§ 81.27 [Amended]
5. In § 81.27 Conditions of provisional listing by removing the entries for “D&C Red No. 8” and “D&C Red No. 9” in paragraph (d).

Frank E. Young,
Commissioner of Food and Drugs.

Hazardous material, Waste treatment and disposal, Recycling.

J.W. McGraw,
Acting Assistant Administrator for Solid Waste and Emergency Response.

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

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for Part 261 continues to read as follows:


2. Section 261.33 is amended by revising the introductory paragraph to read as follows:

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

The following materials or items are hazardous wastes if and when they are discarded or intended to be discarded as described in § 261.2(a)(2)(ii), when they are mixed with waste oil or used oil or other material and applied to the land for dust suppression or road treatment, when they are otherwise applied to the land in lieu of their original intended use or when they are contained in products that are applied to the land in lieu of their original intended use, or when, in lieu of their original intended use, they are produced for use as (or as a component of) a fuel, distributed for use as a fuel, or burned as a fuel.

PART 266—STANDARDS FOR THE MANAGEMENT OF SPECIFIC WASTES AND SPECIFIC TYPES OF WASTE MANAGEMENT FACILITIES

3. The authority citation for Part 266 continues to read as follows:

Authority: Sec. 1000, 2002(a), 3008, and 3014 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended [42 U.S.C. 6905, 6912(a), 6925, and 6934].

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Subpart C—Recyclable Materials Used in a Manner Constituting Disposal

4. Section 266.20 is amended by revising paragraphs (a)(2) and by removing paragraph (a)(3) as follows:

§ 266.20 Applicability.
(a) * * *
(2) after mixing or combination with any other substance(s). These materials will be referred to throughout this subpart as "materials used in a manner that constitutes disposal."

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DEPARTMENT OF THE INTERIOR
Office of Hearings and Appeals
43 CFR Part 4

Special Rules Applicable to Public Land Hearings and Appeals

AGENCY: Office of Hearings and Appeals, Interior.

ACTION: Final rule.

SUMMARY: The Office of Hearings and Appeals (OHA) in the Department of the Interior (DOI) is revising its rules at 43 CFR Part 4, Subpart E, by adding a provision to establish a 60-day limit on the filing of requests for reconsideration of decisions in public land appeals and to make clear that action on such a request does not affect the effectiveness of finality of the decision of which reconsideration is sought.


SUPPLEMENTARY INFORMATION:

I. Discussion of Rule

OHA published its proposed regulation concerning the reconsideration and finality of decisions of the Interior Board of Land Appeals (IBLA) on pages 36414–15 of the Federal Register of October 10, 1986, indicating that comments would be accepted through November 10, 1986. Five letters containing comments from the public were received.

Prior to the effective date of this rule, reconsideration of IBLA’s decisions has been governed by 43 CFR 4.21(c). This regulation has presented two problems. First, it sets no definite time limitation on the filing of petitions for reconsideration; a petition had only to be “filed promptly.” Because of the vagueness of this standard, IBLA has taken time to evaluate the merits of petitions that could have been summarily denied as untimely if a definite time limitation had been in effect.

The second problem presented by 43 CFR 4.21(c) concerns whether a decision issued by the Board constitutes final agency action, so that the filing and disposition of a request for reconsideration does not affect the finality of the decision for which reconsideration is sought. This is particularly important in actions for which Congress has enacted a statute limiting the time in which a suit for judicial review may be filed, such as 30 U.S.C. 226–2 (1982), which provides: “No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter.” A court is the ultimate arbiter of its jurisdiction, but it is the responsibility of the agency to assist the court by indicating when its action is final and when it is not. Although 43 CFR 4.21(c) provides that IBLA decisions are final and that the “filing and pendency of a request for reconsideration shall not operate to stay the effectiveness of the decision,” Federal courts have differed in their interpretations of this language.

One court interpreted the quoted language as intended by the Department: “The clear and imperative language of the regulation states that an IBLA decision is final for the purpose of beginning the . . . appeal period for judicial review unless a stay has been ordered by the Director or the Appeals Board.” Geosearch, Inc. v. Andrus, 494 F. Supp. 978, 979 (D. Wyo. 1980). This view was adopted in Geosearch, Inc. v. Hodel, 801 F.2d 1250 (10th Cir. 1986), a case which involved the same plaintiff but a different oil and gas lease application. Nevertheless, a contrary view was set forth in Lowey v. Andrus, No. 79-5314 (D.D.C. July 28, 1980).

Accordingly, the new rule makes it clear that the date of issuance of the decision of which reconsideration is sought is the effective date of final agency action, with the result that neither the filing of a request for reconsideration nor its denial will toll the time during which a party may seek judicial review of an IBLA decision.

II. Discussion of Comments

The proposed rule would have required petitions to be filed within 30 days after the date of issuance of an IBLA decision. Several comments have convinced us that this period is too short, especially in Alaska, where a decision might not be delivered until 10 days after issuance. One comment suggested that the 30-day period run from the date of receipt of the decision rather than the date of issuance. Other comments suggested extending the period to 60 or 90 days. The final rule provides that a petition for reconsideration shall be filed within 60 days after the date of a decision.

In response to another comment, we have added a provision that a petition for reconsideration may include a request that the Board stay the effectiveness of the decision for which reconsideration is sought.

This provision complements the penultimate sentence of the rule which makes clear that there is no stay unless so ordered by the Board.

One comment notes that the proposed rule retained the provision of 43 CFR 4.21(c) that limits reconsideration to "extraordinary circumstances where . . . sufficient reason appears." The comment recommends deletion of the phrase "extraordinary circumstances" and suggests that sufficient reason should be enough to justify reconsideration even if the circumstances are all quite common. Nevertheless, we have retained this provision because the Board does not intend to enlarge the scope of its reconsideration practice to make it a routine feature of adjudication. This provision reinforces the Board’s expectation that parties will make complete submissions in a timely manner during the appeal, not afterward on reconsideration. This expectation is justified because almost all those who petition for reconsideration have already had two full opportunities to present their cases to the Department: once before the initial decisionmaker and again before the Board. In general, the Board does not give favorable consideration to a petition for reconsideration which merely restates arguments made previously or which contains new material with no explanation for the petitioner’s failure to submit such material while the appeal was pending. Because parties recognize their obligations in this regard, relatively few petitions for reconsideration are ever filed. Even so, the Board rarely finds it necessary to grant them, and even more rarely reverses itself.

One comment suggests that the final regulation provide for responsive briefing to a petition for reconsideration. Because the Board rarely grants petitions for reconsideration, we see no reason why adverse parties should