

becoming effective, and failure to undertake such prior review would not preclude a subsequent enforcement action should the exemption claim later be determined to be inaccurate or otherwise invalid.

As proposed, the certification required to accompany the notification must attest that the waste in question meets all relevant constituent concentration exit levels and that the information in the notification package is true, accurate, and complete. The Agency is taking comment on whether this certification is sufficient assurance that the claimant has made best efforts to accurately characterize the waste or if additional certification language or additional certifications (e.g., from an analytical laboratory) are necessary.

The notification package would be required to be submitted by certified mail with return receipt requested, or other commercial carrier that provided written confirmation of delivery. No claim would be effective until the claimant received the return notification indicating that the package had been delivered.

Submission of the notification package to the implementing authority, however, is not equivalent to approval or verification of the exemption claim. Submission of a notification package would not preclude or in any way limit the implementing authority's ability to take a subsequent enforcement action should it determine that the initial requirements of exemption were never met or that the conditions for maintaining the exemption are not satisfied.

The Agency is taking comment on whether, instead of the exemption becoming effective upon confirmation of delivery of the notification package, there should be some brief waiting period prior to the exemption becoming effective.

Such a period (e.g., 30 or 60 days) could be used by the implementing authority to review notification packages for completeness or for indicia of concerns that would lead to prioritized enforcement, although the exemption would still become automatic after the period regardless of whether any action was taken by the implementing authority. As an alternative, the period could be designed to provide the implementing authority an opportunity to determine that a claimant should not be able to avail itself of the exemption without some further review and to notify the claimant of its views.

Under either approach, governmental review would be discretionary and the lack of such review would not be an

indication of governmental approval of the exemption claim. To ensure that there would be no confusion on this point, the certification could include a statement of recognition that expiration of the delay period without comment by the overseeing agency is not the equivalent of agency approval that the claim is accurate. The Agency has not chosen to propose a delayed implementation approach because it believes a short time frame, particularly combined with an automatic effective date, would not provide an opportunity for thorough prior review and would, at best, provide only marginal benefits as a screening device for potentially problematic claims. The Agency, however, requests comment on whether such a delay would be beneficial to monitoring claims and if there are procedural or other concerns relating to such a delay.

B. Implementation Conditions

After the exit claim has become effective, the claimant would have to continue to meet certain conditions to maintain the exemption. Failure to satisfy any of the conditions would void the exemption and subject the waste to applicable subtitle C requirements.

Under this proposal, wastes must continue to meet the generic exemption levels established for exit to remain non-hazardous. Separate and distinct from any requirement or condition that might be established under this rulemaking, all generators—including claimants of today's proposed exemption—would have a continuing obligation to identify whether they are generating a hazardous waste and to notify the appropriate governmental official if they are generating a hazardous waste. Section 3010; 40 CFR 261.11. If wastes claimed as exempt under today's proposed rule test above exit levels at any time, that waste and subsequently generated waste would have to be managed as hazardous waste—including compliance with all notification requirements—until testing demonstrated that the waste was below exit levels.⁸

⁸ Compliance with HWIR exemption levels will be measured from the last available test data or from the latest representative samples taken from the waste in question. Testing which shows constituent concentration levels above exemption levels will not affect wastes previously generated under a valid claim of exemption based upon representative samples. Similarly, testing, which shows that a waste which tested above exit levels once again tested below all relevant exit levels will exempt all waste generated on or after the date the samples were taken. Waste which exceeded the exit levels would not be able to requalify for the exemption.

1. Records Maintained on Site

In addition to the information described in the Notification Section above, the Agency is also proposing that the following information concerning the initial testing and retesting be maintained in the files on site at the facility making the exemption claim for at least three years:

- All information required to be submitted to the implementing authority as part of the notification of the claim;
- The dates and times waste samples were obtained, and the dates the samples were analyzed;
- The names and qualifications of the person(s) who obtained the samples;
- A description of the (temporal and) spatial locations of the samples;
- The name and address of the laboratory facility at which analyses of the samples were performed;
- A description of the analytical methods used, including any clean-up and extraction methods;
- All quantitation limits achieved and all other quality control results for the analyses (including method blanks, duplicate analyses, matrix spikes, etc.), laboratory quality assurance data, and a description of any deviations from published analytical methods or from the plan which occurred;
- All laboratory documentation that support the analytical results, unless a contract between the claimant and the laboratory provides for the documentation to be maintained by the laboratory for the period specified in § 261.36(b)(2) and also provides for the availability of the documentation to the claimant upon request;
- If the generator claims a waste is exempt from part 268 requirements pursuant to § 261.36(e), documentation to substantiate such a claim.

The Agency requests comment on the proposed information maintenance requirements and comment on additional information that may be necessary.

In addition, claimants will be required to retain certain information concerning retesting of wastes as described below and set out in the text of proposed 40 CFR 261.36(d)(6)(ii).

2. Testing Conditions

Claimants would continue to periodically test their wastes as a condition of the exemption.⁹ Failure to test and maintain documentation of the

⁹ Wastes generated on a one-time basis would not be subject to this requirement.