

Revision Checklists 167 A-F Summary - Revised

Rule Title: Land Disposal Restrictions Phase IV – Treatment Standards for Metal Wastes and Mineral Processing Wastes; Mineral Processing Secondary Metals and Bevill Exclusion Issues; Treatment Standards for Hazardous Soils; and Exclusion of Recycled Wood Preserving Wastewaters

Checklist Title:

- A. Land Disposal Restrictions Phase IV – Treatment Standards for Metal Wastes and Mineral Processing Wastes
- B. Land Disposal Restrictions Phase IV – Hazardous Soils Treatment Standards and Exclusions
- C. Land Disposal Restrictions Phase IV – Corrections
- D. Mineral Processing Secondary Materials Exclusion
- E. Bevill Exclusion Revisions and Clarification
- F. Exclusion of Recycled Wood Preserving Wastewaters

Reference: 63 FR 28556-28753 and 63 FR 31266

Promulgation Date: May 26, 1998 and June 8, 1998

Effective Date: August 24, 1998 for May 26, 1998 rule, except for the following:

For definition of solid waste provisions at 261.2 and 261.4(a)(16)¹:
November 27, 1998 (non-HSWA).^{2, 3}

For revision of the Bevill exclusion at 261.4(b): November 27, 1998 (non-HSWA).

For exclusion of recycled wood preserving wastewaters at 40 CFR 261.4(a)(9): May 26, 1998 (non-HSWA).

For prohibition on land disposal of wastes from elemental phosphorous processing and on mixed radioactive wastes at 40 CFR 268.34(b):
May 26, 2000.

For land disposal restrictions treatment standards at 40 CFR 268.49
for soil contaminated with previously prohibited wastes: May 26, 1998

June 8, 1998 for June 8, 1998 correction.

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| Cluster: | RCRA Cluster VIII |
| Provision Type : | HSWA/non-HSWA |
| Linkage: | <p>CL 167 A: Revision Checklists 78, 109, 116, 123, 124, 136, 137, 142A-E, 151, 155, 157, 159, 162, 170, 172, and 179.</p> <p>CL 167 B: Revision Checklists 78, 109, 116, 123, 124, 136, 137, 142A-E, 151, 155, 157, 159, 162, 179, 183, and 190.</p> <p>CL 167 C: Revision Checklists 78, 109, 116, 123, 124, 136, 137, 142A-E, 151, 155, 157, 159, 162, 179, and 183.</p> <p>CL 167 D: Revision Checklist 179</p> <p>CL 167 E: Revision Checklists 65, 71, 90, and 179.</p> <p>CL 167 F: Revision Checklists 82, 92, and 120</p> |
| Optional: | Checklists 167 B, 167 D and 167 F are optional; portions of Checklists 167 A and 167 E are optional. |

Summary: This rule addresses four interrelated areas associated with the land disposal restrictions:

- (1) This rule promulgates new land disposal restriction treatment standards for wastes identified as hazardous because they exhibit the toxicity characteristic for metals. The universal treatment standards for 12 metal constituents are also revised.
- (2) This rule establishes a land disposal prohibition and treatment standards for a group of newly identified hazardous wastes/mineral processing wastes that exhibit a characteristic of hazardous waste. This group includes not only those mineral processing wastes exhibiting the toxicity characteristic but also mineral processing wastes exhibiting the characteristics of ignitability (D001), corrosivity (D002) or reactivity (D003).
- (3) This rule includes alternative treatment standards for soil that contains a listed hazardous waste or which exhibits a characteristic of hazardous waste.
- (4) Finally, this rule clarifies certain portions of the land disposal restrictions as well as corrects typographical errors.

This rule address three changes to the scope of the hazardous waste program by revising or clarifying which materials are considered solid waste and/or hazardous waste:

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(1) This rule defines the circumstances when secondary materials generated within the primary mineral processing industry from which minerals, acids, cyanide, water or other values are recovered by mineral processing are excluded from the definition of solid waste. Note, however, that the U.S. D.C. Circuit Court of Appeals vacated the portion of this rule that attempted to regulate as waste certain sludges and by-products exhibiting a characteristic of hazardous waste that are not listed in 40 CFR 261.31 or 261.32.

(2) This rule also addresses issues related to whether materials are within the scope of the Bevill exclusion and allows secondary materials from mineral processing to be co-processed with normal raw materials in beneficiation operations which generate Bevill exempt wastes, without changing the exempt status of the resulting Bevill wastes, provided certain requirements are met.

(3) This rule provides an exclusion from RCRA jurisdiction for certain wood preserving wastewaters and spent wood preserving solutions when recycled.

There are some changes described in the preamble to the May 26, 1998 final rule which were not addressed in the amendments portion of the rule. For instance, on page 63 FR 28600, Column 1 of the May 26, 1998 final rule (63 FR 28556; Revision Checklist 167), it is stated that EPA “is revoking five remanded waste listings (K064, K065, K066, K090 and K091) because there is a lack of information demonstrating threats to human health or the environment that would justify a listing at this time”. However, the Agency did not amend 40 CFR 261.32 (listings of hazardous wastes from specific sources) to remove the remanded wastes. EPA intends to issue a technical correction in the future, that will include an amendment to remove K064, K065, K066, K090 and K091 from 40 CFR 261.32. Note that these five K wastes will still be regulated under RCRA Subtitle C if they exhibit a hazardous waste characteristic.

Another example is where EPA explained that the rule includes changes that clarify that a previously promulgated exclusion from hazardous waste regulation for recycled shredded circuit boards also applies to whole circuit boards under certain conditions. The language of the exclusion was not actually modified in the amendments portion of the rule.

Impact of Court Decisions: Two decisions by the D.C. Circuit Court of Appeals have impacted this rule:

(1) As mentioned in the first paragraph of this summary, an April 21, 2000, court decision vacated a portion of this rule addressed by Revision Checklist 167D (63 FR 28556; May 26, 1998). Prior to the May 26, 1998, final rule, all reclaimed spent materials and scrap metal were classified as solid waste while reclaimed sludges and by-products were only classified as solid waste if they had been specifically listed as hazardous waste by EPA. The May 26, 1998, final rule attempted to expand the definition of solid waste to include non-listed, characteristic sludges and by-products generated within the primary mineral processing industry from which minerals, acids, cyanide, water or other values are recovered by mineral processing unless the secondary materials are handled in accordance with the

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requirements in 40 CFR 261.4(a)(16). However, in the April 21, 2000, opinion, the court held that EPA cannot extend its authority to regulate these materials as solid waste simply because they are not stored prior to reclamation in accordance with the provisions promulgated at 40 CFR 261.4(a)(16). As such, the court set aside the parenthetical “(except as provided under 40 CFR 261.4(a)(16))” - to the second sentence, through which EPA attempted to expand its regulation of mineral processing secondary materials. (*Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000)). Based on the wording of 40 CFR 261.4(a)(16), listed sludges and by-products are never excluded from the definition of solid waste; therefore, as a result of the court decision, only reclaimed spent materials are covered by the conditional exclusion in that provision.

(2) On April 9, 1999, the U.S. Court of Appeals for the District of Columbia, in *Great Lakes Chemical Corporation versus EPA* (Docket No. 98-1312), granted the U.S. Government's motion for a voluntary vacatur of the organobromine production wastes K140 and U408, which were added to the listings of hazardous wastes at 40 CFR 268.40 and 268.48 by the May 4, 1998 rule (63 FR 24596) as amended June 29, 1998 (63 FR 35147).

State Authorization: EPA places this rule in RCRA Cluster VIII. Except for the modifications to the definition of solid waste, definition of hazardous waste, and exclusions relative to wood preserving and mineral processing secondary materials, this rule was promulgated under HSWA authorities. Normally, all of the HSWA requirements would go into effect immediately. However, the new Land Disposal Restrictions (LDR) treatment standards for mineral processing wastes will not apply unless the wastes are currently included in the authorized State's definition of solid waste. As per the December 19, 1994 memorandum, the revisions to the existing Universal Treatment Standards (UTS) numbers will not be implemented under HSWA authority separately for those States which have received LDR authorization for a particular waste. EPA views these changes from the existing limits to be neither more or less stringent since the technology basis of the standards has not changed. Accordingly, EPA will not implement the amendments to the UTS in those States with authorization for the treatment standards. The requirement to treat Underlying Hazardous Constituents, however, applies in all States except those authorized for Phase II. EPA will also not implement the treatment standards for soil contaminated with hazardous waste, and the associated site-specific risk based variance provision for contaminated soils, in States that are authorized for existing standards (i.e., authorized for Phase II) because the new standards are less stringent than the existing standards. Both interim and final authorization are available for the HSWA provisions. Only final authorization is available for the non-HSWA requirements. EPA will implement the non-HSWA requirements only in States that do not have interim or final authorization. In authorized States, the non-HSWA requirements will not be applicable until the States revise their programs to adopt equivalent requirements under State law. The State modification deadline is July 1, 1999 (or July 1, 2000 if a State statutory change is necessary). Interim authorization expires January 1, 2003.

The changes to 261.2(c)(3), 261.2(c)(4), 261.2(e)(1)(iii), 261.4(a)(9) and 261.4(a)(16), as well as the changes relative to soils contaminated with hazardous waste, are considered by EPA to be less

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stringent than the existing Federal regulations and are designated as optional on the checklist (with the exception of the vacated change to 261.2(c)(3) which added the parenthetical to the second sentence). EPA strongly encourages the adoption of these provisions in order for there to be national consistency, properly conduct material recovery by the wood preserving industry, and encourage cleanups of contaminated sites based on remedies involving treatment of contaminated soils.

States that choose to ignore the April 21, 2000, court decision and include the second parenthetical in 261.2(c)(3), will have a broader in scope program because the effect is to include materials that are not considered solid waste by EPA. If a State has already adopted this language but does not wish to be broader in scope, the second parenthetical may be removed and the change addressed as a state-initiated change in the next authorization application package.

If a State chooses to follow the April 9, 1999 vacatur, it should remove the vacated wastes in the tables at 40 CFR 268.40 and 268.48. If the vacatur is not followed by a State, then the vacated wastes should remain as shown in the May 26, 1998 rule in tables 40 CFR 268.40 and 268.48. Note, in this latter case, that the State's regulations will be broader in scope to the extent that the wastes addressed by this listing are not hazardous under the hazardous waste characteristic criteria. The State's regulations will also be more stringent because certain requirements, regarding mixtures and when wastes are no longer hazardous are more stringent for listed hazardous wastes than for characteristic hazardous wastes.

To accommodate this rule's broad scope, EPA has broken it into a series of six checklists to allow States to choose those portions of the rule they want to adopt. This organization will also allow better tracking of those portions of the RCRA program for which States are authorized. The first three checklists deal with Land Disposal Restrictions Phase IV, with the first checklist (CL 167 A) addressing treatment standards for TC metal wastes and mineral processing wastes. This checklist is not optional and addresses only HSWA provisions. The second checklist (CL 167 B) addresses hazardous soil treatment standards and exclusions. It is optional and includes only HSWA provisions. The third checklist (CL 167 C) addresses corrections to the existing land disposal restrictions provision and also addresses only HSWA provisions. The fourth checklist (CL 167 D) addressing the exclusion of mineral processing secondary materials is both optional and addresses only non-HSWA provisions. The fifth checklist (167 E) deals with revisions and clarification to the Bevill Exclusion. The sixth and final checklist (CL 167 F) addresses the exclusion of recycled wood preserving wastewaters, is optional and addresses only non-HSWA provisions.

The State Revision Application must include applicable regulations, AG statement addendum, Revision Checklist 167(A-F), other associated checklists, and other application materials (i.e., a program description and an MOA) as determined by the Regional office.

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Attorney General's Statement Entry: The following entries should be placed at Subsections I (OO) and (PP) in the Model Attorney General's Statement.

OO. [OPTIONAL: This is a reduced requirement.] State statutes and regulations provide for secondary materials from mineral processing to be co-processed with normal raw materials in beneficiation operations which generate Bevill exempt wastes, without changing the exempt status of the resulting Bevill waste, provided certain conditions are met as indicated in Revision Checklist 167 E.

Federal Authority: RCRA §3001; 40 CFR 261.4(b)(7) as amended May 26, 1998 (63 FR 28556).

Citation of Laws and Regulations; Date of Enactment and Adoption

Remarks of the Attorney General

PP. State statutes and regulations contain clarifying amendments to requirements regarding exclusion of mixtures under 261.4(b)(7) involving Bevill waste, as indicated in Revision Checklist 167 E.

Federal Authority: RCRA §3001; 40 CFR 261.3(a)(2)(i)&(iii) as amended May 26, 1998 (63 FR 28556).

Citation of Laws and Regulations; Date of Enactment and Adoption

Remarks of the Attorney General

The following entries should be placed at Subsections II (D) & (E) in the Model Attorney General's Statement.

D. [OPTIONAL: This is a reduced requirement.] State statutes and regulations provide for a conditional exclusion from the definition of solid wastes for mineral processing spent materials as indicated in Revision Checklist 167 D.

Federal Authority: RCRA §3001; 40 CFR 261.2(c)(3), 261.2(c)(4) Table 1, 261.2(e)(1)(iii) and 261.4(a)(16) as amended May 26, 1998 (63 FR 28556).

Citation of Laws and Regulations; Date of Enactment and Adoption

Remarks of the Attorney General

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E. [OPTIONAL: This is a reduced requirement.] State statutes and regulations provide for an exclusion from the definition of solid waste for certain materials generated and recycled by the wood preserving industry as indicated in Revision Checklist 167 F.

Federal Authority: RCRA §3001; 40 CFR 261.4(a)(9)(iii) as amended May 26, 1998 (63 FR 28556).

Citation of Laws and Regulations; Date of Enactment and Adoption

Remarks of the Attorney General

The following entries should be placed at Subsections XXI (DD)-(GG) in the Model Attorney General's Statement.

DD. State statutes and regulations include prohibitions and treatment standards for metal hazardous constituents in all hazardous wastes including the toxic characteristic wastes as indicated in Revision Checklist 167 A.

Federal Authority: RCRA §§3004(g)(4) and (m); 40 CFR 268.2(i), 268.3(d), 268.34, 268.40(e)&(h), 268.40 table, and 268.48 as amended May 26, 1998 (63 FR 28556).

Citation of Laws and Regulations; Date of Enactment and Adoption

Remarks of the Attorney General

EE. State statutes and regulations include treatment standards for mineral processing wastes as indicated in Revision Checklist 167 A.

Federal Authority: RCRA §§3004(g)(4) and (m); 40 CFR 268.40 and 268.48 as amended May 26, 1998 (63 FR 28556).

Citation of Laws and Regulations; Date of Enactment and Adoption

Remarks of the Attorney General

FF. [OPTIONAL: This is a reduced requirement.] State statutes and regulations include treatment standards for contaminated soils as indicated in Revision Checklist 167 B.

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Federal Authority: RCRA §§3004(d)-(k) and (m); 40 CFR 268.2(k), 268.7(a)(1)-(6), 268.7(b)(1)-(3), 268.7(b)(4) intro, 268.7(e), 268.44(h)(3)-(5), 268.49 as amended May 26, 1998 (63 FR 28556).

Citation of Laws and Regulations; Date of Enactment and AdoptionRemarks of the Attorney General

The following entry should be placed at Subsection XXI (GG) in the Model Attorney General's Statement.

GG. State statutes and regulations include corrections and clarifications to the land disposal restrictions as indicated in Revision Checklist 167 C.

Federal Authority: RCRA §§3004(d)-(k) and (m); 40 CFR 268.4(a)(2)(ii)&(iii), 268.7(a)(7), 268.7(b)(3)(ii)/Table, 268.7(b)(4)(iv)&(v), 268.7(b)(5)&(6), 268.40/Table, 268.40(e), 268.42(a), 268.45(a) intro, 268.45(d)(3)&(4), 268.48, 268 Appendices VII & VIII as amended May 26, 1998 (63 FR 28556) and June 8, 1998 (63 FR 31266).

Citation of Laws and Regulations; Date of Enactment and AdoptionRemarks of the Attorney General**Incorporation by Reference Guidance:**

States choosing to follow the April 9, 1999 vacatur should exclude from their incorporation by reference the following entries:

1. the entries for K140 and U408 in the table at 40 CFR 268.40; and
2. the entry for 2,4,6-Tribromophenol in the table at 40 CFR 268.48(a).

States choosing not to follow the vacatur should not exclude the entries listed above. It should be noted that this makes the State more stringent and broader in scope as explained in the summary above. This should be noted in the Attorney General's Statement submitted with the authorization package containing this Revision Checklist.

State choosing to recognize the April 21, 2000, opinion of the D.C. Circuit Court of Appeals should exclude from their incorporation by reference the parenthetical to the second sentence in 40 CFR 261.2(c)(3). States choosing to include the parenthetical are broader in scope as explained in the

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summary above. This should be noted in the Attorney General's Statement submitted with the authorization package containing this Revision Checklist.

At 261.4(a)(9)(iii)(E), States should replace the phrases "appropriate Regional Administrator or State Director" with the applicable State notification authority.

- ¹ Note there are typographical errors in 40 CFR 261.2 and 261.4(a)(16) provisions as amended by this rule. The provisions refer to 261.4(a)(15) rather than 261.4(a)(16) as they should. Revision Checklist 179 (64 FR 25408-25417; May 11, 1999) has redesignated 261.4(a)(16) as 261.4(a)(17).
- ² For the list of correct effective dates, see the memorandum entitled "Phase IV Land Disposal Restrictions Rule -- Clarification of Effective Dates", signed by Elizabeth Cotsworth, Acting Director, Office of Solid Waste, U.S. EPA, and dated October 19, 1998 (attached). On August 10, 1998, a final rule/correction of effective date and technical amendments was promulgated which affects CL 165 (rules promulgated May 4, 1998 and June 29, 1998) and CL 167 (rule promulgated May 26, 1998). The affected entries in CL 165 are the 268.40 and 268.48 tables. However, CL 167 includes the corrections to the affected tables in CL 165. Therefore, States should treat CL 167 as being later in time than the August 10, 1998 rule because the correct entries were included in the tables which were revised and reprinted entirely by the May 26, 1998 rule (CL 167). However, there is an error in the 268.40 Table as reprinted (rule promulgated May 26, 1998, 63 FR 28556, 28737) in which the CAS number for U408 listed as 111-79-6 should be 118-79-6. The August 10, 1998 rule affected the effective dates of CL 167. The correct effective dates for CL 167 are set forth in the memorandum cited at the beginning of this endnote.
- ³ These provisions relating to the definition of solid waste apply only in unauthorized States.