

constituent-specific mass loading limits to define the scope of the listing. The primary purpose of this “mass loadings-based listing” is to establish levels at the point of generation of a waste, at or above which that waste is considered to be a listed hazardous waste (*i.e.*, “entrance” levels). Wastes that are generated with constituent masses below these levels (on an annual basis) would not be subject to these listings.

Residuals from the treatment, storage, or disposal of listed hazardous wastes are usually classified as hazardous wastes based on the “derived-from” rule (*see* 40 CFR 261.3(c)(2)(i)).⁵⁶ We are not proposing to use the mass loading-based levels as “exit” levels for residues from treatment of dyes and/or pigments production nonwastewaters (K181). Thus, we are not proposing any exemption to the mixture rule for the K181 wastes.

In the listing determination for paint manufacturing waste solids, we proposed that the concentration-based listing levels would also serve as “exit” levels. That is, we proposed that waste solids that were treated to below the listing limits could exit the hazardous waste system and would become nonhazardous waste (66 FR 10110). We considered proposing to use the mass loading limits as exit levels for dye and pigment wastes, but we decided not to do this for several reasons. Most important, the mass-based loading is different from a concentration-based listing, because the proposed mass-based approach already builds in an exemption for wastes with constituent masses below the loading limit. Thus, the proposed approach allows a facility to handle as nonhazardous any wastes containing constituents of concern up to the loading limit. In contrast, a concentration-based listing would require all wastes that meet the listing level to be handled as hazardous.

In addition, an exemption for treatment residuals would be complex to implement. For example, a facility could generate an initial portion of waste up to the mass loading limit and handle that portion as nonhazardous. With an exemption for treatment residuals, the facility could then treat additional wastes and claim the residuals are below the loading limits. However, given that the facility already generated and disposed of wastes that contained the permissible mass loading limits, it would be inappropriate to

classify the treatment residuals as nonhazardous.

Difficulties would also arise in any exemption for treatment residuals, if such treatment were to occur offsite. The offsite facility would have to demonstrate that the conditions set out in the proposed regulations were met and document that the waste is nonhazardous (*i.e.*, according to the proposed listing regulations in subparagraphs (c), (d) and (e)). An offsite treatment facility may not have the knowledge to track the cumulative loadings from the generator to ensure that the conditions for becoming nonhazardous are met. Furthermore, the treatment facility would likely be accepting a variety of hazardous wastes from numerous generators. Thus, even if this facility was able to comply with the conditions for determining the treated waste is not K181, the treatment residuals could still carry other hazardous waste codes under the mixture rule (*see* 40 CFR 261.3(a)(2)(iv)), as well as the derived-from rule. Thus, any implementation scheme for offsite treatment facilities appears problematic.

Finally, the treatment of any waste that is classified as K181 at the point of generation would have to comply with hazardous waste regulations. For example, if the waste was incinerated, the combustion unit would have to be permitted under Subtitle C. Therefore, the benefits of possibly classifying the treatment residuals as nonhazardous do not appear to be significant, compared to the cost of constructing and permitting a hazardous waste treatment unit (which, if we limited any exemption to onsite treatment, would have to be located onsite).

We seek comment on the need for any exemption for treatment residuals, and how such an exemption could be structured. If we were to adopt such an exemption, we would add an exemption to the derived-from rule (*e.g.*, in § 261.3(c)(2)(ii)), which would require the generator to show that the treated waste no longer meets the listing levels of K181 (using the determination process proposed in § 261.32(d)), and that the residuals meet the requirements specified in part 268. As described above, we believe that any exemption from the derived-from rule would be most applicable to generators who treat their waste onsite, because the generator would have the information needed to track the cumulative mass of the various constituents in the treated waste.

E. What Is the Status of Previously Disposed Wastes and Landfill Leachate From Previously Disposed Wastes?

The Agency has been clear in the past that hazardous waste listings normally apply to wastes disposed of prior to the effective date of a listing, even if the landfill ceases disposal of the waste when the waste becomes hazardous. (*See* 53 FR 31147, August 17, 1988.) We also have a well-established interpretation that listings apply to leachate derived from the disposal of listed hazardous wastes, including leachate derived from wastes meeting the listing descriptions that were disposed before the effective date of a listing. Leachate derived from the treatment, storage, or disposal of listed hazardous wastes is classified as a hazardous waste by virtue of the “derived-from” rule in 40 CFR 261.3(c)(2). We are not reopening nor taking comment on any of these issues with this proposed rulemaking.

As set out in detail in the August 1988 notice, this does not mean that landfills simply holding wastes that are listed now as hazardous become subject to Subtitle C regulation. However, previously disposed wastes now meeting a listing description that are actively managed,⁵⁷ including actively managed residues such as leachate that are derived from such wastes, become subject to Subtitle C regulation. (*See* 53 FR at 31149, August 17, 1988.) In most circumstances, active management of leachate is exempt from Subtitle C regulation. Specifically, management of leachate in wastewater treatment tanks prior to discharge under the CWA is exempt from RCRA regulation (40 CFR 264.1(g)(6)). Discharge to a POTW via the sewer system, where leachate mixes with domestic sewage, is also excluded from RCRA jurisdiction (*see* RCRA section 1004(27) and 40 CFR 261.4(a)(1)). Similarly, discharge to navigable waters is excluded from RCRA jurisdiction (*see* RCRA section 1004(27) and 40 CFR 261.4(a)(2)).

⁵⁷ The Agency often uses the term “active management” as a catch-all term to describe the types of activities that may trigger RCRA Subtitle C permitting requirements. In general, those activities are hazardous waste treatment, storage, and disposal, all of which are defined in 40 CFR 260.10. It is important to note, however, that EPA interprets the disposal that triggers RCRA Subtitle C permitting requirements to be the types of disposal as described in the definition of “disposal facility” in 40 CFR 260.10, and not the broader, more general definition of “disposal” in that section and in RCRA section 1004(3). *See, e.g.*, 53 FR 31149 (August 17, 1988). Instead, the latter, broader definition is used to determine the applicability of certain statutory provision, such as RCRA section 7003, 7002(a)(1)(B), 3013, and 3007. *See, e.g.*, 55 FR 8759 (March 8, 1990).

⁵⁶ Also, the “mixture” rule (*see* 40 CFR 261.3(a)(2)(iii) and (iv)) provides that, with certain limited exceptions, any mixture of a listed hazardous waste and a solid waste is itself a RCRA hazardous waste.