

compromising needed environmental protection.<sup>3</sup>

By proposing a risk-based "floor" to listed wastes, today's proposal should give a very strong incentive to generators of listed hazardous waste to apply pollution prevention to their processes to avoid Subtitle C control. This action should also give incentive for the development of innovative treatment technologies to render wastes less risky.

Today's proposed rule specifies sampling and analysis requirements, public participation, reporting and record keeping requirements. Most of these provisions are alternatives to the safeguard of waste-specific review provided under the delisting program. The exit levels are risk-based concentrations at which a human or wildlife species could be directly or indirectly exposed to the exempted waste, and would be unlikely to suffer adverse health effects. The exposure scenario used to develop these levels assume that the exempted waste will no longer be subject to Subtitle C control, but will be managed as a solid waste in one of a variety of non-hazardous waste management units regulated under Subtitle D.

## 2. Characteristic Wastes

Listed hazardous wastes exempted under today's proposed rule which exhibit any of the characteristics will continue to be regulated as hazardous wastes until the characteristic is removed. In a number of cases, wastes were listed on the basis of containing both toxic hazardous constituents and exhibiting one or more of the hazardous waste characteristics that do not relate to chemical toxicity (e.g., ignitability, corrosivity, or reactivity). If such a waste still exhibits any characteristic after complying with the exemption criteria proposed in today's proposed rule, it must continue to be managed as a characteristically hazardous waste.

## III. Scope of Revisions to the Mixture and Derived-From Rules

The mixture and derived-from rules promulgated in 1980 and reinstated in 1992 require Subtitle C regulation of all mixtures of listed hazardous wastes and solid wastes and all residuals from treatment of hazardous wastes. The rules proposed today, however, allow rapid exemptions for mixtures and

derived-from wastes that present no significant threats to human health and the environment. Those wastes that would remain subject to the mixture and derived-from rules typically will pose risks that warrant regulation under Subtitle C. To the extent that this is not true for a particular mixture or treatment residual, the delisting process remains available (at least at the state level) to exempt wastes with constituents at more site- and waste-specific levels. Consequently, EPA has tentatively determined that further revisions of the mixture and derived-from rules, with the exception of the one minor change to the derived-from rule discussed later in this section, are not warranted in this rulemaking. However, EPA requests comment on this conclusion.

### A. Rationale for Retention of the Mixture and Derived-From Rules

EPA continues to believe that it had ample statutory and regulatory authority to promulgate the original rules and that it also has ample authority to maintain the rules without further revisions. The mixture and derived-from rules, particularly with the revisions proposed today, ensure that hazardous wastes that are mixed with other wastes or treated in some fashion do not escape regulation so long as they are reasonably likely to continue to pose threats to human health and the environment. They thus retain jurisdiction over listed hazardous wastes and clarify that such wastes are not automatically eligible for exit when they are mixed or treated. Although RCRA sets out criteria for the identification of hazardous wastes to enter the subtitle C system, it is silent on the question of how to determine that a waste is eligible to exit the system. EPA's interpretation of the statute is thus entitled to deference so long as it is reasonable and consistent with RCRA's purposes.

EPA believes that its decision to retain jurisdiction over major portions of the universe of waste mixtures and treatment residues is consistent with its authorities under sections 3002–3004 of RCRA to impose requirements on waste handlers until wastes have "cease[d] to pose a hazard to the public". *Shell Oil Corp. v. EPA*, 959 F.2d 741, 754 (D.C. Cir. 1991). See also *Chemical Manufacturers Assoc. v. EPA*, 919 F.2d 158, 162–65 (EPA may regulate the disposal of nonhazardous wastes in a hazardous waste impoundment under section 3004) and *Chemical Waste Management, Inc. v. EPA*, 976 F.2d 2, 8, 13–14 (D.C. Cir. 1992) (EPA may require further treatment of wastes under

section 3004 even though they cease to exhibit a hazardous characteristic).

The mixture and derived-from rules are also valid exercises of EPA's authority to list hazardous wastes under section 3001. That provision gives EPA broad authority to promulgate listing criteria. EPA's 1980 criteria authorize the listing of classes of hazardous wastes when it has reason to believe that wastes in the class are typically or frequently hazardous. See 40 CFR 261.11(b). Such class listings are permissible even if some members of the class do not actually pose hazards. Nothing in the section 1004(5) definition of hazardous waste, in section 3001, or in EPA's listing criteria require EPA to prove that every member of a class poses a hazard. In fact, many waste listings describe "classes" of hazardous wastes because they cover a range of materials that are not identical in composition. The mixture and derived-from rules thus are fully authorized as class "listings" under section 3001.

EPA has also made a reasonable factual determination that these classes of waste warrant regulation under sections 3002–3004 and section 3001. In 1980 EPA determined that the hazardous constituents contained in these wastes are not generally eliminated or rendered nontoxic simply because a waste is mixed with other wastes or managed in some fashion. In 1992, when EPA repromulgated the mixture and derived-from rules, it documented numerous instances of mixed and derived-from wastes that continued to pose hazards. See 57 FR 7629 (March 3, 1992). Today, EPA is proposing that members of this class of wastes that pose low risks will be eligible for an expedited, self-implementing exemption from Subtitle C regulation. Accordingly, EPA has an even better basis for believing that wastes which remain within the scope of the mixture and derived-from rules pose threats warranting regulation.

Additionally, EPA continues to believe, as it did in 1980, that it would be virtually impossible to try to identify all possible waste mixtures and treated wastes and assess their hazards individually. EPA's rule reasonably retains jurisdiction over both broad classes and places the burden of proof on the regulated community to show that a particular waste has ceased to present a hazard. Today's self-implementing exit proposal will reduce that burden significantly, ensuring that the mixture and derived-from rules represent a reasonable approach to regulating these classes of wastes.

<sup>3</sup> As will be discussed further in this notice, the Agency believes that the delisting process will continue to be valuable for certain types of wastes which are not eligible for an exemption under this proposal. Thus the Agency is not proposing to eliminate or modify the delisting program as a result of this proposal.