

In order to provide flexibility for legitimate businesses, the October 17, 2001 rule also established, on an interim basis, specific exclusions and waivers for chemical handlers engaged in certain activities. DEA has completed its review of comments pertaining to these interim provisions. This rulemaking finalizes these exclusions and waivers related to the handling of the listed chemicals red phosphorus, white phosphorus, and hypophosphorous acid (and its salts).

What Interim Exclusions and Waivers Did the October 17, 2001 Rule Put Into Effect?

The October 17, 2001 rule established, on an interim basis, an exclusion from the definition of regulated transaction for domestic transactions involving red phosphorus and white phosphorus which are return shipments of residual quantities (from customer to producer) in rail cars and intermodal tank containers which conform to International Standards Organization specifications (with capacities greater than or equal to 2,500 gallons in a single container). The rule also established, on an interim basis, a waiver from the registration requirement for such activity. Additionally, this final rule established, on an interim basis, a waiver from the registration requirement for any person whose activities with respect to List I chemicals are limited to the distribution of red phosphorus, white phosphorus, or hypophosphorous acid (and its salts) to: Another location operated by the same firm solely for internal end-use; or an EPA or State licensed waste treatment or disposal firm for the purpose of waste treatment or disposal.

Why Did the October 17, 2001 Rule Place These Provisions Into Effect on an Interim Basis and Solicit Comments Pertaining to These Provisions?

DEA became aware of the potential need for these provisions via comments received in response to the September 25, 2000 Notice of Proposed Rulemaking (65 FR 57577) which initially proposed the control of red phosphorus, white phosphorus and hypophosphorous acid as List I chemicals. Since that original NPRM did not propose the exclusion and waivers, the public did not have an opportunity to comment on these issues.

In addition to deciding that exclusion/waivers were warranted, the DEA determined that good cause existed under the Administrative Procedure Act (5 U.S.C. 553 *et seq.*)(APA) to forgo a Notice of Proposed Rulemaking for the exclusion and waivers. The APA states that an agency may forgo a NPRM if it is impracticable, unnecessary, or

contrary to the public interest. To avoid unnecessary or temporary burdens on affected companies during the pendency of proceedings in this matter, DEA included as part of the October 17, 2001 rulemaking, an interim rule with request for comments regarding these issues.

The October 17, 2001 rule, therefore solicited comments only on those portions of the rule pertaining to the exclusion/waiver issues. DEA allowed 60 days for persons to comment on the exclusion and waivers. The rulemaking further indicated that after the close of this comment period, DEA would publish a final rule in the **Federal Register** to inform interested parties if changes were needed or if the exclusion and waivers would be adopted as originally stated.

What Comments, Submitted in Response to the September 25, 2000 NPRM, Led DEA To Create the Interim Exclusions and Waivers?

In response to the September 25, 2000 NPRM, two commentors requested clarification regarding the potential applicability of the regulation to end-users that utilize red phosphorus in their production processes. These commentors expressed concerns that an end-user may become subject to regulatory requirements because of distribution of excess material off-site for disposal purposes or because of the transfer of stock from one company location to another.

Under the proposed regulations, distributions of red phosphorus, white phosphorus and/or hypophosphorous acid (and its salts) for the purpose of disposal would be considered regulated transactions subject to all CSA chemical regulatory requirements including registration, recordkeeping and reporting. Additionally, the transfer of stock from one company location to another would require the registration of each location.

The CSA, pursuant to 21 U.S.C. 822(d), provides that the Attorney General may, by regulation, waive the requirement of registration of certain manufacturers, distributors or dispensers, if consistent with the public health and safety. Therefore, in order to reduce any burden on end-users of these chemicals, DEA agreed to waive the registration requirement for any person whose activities with respect to List I chemicals are limited to the distribution of red phosphorus, white phosphorus, or hypophosphorous acid (and its salts) to: Another location operated by the same firm solely for internal end-use; or an EPA or State licensed waste treatment or disposal firm for the purpose of waste treatment or disposal.

This waiver of registration as it pertains to distributions for waste treatment or disposal applies only to the registration requirement, and all other CSA chemical regulatory controls such as recordkeeping and reporting will still apply.

Additionally, in response to the September 25, 2000 NPRM, two producers of elemental phosphorus requested that large transactions be exempted when shipped in reusable containers with capacities of 2500 or 2800 gallons. These commentors stated that these bulk containers are exclusively rail cars or large intermodal tank containers specially designed to enable safe transport. After unloading, the bulk containers are shipped back to the producers (filled with water for safety reasons due to the remaining phosphorus in the container) for reuse. Therefore, the commentors expressed concerns that their other sites and customers would possibly be subject to recordkeeping and registration requirements due to the return shipments. The commentors further stated that "safeguards already include recordkeeping, incident reporting, tamper-detection, sealed valves, and use of bulk reusable containers". The commentors believe that "registering and tracking these types of shipments back and forth with DEA would provide no additional benefit and would impose an undue burden on DEA, our operations and our customers."

DEA agreed that return shipments of residual quantities should not be impacted by this regulation. DEA also recognized the difficulty in quantifying the residual amounts of red and white phosphorus contained in these rail cars and intermodal tank containers which conform to International Standards Organization specifications (with capacities greater than or equal to 2500 gallons in a single container). The CSA authorizes DEA, pursuant to 21 U.S.C. 802(39)(A)(iii), to remove certain transactions in listed chemicals from the definition of regulated transaction. Therefore DEA issued an interim rule excluding from the definition of regulated transaction (21 CFR 1310.08(j)), domestic transactions involving red phosphorus and white phosphorus which are return shipments of residual quantities (from customer to producer) in rail cars and intermodal tank containers which conform to International Standards Organization specifications (with capacities greater than or equal to 2500 gallons in a single container). As such, these return shipment transactions will not require recordkeeping. Additionally, DEA issued an interim rule waiving the