



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA-R06-RCRA-2018-0506; FRL-10015-47-Region 6]

Texas: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The State of Texas Commission on Environmental Quality (TCEQ) has applied to the Environmental Protection Agency (EPA) for final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). The EPA has reviewed Texas' application and has determine that these changes appear to satisfy all requirements needed to qualify for final authorization and is proposing to authorize the State's changes. The EPA is seeking public comment prior to taking final action.

DATES: Comments on this proposed rule must be received by [**insert date 30 days after date of publication in the *Federal Register***]. Today's document also corrects errors in the ADDRESSES section of a previous Texas authorization *Federal Register* document published on August 18, 1999 (64 FR 44836).

ADDRESSES: Submit your comments by one of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *Email:* patterson.alima@epa.gov.

Instructions: EPA must receive your comments by [**insert date 30 days after date of publication in the *Federal Register***]. Direct your comments to **Docket ID Number EPA-R06-**

RCRA-2018-0506. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <https://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <https://www.regulations.gov>, or email. The Federal *regulations.gov* website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment with any CD you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption and be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at www.regulations.gov. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy.

You can view and copy Texas' application and associated publicly available docket materials either through www.regulations.gov at the following locations: Texas Commission on Environmental Quality, (TCEQ), 12100 Park S. Circle, Austin, Texas 78753-3087, (512) 239-6079 and EPA, Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270. The EPA facility is

open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID-19. We recommend that you telephone Alima Patterson, Regional Authorization/Codification Coordinator at (214) 665-8533, before visiting the Region 6 office. Interested persons wanting to examine these documents should make an appointment with the office.

FOR FURTHER INFORMATION CONTACT: Alima Patterson, (214) 665-8533, *patterson.alima@epa.gov*. Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office will be closed to the public to reduce the risk of transmitting COVID-19. We encourage the public to submit comments via <https://www.regulations.gov>, as there will be a delay in processing mail and no courier or hand deliveries will be accepted. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION:

A. Why Are Revisions to State Programs Necessary?

States which have received final authorization from the EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, States must change their programs and ask the EPA to authorize the changes. Changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 268, 270, 273, and 279.

B. What decisions have EPA made in this Rule?

On December 5, 2018, the State of Texas submitted a final complete program revision application seeking authorization of changes to its hazardous waste program that correspond to certain Federal rules promulgated between February 7, 2014, and April 17, 2015, which includes portions of RCRA Cluster XXIII and RCRA Cluster XXIV (Checklists 231 and 233A, 233B, 233C, 233D2 and 233E), as well as, state-initiated changes. The EPA has reviewed Texas' application to revise its authorized program and is proposing to find that it meets all of the statutory and regulatory requirements established by RCRA. Therefore, we propose to grant the State of Texas final authorization to operate its hazardous waste program with the changes described in the authorization application, except for federal provisions that were vacated from the January 13, 2015, final rule (Revisions to the Definition of Solid Waste (DSW)) by the United States 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*, No. 09–1038 (DC Cir. Mar. 6, 2018)).

The State of Texas will continue to have responsibility for permitting treatment, storage and disposal facilities (TSDFs) within its borders (except in Indian Country), and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, the EPA will implement those requirements and prohibitions in the State of Texas, including issuing permits, until the State is granted authorization to do so.

C. What is the effect of this proposed authorization decision?

If the State of Texas is authorized for these changes, a facility in Texas subject to RCRA will

now have to comply with the authorized State requirements instead of the equivalent Federal requirements in order to comply with RCRA. Additionally, such facilities will have to comply with any applicable Federal requirements such as, for example, HSWA regulations issued by the EPA for which the State has not received authorization. The State of Texas will continue to have enforcement responsibilities under its State hazardous waste program for violations of such program, but the EPA retains its authority under RCRA sections 3007, 3008, 3013 and 7003, which include, among others, authority to:

- conduct inspections and require monitoring, tests, analyses, or reports;
- enforce RCRA requirements and suspend or revoke permits, and
- take enforcement actions after notice to and consultation with the State.

The action to approve these provisions would not impose additional requirements on the regulated community because the regulations for which the State of Texas is requesting authorization are already effective under State law and are not changed by the act of authorization.

D. What happens if the EPA receives comments on this action?

If the EPA receives comments on this proposed action, we will address those comments in our final action. You may not have another opportunity to comment. If you wish to comment on this proposed authorization, you must do so at this time.

E. What has Texas previously been authorized?

The State of Texas initially received final authorization on December 26, 1984 (49 FR 48300), to implement its Base Hazardous Waste Management Program. This authorization was clarified in a notice published March 26, 1985 (50 FR 11858). Texas received authorization for revisions to its program, effective October 4, 1985 (51 FR 3952), February 17, 1987 (51 FR

45320), March 15, 1990 (55 FR 7318), July 23, 1990 (55 FR 21383), October 21, 1991 (56 FR 41626), December 4, 1992 (57 FR 45719), June 27, 1994 (59 FR 16987), June 27, 1994 (59 FR 17273), November 26, 1997 (62 FR 47947), December 3, 1997 (62 FR 49163), October 18, 1999 (64 FR 44836), November 15, 1999 (64 FR 49673), September 11, 2000 (65 FR 43246), June 14, 2005 (70 FR 34371), December 29, 2008, (73 FR 64252), and July 13, 2009 (74 FR 22469); March 7, 2011 (76 FR 12283), effective May 6, 2011; March 6, 2012 (77 FR 13200), effective May 7, 2012; November 30, 2012 (77 FR 71344), effective January 29, 2013; September 3, 2014 (79 FR 52220), effective November 3, 2014; October 21, 2015 (80 FR 63691), effective December 21, 2015; December 28, 2015 (80 FR 80672), effective February 26, 2016; and April 10, 2020 (85 FR 20187), effective April 10, 2020.

The EPA incorporated by reference Texas' then authorized hazardous waste program effective December 3, 1997 (62 FR 49163), November 15, 1999 (64 FR 49673), December 29, 2008 (73 FR 64252), May 6, 2011 (76 FR 12283), January 29, 2013 (77 FR 71344), February 26, 2016 (80 FR 80672), and April 10, 2020 (85 FR 20187).

In 1991, Texas Senate Bill 2 created the Texas Natural Resource Conservation Commission (TNRCC) which combined the functions of the former Texas Water Commission and the former Texas Air Control Board. The transfer of functions to the TNRCC from the two agencies became effective on September 1, 1993. House Bill 2912, Article 18 of the 77th Texas Legislature, 2001, changed the name of the TNRCC to the Texas Commission on Environmental Quality (TCEQ) and directed the TNRCC to adopt a timetable for phasing in the change of the agency's name. The TNRCC decided to make the change of the agency's name to the TCEQ effective September 1, 2002. The change of name became effective September 1, 2002, and the legislative history of the name change is documented at (See, Act of June 15, 2001, 77th Leg. R.

S., Ch 965, Section 18.01, 2001 Tex. Gen. Laws 1985). The TCEQ may perform any act authorized by law either as the TNRCC or as the TCEQ. Id. Therefore, references to the TCEQ are references to TNRCC and to its successor, the TCEQ.

The TCEQ has primary responsibility for administration of laws and regulations concerning hazardous waste. The official State regulations may be found in Title 30, Texas Administrative Code, Chapters 305, 324 and 335, effective June 16, 2016. Some of the State rules incorporate the Federal regulations by reference. Texas Water Code Section 5.103 and Section 5.105 and Texas Health and Safety Code Section 361.017 and Section 361.024 confer on the Texas Commission on Environmental Quality the powers to perform any acts necessary and convenient to the exercise of its jurisdiction. The TCEQ is authorized to administer the RCRA program. However, the Railroad Commission (RRC) has jurisdiction over the discharge, storage, handling, transportation, reclamation, or disposal of waste materials (both hazardous and non-hazardous) that result from the activities associated with the exploration, development, or production of oil or gas or geothermal resources and other activities regulated by the RRC. A list of activities that generate wastes that are subject to the jurisdiction of the RRC is found at Texas Health and Safety Code Section 401.415. Such wastes are termed “oil and gas wastes.” The TCEQ has responsibility to administer the RCRA program, however, hazardous waste generated at natural gas or natural gas liquids processing plants or reservoir pressure maintenance or repressurizing plants are subject to the jurisdiction of the TCEQ until the RRC is authorized by EPA to administer that waste under RCRA. The TCEQ jurisdiction over Solid waste can be found at Chapter 361, Sections 361.001 through 361.754 of the Texas Health and Safety Code. The TCEQ’s jurisdiction encompasses hazardous and nonhazardous, industrial and municipal Solid waste. The definition of Solid waste can be found at Texas Health and Safety Code Section

361.003(34). When the RRC is authorized by EPA to administer the RCRA program for these wastes, jurisdiction over such hazardous waste will transfer from the TCEQ to the RRC. The EPA has designated the TCEQ as the lead agency to coordinate RCRA activities between the two agencies. The EPA is responsible for the regulation of any hazardous waste for which TCEQ has not been previously authorized.

Further clarification of the jurisdiction between the TCEQ and the RRC can be found in a separate document. This document, a Memorandum of Understanding (MOU), became effective on May 31, 1998.

The TCEQ has the rules necessary to implement EPA's portion of RCRA Cluster XXIII and RCRA Cluster XXIV rule. The State is seeking authorization for Hazardous Electronic Manifest rule (Checklist 231) and Revisions to the Definition of Solid Waste, excluding provisions related to the vacatur of Factor 4 of the Legitimacy Test on Checklist 233B and also provisions related to the vacatur of the verified recycler exclusion on Checklist 233D2. The Commissioners adopted revisions to the Federal hazardous waste standards promulgated between February 7, 2014 and January 13, 2015. TCEQ regulations 30 Texas Administrative Code Chapter 335 were revised to include portions of the RCRA Cluster XXIII and RCRA Cluster XXIV. The TCEQ adopted the Federal regulations on June 10, 2016, effective June 16, 2016. The TCEQ authority to incorporate Federal rules by reference can be found at Texas Administrative Code 335 Sections 335.28, 335.29 and 335.31.

F. What changes is EPA proposing to authorize with today's action?

On December 5, 2017, the State of Texas submitted a final complete program revision application, seeking authorization of their changes in accordance with 40 CFR 271.21. The State of Texas' program revision application includes revisions to the federal hazardous waste

program, as well as, state-initiated changes to the state's previously authorized program. We have determined that the TCEQ's hazardous waste program revision satisfies all of the requirements necessary to qualify for final authorization, with the exception of the final rule addressed by Checklist 232 (Revisions to the Export Provisions of the Cathode Ray Tube Rule; June 26, 2014; 79 FR 36220). EPA cannot authorize the State for Checklist 232 because the State has not amended the date of its incorporation by reference to include the changes addressed by this final rule.

The EPA proposes to authorize, subject to receipt of written comments that oppose this action that the State of Texas hazardous waste program revisions are equivalent to, consistent with, and no less stringent than the Federal program, and therefore satisfy all of the requirements necessary to qualify for final authorization.

1. Program Revision Changes for Federal Rules

The TCEQ revisions consist of regulations which specifically govern Federal hazardous waste revisions promulgated February 7, 2014, (RCRA Cluster XXIII; Checklist 231) and January 13, 2015 (RCRA Cluster XXIV; Checklists 233A, 233B, 233C, 233D2 and 233E). Texas' adoption of the January 13, 2015 final rule (80 FR 1694; Revisions to the Definition of Solid Waste (DSW)), includes provisions that have been vacated by the United States 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*, No. 09-1038 (DC Cir. Mar. 6, 2018)). The impact of the vacatur on the Texas hazardous waste program is discussed in Section G of this document. We propose to authorize Texas for the following program changes in Table 1 below:

Table 1. Program Revision Changes for Federal Rules

| Description of Federal requirement (include Checklist No., if relevant) | Federal Register date and page (and/or RCRA statutory authority) | Analogous state authority |
|--|---|--|
| 1. Hazardous Waste Electronic Manifest Rule. (Checklist 231). | 79 FR 7518-7563 February 7, 2014. | Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Sections 361.017 and 361.024; 30 Texas Administrative Code Chapter 335 Sections 335.1(50)-(51), 335.1(101), 335.1(180); 335.10(a) , 335.11(a), 335.12(a), as amended, effective June 16, 2016. |
| 2. Revisions to the Definition of Solid Waste Changes affecting non-waste determinations and variances (Checklist 233A). | 80 FR 1694-1814 January 13, 2015 | Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Sections 361.017 and 361.024; 30 Texas Administrative Code Chapter 335. Sections 335.19(c), 335.19(c)(1) – (5), 335.21, 335.21(4) – (6), 335.26, as amended, effective June 16, 2016. |
| 3. Revisions to the Definition of Solid Waste – Legitimacy-related provisions. (Checklist 233B) | 80 FR 1694 – 1814 January 13, 2015 | Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Sections 361.017 and 361.024; 30 Texas Administrative Code Chapter 335 Sections 335.1(33), 335.1(33)(A) – (D), 335.27 (except for the incorporation by reference of 260.43(a)(4)), 335.1(146)(C)(iii), 335.1(146)(C)(iv), and 335.1(146)(J) as amended, effective June 16, 2016. |
| 4. Revisions to the Definition of Solid Waste - Speculative Accumulation (Checklist 233C). | 80 FR 1694 – 1814 January 13, 2015 | Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Sections 361.017 and 361.024; 30 Texas Administrative Code Chapter 335 Section 335.17(a)(8) as amended, effective June 16, 2016. |
| 5. Revisions to the Definition of Solid Waste – Exclusions and non-waste determinations. (Checklist 233D2) | 80 FR 1694 – 1814 January 13, 2015 | Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Sections 361.017 and 361.024; 30 Texas Administrative Code: Chapter 335, Sections 335.1(61), 335.1(61)(A) – (C), 335.1(71), 335.1(89), 335.1(92), 335.1(146)(A)(iv) (incorporation by reference of 40 CFR |

| Description of Federal requirement (include Checklist No., if relevant) | Federal Register date and page (and/or RCRA statutory authority) | Analogous state authority |
|---|--|---|
| | | <p>261.4(a)(23) and (a)(27)), 335.1(146)(D)(iii) – (iv), 335.1(146)(D)(iv) Table 1, 335.1(161), 335.17(a)(4), 335.18 Heading, 335.18(a), 335.18(a)(2), 335.18(a)(4) – (5), 335.21 Heading, 335.21, 335.21(1) –(2), 335.32, 335.701, 335.702(a)(3), 335.703(a)(1)–(2), 335.703(b), 335.703(c)–(k), 335.704(a), 335.704(b), 335.704(b)(1)–(4), 335.704(c)- (e), 335.705, 335.705(a), 335.705(b), 335.705(b)(1) – (4), 335.705(c) - (d), 335.706; Chapter 37, Sections 37.11, 37.41, 37.51, 37.61, 37.61(a)(1)-(2), 37.61(1), 37.71(a)-(b), 37.131, 37.141, 37.151, 37.161, 37.161(a), 37.161(a)(1), 37.161(a)(2), 37.161(a)(2)(A)-(D), subchapter C, 37.201(a)-(e), 37.201(g)-(k), 37.211(a)-(b), 37.211(c), 37.211(d), 37.211(d)(1)–(3), 37.211(e) –(f), , 37.211(g), 37.231(a)-(b), 37.231(c), 37.231(d)-(f), 37.231(h), 37.251(a)-(b), 37.251(b)(1), 37.251(b)(1)(A)-(D) 37.251(b)(2), 37.251(b)(2)(A)-(D), 37.251(c), 37.251(c)(1)-(3), 37.251(d)-(g) 37.261(a)-(d), 37.261(e)(2), 37.261(e)(3), 37.301(a)-(b), 37.311, 37.331, 37.351, 37.361, 37.402, 37.404(b), 37.404(b)(1) - (3), 37.411, 37.501, 37.501(a)-(d), 37.511, 37.511(a)-(d), 37.521, 37.521(a)-(e), 37.531(a) - (d), 37.541, 37.541(a), 37.541(b), 37.541(b)(1), 37.541(b)(1)(A)- (C), 37.541(b)(2), 37.541(b)(2)(A)-(D), 37.541(c), 37.541(d), 37.541(d)(1)-(3), 37.541(e)-(f), 37.541(h), 37.551(a)-(d), 37.551(f)-(h), 37.661, 37.601(a)-(b), 37.611, 37.621, 37.631, 37.641, 37.651, 37.671(a)-(b), as amended, effective June 16, 2016.</p> |
| 6. Revisions to the Definition of Solid Waste – Remanufacturing | 80 FR 1694 – 1814 January 13, 2015 | Texas Water Code Annotated Sections 5.103 and 5.105, Texas Health & Safety Code Annotated Sections 361.017 and 361.024; 30 Texas Administrative Code |

| Description of Federal requirement (include Checklist No., if relevant) | Federal Register date and page (and/or RCRA statutory authority) | Analogous state authority |
|---|--|--|
| exclusion (Checklist 233E). | | Chapter 335 Sections 335.1(134), 335.1(146)(D) Table, 335.1(146)(D)(iii) – (iv), 335.701, 335.702(a)(1)-(2), 335.702(a)(4)-(6), as amended, effective June 16, 2016. |

2. *State-initiated Changes*

In addition to adopting the federal program revisions in Section F.1, Texas has made amendments to its regulations that are not directly related to any of the federal rules addressed in Item F.1. Some of the state provisions have no direct federal analog but are related to particular paragraphs, sections, or parts of the federal hazardous waste regulations. These amendments clarify the State’s regulations and make the State’s regulations more internally consistent. The State’s regulations, as amended by these provisions, provide authority which remains equivalent to, and no less stringent than the Federal laws and regulations. The EPA has reviewed the state-initiated changes and have determined they satisfy the requirements of 40 CFR 271.21(a).

We are proposing to grant Texas final authorization to carry out the State’s hazardous waste program, as amended by the state-initiated changes, in lieu of the Federal program. These provisions listed in Table 2 are analogous to the indicated RCRA regulations found at 40 CFR as of January 13, 2015. The Texas provisions are from the Texas Administrative Code (TAC), Title 30, amended to be effective December 31, 2016.

Table 2. State-Initiated Changes

| State citation – 30 TAC (effective 12/31/16) | Reason for Change | Analogous Federal Citation – 40 CFR |
|--|--|-------------------------------------|
| 20.15 | Conforming and clarifying changes, including paragraph restructuring, renumbering and correlated corrections to internal references. | 260.20 |
| 335.1 (Definitions)..... | Amended to include names for acronyms plus | 260.10 related |

| | | |
|-----------------|---|-----------------------------|
| 335.4 | minor edits involving the use of quotation marks and capitalizations. Conforming change to correct State Agency name from “Texas Natural Resource Conservation Commission” to “Texas Commission on Environmental Quality.” | Part 264 related |
| 335.602(c)..... | Revised provision to correctly reference title of Chapter 37, Subchapter P instead of Chapter 335, Subchapter P. | Part 267, Subpart H related |

G. Where are the revised State Rules different from the Federal Rules?

1. Evaluation and Analysis on When State Regulations are More Stringent or Broader in Scope than the Federal Regulations

Under 40 CFR 271.1(i), EPA allows states to (1) adopt and enforce requirements which are more stringent or more extensive than those required by the federal RCRA program, and (2) operate a program with a greater scope of coverage than that required by the federal program. To determine whether particular state provisions are more stringent or broader in scope, EPA uses the December 23, 2014, guidance document: “Determining Whether State Hazardous Waste Requirements are More Stringent (MS) or Broader in Scope (BIS) than the Federal RCRA Program.”¹ In the guidance document, EPA uses a two-part test to determine if state regulations are MS or BIS. The two-part test requires that the following questions be answered sequentially:

- a. Does imposition of the particular state requirement increase the size of the regulated community or universe of wastes beyond what is covered by the federal program through either directly enforceable requirements or certain conditions for exclusion?
- b. Does the particular requirement under review have a counterpart in the federal regulatory program?

If the answer to the first part of the test is yes, then the state requirement is generally

¹ A copy of this guidance is included in the docket of this proposed rule.

considered broader in scope. If the answer is no, then EPA uses the second part of the test to determine whether the state requirement is more stringent or broader in scope. If the state requirement has a counterpart in the federal program, the state requirement is classified as more stringent. However, if the state requirement does not have a counterpart, it is classified as broader in scope.

State provisions that are broader in scope are not part of the federally authorized program and thus, are not federally enforceable.

2. Texas Requirements That Are Broader in Scope Than the Federal Program

TCEQ has adopted the Revisions to the Definition of Solid Waste (DSW) Rule published on January 13, 2015 (80 FR 1694). However, 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) vacated certain aspects of the 2015 federal DSW rule and replaced them with provisions from the 2008 DSW rule, see 73 FR 64668 (October 30, 2008). The Court (1) vacated the federal 2015 verified recycler exclusion for hazardous waste that is recycled off-site (except for certain provisions) (40 CFR 261.4(a)(24)) and the associated provisions at 40 CFR 260.30(f) and 260.31(d); (2) reinstated the transfer-based exclusion at 261.4(a)(24) and (25) from the 2008 rule to replace the now vacated 2015 verified recycler exclusion; (3) vacated Factor 4 of the 2015 definition of legitimate recycling in its entirety (40 CFR 260.43(a)(4)); and (4) reinstated the 2008 version of Factor 4 at 40 CFR 260.43(c)(2) to replace the now-vacated 2015 version of Factor 4.

In order to determine whether the State of Texas regulations are more stringent or broader in scope than the federal RCRA program, the EPA used the two-part test described in Section G.1.

With respect to the first test, Texas regulates the same size of the regulated community and the same universe of hazardous secondary materials as the federal RCRA program. With respect to the second test, EPA has determined that the following State of Texas provisions from the 2015 federal DSW rule are broader in scope: Texas Administrative Code (TAC), Title 30, sections 335.18(a)(6) [260.30(f)], 335.19(d) [260.31(d)], 335.1(146)(A)(iv) incorporation by reference of 261.4(a)(24) with respect to the verified recycler exclusion and 335.27 incorporation by reference of 260.43(a)(4) with respect to Factor 4 definition of legitimate recycling.

Due to the vacatur of certain 2015 federal DSW provisions and the reinstatement of 2008 federal DSW provisions, EPA's regulations do not include the provisions that were vacated by the Court.² Texas has adopted these vacated provisions, including the vacated 2015 DSW Factor 4 in the definition of legitimate recycling of hazardous secondary material and the verified recycler exclusion.³ As a result of the federal vacatur, the Texas provisions at 30 TAC sections 335.18(a)(6), 335.19(d), 335.1(146)(A)(iv) incorporation by reference of 261.4(a)(24), and 335.27 incorporation by reference of 40 CFR 260.43(a)(4) have no direct analogs in the federal regulations. Our December 23, 2014, guidance supports this conclusion. On page 6 of our December guidance, EPA provides that, "...Further, if a state adopts a federal solid or hazardous waste exclusion, but adds additional conditions that must be met for the state exclusion to apply, those additional conditions would be considered outside the scope of the federal program and would not be part of the federally authorized program, although the entity would still be subject to federal enforcement regarding the part of the state regulations which track the federal conditions." Following the vacatur of portions of the federal rules, Texas' program effectively

² EPA issued a final rule referred to as the Transfer Base Exclusion reflecting the Court's ruling, see 83 FR 24664 (May 30, 2018).

³ The Federal Register citation for the "2015 DSW rule" is 80 FR 1694, January 13, 2015, and for the "2008 DSW rule" is 73 FR 64668, October 30, 2008.

contains additional conditions that must be met for the exclusion to apply. This makes the State's additional provisions broader in scope and not part of the federally authorized program, see 40 CFR part 271.1(i)(2).

The TCEQ provisions that are broader in scope than the federal regulations are not part of the program being proposed to be authorized by today's proposed action. EPA cannot enforce requirements that are broader in scope, although compliance with such provisions is required by Texas law. 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. We make this determination due to the fact that the broader in scope provisions in Texas' verified recycler exclusion require additional conditions to be met in order to qualify for the exclusion when compared to the reinstated transfer-based exclusion found in 83 FR 24664 (May 30, 2018).

3. Texas Requirements That Are More Stringent Than the Federal Program

Texas' regulations contain financial assurance requirements for the management of excluded hazardous secondary materials that are more stringent than are required by the RCRA program. The specific more stringent requirements are noted in the State's authorization Program Revision Application package and include, but are not limited to, the following:

a. Financial Mechanisms:

(1) The TCEQ rules are more stringent than the federal rules to the extent that, unlike the federal program which allows the use of insurance under 40 CFR 261.143(d) and 261.151(d), in Texas, insurance may not be used for financial assurance for removal, decontamination, and corrective action as a condition of the exclusion for hazardous secondary material. As a result, 30 TAC sections 335.703(c) and 37.41 are also more stringent than 40 CFR 261.143(f) because

insurance is not included among the financial assurance mechanisms that may be combined to satisfy financial assurance for removal, decontamination, and corrective action as a condition of an exclusion for hazardous secondary materials. However, at 30 TAC section 335.703(i)(1), the TCEQ did adopt the use of insurance endorsements as an acceptable financial assurance mechanism for an owner or operator of a reclamation facility or intermediate facility that is required to establish financial assurance for liability coverage, as found in 40 CFR 261.147.

(2) The TCEQ provisions regarding financial test for a corporate guarantee at 30 TAC section 335.703(d) and sections 37.251(b)(1)(B), (b)(1)(D), (b)(2)(B) and (b)(2)(D) are more stringent than the federal rules at 40 CFR 261.143(e)(1)(i)(B), (e)(1)(i)(D), (e)(1)(ii)(B) and (e)(1)(ii)(D) to the extent that a broader scope of financial obligations are required to be included in the eligibility determination for a financial test. The requirements of the eligibility determination in the federal rule compare the owner or operator's net working capital and tangible net worth to a sum of the current plugging and abandonment cost estimates multiplied by six. In contrast, the requirements of the eligibility determination in the TCEQ rule compare the owner or operator's net working capital and tangible net worth to a sum of the current plugging and abandonment cost estimates multiplied by six plus the cost of liability coverage plus any other financial obligations that exist under state and federal environmental laws and regulations.

(3) The TCEQ provisions at 30 TAC sections 335.703(d) and 37.251(c)(2) are more stringent than the federal provision at 261.143(e)(3)(ii) to the extent that the TCEQ rule requires an "unqualified opinion" of the owner or operator's financial auditor.

(4) The TCEQ provisions at 30 TAC sections 335.703(d) and 37.251(c)(3) are more stringent than the federal provision at 261.143(e)(3)(iii) to the extent that the TCEQ requires a special

report from the owner or operator's independent CPA in every case, whereas, the federal rule requires a special report only under certain circumstances.

(5) The TCEQ provisions at 30 TAC sections 335.703(d) and 37.261(e)(2) are more stringent than the corresponding federal rule at 261.143(e)(10)(ii) to the extent that the TCEQ rule requires a guarantee to remain in force until the executive director approves alternative financial assurance, while the federal rule provides that a guarantee remains in place for 120 day from the date of receipt of cancellation.

b. Liability Requirements:

(1) Texas has no analog to 40 CFR 261.147(c). The TCEQ rules are more stringent than the federal rules to the extent that the TCEQ did not adopt an opportunity for an owner or operator to request an adjustment in the level of financial responsibility required for liability coverage.

(2) The TCEQ rules at 30 TAC sections 335.703(i) and 37.541(d)(3) are more stringent than the corresponding federal provision at 40 CFR 261.147(f)(3)(iii) to the extent that the TCEQ rules require a special auditor's report in every instance, while the federal rules require a special auditor's report only if an audited financial statement or financial data filed with the SEC differs from the financial data in the letter from the Chief Financial Officer demonstrating how the owner or operator satisfies the financial test. Furthermore, the TCEQ rules go into more detail regarding a CPA's positive/negative verification.

(c) Acceptability of State Assumption of Responsibility: The TCEQ rule at 30 TAC section 335.703(k) is more stringent than 40 CFR 261.150(a) to the limited extent that an owner or operator is not considered to be in compliance until the executive director has made a determination of equivalency, while the federal rule considers an owner or operator to be in compliance while an equivalency determination is pending.

(d) Financial Instruments:

(1) The TCEQ provisions at 30 TAC sections 335.703(e) and 37.351 are more stringent than the federal provision at 40 CFR 261.151(e) to the extent the Chief Financial Officer letter discusses and integrates the components of the financial test because, the TCEQ rules require a broader scope of financial obligations to be included in the eligibility determination for a financial test. Similarly, at 30 TAC sections 335.703(j) and 37.651 (analogous to 40 CFR 261.151(f)), Texas includes a similar requirement regarding the letter from the Chief Financial Officer for liability.

(2) The TCEQ provisions at 30 TAC sections 335.703(j) and 37.661 are more stringent than 261.151(f) and 261.151(g)(2). The TCEQ rule allows a firm whose parent corporation is also the parent corporation of the owner or operator to be a guarantor if it has a substantial business relationship with the owner or operator. However, the federal rules and the TCEQ rules require the amount of consideration received by the corporate guarantor from the owner or operator to be disclosed in different places. The federal rules require consideration to be discussed in the letter from the chief financial officer, while the TCEQ rules require the amount of consideration to be included as a provision of the corporate guarantee instrument.

H. Who handles permits after the authorization takes effect?

The State of Texas will issue permits for all the provisions for which it is authorized and will administer the permits it issues. The EPA will continue to administer any RCRA hazardous waste permits or portions of permits which we issued prior to the effective date of this authorization. EPA will not issue any more new permits or new portions of permits for the provisions listed in Table 1 in this document after the effective date of this authorization. The EPA will continue to implement and issue permits for HSWA requirements for which Texas is

not yet authorized.

I. How does today's action affect Indian Country (18 U.S.C.1151) in Texas?

Texas is not authorized to carry out its Hazardous Waste Program in Indian Country within the State. This authority remains with EPA. Therefore, this action has no effect in Indian Country.

J. What is codification and is the EPA codifying Texas' 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 parts 272. We reserve the amendment of 40 CFR parts 272, subpart SS for this authorization of Texas' program changes until a later date. In this authorization application the EPA is not codifying the rules documented in this **Federal Register** notice.

K. Corrections to the August 18, 1999 (64 FR 44836) Authorization Federal Register Document for Texas

In the ADDRESSES section of the August 18, 1999 authorization notice, the reference to "the State of Louisiana" is corrected to read "the State of Texas." In addition, the State's address referencing Louisiana Department of Environmental Quality is corrected to read "Texas Commission on Environmental Quality, (TCEQ), 12100 Park S. Circle, Austin, Texas 78753-3087, (512) 239-6079."

L. Administrative Requirements

The Office of Management and Budget (OMB) has exempted this action (RCRA State Authorization) from the requirements of Executive Orders 12866 (58 FR 51735, October 4,

1993) and 13563 (76 FR 3821, January 21, 2011). Therefore, this action is not subject to review by OMB. This action proposes to authorize State requirements for the purpose of RCRA 3006, and imposes no additional requirements beyond those imposed by State law. Because this proposed rule is not subject to Executive Order 12866, this proposed rule is not subject to Executive Order 13771 (82 FR 9339, February 3, 2017), entitled Reducing Regulations and Controlling Regulatory Costs. Accordingly, this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Because this action proposed to authorize preexisting requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). For the same reason, this proposed action also does not significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely proposes to authorize State requirements as part of the State RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA.

This proposed action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This proposed rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or

Use” (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

Under RCRA 3006(b), the EPA grants a State's application for authorization as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a State authorization application; to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this proposed rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the “Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings” issued under the Executive Order. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Executive Order 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. Because this rule proposed to authorize pre-existing State rules which are at least equivalent to, and no less stringent than existing federal

requirements, and imposes no additional requirements beyond those imposed by State law, and there are no anticipated significant adverse human health or environmental effects, the proposed rule is not subject to Executive Order 12898.

List of Subjects in 40 CFR Parts 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: October 26, 2020.

Kenley McQueen,
Regional Administrator, Region 6.

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