



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA-R06-RCRA-2018-0395; FRL-9987-30-Region 6]

Louisiana: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On September 5, 2018, the Environmental Protection Agency (EPA) published a notice of proposed rulemaking to approve a revision to the State of Louisiana hazardous waste program under the Resource Conservation and Recovery Act (RCRA) and provided for a thirty-day public comment period. The public comment period closed on October 5, 2018, and EPA received fifteen comments. The EPA has reviewed and analyzed all submitted comments, and now issues this final rule. After consideration of all comments, EPA confirms that the program revisions to the State of Louisiana hazardous waste program satisfy all requirements needed to qualify for final authorization.

DATES: This final authorization is effective **[Insert date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R06-RCRA-2018-0395. All documents in the docket are listed in www.regulation.gov index.

Although listed in the index, some of the information is not publicly available. e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly

available docket materials are available either electronically through www.regulation.gov or in hard copy. You can view and copy Louisiana's application and associated publicly available materials from 8:30 a.m. to 4:00 p.m., Monday through Friday, at the following locations:

Louisiana Department of Environmental Quality 602 N. Fifth Street, Baton Rouge, Louisiana 70884-2178, phone number (225) 219-3559 and EPA, Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, phone number (214) 665-8533.

FOR FURTHER INFORMATION CONTACT: Alima Patterson, Region 6, Regional Authorization/Codification Coordinator, Permit Section (6MM-RP), Multimedia Division, (214) 665-8533, EPA Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, and Email address patterson.alima@epa.gov.

SUPPLEMENTARY INFORMATION:

A. What revisions is EPA authorizing with this action?

On March 13, 2018, LDEQ submitted a final complete program revision application seeking authorization of its program revision in accordance with 40 CFR 271.21. EPA now makes a final decision that LDEQ's hazardous waste program revisions satisfy all the requirements necessary to qualify for final authorization. EPA will continue to implement and enforce Hazardous and Solid Waste Amendments of 1984 (HSWA) provisions for which the State is not authorized. For a list of rules that become effective with this Final Rule, please see the Proposed Rulemaking published in the September 5, 2018, **Federal Register** at 83 FR 45061.

B. What were the comments and responses to EPA's proposal?

EPA received fifteen comments. Twelve comments were supportive of EPA to grant the State of Louisiana portions of the Subtitle C Hazardous Waste Management Program and two were

irrelevant to the proposed rulemaking. EPA received a written adverse comment from TD*X Associates LP, Beaumont Texas, (TD*X) requesting that EPA not authorize the State of Louisiana to implement the regulatory provisions commonly known as the “Verified Recycler Exemption,” or “VRE.” EPA received only one adverse comment, from TD*X, opposing EPA’s proposal to authorize revisions to Louisiana’s hazardous waste regulations. The full set of comments can be found in the docket for this action. The commenter asserts that the Louisiana program that employs both the VRE and the associated Verified Reclamation Facility (VRF) variance is not protective of human health and the environment, and does not implement the State’s legally mandated requirement to enforce regulations for the management of designated hazardous waste materials that are at least as stringent as the RCRA regulations. TD*X’s extensive comments address two issues related to 1) EPA’s proposed authorization of the Louisiana Department of Environmental Quality (LDEQ) revised hazardous waste management program as published in the Federal Register on September 5, 2018, at 83 FR 45061, and 2) Louisiana’s April 19, 2018, proposal to issue a site-specific feedstock variance from the classification as a solid waste to Thermaldyne LLC – Thermaldyne Port Allen Facility, in accordance with the Louisiana Administrative Code (LAC) 33:V.105.O.1.b and 105.O.2.b [analogous to 40 CFR 260.30(b) and 260.31(b)] (Further information about the LDEQ proposal to issue a site-specific variance to Thermaldyne LLC can be found at <http://www.deq.louisiana.gov/public-notices>). In accordance with the approval process found at 40 CFR part 271, EPA provides the following responses to comments regarding authorization of Louisiana’s requested program revision:

1. The commenter stated that EPA Region 6 should either: not authorize the LDEQ State program if it includes any of the court vacated VRE language and conditions; or issue a limited program authorization that excludes any reference to either the VRE or VRF variance process. Specifically, the commenter argued that if Louisiana is authorized, including any of the VRE language, then all references to LDEQ being allowed to issue a VRF variance should be struck and that a specific reference or condition should be included in the EPA authorization requiring that LDEQ not issue any VRF variance for a “recycling” facility that employs a treatment method that EPA has designated as requiring a specific RCRA permit. The commenter also requested EPA to eliminate the following statement in the Federal Register at 83 FR 45061 (September 5, 2018), on page 45066, Section G: *“For the purposes of RCRA section 3009, the Agency has determined that the broader in scope provisions are more protective/stricter, thus being within the State’s authority to maintain them as part of the State’s RCRA program.”* For the reasons set forth below, EPA does not agree with the commenter.

EPA did not propose to authorize Louisiana for the VRE requirements that were vacated by the Court of Appeals for the District of Columbia Circuit, Am. Petroleum Inst. v. EPA, 862 F.3d 50 (DC Cir. 2017) and Am. Petroleum Inst. v. EPA, 883F.3d 918 (DC Cir. 2018). On page 83 FR 45066, column 3 of the proposed rulemaking, EPA specified that the Agency considers the Louisiana VRE requirements broader in scope than EPA regulations. EPA further clarified that the LDEQ provisions that are broader in scope than the federal regulations are not part of the proposed program authorization because EPA cannot enforce requirements that are broader in scope, even if compliance with such provisions is required by Louisiana law. LDEQ may implement these state regulations because they are at least as stringent as federal law, but

because they are broader in scope than federal law, they are not federally enforceable. EPA addressed this question in the Final Rule, “Response to Vacatur of Certain Provisions of the Definition of Solid Waste Rule” in the Federal Register at 83 FR 24664, 24666, May 30, 2018: “For states that have adopted rules similar to the verified recycler exclusion and the 2015 definition of legitimate recycling, but have not yet been authorized for them, the vacatur of the federal rules will not change the authorization status of the state program.... The vacatur and subsequent reinstatement of various provisions of the prior federal rules will result in state provisions that are broader in scope than the federal program as it pertains to the specific vacated provisions.”

With respect to the issuance of variances, if the material receives an exclusion or variance from being a solid waste, it is by definition not a hazardous waste and does not have to be treated as such, subject to any conditions in the exclusion or variance. The State of Louisiana has the authority to issue site-specific variances from classification as a solid waste under 40 CFR 260.30(a) through (c) and 260.31(a) through (c) in lieu of EPA since EPA first authorized the state for the initial Definition of Solid Waste (DSW) final rule (50 FR 614, January 4, 1985; as amended by the final rules published at 50 FR 14216, April 11, 1985; and 50 FR 33541, August 20, 1985). In accordance with 40 CFR 260.30 and 260.31, the granting of variances for reclaimed materials is site-specific and the variances are granted on a case-by-case basis. In granting variances, an authorized state must evaluate the particular waste material managed and types of processing operations conducted. Authorized states that implement hazardous waste programs have reasonable flexibility to evaluate case-by-case situations within their state.

Finally, RCRA 3009 states that nothing prohibits a state from imposing ANY requirements which are more stringent than our rules. Also, under 40 CFR 271.1(i), states are not precluded from having requirements that are more stringent or more extensive; or operating a program with a greater scope of coverage but the greater in scope coverage is not part of federally approved program. For the purposes of federal authorization and enforcement, the EPA RCRA hazardous waste regulations distinguish between these two kinds of allowable state requirements. While state requirements that are more stringent may be authorized as part of the state's RCRA program, broader in scope state provisions cannot be authorized. The preamble of the 2015 DSW rule (80 FR 1694; January 13, 2015) documented in detail the additional requirements that must be met to qualify for the state's verified recycler exclusion, compared to the transfer-based exclusion that was reinstated by the court. EPA stated in the preamble that the changes to the standards and criteria for variances from classification as a solid waste discussed in section IX (Revisions to Solid Waste Variances and Non-Waste Determinations) are more stringent than the existing federal hazardous waste program, including the transfer-based exclusion (see 80 FR 1732 – 1735; January 13, 2015). Based on the EPA guidance document, "Determining Whether State Hazardous Waste Requirements are More Stringent or Broader in Scope than the Federal RCRA Program" (December 23, 2014), as discussed in Section G.1 of the proposed rulemaking preamble, EPA affirms that the LDEQ provisions that are broader in scope than the federal regulations are not part of the program proposed to be authorized by the September 5, 2018, Federal Register document (83 FR 45061). EPA cannot enforce requirements that are broader in scope, although compliance with such provisions is required by Louisiana law.

2. The commenter presented an example involving LDEQ's proposal to issue a VRF variance to the Thermaldyne facility in Port Allen, Louisiana, as an example of why EPA should not authorize LDEQ for the VRE requirements. The commenter stated that the Thermaldyne facility uses a hazardous waste combustor to treat RCRA regulated listed and characteristic hazardous waste materials, and that "the facility embodies all of the aspects of sham recycling that the 1989 Lowrance Memo [RO 11426], and both the 2008 and 2015 DSW rulemakings were intended to prohibit." EPA responds to this comment as follows:

Issues regarding individual facilities are beyond the scope of this rulemaking. The purpose of the proposed rulemaking published at 83 FR 45061, September 5, 2018, was not to evaluate recycling activities at particular facilities or VRF variance applications. The Louisiana proposed rulemaking addresses regulations that the state adopted and EPA reviewed. EPA concluded that the state regulations, except for the court vacated provisions, are equivalent and consistent with the federal RCRA Subtitle C program, as amended through April 17, 2015. EPA reiterates that the Agency determined the Louisiana VRE standard is broader in scope than the federal regulations and, accordingly, did not propose to authorize the State of Louisiana for the VRE standard.

C. Final Action

Based on the comments received in response to the proposed authorization of the State of Louisiana hazardous waste program, EPA's responses to the comments, and consideration of the administrative record, EPA is granting final authorization of the state's program, except for the VRE and other state provisions which are broader in scope than federal rules and remain unaffected by the vacatur ordered by the United States Court of Appeals for the District of

Columbia Circuit, on July 7, 2017, as modified on March 6, 2018. EPA retains its authority under RCRA sections 3007, 3008, 3013 and 7003 which include, among others, authority to: (1) take enforcement actions regardless of whether the state has taken its own action, (2) enforce RCRA requirements and suspend or revoke permits; and (3) perform inspections, and require monitoring, tests, analyses or reports.

D. What is codification and is the EPA codifying Louisiana’s hazardous waste program as authorized in this rule?

Codification is the process of placing the State's statutes and regulations that comprise the State's authorized hazardous waste program into the CFR. We do this by referencing the authorized State rules in 40 CFR part 272. We reserve the amendment of 40 CFR part 272 subpart T for this authorization of Louisiana’s program changes until a later date. In this authorization application, the EPA is not codifying the rules documented in this **Federal Register** notice.

E. Administrative Requirements

This final authorization revises Louisiana’s authorized hazardous waste management program pursuant to RCRA section 3006 and imposes no requirements other than those currently imposed by state law. For further information on how this authorization complies with applicable executive orders and statutory provisions, please see the proposed rulemaking published in the **Federal Register** (83 FR 45061, September 5, 2018).

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: December 18, 2018.

Anne Idsal,

Regional Administrator, Region 6.

[FR Doc. 2018-27794 Filed: 12/21/2018 8:45 am; Publication Date: 12/26/2018]