

**ENVIRONMENTAL PROTECTION
AGENCY**
40 CFR Part 268
[FRL-6153-2]
RIN 2050-AE05
**Hazardous Waste Recycling; Land
Disposal Restrictions**
AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is issuing an amendment to the final rule, published on May 26, 1998 (63 FR 28556), which, in part, amended the Land Disposal Restriction (LDR) treatment standards for metal-bearing hazardous wastes which exhibit the characteristic of toxicity. EPA is amending the rule only insofar as it applies to zinc micronutrient fertilizers which are produced from these toxicity characteristic wastes. The Agency is taking this action because it appears that the new treatment standards are not well suited for zinc micronutrient fertilizers, and also could result in greater use of zinc fertilizers that contain relatively higher concentrations of hazardous constituents. The Agency expects to develop a more consistent and comprehensive approach to regulating hazardous waste-derived fertilizers, and currently intends to leave this amendment in place until those new regulations are adopted. In the interim, the fertilizers affected by this amendment would remain subject to the previous treatment standards for toxic metals.

EFFECTIVE DATE: August 21, 1998.

ADDRESSES: The public docket for this rule is available for public inspection at EPA's RCRA Information Center, located at Crystal Gateway, First Floor, 1235 Jefferson Davis Highway, Arlington, Virginia. The regulatory docket for this rule contains a number of background materials. To obtain a list of these items, contact the RCRA Docket at 703 603-9230 and request the list of references in EPA Docket #F-98-PH4S-FFFFF.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA Hotline at (800) 424-9346 (toll free) or (703) 920-9810 in the Washington, DC metropolitan area. For information on this notice contact David M. Fagan (5301W), Office of Solid Waste, 401 M Street, SW, Washington DC 20460, (703) 308-0603.

SUPPLEMENTARY INFORMATION:
Availability of Rule on Internet

This notice is available on the internet, at: [www: http://www.epa.gov/oswer/hazwaste/ldrmetal/facts.htm](http://www.epa.gov/oswer/hazwaste/ldrmetal/facts.htm)

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I. Background

Under RCRA, hazardous wastes are prohibited from land disposal unless they meet treatment standards established by EPA. (The major exception, not relevant here, is if the wastes are disposed in a unit from which there will be no migration of hazardous constituents for as long as the wastes remain hazardous.) See RCRA sections 3004(g)(5) and (m); 63 FR 28557-28558. The land disposal restriction treatment standards also apply to certain products that are made from hazardous wastes, and that are placed on the land. See 40 CFR 266.20(b). This "use constituting disposal" provision in the RCRA regulations, which was promulgated on August 17, 1988, was intended to provide an additional degree of environmental protection for hazardous waste-derived products that are used in this manner (i.e., that are introduced directly into the environment by being placed on the land).

One particular category of hazardous waste-derived products that have been subject to these regulatory provisions are zinc micronutrient fertilizers that are produced from or which otherwise contain hazardous wastes. See 40 CFR 261.2(c)(1)(B) (defining hazardous secondary materials used in this manner as solid wastes for purposes of RCRA subtitle C). This type of fertilizer can be manufactured from several types of hazardous wastes that have high zinc content, such as dusts collected in emission control devices ("baghouse dust") from electric arc steel making furnaces and brass foundries, ash from combustion of used tires, and other sources. These fertilizers can also be made from waste materials that are not classified as hazardous wastes, as well as from virgin raw materials such as refined zinc ores.

Prior to promulgation of the May 26, 1998 rule (commonly referred to as the

"Phase IV" LDR rule), zinc micronutrient fertilizers made from hazardous waste secondary materials were subject (with one specific exemption, described below) to the treatment standards promulgated by EPA in the "Third Third" LDR rules (see 55 FR 22688, June 1, 1990, establishing prohibitions for wastes which exhibit the toxicity characteristic for metals). Those regulations essentially required that the fertilizer products be treated such that they no longer exhibited a hazardous waste characteristic before they could be applied to the land. However, the Phase IV regulations (which revised the standards in § 268.40 that apply to toxicity characteristic metal wastes) now require treatment below the hazardous waste characteristic levels. Such treatment standards are consistent with the D.C. Circuit's ruling in *Chemical Waste Management v. EPA*, 976 F. 2d 2, 13-14 (D.C. Cir. 1992), that hazardous wastes must be treated so that threats posed by land disposal of their hazardous constituents are minimized (within the meaning of RCRA section 3004(m)), and treating to the hazardous waste characteristic level does not always guarantee that the requisite minimization has occurred. (See also RCRA Docket document #F93TTCFS0008, stating that this principle applies to hazardous wastes used in a manner constituting disposal.)

Since zinc micronutrient fertilizers often contain measurable levels of lead and cadmium (which are hazardous constituents and are not agriculturally beneficial), the new Phase IV treatment standards for these metals are particularly relevant with regard to fertilizers that are made from characteristic hazardous wastes. Under the Phase IV rules, such fertilizer products would have to meet the treatment standards of .75 ppm for lead and .11 ppm for cadmium, both as measured by the toxicity characteristic leaching procedure (TCLP). These treatment standards would supersede the existing standards of 5ppm for lead, and 1ppm for cadmium (also measured in leachate).

As mentioned above, fertilizers made from one particular type of hazardous waste—electric arc furnace dust (RCRA hazardous waste code K061)—are not currently subject to the LDR treatment standards. See 40 CFR 266.20(b), final sentence. EPA decided to provide this exemption in 1988, since based on the data available at the time it did not appear that fertilizers using K061 as an ingredient were significantly different, with respect to concentrations of hazardous constituents, than other zinc

micronutrient fertilizers. 53 FR 31164 (August 17, 1988).

II. Today's Action

EPA is today amending § 268.40 by adding a new paragraph (I), which will in effect stay the Phase IV rule insofar as it applies treatment standards for hazardous constituent metals in zinc-containing fertilizers that are produced from hazardous wastes which exhibit the toxicity characteristic. The Agency is persuaded that this particular stay of the Phase IV rule is appropriate, for several reasons. For one thing, in retrospect the Agency is not certain that these treatment standards are well suited for micronutrient fertilizers. Compliance with the new LDR standards could require that the hazardous metal constituents be immobilized or stabilized such that they do not leach above the prescribed regulatory levels. However, such treatment would likely also immobilize the zinc component of the fertilizer, which would render it unsuitable for plant food use. Cf. 50 FR 628-629 (Jan. 4, 1985) (imposition of normal subtitle C standards on uses constituting disposal means in most cases that the activity will not occur).

EPA is also concerned that applying the Phase IV standards to zinc fertilizers could have the effect of eliminating from the market certain fertilizer products that contain relatively low levels of hazardous constituents (e.g., lead and cadmium), while other fertilizer products that contain higher levels of contaminants, including some produced from hazardous wastes, would be unaffected. It is likely that some zinc fertilizers that are made from hazardous wastes (and that have been in compliance with the existing RCRA treatment standards) will be unable to meet the new Phase IV standards. (See letter from Chris S. Leason, July 6, 1998.) However, some zinc fertilizers that are manufactured from non-waste materials can contain considerably higher concentrations of non-beneficial metals than the fertilizers that would be affected by the Phase IV standards. Thus, by eliminating from the market the regulated waste-derived products, the Phase IV rules could actually have the effect of increasing consumption of fertilizers with higher contaminant levels.

Similarly, the Phase IV rules could encourage the use of zinc fertilizers made from K061, which is exempt from regulation (and thus does not have to meet RCRA treatment standards) when used to manufacture fertilizer. Although not apparent in 1988 when EPA promulgated this exemption, further

study makes clear that these fertilizers typically contain higher concentrations of hazardous constituents (e.g., lead and cadmium) than zinc-containing fertilizers produced from characteristic hazardous wastes. (Letter from Chris Leason, August 17, 1998.) Thus, the Phase IV rule, by foreclosing the use of these less contaminated waste-derived fertilizers, could actually result in greater use of K061-derived fertilizers, which generally contain higher levels of contaminants.

The Agency recognizes that the Phase IV rulemaking has highlighted the anomalous and inconsistent nature of the current RCRA regulations that apply to use of hazardous wastes in fertilizer manufacture. Consequently, the Agency is now planning to develop a more consistent and comprehensive set of regulations for controlling such practices, and expects to publish a Notice of Proposed Rulemaking in 1999. Issues that we expect to examine in the context of this rulemaking process include the appropriateness of the exemption for recycling of K061 in fertilizers, whether or not the current treatment standards should be replaced with a set of standards more specifically tailored to fertilizers, and the need to clarify the applicability of current regulatory provisions on "use constituting disposal" in subpart C of 40 CFR part 266.

Until this regulatory proceeding is completed, the Agency believes that it is inappropriate to apply the Phase IV treatment standards to hazardous waste-derived zinc micronutrient fertilizers. Accordingly, EPA is staying that portion of the Phase IV regulation. As a result, the zinc micronutrient fertilizers affected by this administrative stay will continue to be subject to the regulations in effect prior to the Phase IV regulations.

III. Legal Authority

EPA is issuing this administrative stay pursuant to 5 U.S.C. 705, authorizing administrative agencies to stay administrative action pending judicial review when "justice so requires." See also Rule 18 of the Federal Rules of Appellate Procedure authorizing issuance of administrative stays pending review. (A petition for review has been filed regarding applicability of the Phase IV standards to zinc micronutrient fertilizers produced from characteristic hazardous wastes.) EPA believes that issuance of a stay for these zinc micronutrient fertilizers is needed because the promulgated regulation could result in discontinuance of use of the material and encourage use of a hazardous waste-derived zinc

micronutrient fertilizers which are more contaminated. The administrative stay is needed to prevent this anomalous result. These same reasons provide good cause (pursuant to 5 U.S.C. 553 (b)) to issue this administrative stay immediately, to the extent good cause is needed to justify issuing this immediately effective rule.

IV. Analysis Under Executive Order 12866, Executive Order 12875, the Paperwork Reduction Act, National Technology Transfer and Advancement Act of 1995, Executive Order 13045, and Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

This action stays treatment standards established in the recently promulgated LDR Phase IV Rule for zinc micronutrient fertilizers (63 FR 28556). Today's action has been deemed by the Agency as being a "significant regulatory action" for the purposes of Executive Order 12866, and is, therefore, subject to review by the Office of Management and Budget. Today's rule does not, however, impose obligations on State, local or tribal governments for the purposes of Executive Order 12875. Furthermore, this action is not subject to the Regulatory Flexibility Act (RFA) since this rule is exempt from notice and comment rulemaking requirements for good cause which is explained in section III. The Administrator is, therefore, not required to certify under the RFA. Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. There are no voluntary consensus technical standards directly applicable to metal contaminants in zinc micronutrient fertilizers. Therefore, EPA did not consider the use of any voluntary standards in this rulemaking. Today's rule is not subject to E.O. 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because this action is not an

economically significant rule, and it is not expected to create any environmental health risks or safety risks that may disproportionately affect children. Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, EPA must consider the paperwork burden imposed by any information collection request in a proposed or final rule. This rule will not impose any new information collection requirements. Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their

communities." Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action stays treatment standards established in the recently promulgated LDR Phase IV Rule for zinc micro-nutrient fertilizers (63 FR 28556). Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

V. Submission to Congress and the General Accounting Office

The Congressional Review Directory Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and thus is promulgating this administrative stay as a final rule. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the

Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 268

Environmental protection, Hazardous waste, Land disposal restrictions.

Dated: August 21, 1998.

Carol M. Browner,
Administrator.

For the reasons set forth in the preamble, Title 40 chapter I of the Code of Federal Regulations is amended as follows:

PART 268—[AMENDED]

Subpart D—Treatment Standards

1. Section 268.40 is amended by adding paragraph (i), to read as follows:

§ 268.40 Applicability of treatment standards

* * * * *

(i) Zinc-containing fertilizers that are produced for the general public's use and that are produced from or contain recycled characteristic hazardous wastes (D004–D011) are subject to the applicable treatment standards in § 268.41 contained in the 40 CFR, parts 260 to 299, edition revised as of July 1, 1990.

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