8" and "D&C Red No. 9" in paragraph (b).

§ 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).

Dated: May 31, 1987.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 87-12798 Filed 6-4-87; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 261 and 266

[SW FRL-3213-6]

Hazardous Waste Management System; Definition of Solid Waste; Technical Corrections

AGENCY: Environmental Protection Agency.

ACTION: Technical corrections to definition of solid waste rulemaking.

SUMMARY: On January 4, 1985, EPA promulgated final rules defining the statutory term "solid waste" and adopting regulations for hazardous wastes that are recycled. EPA has since identified two provisions that require correction or clarification. This notice makes those changes.

EFFECTIVE DATE: June 5, 1987.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline, toll free, at (800) 424-9436 or (202) 382-3000. For technical information contact Michael Petruska, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC. 20460, (202) 382-4761.

SUPPLEMENTARY INFORMATION:

I. Technical Corrections to Rule

1. On January 4, 1985, as part of the final rule defining "solid waste", EPA amended § 261.33 to state that commercial chemical products are solid wastes when they are "discarded" as defined in § 261.2(a)(2)(i) (*i.e.* by being abandoned), or when recycled by burning, use in fuel production, or placement on the land when this is not the material's normal manner of use. See 50 FR at 665. This provision correctly reflected the Agency's intent. The provision was amended in the course of codifying certain of the 1984 RCRA amendments, however, and this amendment (51 FR at 28744, July 15, 1985) inadvertently changed the meaning of the provision to say that these materials are wastes when recycled in any manner (because, under the July 15 amendment, the term "discarded" was no longer limited to its meaning of § 261.2(a)(2)(i)). EPA did not intend this change, 50 FR at 618, nor did the Congress (see, e.g. RCRA section 3004(q)(1), final sentence). Accordingly, we are correcting the rule by restoring the regulatory language that was inadvertently deleted from the January 4, 1985 rule.

2. Subpart C of Part 266 applies to hazardous wastes that are recycled by being placed on or applied to the land, a practice termed 'used in a manner constituting disposal.' The rules apply when hazardous wastes are applied directly to the land, and when hazardous wastes are first mixed or otherwise combined with any other substance (or substances) before being applied to the land. See § 266.20(a). The rules further indicate that certain waste-derived products that are placed on the land are not presently subject to regulation, namely those that are produced for the general public's use and that undergo a chemical reaction in the course of production so that the hazardous waste component is inseparable by physical means. See § 266.20(b). (Waste-derived fertilizers produced for the general public's use also are exempt. *Id.*)

These rules contain an unintended redundancy. Language in § 266.20(b), exempting certain waste-derived products from regulation, is also cited in § 266.20(a) which states the overall applicability of the section, and so applies not only to waste-derived products but also to the hazardous wastes themselves before being incorporated into the products. We are correcting the redundancy by removing the langauge exempting products from § 266.20(a), so that § 266.20(a) (as intended) sets out the jurisdictional applicability of Subpart C of Part 266, and § 266.20(b) sets forth exemptions from regulation (again, as intended). This change will not only remove redundant regulatory language but indicate more clearly that hazardous wastes are *always* subject to regulation prior to being used in a manner that constitutes disposal (*i.e.*, in the transportation and storage phases of management, even if a waste-derived products' actual application is presently exempt.) The Agency, in the preamble to the final rule, stated explicitly that such wastes are regulated before being incorporated into waste-derived products. See 50 FR 629/1 (Jan. 4, 1985).

II. Regulatory Impact

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirements of a Regulatory Impact Analysis. Since this notice makes technical corrections and does not change the previously approved final rule, this rule is not major and no Regulatory Impact Analysis is required.

List of Subjects in 40 CFR Parts 261 and 266

Hazardous material, Waste treatment and disposal, Recycling.

Dated: May 29, 1987.

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:

Authority: Sections 1006, 2002(a), 3001, and 3002 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), 6921, and 6922].

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)(i), 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. 1006, 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. 6095, 6912(a), 6925, and 6934].

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 conmbination with any other substance(s). These materials will be referred to throughout this subpart as "materials used in a manner that constitutes disposal."

* * * * *

[FR Doc. 87-12827 Filed 6-4-87; 8:45am]
BILLING CODE 6560-50-M

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.

EFFECTIVE DATE: July 6, 1987.

FOR FURTHER INFORMATION CONTACT: James R. Kleiler, Attorney-Adviser, Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203; Telephone: (703) 235-3750.

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 was 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. 79-3314 (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