

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460**

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Joe J. Mayhew, Assistant Vice President
Environmental & Policy Analysis
Regulatory Affairs
1300 Wilson Blvd.
Arlington, VA 22209

Dear Mr. Mayhew:

Thank you for your letter of July 29, 1997 requesting clarification of several paperwork provisions in the Phase IV Land Disposal Restrictions Rule published on May 12, 1997 (62 FR 25998). After carefully reviewing your comments, we have decided to alter the language to clarify and correct some of those provisions. Until the time when the changes are placed in the CFR, this letter will serve to explain EPA policy on these paperwork matters. The attachment describes the intended changes for each provision, in the order presented in your letter.

I hope this response to your letter resolves your concerns about the new language on paperwork contained in the Phase IV rule. If you have further questions, please contact Sue Slotnick (703) 308 - 8462 or Rhonda Minnick (703) 308 - 8771 on my staff.

Sincerely,

Elizabeth A. Cotsworth, Acting Director
Office of Solid Waste

Enclosure

**Attachment to letter to Mr. Joe Mayhew, Chemical Manufacturers
Association**

1. Clarification of the Generator Paperwork Requirements Table at 268.7(a)

Your letter raises four questions about the language in the table, as discussed at the bullets below. For reference I am including the language as it currently reads (it is the third item required on the LDR notification document that generators supply to

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treatment or storage facilities):

The waste is subject to the LDRs. The constituents of concern for F001-F005, and F039, and underlying hazardous constituents (for wastes that are not managed in a Clean Water Act (CWA) or CWA- equivalent facility), unless the waste will be treated and monitored for all constituents. If all constituents will be treated and monitored, there is no need to put them all on the LDR notice. (The italics are added.)

o Notification of Unless all Constituents Are Monitored and Treated

Your letter asked whether EPA intended to change language in 40 CFR 268.7 (a) to require that any generator of specified wastes (F001- F005, F039, or characteristic wastes) include in its notification a list of the waste's constituents unless the waste will be treated and monitored for all constituents (see italics in the reference paragraph). Previously, we had only used the word monitored. We agree that the word "treated" should be deleted.

o Use of the term "constituents of concern"

Your letter seeks clarification of the term in the reference paragraph. The specific constituents that EPA requires the notification to include are the constituents contained in the treatment standard for those specified wastes, which in the case of characteristic wastes, are any underlying hazardous constituents in the UTS list at 268.48 that are reasonably expected to be present. EPA agrees that the term could be more specific, e.g. "regulated constituents," and we intend to change the term in the table.

o Use of the term "underlying hazardous constituents"

We agree with your letter's suggestion that the phrase should be "applicable underlying hazardous constituents" or "underlying hazardous constituents in characteristic waste." We plan to make this change.

o Deletion of the term in parentheses

Since underlying hazardous constituents must be identified in wastewaters being decharacterized and treated in systems that are CWA-regulated, CWA-equivalent, or SDWA-regulated, EPA intends to remove the parenthetical phrase.

2. Notification to Receiving Facilities for No-Longer-Hazardous Debris

As you note in your letter, EPA had earlier decided not, to require generator/treaters to notify receiving facilities when shipping debris that had been treated to be nonhazardous. You said it appeared that EPA had changed that policy and was now requiring generators to send a notification, though not a certification, to the receiving facility.

In fact, the Phase IV final rule dated May 12, 1997 reflects a continuation of the original policy. See Part 268.7(b)(4)(ii) in the Phase IV rule, which states "Debris excluded from the definition of hazardous waste...is subject to the notification and certification requirements of paragraph (d) of this section rather than the certification requirements of this paragraph." That paragraph, section (268.7(d)), states that a notification should be sent to EPA and a certification must be kept in the generator/treater's files. There is no mention of the receiving facility, nor does EPA intend for there to be any. However, I believe we could be somewhat clearer by repeating this policy at 268.7(b)(3). EPA plans to make that addition at a later time.

3. Good Faith Analytical Certification Requirements

Your letter pointed out that EPA may have inadvertently made the good faith analytical certification at 268.7(b)(4)(iii) a substitute for the general certification by dropping the word "also" from that section. We agree and plan to reinstate that language, which might read: "For wastes with organic constituents having treatment standards expressed as concentration levels, if compliance with the treatment standards is based in whole or in part on the analytical detection limit alternative specified in 268.40(d), the certification...must also [italics added] state the following: [actual wording of certification follows]."

CHEMICAL MANUFACTURERS ASSOCIATION

JOE J. MAYHEW
ASSISTANT VICE PRESIDENT
ENVIRONMENTAL & POLICY ANALYSIS
REGULATORY AFFAIRS

July 29, 1997

Ms. Elizabeth Cotsworth
Acting Director
Office of Solid Waste
U.S. Environmental Protection Agency
401 M. Street, S.W.
Washington, DC 20460

Re: Concerns With The Final Phase IV LDR Rule Language

Dear Ms. Cotsworth:

We are writing to ask that the Agency clarify certain ambiguous provisions of the Phase IV rule. In that rule, EPA adopted revisions that were designed to reduce the paperwork burden associated with the land disposal restriction ("LDR") program, without imposing any new substantive requirements. CMA fully supports EPA's efforts to streamline the paperwork requirements. We believe that it is important for EPA to review these provisions because they may significantly reduce the benefits of the rule.

CMA has identified three principal issues regarding the notification and certification provisions of the Phase IV rule.

1. EPA is apparently requiring the generator to use a one-time notification, unless they treat and monitor all constituents, even those that are neither regulated hazardous constituents nor underlying hazardous constituents.
2. Contrary to prior Agency policy, treatment facilities may now be required to provide notification to Subtitle D facilities, for no-longer-hazardous debris.
3. The certification statement for the good faith analytical alternative now appears to be a substitute for the general certification statement, even when the facility is relying on the good faith analytical process for only part of the LDR requirements.

We have provided an attachment to this letter that describes these issues in more detail.

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INNOVATION, TECHNOLOGY AND RESPONSIBLE CARE AT WORK

1300 WILSON BLVD., ARLINGTON, VA 22209 o Telephone 703-741-5230 o FAX 703-741-6099

CMA urgently requests your attention to these matters. We hope that the Agency can respond before August 10, 1997, the deadline for filing a petition for review of the Phase IV rule so that we can avoid having to file a protective appeal. We would be glad to meet with you and your staff at your earliest convenience to discuss these issues in greater detail. Please call Jeff Gunnulfsen, of my staff, at 1-703-741-5239, or Ron Shipley, of the Office of General Counsel, at 1-703-741-5162.

Sincerely,

Joe J. Mayhew
Assistant Vice President
Environmental & Policy Analysis
Regulatory Affairs

Attachment

cc: Ms. Rhonda Minnick, EPA
Mr. Nick Vizzone, EPA
Ms. Sue Slotnick, EPA
Mr. Steven Silverman, EPA

bcc: Joshua Samoff, Morgan, Lewis & Bockius LLP

CMA's CONCERNS WITH THE PHASE IV LDR RULE

1. **Notification of Constituents Unless All Constituents Are Monitored and Treated**

The Phase IV rule amended the generator notification provisions in 40 C.F.R. §268.7(a) & (b) by removing the notification requirement for each waste shipment. Instead, the new rule requires a one-time notification to the receiving facility, absent changes to the waste. The Agency then rewrote most of the "language specifying what must be included on LDR notifications to include reductions in paperwork burden and to make it easier for the regulated community to understand" and simplified the rule by including a Generator Paperwork Requirements. Table. See 62 F.R. 26,004/1 and 40

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C.F.R. §§268.7(a)(2)&(a)(3) Generator Paperwork Requirements Table, 268.7(b)(3) Table 2, and 268.9(d)(1)(ii).

Our question involves the third item in that Table relating to the constituent information that must be included in the notification. Under prior rules, a generator had to identify waste constituents only if the treatment facility was not monitoring all regulated hazardous constituents in a particular waste. In this way, the treatment facility would know that it had to check for a particular constituent prior to land disposal. If the treatment facility was monitoring for all regulated constituents, then the rule did not require the generator to identify constituents since, the treatment facility would automatically be checking for them.

The new rule has modified this provision by now requiring the generator to list the constituents of concern for F001-F005 or F039 and underlying hazardous constituents, "unless the waste will be treated and monitored for all constituents." The language regarding treatment is not explained in the preamble and appears to be unnecessary for the generator's notification to the treatment facility. It is also a substantive change to the notification requirements that could eliminate the paperwork reduction gains that the Agency sought to achieve through the Phase IV rule, since generators will now have to include additional pieces of paper to identify the regulated constituents in their wastes, unless they know that they are sending their waste to a facility that treats all constituents. Few facilities treat all constituents, e.g., both metals and organics, but all monitor for compliance with the LDR treatment standards prior to land disposal. That was the reason behind the prior policy. Preliminary estimates suggest that hundreds of thousands of additional pieces of paper could be required as a result of the new regulatory language. Collecting and providing the additional information will pose a particular burden for small businesses, which frequently aggregate their waste streams before sending them off-site for treatment.

Since the Agency indicated that they were merely simplifying the generator notification requirements and not imposing substantive changes (see 62 F.R. 26,005/2) we are asking that EPA clarify whether they intentionally included the requirement of treatment or if it was an oversight that will be corrected by a technical correction? The preamble to the proposed Phase IV rule did not discuss the pertinent changes to the regulatory language of §268.7(a)&(b). See 60 Fed. Reg. 43,654, 43,677/3, 43,678/1 (Aug. 22,1995). And, elsewhere in the preamble the Agency explained that constituents did not need to be listed in the notification "if all underlying hazardous constituents reasonably expected to be present in a characteristic waste will be monitored, then the generator need not list any of them on the LDR notification." 62 Fed. Reg. at 26,005/2.

In addition, we are concerned about the ambiguity regarding different phrases in this

provision. This includes the terms:

- o "constituents of concern" - a term that the Phase IV rule does not define and that its preamble does not discuss, but which CMA assumes refers to the regulated hazardous constituents identified for each such waste in 40 C.F.R. §268.40
- o the use of the phrase "underlying hazardous constituents" in a way that is unattached to either the word "applicable" or the phrase "characteristic hazardous waste."

CMA thus seeks clarification that EPA did not intend to impose these substantive changes when promulgating the Phase IV rule. Because the language of the rule may be adopted by states, moreover, CMA requests that EPA issue a technical correction that removes the words "treat and" to avoid any ambiguity on this point in three locations: 40 C.F.R. §§268.7(a)(2)&(a)(3) Generator Paperwork Requirements Table, 268.7(b)(3) Table 2, and 268.9(d)(1)(ii). In addition, CMA seeks clarification that by adopting the undefined term "constituents of concern," EPA intended to require identification only of the regulated constituents, in particular F001-F005 and F039 wastes. Finally, CMA suggests that EPA insert the word "applicable" prior to the phrase "underlying hazardous constituents" and delete the parentheses in the sentence.

2. Notification To Receiving Facilities For No-Longer-Hazardous Debris

Prior to the Phase IV rules, CMA's members were not required to provide notifications to receiving facilities regarding no-longer-hazardous debris, but were required only to provide notifications and certifications to EPA. See 40 C.F.R. §268.7(d). This alternative notification and certification regime was consciously designed to avoid entangling Subtitle D facilities in the LDR paperwork scheme. Subtitle D facilities were not prepared to assume the information management obligations that the LDR regulations would otherwise impose.

In the Phase IV rule, EPA modified this exemption. Treatment facilities were no longer required to provide one-time certifications to disposal facilities for debris that is no longer considered hazardous pursuant to 40 C.F.R. §261.3(f). See 40 C.F.R. §268.7(b)(4)(ii). In contrast, the Phase IV rule does not exempt treatment facilities from the requirement to provide notification to disposal facilities for such debris. See 40 C.F.R. §268.7(b)(3).

CMA believes that the failure to exempt treatment facilities from the notifications in 40 C.F.R. §268.7(b)(3) similar to the exemption from notification is an oversight. In the proposed Phase IV rule, both 40 C.F.R. §268.7(b)(3) and §268.7(b)(4) included language

that subjected such debris only to the notification and treatment requirements of 40 C.F.R. §268.7(d). EPA removed the language from the introduction of both sections, but apparently included the language in a new subsection only in §268.7(b)(4). See 60 Fed. Reg. at 43,693/1&3. CMA thus urges EPA to clarify that the relevant language from proposed 40 C.F.R. §268.7(b)(3) was accidentally omitted from the final Phase IV rule and thus that notification of disposal facilities is not required for such debris.

3. Good Faith Analytical Certification Requirements

The final Phase IV rule compressed the existing certification requirements formerly in 40 C.F.R. §268.7(b)(5)(i) & (ii) into a single, general certification and amended the certification for good faith analytical requirements formerly in §268.7(b)(5)(iii). See 40 C.F.R. §268.7(b)(4)(i) & (iii). In doing so, however, EPA deleted the language making the good faith analytical certification an additional certification to the general certification for treatment facilities. See 40 C.F.R. §268.7(b)(4)(iii).

CMA does not believe that EPA intended to make the good faith analytical certification a substitute for the general certification. Failure to require the general certification would leave a gap in certification for compliance with other applicable LDR treatment concentration limits, when the good faith analytical provisions are relied upon only in part to achieve compliance. In the proposed Phase IV rule, EPA reiterated that, for good faith analyticals, "the certification also must state the following: * * * " 60 Fed. Reg. at 43,693/2 (proposed 40 C.F.R. §268.7(b)(4)(iii)) (emphasis added). CMA thus urges EPA to clarify that the "also" language was inadvertently omitted from the final Phase IV rule. This will avoid requiring regulated entities to guess which certification statement(s) must be used.