

## I. Authority

These regulations are proposed under the authority of sections 2002(a), 3001, 3002, 3004 and 3006 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6912(a), 6921, 6922, 6924 and 6926.

## II. Background

### A. Overview of the Hazardous Waste Identification Program

Section 1004(5) of the Resource Conservation and Recovery Act (RCRA) as amended by the Hazardous and Solid Waste Amendments (HSWA) of 1984, defines "hazardous waste" as "a solid waste, or combination of solid waste, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause, or significantly contribute to an increase in the mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."

Section 3001 of RCRA requires EPA to identify those wastes that should be classified as "hazardous." The Agency's hazardous waste identification rules designate wastes as hazardous in one of two ways. First, the Agency has established four hazardous waste characteristics which identify properties or attributes of wastes which would pose a potential hazard if the waste is improperly managed. See 40 CFR 261.21-261.24. Any generator of a solid waste is responsible for determining whether a solid waste exhibits any of these characteristics. See 40 CFR 262.11. Any solid waste that exhibits any of the characteristics remains hazardous until it no longer exhibits the characteristics. See 40 CFR 261.4(d)(1).

The other mechanism EPA uses to designate wastes as hazardous is "listing." The Agency has reviewed data on specific waste streams generated from a number of industrial processes and has determined that these wastes would pose hazards if mismanaged for one or more reasons, including the presence of significant levels of hazardous constituents listed in appendix VIII to 40 CFR part 261, the manifestation of one or more of the hazardous waste characteristics, or the potential to impose detrimental effects on the environment. (See generally 40 CFR 261.11). As discussed in detail in the preambles and in associated dockets

accompanying the listings, EPA has generally determined that these wastes contain toxic constituents at concentrations which pose risks which are unacceptable for human or environmental exposure and that these constituents are mobile and persistent to the degree that they can reach environmental or human receptors.

On May 19, 1980, as part of the final and interim final regulations implementing section 3001 of RCRA, EPA published two lists of hazardous wastes: One composed of wastes generated from non-specific sources (e.g., spent solvents) and one composed of wastes generated from specific sources (e.g., distillation bottoms from the production of benzyl chloride). The Agency also published two lists of discarded commercial chemical products, off-specification species, container residues, and spill residues thereof which are hazardous wastes under specific circumstances. These four lists have been amended several times, and are currently published in 40 CFR 261.31, 261.32, 261.33(e) and (f), respectively.

### B. The Mixture and Derived-From Rules and the Contained-In Policy

#### 1. Mixture and Derived-From Rules

##### a. Scope and Purpose of the Rules

In 1980 EPA promulgated its first comprehensive regulatory program for the management of hazardous waste under RCRA. 45 FR 33066 (May 19, 1980). As part of that rulemaking EPA promulgated several rules to identify hazardous wastes. Two of these rules clarify the scope of the hazardous waste listings. Under the mixture rule, a solid waste is a hazardous waste if it is mixed with one or more listed hazardous wastes. 40 CFR 261.3(a)(2)(iv). Under the derived-from rule a solid waste generated from the treatment, storage or disposal of a listed hazardous waste is also a hazardous waste. 40 CFR 261.3(c)(2)(i).

EPA promulgated the mixture and derived-from rules to close potentially major loopholes in the subtitle C management system. Without a "mixture" rule, generators of hazardous wastes could potentially evade regulatory requirements by mixing listed hazardous wastes with other hazardous wastes or non-hazardous solid wastes to create a "new" waste that arguably no longer met the listing description, but continued to pose a serious hazard. Such a waste also might not exhibit any of the hazardous waste characteristics. Similarly, without a "derived-from" rule, hazardous waste generators and owners and operators of

hazardous waste treatment, storage, and disposal facilities (TSDFs) could potentially evade regulation by minimally processing or managing a hazardous waste and claiming that resulting residue was no longer the listed waste, despite the continued hazards that could be posed by the residue even though it does not exhibit a characteristic. (See 57 FR 7628).

It is for these reasons that the Agency continues to believe that the mixture and derived-from rules are extremely important in regulating hazardous wastes and reducing risk to human health and the environment. However, EPA acknowledges that the mixture and derived-from rules apply regardless of the concentrations and mobilities of hazardous constituents in the waste. The purpose of this rulemaking is to reduce any overregulation of low-risk wastes captured by the mixture and derived-from rule.

#### b. Subsequent History

Numerous industries that generate hazardous wastes challenged the 1980 mixture and derived-from rules in *Shell Oil v. EPA*, 950 F. 2d 741 (D.C. Cir. 1991). In December 1991 the D.C. circuit vacated the rules because they had been promulgated without adequate notice and opportunity to comment. The court, however, suggested that EPA might want to consider reinstating the rules pending full notice and comment in order to ensure continued protection of human health and the environment.

In response to this decision, EPA promulgated an emergency rule reinstating the mixture and derived-from rules as interim final rules without providing notice and opportunity to comment. 57 FR 7628 (Mar. 3, 1992). EPA also promulgated a "sunset provision" which provided that the mixture and derived-from rules would remain in effect only until April 28, 1993. Shortly after, EPA published the proposal containing several options for revising the mixture and derived-from rules. See 57 FR 21450 (May 20, 1992). This proposal also included options for exempting media contaminated with listed hazardous wastes that are regulated under the "contained in" policy.

The May 1992 proposal and the time pressure created by the "sunset provision" generated significant controversy. In response, Congress included in EPA's 1992 appropriations bill several provisions addressing the mixture and derived-from rules. Pub. L. No. 102-389, 106 Stat. 1571. First, Congress nullified the sunset provision by providing that EPA could not promulgate any revisions to the rules