

arrangements with receiving facilities to allocate responsibility for satisfaction of the conditions among themselves although such arrangements will not relieve the claimant of liability if the receiving facility manages the waste improperly. It should be noted, however, that facilities receiving contingent management exemption wastes could also become liable for violations of permitting, Subtitle C treatment, storage and disposal standards should they dispose of the nonwastewaters that do not qualify.

Under today's proposal, § 261.37(g), the burden of proof to establish conformance with the exemption criteria is on the claimant in the event of an enforcement action. One alternative for simplifying the claimant's burden of proving compliance with all conditions would be to set out in the rule certain documentation that, while not necessarily required of the claimant, presumptively would be sufficient evidence of satisfaction of the management condition. Of course, EPA could rebut this presumption regarding actual disposal through evidence that the claimant's documentation is deficient or inaccurate. For example, claimants might be able to develop rebuttable evidence of proper off-site disposal by keeping correspondence with the receiving facility, indicating that the waste went to a landfill or monofill, and by keeping a returned manifest which indicates that the waste reached that facility. The Agency is taking comment on whether establishing certain evidentiary standards would provide useful guidance to claimants on how to satisfy the management condition and provide helpful incentive for claimants to maintain proper documentation of their exemption claims.

Comment is also requested on whether any additional conditions or requirements, substantive or procedural, should be imposed on claimants to ensure that the contingent management exemption waste is actually managed in a qualifying unit.

#### *E. Retesting and Recordkeeping Conditions for Contingent Management Exemptions*

Claimants continuing to generate or otherwise manage waste for which they continue to claim a contingent management exemption would be required, under § 261.37(d)(2), to retest the waste with the same frequency and under the same conditions as is being proposed for the base exemptions, § 261.36(d)(2). If a claimant finds that the exempted waste no longer meets the

constituent concentration levels on Appendix XI of 40 CFR part 261 for the contingent management exemption, or that the waste has not been placed in a landfill or monofill, the claimant must comply with all applicable requirements for generators of listed wastes (including disposal of waste at a Subtitle C facility) and the disposal facility would have to comply with all of the requirements for owner/operators of treatment, storage, and disposal facilities under 40 CFR parts 262–270. The generator and disposal facility's obligations would also include renotifying the Agency of hazardous waste management activity using EPA form 8700–12.

Under § 261.37(d)(6), claimants also would be required to maintain on-site, for at least three years after Agency receipt of the notification and certification, all documentation required under this rule including, but not limited to, the sampling and analysis plan and test data and the accompanying notification and certification. These requirements are similar to those proposed for the "base" exemption in § 261.36.

The Agency requests comment on alternative record retention periods for claimants such as 5 years, which corresponds to the applicable statute of limitations period at 28 U.S.C. 2462. An extended record retention period may assist claimants in substantiating their conformance with the contingent management exemption criteria. The documentation must be available for review by the Agency or an authorized State at the time of site inspection. The three-year claimant record retention period will be automatically extended during the course of any unresolved enforcement action regarding the regulated activity.

#### *F. Compliance Monitoring and Enforcement for Contingent Management Exemptions*

Since contingent management exemptions are self-implementing, the Agency needs to rely on its enforcement authorities to ensure that the exemptions are being applied in an appropriate manner and that only those wastes that are truly nonhazardous are relieved from Subtitle C disposal requirements. Compliance monitoring and enforcement of the contingent management program would be carried out under existing authorities and conditions with which the regulated community should already be familiar.

Claimants must comply with all of the previously described conditions of the exemptions to qualify for the exemptions. All persons who manage waste for which an exemption has been

claimed must manage the waste as required under Subtitle C during periods when any of those conditions are not met. Claimants that fail to comply with the applicable conditions of the contingent management exemption risk enforcement action for violations of Subtitle C requirements, including administrative, civil and criminal penalties.

#### *1. Compliance Monitoring*

The Agency is proposing that compliance monitoring of the contingent management exemption occur through EPA and State oversight, primarily through review of notifications and inspections.

The Agency has the authority, under section 3007 of RCRA, to require submission of information and to conduct inspections of facilities which EPA has reason to believe may be generating or managing a hazardous waste. EPA and States may do confirmatory sampling and analysis to determine whether a waste meets the exemption levels. Under this authority, the Agency would be able to inspect a non-Subtitle C facility receiving contingent management exemption waste.

Inspections of off-site laboratories may also be performed.

#### *2. Enforcement*

The contingent management exemption criteria proposed today would create an exit from the Subtitle C system only so long as the requirements and conditions established for the exemption are met. Failure to comply with any of the conditions for the exemption would mean that the wastes would not be exempt from Subtitle C, and the claimant could be subject to immediate enforcement action for violation of Subtitle C requirements.

The Agency has the authority under this regulation and RCRA Section 3007 to require submission of information on the management of exempted wastes in a situation where the Agency suspects the claimant has not satisfactorily determined whether a waste meets the appropriate exemption levels. Alternatively, the Agency may require improved analysis using an administrative or civil action under section 3013. Failure to manage the contingent management exemption waste in accordance with the conditions would void the exemption and the conditionally exempt waste would be subject to full Subtitle C regulation. The receiving facility, therefore, would become a Subtitle C treatment, storage, and/or disposal facility requiring a permit.