

US EPA ARCHIVE DOCUMENT

40 CFR Part 261

[SWH-FRL 1680-4]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final amendment to rule and request for comments.

SUMMARY: The Environmental Protection Agency is amending the hazardous waste management regulations (40 CFR 261.4) to provide that arsenical-treated wood or wood products which are generated by persons who utilize such treated wood or wood products for the woods' intended end use, and which wood constitutes hazardous waste solely because it fails the test for the characteristic of Extraction Procedure toxicity, is not subject to regulation under 40 CFR Parts 262 through 265 or Parts 122 through 124 or the requirements of Section 3010 of RCRA until the Agency's Office of Pesticide Programs has made further progress in its pending review of arsenical wood preservatives. This amendment is being made as a result of public comments.

DATES: Effective date; November 19, 1980.

Comment date: The Agency will accept comments on this amendment until January 26, 1981. Any person may request a hearing on this interim final rule by filing a request with John P. Lehman, whose address appears below, by December 16, 1980. The request must contain the information prescribed in § 260.20(d) of this chapter.

ADDRESSES: Comments on this amendment should be sent to Docket Clerk, Docket No. "3001/Arsenical-Treated Wood," Office of Solid Waste (WH-565), U.S. Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

Requests for hearing should be addressed to John P. Lehman, Director, Hazardous and Industrial Waste Division, Office of Solid Waste (WH-565), U.S. Environmental Protection Agency, Washington, D.C. 20460.

The public docket for this interim final rule is located in Room 2711, U.S. Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460. The public docket is available for viewing from 9:00 a.m. to 4:00 p.m. Monday through Friday, except legal holidays.

FOR FURTHER INFORMATION CONTACT: Matthew A. Straus, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460, (202) 755-9187.

SUPPLEMENTARY INFORMATION:

I. Introduction

On May 19, 1980, as part of its initial regulations implementing Section 3001 of the Resource Conservation and Recovery Act (RCRA), the Agency promulgated rules governing the identification and listing of hazardous wastes. Among other things, these rules identified four characteristics of hazardous wastes which are to be used by all persons generating solid waste to determine if the solid waste is hazardous. (See 40 CFR Part 261, Subpart C.) Pursuant to 40 CFR Part 261, a solid waste is a hazardous waste if it is not excluded by a provision of 40 CFR 261.4(b) and it exhibits one or more of the characteristics of hazardous waste identified in Subpart C of 40 CFR Part 261.

One of the characteristics which EPA has determined makes a solid waste a hazardous waste is described as "Extraction Procedure Toxicity" or "EP Toxicity" and appears at 40 CFR 261.24. In December, 1978, the Agency proposed the EP toxicity characteristic as a criterion for identifying hazardous waste. No comments relating to arsenical-treated wood or wood products were submitted in response to the proposal. In May, 1980, the Agency promulgated the EP toxicity characteristic as a final regulation. In July, 1980, approximately one and one-half years after the initial proposal of the EP toxicity characteristic, the American Wood Preservers Institute (AWPI) first brought to the Agency's attention the possibility that some wood treated with arsenical-based preservatives exhibits the characteristic of EP toxicity and, therefore, might be classified as hazardous waste when disposed of. AWPI requested a delay in the regulations' effective date with respect to arsenical-treated wood.

II. AWPI Comments Relating to Arsenical-Treated Wood

AWPI has requested that the Agency delay action to classify treated wood as a hazardous waste and to "clarify its regulations to indicate that all types of preserved wood, including arsenical treated wood, do not constitute hazardous wastes when disposed." AWPI's request is based on two arguments:

(1) the method of disposing of wood treated with arsenical preservatives is identical to registered uses of the treated wood in place—ground contact; and (2) the Office of Solid Waste should await the outcome of the Agency's Office of Pesticide Programs' pending examination of wood preservatives. The

Office of Pesticide Programs is reviewing the risks and benefits, associated with the use of arsenical wood preservatives as part of the Federal Insecticide, Fungicide and Rodenticide Rebuttable Presumption Against Registration (RPAR) process. (Arsenical wood preservatives are pesticides under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) because they are applied to control fungi and termites.) The RPAR review will determine whether pesticide registrations of arsenical wood treatments should be modified or canceled.

AWPI commented that application of EPA's hazardous waste regulations to arsenical preservative-treated wood on November 19, 1980, would have unintended consequences. For example, construction companies, utility companies, and other buyers of treated wood could become generators of hazardous waste. AWPI supported its request that the Agency await the completion of the RPAR review by pointing out that the RPAR review would "examine all the environmental effects of the use of treated wood, including ground and marine installation of arsenical-treated wood, such as utility poles and pilings." AWPI contended that the RPAR review would reveal that ground-contact uses of arsenical-treated wood would present no environmental hazard and, consequently, that disposal of arsenical-treated wood by land burial presents no hazard.

III. Amendments to 40 CFR 261.4 With Respect to Arsenical-Treated Wood and Wood Products

The Agency does not believe that implementation of RCRA regulations that affect toxic chemicals that are undergoing review for possible regulation by a program administered by EPA other than the Office of Solid Waste necessarily should await the conclusion of the other program's review. In particular, the Agency believes that substantial differences in the statutory mandates of RCRA and of FIFRA militate against deferring RCRA regulation until the completion of RPAR reviews. RPAR reviews do not include analyses of waste streams and, thus, do not relate directly to concerns about hazardous waste. For example, information relating to the risks associated with the use of creosote- and pentachlorophenol-based wood preservatives would have little direct relevance to the hazards of disposal of wastewater treatment sludges from wood preserving processes that use creosote and/or pentachlorophenol. These wastes are listed in 40 CFR

281.32. In a separate notice, the Agency in fact has announced that it will not wait until the completion of the RPAR review of wood preservatives before proceeding with regulation of these wastes under RCRA. 45 FR 74885, 74888-89 (November 12, 1980). The Agency recognizes, however, that in unusual instances it may be appropriate to defer action under RCRA while RPAR reviews are generating information.

The Agency agrees with AWPI that the RPAR review of wood preservatives could provide meaningful information with respect to the risks presented by disposal of arsenical-treated wood and that it is appropriate for the Agency to defer temporarily the full impact of characterizing arsenical-treated wood as a hazardous waste until the pending RPAR review has progressed further. As AWPI has pointed out, ground-contact uses of arsenical-treated wood present risks similar to the risks associated with land burial of discarded arsenical-treated wood. Therefore, the RPAR review, which will analyze to some extent the risks associated with ground-contact uses of arsenical-treated wood, is likely to produce information directly relevant to the risk associated with disposal of arsenical-treated wood by land burial. In addition, the RPAR review may provide guidance with respect to waste management procedures which might be specifically appropriate to disposal of arsenical-treated wood.

Although the Agency believes it appropriate to await further progress of the RPAR review of wood preservatives before making Subtitle C requirements completely applicable to disposal of arsenical-treated wood, the Agency believes that Subtitle C requirements should apply immediately to arsenical-containing wood wastes such as wastes generated by sawmills or by facilities at which arsenical preservatives are applied to wood. These arsenical-treated wood wastes are likely to be generated and managed in larger, more concentrated quantities than wastes generated by ultimate users of arsenical-treated wood. Moreover, these generators' wastes might be in a form—such as sawdust—which presents risks dissimilar to those which the RPAR review will analyze. In addition, disposal of freshly-treated wood by sawmills or processors is likely to present greater hazards than wood which has been treated years prior to use and disposal. For these reasons, today's action provides a temporary exclusion from Subtitle C only for arsenical-treated wood wastes generated by persons who utilize such

treated wood or wood products for the woods' intended end use.

For the reasons set forth above, the Agency has decided to defer, for an estimated three to six-month period, applying RCRA Subtitle C requirements to discarded arsenical-treated wood or wood products following these materials' intended end use. It should be noted, however, that the decision to await further progress of the RPAR review does not signify that discarded arsenical-treated wood and wood products will be excluded permanently from all Subtitle C requirements if the Agency's Office of Pesticide Programs determines that certain ground uses of arsenical wood preservatives do not present unreasonable risks. Such a determination under FIFRA does not necessarily mean that the pesticide is not hazardous; it may mean that the economic benefits of a pesticide are great enough that the risk should be tolerated. This conclusion—if it is reached by the Agency's Office of Pesticide Programs—would not necessarily indicate that the disposal of arsenical-treated wood at the expiration of its useful life should not be subject to safeguards imposed under RCRA.

IV. Interim Final Promulgation

This temporary exclusion from Subtitle C requirements is being promulgated in interim final form. Thus, discarded arsenical-treated wood or wood products following these materials' intended end use is no longer subject to Subtitle C requirements on the basis of the arsenical treatments. This amendment is final for purposes of the 90-day petition deadline under Section 7006 of RCRA. The Agency, however, is soliciting comments on the amendment.

The Agency is making this amendment effective immediately because public comment has been submitted and because delay in promulgating the temporary exclusion could cause significant harm to the regulated community. Since it was public comment which prompted the Agency to promulgate this amendment, the policy underlying solicitation of comments prior to the effectiveness of regulations has been substantially satisfied. The purpose of the temporary exclusion is to defer imposing the full Subtitle C requirements for only a few months to await further development of pertinent information. During this period, the most likely sources of possible hazard—entities such as sawmills—will be subject to Subtitle C. Thus, the Agency believes that there will be sufficient protection of public health. Accordingly, good cause exists

for adopting this regulation in interim final form (see 5 U.S.C. § 553(b)(B)).

V. Solicitation of Public Comments

The Agency invites further public comments with respect to any aspect to today's action. In particular, the Agency would welcome comments relevant to the following issues:

1. What percentage of these wastes fail the test for the characteristic of EP toxicity? Do any particular types of arsenical-treated wood products fail more than others? What are the results of particular EP toxicity tests for arsenical-treated wood products? (These data should be currently available, in light of generators' obligations under 40 CFR § 262.11 to determine whether their waste is hazardous.)¹

2. What are the usual disposal practices for these wastes? What percentage of this material is reused, what are the types of reuses, and what percentage of reuses constitute direct land application of the material?

3. How many generators which are not subject to the small generator exclusion (40 CFR 261.5) would become generators of hazardous waste but for the promulgation of today's exclusion? What is the volume of waste that they generate?

4. What modifications, if any, in the waste management standards established in 40 CFR Part 264 and 40 CFR Part 265 should be made if the Agency were to conclude that the disposal of arsenical-treated wood by all generators should be subject to regulation under Subtitle C?

Dated: November 19, 1980.

Douglas M. Costle,
Administrator.

Title 40 CFR Part 261 amended as follows:

1. In § 261.4, Exclusions, add the following paragraph (b)(8):

§ 261.4 [Amended]

(b) * * *

(8) Solid waste which consists of discarded wood or wood products which fails the test for the characteristic of EP toxicity and which is not a hazardous waste for any other reason if the waste is generated by persons who utilize the arsenical-treated wood and

¹Today's action, of course, does not excuse generators of these wastes from their past obligation to determine if their wastes are hazardous and, in the case of large quantity generators, to have notified the Agency as of August 18, 1980.