

EPA Requests Comment on Tentative Denial of Petition to Expand Dramatically RCRA Corrosivity Characteristic

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Summary: This news alert discusses EPA's tentative decision to deny a petition from one of its own scientists and an environmental group, both seeking a dramatic expansion of the definition of "corrosive" wastes under the U.S. federal hazardous waste regulations. The Agency will accept public comments on its tentative decision until June 10, 2016, after which time it will either issue a final decision denying the petition or initiate a rulemaking to change the corrosivity characteristic.

The ***U.S. Environmental Protection Agency*** ("**EPA**" or the "Agency") yesterday announced its tentative decision to deny a rulemaking petition to expand dramatically the corrosivity characteristic used to identify wastes as hazardous under the ***Resource Conservation and Recovery Act*** ("**RCRA**"). See [81 Fed. Reg. 21,295](#) (April 11, 2016). Importantly, EPA's action on the petition is not yet final, and the Agency is asking for public comment on its tentative decision. Comments are due on June 10, 2016. If EPA ultimately finalizes its denial of the petition, the petitioners may seek to challenge such action in court.

Background

Under the RCRA regulations that have been in effect since 1980, one of the ways that wastes may be classified as hazardous, and thus subject to hazardous waste regulation, is if they exhibit the characteristic of corrosivity. Wastes are considered corrosive if a representative sample (a) is aqueous and has a pH less than or equal to 2.0, or greater than or equal to 12.5, or (b) is liquid and corrodes steel at a rate greater than 6.35 mm/year.

On September 8, 2011, an EPA scientist, Dr. Catherine ("Cate") Jenkins, and the Public Employees for Environmental Responsibility ("PEER") (hereinafter referred to jointly as "Petitioners") submitted an administrative petition to EPA, asking the Agency to modify the RCRA corrosivity characteristic in two ways: (1) by changing the pH threshold for alkaline corrosive wastes from 12.5 to 11.5 (a ten-fold change, given that pH is measured on a logarithmic scale), and (2) by applying the pH thresholds for both alkaline and acidic corrosive wastes to non-aqueous wastes. The prime motivation for the petition was a concern that the respiratory symptoms suffered by first responders on 9/11 may have been caused by caustic particles in the dust from the collapse of the World Trade Center buildings.

Petitioners evidently believe that if the 9/11 dust had been classified as corrosive under RCRA and related regulatory regimes, the first responders would have worn respirators that would have prevented injury to their respiratory systems. The petition also mentioned similar concerns with respect to dust from demolition of buildings, from cement manufacturing plants, and from transport of cement.

The requested changes to the characteristic of corrosivity could have important implications for an extremely broad range of industrial and government activities, including, but not limited to, the following:

- Construction, renovation and demolition, because cement and concrete wastes might fail the corrosivity characteristic as the Petitioners want it to be revised. Indeed, the Petitioners targeted their efforts partially on such wastes, claiming that “routine building demolition results in cement dust with pH levels over 11.5.”
- Waste/wastewater treatment and air pollution control, because lime – which has a pH just below the current regulatory threshold of 12.5 – is frequently utilized as a reagent in such activities, and the resulting residues may also have a pH above 11.5. The treatment standard for many/most metal-bearing hazardous wastes under RCRA is stabilization with lime or similar materials, and if the resulting stabilized wastes were reclassified as hazardous wastes, some additional (as of yet unspecified) additional treatment would have to be performed to remove the (revised) characteristic of corrosivity.
- Other industrial activities (e.g., mineral processing, steelmaking, paper production, chemical manufacture/purification, and food processing), because lime is often used in such operations. Although data on the pH of wastes from these operations is limited, it seems possible, if not likely, that some of these wastes might be affected by reducing the pH threshold from 12.5 to 11.5, and/or applying the threshold to non-aqueous wastes.
- Handling of consumer products, such as cleaning supplies, that are discarded following use, spillage, damage, expiration, etc., because some of these products (e.g., ammonia, bleach, and lye) have elevated pH, potentially in the range of 11.5 to 12.5, depending upon their strength.

Three years after filing the petition with EPA, on September 9, 2014, the Petitioners filed a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) claiming that the Agency was unreasonably delaying its response to the 2011 petition. Petitioners asked for a writ of mandamus from the Court to compel EPA to issue a response. See, *In re Cate Jenkins, Ph.D. and PEER*, Petition for Writ of Mandamus (D.C. Cir. No. 14-1173). On February 24, 2015, the Petitioners and EPA filed a joint motion with the Court asking to stay the judicial proceedings on the ground that the Agency intended to issue a response to the administrative petition on or before March 31, 2016. The notice issued yesterday by EPA provides that response.

EPA’s Basis for Tentatively Denying the Petition

EPA has tentatively decided to deny the petition in its entirety, which would mean that the corrosivity characteristic would continue to apply only to aqueous wastes with pH less than or equal to 2.0, or greater than or equal to 12.5 (as well as liquid wastes that corrode steel at a rapid rate, since that portion of the characteristic was not addressed in the petition). According to the Agency, the

Petitioners failed to demonstrate that the requested changes to the corrosivity characteristic are warranted. EPA pointed, in particular, to the following:

- Although the Petitioners are correct that a pH level of 11.5, rather than 12.5, is used in some other regulatory regimes, that level is not used under such regulations as a definitive indicator of corrosivity. Instead, the 11.5 level serves only to provide an optional indicator for persons who do not want to perform actual corrosion tests (e.g., on animals), or to establish a rebuttable presumption of corrosiveness that can be overridden by actual corrosion tests. The same level would not be appropriate under RCRA, because the characteristic level is definitive, and further testing cannot be used to classify a waste as non-corrosive if it exceeds the regulatory threshold.
- Although the Petitioners are correct that persons exposed to dust from the collapse of the World Trade Center suffered injuries from such exposures, the injuries do not appear to be related to corrosion (*i.e.*, they did not involve serious destruction of skin or other tissues at the point of contact). Similarly, the Petitioners did not provide evidence of corrosive injuries from dusts generated during manufacture of cement, demolition of buildings, or similar activities. Thus, the hazards associated with these various dusts cannot form the basis for any change to the RCRA corrosivity characteristic.
- Many of the dusts that the Petitioners express concern about actually have pH levels below 11.5. Thus, the regulatory changes sought by the Petitioners would not provide the relief they desire.
- Petitioners failed to provide any support for the contention that an expanded RCRA corrosivity characteristic would have helped protect workers at the World Trade Center site. As an initial matter, there is no evidence that worker exposures (and injuries) at the site were related to management of wastes. In addition, other regulations (e.g., under the Occupational Safety and Health Act) governed, and would still govern, use of respirators at the site. To the extent that Petitioners have concerns about the adequacy of those other regulations, they should be addressing those concerns elsewhere.
- Although there may be some ambiguities, as alleged by Petitioners, in the definition of “aqueous wastes” subject to the pH test under the existing regulations, there are better ways to remedy this issue than expanding the characteristic to include non-aqueous wastes.
- Petitioners failed to provide any information about the potential hazards of non-aqueous wastes with pH levels below 2.0, which would be brought into the RCRA hazardous waste program if the petition were granted.

Next Steps

EPA’s action on the petition is still not final, and the Agency is requesting public comment on its tentative decision to deny the petition. In particular, it has asked for information about the types and amounts of wastes that might be reclassified as hazardous under the petition, the potential hazards associated with such wastes, and the potential costs if such wastes had to be managed as hazardous wastes under RCRA.

Comments will be due on June 10, 2016. EPA will then review the comments and arrive at a final

decision, which may consist of either a final denial of the petition or the start of a rulemaking to revise the corrosivity characteristic (e.g., an Advanced Notice of Proposed Rulemaking (“ANPRM”) or a notice of proposed rulemaking [“NPRM”]). There is currently no deadline for final action by EPA. However, in the D.C. Circuit litigation mentioned above, the Petitioners may seek to impose such a deadline. Indeed, the parties in that case are scheduled to file motions to govern further proceedings by April 14, 2016.

If EPA issues a final denial of the petition (as seems likely, given the strength of the arguments set forth in the Agency’s notice of tentative denial), that could be the end of the story. However, it is also possible that the Petitioners could file a new court case challenging EPA’s action.

Regardless of the final outcome, EPA’s notice seems to open the door to other related developments. For example, the Agency says that it may consider clarifying when wastes are “aqueous,” and thus subject to the pH test, in a future update to its guidance on test methods for solid wastes (commonly referred to by its EPA publication number, “SW-846”). EPA also notes that it could initiate a rulemaking process (perhaps in response to a future petition) to establish an entirely new hazardous waste characteristic covering “irritant wastes,” or to explicitly list as hazardous wastes specific wastes (aqueous or non-aqueous) in the pH range between 11.5 and 12.5. Although EPA does not appear to have any immediate plans to undertake any of these efforts, the potential stakes are so high that these issues may warrant close monitoring and active engagement with the Agency.

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