice to qualify for interim status. This is predicated on the Agency's determination that the time periods specified in § 270.10(e) are triggered as of the date of publication of this notice given the circumstances presented herein. It should be noted, however, that radioactive mixed waste land disposal facilities must also submit a final (Part B) permit application and certification of compliance with applicable ground-water monitoring and financial assurance requirements within twelve months from the date of this notice pursuant to section 3005(e)(3) of RCRA. Failure to do so may result in loss of interim status for the affected units and possibly for the facility. Facilities other than land disposal must submit Part B of the permit application in accordance with deadlines established by the EPA Regional Office for radioactive mixed waste. TSDF's under base program authorization must comply with applicable State requirements and deadlines for obtaining interim status as prescribed in authorized State law. Radioactive mixed waste land disposal facilities obtaining interim status in authorized States are nevertheless subject to the section 3005(e)(3) one-year provision on loss of interim status for newly-listed wastes. Thus, the owners or operators of such facilities must submit the State analogue of the Part B permit application and the

required certifications within twelve months of the effective date of the State's authorization to regulate radioactive mixed waste. Failure to submit the Part B permit application or the required certifications will result in loss of interim status for the affected units and possibly for the facility. Facilities other than land disposal must submit the Part B permit application in accordance with deadlines established by the authorized State program.

3. Requirement to Comply with Section 3010 Notification

The final condition for obtaining interim status under section 3005(e) of RCRA is notification of hazardous waste activity under section 3010(a) of RCRA. Section 3010(a) requires persons handling hazardous wastes at the time of publication of EPA's initial hazardous waste regulations (on May 19, 1980) to notify EPA of their hazardous waste activity within 90 days (i.e., by August 18, 1980). Section 3010(a) also allows the Administrator discretion on whether to require persons to provide such notification not later than 90 days after promulgation or regulations identifying a substance they handle as hazardous waste thereby providing EPA with a current picture of the hazardous waste universe.

Although many facilities currently treating, storing, or disposing of radioactive mixed waste were doing so in May 1980, EPA believes that the status of radioactive mixed waste was sufficiently unclear that no notification under section 3010(a) was required by August 18, 1980 for facilities handling such waste (See 45 FR 76631-32, November 19, 1980). Nor has notification subsequently been required as part of EPA promulgation of additional RCRA regulations. Therefore, EPA has determined that it is unreasonable to penalize owners and operators of facilities currently handling radioactive mixed waste for any failure to file notification under Section 3010.

Further, EPA finds that TSDF's have complied with the requirements of section 3010(a) for purposes of section 3005(e) interim status under 40 CFR 270.70(a)(1). This finding is predicated largely on the fact that radioactive mixed waste will not be subject to hazardous waste regulations in the vast majority of States until they revise their programs to include such authority. These program revisions could take until July 3, 1989 for States needing a statutory amendment. Because notification would be linked to radioactive mixed waste authorization for these States, receipt of this

information would be fragmented. Moreover, the Agency has been aware of the magnitude of the potential radioactive mixed waste universe for some time since each NRC and NRC Agreement State licensee is a potential handler of radioactive mixed waste. Thus, no further notification of EPA under § 270.70(a)(1) is required in order for facilities treating, storing or disposing of mixed waste to qualify for interim status. However, TSDF owners and operators, like generators and transporters of radioactive mixed waste, must obtain an EPA Identification Number in accordance with the procedures set forth in 40 CFR 265.11 if they do not already have one. The Identification Number may be obtained by completing EPA Notification Form 8700-12 and submitting it to the EPA Regional Office serving the area where the hazardous waste activity is located.

D. Joint Regulation of Radioactive Mixed Waste

As stated previously, a single radioactive mixed waste stream is subject to regulation by two separate Federal agencies (i.e., EPA and NRC, or EPA and DOE). This dual regulatory system requires handlers of waste formerly regulated exclusively by NRC or DOE to also comply with RCRA regulations for hazardous waste management. EPA is committed to minimizing the impact of RCRA regulations by developing a strategy for joint regulation of radioactive mixed wastes that will effect program implementation in the least burdensome manner practicable.

One area of the radioactive mixed waste regulatory process which may lend itself to streamlining occurs when regulatory requirements for hazardous and radioactive waste management are duplicative. When this occurs, compliance with regulations governing radioactive waste management may accomplish a level of environmental protection that may be commensurate with that required under RCRA for hazardous waste management activities. EPA is currently assessing the feasibility of accepting, to the extent possible, information already submitted to the NRC when processing the RCRA permit. Moreover, EPA and NRC are assessing the feasibility of developing a joint permitting/licensing guidance that will address these concerns. Suggestions from the regulated community regarding duplicative requirements and simplification of the licensing/permitting process are welcome. Comments should be specific and should document how equivalent protection of human health and the environment from hazardous

waste is achieved. The Agency urges States authorized to regulate radioactive mixed waste to adopt a comparable practice when implementing its hazardous waste program.

E. Consistency with the Atomic Energy Act

Publication of the clarification notice addressing RCRA applicability to radioactive mixed waste precipitated a variety of concerns from the regulated community, most of which reflected confusion about the RCRA program. However, two issues were commonly raised, namely, (1) the appropriateness of RCRA hazardous waste regulations for managing waste containing radioactive components and, (2) compliance with RCRA would result in violation of a basic tenet of radioactive waste management, that of keeping radiation exposures as low as reasonably achievable (ALARA).

These concerns prompted the EPA and the NRC to jointly review their respective regulations in an effort to delineate the extent of inconsistencies between EPA's hazardous waste and NRC's radioactive waste management requirements. No inconsistencies were identified as a result of this comparison although RCRA was more prescriptive in some instances and differences in stringency were observed. Differing or more stringent regulations do not necessarily constitute inconsistent requirements. For example, the comparison of container management regulations (See 10 CFR Parts 61 and 71 and 40 CFR Part 264, Subpart I) revealed that they covered different aspects of container management. NRC regulations provide requirements for packaging and placement for land disposal (including the use of fill and liquid-absorbent materials) (See 10 CFR 61.51 and 10 CFR 40-44) while EPA regulations provide prescriptive provisions for the design, use, and inspection of containers at storage facilities and describe how spills from storage areas are to be mitigated. Both agencies have regulations on packaging of waste for transport. However, the regulations are complementary rather than conflicting.

Although NRC and EPA waste management regulations differ in stringency and scope, the technical requirements were not found to be inconsistent. Section 1006(a) of RCRA precludes any solid or hazardous waste regulation by EPA or a State that is "inconsistent" with the requirements of the AEA. In such instances, the AEA would take precedence and the inconsistent RCRA requirement would be inapplicable.

EPA recognizes that implementation of the dual regulatory program for radioactive mixed waste management might result in instances where compliance with both sets of regulations is not only infeasible but undesirable. Therefore, EPA urges the regulated community to bring to our attention all cases of actual inconsistency which may form the basis for future rulemaking and/or technical or policy guidance.

Dated September 18, 1988.

Lee M. Thomas,

Administrator, Environmental Protection Agency.

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[OPTS-51714; FRL-3452-9]

Toxic and Hazardous Substances; Certain Chemicals Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the Federal Register of May 13, 1983 (48 FR 21722). This notice announces receipt of forty-eight such PMNs and provides a summary of each.

DATES: Close of Review Periods:

P 88-1878, 88-1879, 88-1880, November 22, 1988.

P 88-1881, 88-1882, November 23, 1988.

P 88-1883, 88-1884, 88-1885, 88-1886, 88-1887, 88-1888, 88-1889, 88-1890, 88-1891, 88-1892, 88-1893, 88-1894, 88-1895, 88-1896, November 26, 1988.

P 88-1897, 88-1898, 88-1899, 88-1900, 88-1901, 88-1902, 88-1903, 88-1904, 88-1905, 88-1906, 88-1907, 88-1908, 88-1909, 88-1910, 88-1911, November 27, 1988.

P 88-1912, 88-1913, 88-1914, November 28, 1988.

P 88-1915, 88-1916, 88-1917, 88-1918, 88-1919, 88-1920, 88-1921, 88-1922, 88-1923, 88-1924, 88-1925, November 29, 1988.

Written comments by:
P 88-1878, 88-1879, 88-1880, October 23, 1988.
P 88-1881, 88-1882, October 24, 1988.
P 88-1883, 88-1884, 88-1885.