

7. Subject to item 5, in lieu of item 1(1), for vessel carrying new cargo on the MLO section or returning ballast after carrying new cargo on the MLO Section, a charge per gross registered ton of the ship, the gross registered tonnage being calculated according to item 1(1):

0.0000

N/A.

¹ The applicable charge at the Saint Lawrence Seaway Development Corporation's locks (Eisenhower, Snell) for pleasure craft is \$25 U.S., or \$30 Canadian per lock. The applicable charge under item 3 at the Saint Lawrence Seaway Development Corporation's locks (Eisenhower, Snell) will be collected in U.S. dollars. The other amounts are in Canadian dollars and are for the Canadian Share of tolls. The collection of the U.S. portion of tolls for commercial vessels is waived by law (33 U.S.C. 988a(a)).

Issued at Washington, DC, on February 2, 2006.

Saint Lawrence Seaway Development Corporation.

Albert S. Jacques,
Administrator.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SW FRL-8031-5]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Proposed Exclusion

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule and request for comment.

SUMMARY: EPA is proposing to grant a petition submitted by Bayer Material Science LLC (Bayer) to exclude (or delist) a certain solid waste generated by its Baytown, Texas, facility from the lists of hazardous wastes.

EPA used the Delisting Risk Assessment Software (DRAS) in the evaluation of the impact of the petitioned waste on human health and the environment.

EPA bases its proposed decision to grant the petition on an evaluation of waste-specific information provided by the petitioner. This proposed decision, if finalized, would exclude the petitioned waste from the requirements of hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA).

If finalized, EPA would conclude that Bayer's petitioned waste, spent carbon, is non-hazardous. The spent carbon from the facility's waste water treatment plant, before treatment, would be listed under the hazardous waste codes K027, K104, K111, and K112. Long- and short-term threats to human health and the environment from the spent carbon as generated are minimized.

DATES: EPA will accept comments until March 16, 2006. EPA will stamp comments received after the close of the comment period as late. These late comments may not be considered in formulating a final decision. Your requests for a hearing must reach EPA by March 1, 2006. The request must contain the information prescribed in 40 CFR 260.20(d) (hereinafter all CFR cites refer to 40 CFR unless otherwise stated).

ADDRESSES: Please send three copies of your comments. You should send two copies to the Chief, Corrective Action and Waste Minimization Section (6PD-C), Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency Region 6, 1445 Ross Avenue, Dallas, Texas 75202. You should send a third copy to the Texas Commission on Environmental Quality, P.O. Box 13087, Austin, TX 78712. Identify your comments at the top with this regulatory docket number: R6-TXDEL-FY06-Bayer-Spent Carbon. You may submit your comments electronically to Michelle Peace at peace.michelle@epa.gov. You may also submit your comments through <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

You should address requests for a hearing to Ben Banipal, Chief, Corrective Action and Waste Minimization Section (6PD-C), Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency Region 6, 1445 Ross Avenue, Dallas, Texas 75202.

FOR FURTHER INFORMATION CONTACT: Michelle Peace (214) 665-7430.

SUPPLEMENTARY INFORMATION: The information in this section is organized as follows:

I. Overview Information

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- How will Bayer manage the waste if it is delisted?
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VI. Statutory and Executive Order Reviews

I. Overview Information

A. What action is EPA proposing?

EPA is proposing to grant the delisting petition submitted by Bayer to have its spent carbon (K027, K104, K111, and K112 listed hazardous waste) excluded, or delisted, from the definition of a hazardous waste.

B. Why is EPA proposing to approve this delisting?

Bayer's petition requests a delisting for the spent carbon derived from the treatment of hazardous waste water listed as K027, K104, K111, and K112 be delisted. Bayer does not believe that the petitioned waste meets the criteria for which EPA listed it. Bayer also believes no additional constituents or factors could cause the waste to be hazardous. EPA's review of this petition included

6921(f), and 40 CFR 260.22 (d)(1)–(4). In making the initial delisting determination, EPA evaluated the petitioned waste against the listing criteria and factors cited in §§ 261.11(a)(2) and (a)(3). Based on this review, EPA agrees with the petitioner that the waste is non-hazardous with respect to the original listing criteria. If EPA had found, based on this review, that the waste remained hazardous based on the factors for which the waste was originally listed, EPA would have proposed to deny the petition. EPA evaluated the waste with respect to other factors or criteria to assess whether there is a reasonable basis to believe that such additional factors could cause the waste to be hazardous. EPA considered whether the waste is acutely toxic, the concentration of the constituents in the waste, their tendency to migrate and to bioaccumulate, their persistence in the environment once released from the waste, plausible and specific types of management of the petitioned waste, the quantities of waste generated, and waste variability. EPA believes that the petitioned waste does not meet the listing criteria and thus should not be a listed waste. EPA's proposed decision to delist waste from the facility is based on the information submitted in support of this rule, including descriptions of the waste and analytical data from the Bayer, Baytown, Texas facility.

C. How will Bayer manage the waste if it is delisted?

Bayer will dispose of the spent carbon in a Subtitle D landfill.

D. When would the proposed delisting exclusion be finalized?

RCRA section 3001(f) specifically requires EPA to provide notice and an opportunity for comment before granting or denying a final exclusion. Thus, EPA will not grant the exclusion unless and until it addresses all timely public comments (including those at public hearings, if any) on this proposal.

RCRA section 3010(b)(1), at 42 U.S.C. 6930(b)(1), allows rules to become effective in less than six months after EPA addresses public comments when the regulated facility does not need the six-month period to come into compliance. That is the case here, because this rule, if finalized, would reduce the existing requirements for persons generating hazardous wastes.

effective date would impose unnecessary hardship and expense on this petitioner. These reasons also provide good cause for making this rule effective immediately, upon final publication, under the Administrative Procedure Act, 5 U.S.C. 553(d).

E. How would this action affect the states?

Because EPA is issuing this exclusion under the Federal RCRA delisting program, only states subject to Federal RCRA delisting provisions would be affected. This would exclude states which have received authorization from EPA to make their own delisting decisions.

EPA allows the states to impose their own non-RCRA regulatory requirements that are more stringent than EPA's, under section 3009 of RCRA, 42 U.S.C. 6929. These more stringent requirements may include a provision that prohibits a Federally issued exclusion from taking effect in the state. Because a dual system (that is, both Federal (RCRA) and state (non-RCRA) programs) may regulate a petitioner's waste, EPA urges petitioners to contact the state regulatory authority to establish the status of their wastes under the state law. Delisting petitions approved by EPA Administrator under 40 CFR 260.22 are effective in the State of Texas only after the final rule has been published in the **Federal Register**.

II. Background

A. What is the history of the delisting program?

EPA published an amended list of hazardous wastes from nonspecific and specific sources on January 16, 1981, as part of its final and interim final regulations implementing section 3001 of RCRA. EPA has amended this list several times and published it in §§ 261.31 and 261.32. EPA lists these wastes as hazardous because: (1) They typically and frequently exhibit one or more of the characteristics of hazardous wastes identified in Subpart C of part 261 (that is, ignitability, corrosivity, reactivity, and toxicity) or (2) they meet the criteria for listing contained in § 261.11(a)(2) or (a)(3).

Individual waste streams may vary, however, depending on raw materials, industrial processes, and other factors. Thus, while a waste described in these regulations generally is hazardous, a specific waste from an individual

company, under some circumstances, may prove that EPA should not regulate a specific waste from a particular generating facility as a hazardous waste.

B. What is a delisting petition, and what does it require of a petitioner?

A delisting petition is a request from a facility to EPA or an authorized State to exclude wastes from the list of hazardous wastes. The facility petitions EPA because it does not believe the wastes should be hazardous under RCRA regulations.

In a delisting petition, the petitioner must show that wastes generated at a particular facility do not meet any of the criteria for which the waste was listed. The criteria for which EPA lists a waste are in part 261 and further explained in the background documents for the listed waste.

In addition, under § 260.22, a petitioner must prove that the waste does not exhibit any of the hazardous waste characteristics and present sufficient information for EPA to decide whether factors other than those for which the waste was listed warrant retaining it as a hazardous waste. See part 261 and the background documents for the listed waste.

Generators remain obligated under RCRA to confirm whether their waste remains non-hazardous based on the hazardous waste characteristics even if EPA has “delisted” the waste.

C. What factors must EPA consider in deciding whether to grant a delisting petition?

Besides considering the criteria in § 260.22(a) and section 3001(f) of RCRA, 42 U.S.C. 6921(f), and in the background documents for the listed wastes, EPA must consider any factors (including additional constituents) other than those for which EPA listed the waste, if a reasonable basis exists to determine that these additional factors could cause the waste to be hazardous.

EPA must also consider as hazardous waste mixtures containing listed hazardous wastes and wastes derived from treating, storing, or disposing of listed hazardous waste. See § 261.3(a)(2)(iii) and (iv) and (c)(2)(i), called the “mixture” and “derived-from” rules, respectively. These wastes are also eligible for exclusion and remain hazardous wastes until excluded. See 66 FR 27266 (May 16, 2001).

Bayer petitioned EPA on September 26, 2003, to exclude from the lists of hazardous waste contained in §§ 261.31 and 261.32, the spent carbon from its waste water treatment plant. This petition also included a request to delist the Clarifier Outlet Wastewater. This waste stream was subsequently removed from the petition. The spent carbon waste stream is generated from the Bayer facility located in Baytown, Texas. The spent carbon is listed under EPA Hazardous Waste Nos. K027, K104, K111, and K112, because it is derived from the treatment of listed waste water which is treated at the facility's waste water treatment plant. Specifically, in its petition, Bayer requested that EPA grant an exclusion for 7,728 cubic yards per calendar year of spent carbon resulting from the treatment of waste waters from the manufacturing processes at its facility.

B. Who is Bayer and what process do they use to generate the petition waste?

Bayer produces plastics, coatings, polyurethanes, and industrial chemicals. Bayer is the first facility in the United States to employ Tower Biology, an onsite waste water treatment plant (the plant) process that uses bacteria to treat waste above ground to protect ground water resources. The waste waters treated at the plant are generated by the various manufacturing operations at the Baytown facility. Influent waste waters enter the plant via

clarifier, the waste water is placed in a tank that feeds the waste water to a denitrification reactor prior to treatment in the biological oxidation towers. Following biological treatment, the waste water is run through a secondary clarifier. Waste water from the clarifier is sent to an activated carbon absorption system. Upon exiting the carbon absorption system, the waste water is fed to a series of filters. After filtration, the treated waste water is placed in an outfall tank for subsequent discharge under Bayer's TPDES discharge permit.

Influent waste waters that enter the plant via the "brine waste water header" are placed in dedicated brine tanks and a brine carbon absorption system. After filtration, the brine waste water is commingled in the outfall tank with the treated normal waste water prior to being discharged in accordance with the Bayer TPDES discharge permit.

Bayer intends to dispose of the delisted spent carbon at a Subtitle D Landfill. Treatment of the waste waters, which result from the manufacturing process generates the spent carbon that is classified as K027, K104, K111, and K112 listed hazardous wastes pursuant to 40 CFR 261.31. The 40 CFR part 261, appendix VII hazardous constituents which are the basis for listing K027, K104, K111, and K112 hazardous wastes are: Toluene diisocyanate, aniline, benzene, diphenylamine, nitrobenzene, phenylenediamine, 2,4-dinitrotoluene,

To support its petition, Bayer submitted:

(1) Analytical results of the toxicity characteristic leaching procedure and total constituent analysis for volatile and semivolatile organics, pesticides, herbicides, dioxins/furans, PCBs and metals for six spent carbon samples;

(2) Analytical results from multiple pH leaching of metals; and

(3) Descriptions of the waste water treatment process and carbon regeneration process.

D. What were the results of Bayer's analysis?

EPA believes that the descriptions of Bayer's waste, and the analytical data submitted in support of the petition show that the spent carbon is non-hazardous. Analytical data from Bayer's spent carbon samples were used in the Delisting Risk Assessment Software. The data summaries for detected constituents are presented in Table 1. EPA has reviewed the sampling procedures used by Bayer and has determined that they satisfy EPA's criteria for collecting representative samples of the variations in constituent concentrations in the spent carbon. The data submitted in support of the petition show that constituents in Bayer's wastes are presently below health-based risk levels used in the delisting decision-making. EPA believes that Bayer has successfully demonstrated that the spent carbon is non-hazardous.

TABLE 1.—MAXIMUM TCLP AND TOTAL CONSTITUENT CONCENTRATIONS OF THE SPENT CARBON AND CORRESPONDING DELISTING LIMITS ¹

Chemical name	Waste stream total concentration (mg/kg)	Waste stream TCLP concentration (mg/l)	Delisting concentration (mg/kg)
Acetophenone	3.0E-04	1.60E+00	8.71E+01
Aniline	2.56E-03	1.20E-01	2.82E+00
Antimony	7.10E-03	1.90E-02	2.51E-01
Arsenic	8.20E-03	1.72E-02	3.85E-01
Aldrin	8.50E-03	<2.00E-05	4.82E-05
Barium	4.42E+01	2.43E-01	8.93E+00
Benzene	5.00E-03	<5.00E-02	5.54E-01
Benzyl Alcohol	2.4E-01	<4.00E-04	2.61E+02
Beryllium	1.0E+00	5.00E-02	9.53E-01
Bis(2-ethylhexyl)phthalate	7.90E-02	<2.00E-04	3.42E-01
Butylbenzylphthalate	2.50E-02	1.25E-03	3.54E+00
Cadmium	<4.50E-04	<2.30E-01	6.87E-01
Chloroform	2.00E-02	<5.00E-02	2.97E-01
Chromium	1.50E+01	2.30E-03	5.00E+00
Cobalt	4.10E+00	2.05E-01	2.75E+00
Copper	6.58E+01	3.29E+00	1.28E+02
Cyanide	4.33E+01	4.18E-003	1.65E+00
Di-n-butyl phthalate	5.60E-02	2.00E-03	2.02E+00
Di-n-octyl phthalate	3.70E-02	<1.5E-04	4.27E-03

Chemical name	concentration (mg/kg)	centration (mg/l)	concentration (mg/kg)
Dinitrotoluene, 2,4-	1.20E+00	<1.5 E-04	2.49E-02
Dioxane, 1,4-	1.60E+00	<4.6E+00	1.46E+01
Dinitrotoluene, 2,6-	1.70E+00	<1.0E-04	2.49E-02
Diphenylamine	1.00E-01	<1.50E-04	1.43E+00
Kepone	<4.15E-01	<2.20E-04	3.73E-04
Lead	4.10E-01	2.60E-03	5.0E+00
Mercury	<3.4E+00	<2.60E-02	2.94E-02
2-Nitrophenol	3.40E+00	<1.50E-04	8.79E+01
N-Nitrodiphenylamine	<1.0E-04	2.30E-01	3.28E+00
Nickel	1.70E+02	3.18E-01	3.45E+00
Phenol	4.10E-02	<1.00E-04	5.22E+01
Selenium	1.20E+00	1.76E-02	2.66E-01
Tin	1.90E+00	9.50E-02	2.75E+01
Toluene diisocyanate	<1.0 E-02	<1.0E-02	1.0E-02
2,4 toluenediamine	<2.0 E-02	<4.0E-03	5.02E-03
Vanadium	1.17E+01	5.85E-01	2.58E+00
Zinc	8.64E+01	4.32E+00	3.42E+01

¹ These levels represent the highest concentration of each constituent found in any one sample. These levels do not necessarily represent the specific levels found in one sample.

< # Denotes that the constituent was below the detection limit.

E. How did EPA evaluate the risk of delisting this waste?

The worst case scenario for management of the spent carbon was modeled for disposal in a landfill. EPA used such information gathered to identify plausible exposure routes (*i.e.*, ground water, surface water, soil, air) for hazardous constituents present in the spent carbon. EPA determined that disposal in a Subtitle D landfill is the most reasonable, worst-case disposal scenario for Bayer's spent carbon. EPA applied the DRAS described in 65 FR 58015 (September 27, 2000) and 65 FR 75637 (December 4, 2000), to predict the maximum allowable concentrations of hazardous constituents that may be released from the petitioned waste after disposal and determined the potential impact of the disposal of Bayer's petitioned waste on human health and the environment. In assessing potential risks to ground water, EPA used the maximum estimated waste volumes and the maximum reported extract concentrations as inputs to the DRAS program to estimate the constituent concentrations in the ground water at a hypothetical receptor well down gradient from the disposal site. Using the risk level (carcinogenic risk of 10^{-5} and non-cancer hazard index of 0.1), the DRAS program can back-calculate the acceptable receptor well concentrations (referred to as compliance-point concentrations) using standard risk assessment algorithms and Agency health-based numbers. Using the maximum compliance-point

concentrations and EPA Composite Model for Leachate Migration with Transformation Products (EPACMTP) fate and transport modeling factors, the DRAS further back-calculates the maximum permissible waste constituent concentrations not expected to exceed the compliance-point concentrations in ground water.

EPA believes that the EPACMTP fate and transport model represents a reasonable worst-case scenario for possible ground water contamination resulting from disposal of the petitioned waste in a landfill, and that a reasonable worst-case scenario is appropriate when evaluating whether a waste should be relieved of the protective management constraints of RCRA Subtitle C. The use of some reasonable worst-case scenarios resulted in conservative values for the compliance-point concentrations and ensured that the waste, once removed from hazardous waste regulation, will not pose a significant threat to human health and/or the environment. The DRAS also uses the maximum estimated waste volumes and the maximum reported total concentrations to predict possible risks associated with releases of waste constituents through surface pathways (*e.g.*, volatilization or wind-blown particulate from the landfill). As in the above ground water analyses, the DRAS uses the risk level, the health-based data and standard risk assessment and exposure algorithms to predict maximum compliance-point concentrations of waste constituents at a hypothetical point of exposure. Using fate and transport equations, the DRAS

uses the maximum compliance-point concentrations and back-calculates the maximum allowable waste constituent concentrations (or "delisting levels").

In most cases, because a delisted waste is no longer subject to hazardous waste control, EPA is generally unable to predict, and does not presently control, how a petitioner will manage a waste after delisting. Therefore, EPA currently believes that it is inappropriate to consider extensive site-specific factors when applying the fate and transport model. EPA does control the type of unit where the waste is disposed.

EPA also considers the applicability of ground water monitoring data during the evaluation of delisting petitions. In this case, Bayer has never directly disposed of this material in a solid waste landfill, so no representative data exists. Therefore, EPA has determined that it would be unnecessary to request ground water monitoring data.

EPA believes that the descriptions of Bayer's spent carbon and analytical characterization which illustrate the presence of toxic constituents at lower concentrations in these waste streams provide a reasonable basis to conclude that the likelihood of migration of hazardous constituents from the petitioned waste will be substantially reduced so that short-term and long-term threats to human health and the environment are minimized.

The DRAS results, which calculated the maximum allowable concentration of chemical constituents in the spent carbon are presented in Table 1. Based

present or formed as reaction products or by products in Bayer's waste.

F. What did EPA conclude about Bayer's analysis?

EPA concluded, after reviewing Bayer's processes that no other hazardous constituents of concern, other than those for which Bayer tested, are likely to be present or formed as reaction products or by-products in Bayer's wastes. In addition, on the basis of explanations and analytical data provided by Bayer, pursuant to § 260.22, EPA concludes that the petitioned waste, spent carbon, does not exhibit any of the characteristics of ignitability, corrosivity, reactivity, or toxicity. *See* §§ 261.21, 261.22, 261.23, and 261.24 respectively.

G. What other factors did EPA consider in its evaluation?

During the evaluation of this petition, in addition to the potential impacts to the ground water, EPA also considered the potential impact of the petitioned waste via non-ground water exposure routes (*i.e.*, air emissions and surface runoff) for the spent carbon. With regard to airborne dispersion in particular, EPA believes that exposure to airborne contaminants from the petitioned waste is unlikely. No appreciable air releases are likely from the spent carbon under any likely disposal conditions. EPA evaluated the potential hazards resulting from the unlikely scenario of airborne exposure to hazardous constituents released from the waste water in an open landfill. The results of this worst-case analysis indicated that there is no substantial present or potential hazard to human health and the environment from airborne exposure to constituents from the spent carbon.

H. What is EPA's evaluation of this delisting petition?

The descriptions by Bayer of the hazardous waste process and analytical characterization, with the proposed verification testing requirements (as discussed later in this action), provide a reasonable basis for EPA to grant the petition. The data submitted in support of the petition show that constituents in the waste are below the maximum allowable concentrations (*See* Table 1). EPA believes that the spent carbon generated by Bayer contains hazardous constituents at levels which will present minimal short-term and long-term

carbon. EPA believes that the data submitted in support of the petition show the Bayer's spent carbon to be non-hazardous.

EPA has reviewed the sampling procedures used by Bayer and has determined they satisfy EPA's criteria for collecting representative samples of variable constituent concentrations in the spent carbon. The data submitted in support of the petition show that constituents in Bayer's wastes are presently below the compliance-point concentrations used in the delisting decision-making process and would not pose a substantial hazard to the environment and the public. EPA believes that Bayer has successfully demonstrated that the spent carbon is non-hazardous.

EPA, therefore, proposes to grant an exclusion to Bayer for the spent carbon described in its September 2003 petition. EPA's decision to exclude this waste is based on analysis performed on samples taken of the spent carbon.

If EPA finalizes the proposed rule, EPA will no longer regulate 7,728 cubic yards/year of spent carbon from Bayer's Baytown facility under parts 262 through 268 and the permitting standards of part 270.

IV. Next Steps

A. With what conditions must the petitioner comply?

The petitioner, Bayer, must comply with the requirements in 40 CFR part 261, appendix IX, Table 2 as amended by this action. The text below gives the rationale and details of those requirements.

(1) Delisting Levels

This paragraph provides the levels of constituent concentrations for which Bayer must test in the spent carbon, below which these wastes would be considered non-hazardous.

EPA selected the set of inorganic and organic constituents specified in paragraph (1) and listed in 40 CFR part 261, appendix IX, Table 2, based on information in the petition. EPA compiled the inorganic and organic constituents list from descriptions of the manufacturing process used by Bayer, previous test data provided for the waste, and the respective health-based levels used in delisting decision-making. These delisting levels correspond to the allowable levels measured in the leachable concentrations of the spent carbon.

for two consecutive quarterly sampling events. For example, if Bayer is issued a final exclusion in August, the first quarter samples are due in November and the second quarter samples are due in February. If EPA deems that both the first and second quarter samples (a total of four) meet all the delisting limits, classification of the waste as non-hazardous can begin in March. If constituent levels in any sample taken by Bayer exceed any of the delisting levels set in paragraph (1), Bayer must: (i) notify EPA in accordance with paragraph (6), and; (ii) manage and dispose of the spent carbon as hazardous waste generated under Subtitle C of RCRA.

(3) Verification Testing Requirements

Bayer must complete a verification testing program on the spent carbon to assure that the wastes do not exceed the maximum levels specified in paragraph (1). If EPA determines that the data collected under this paragraph does not support the data provided in the petition, the exclusion will not cover the tested waste. This verification program operates on two levels.

The first part of the quarterly verification testing program consists of testing a batch of spent carbon for specified indicator parameters as described in paragraph (1). Each quarterly sampling event will consist of at least two samples of the spent carbon. Levels of constituents measured in the samples of the spent carbon that do not exceed the levels set forth in paragraph (1) can be considered non-hazardous after two consecutive quarters of sampling data meet the levels listed in paragraph (1).

The second part of the verification testing program is the annual testing of two representative composite samples of the spent carbon for all constituents specified in paragraph (1).

If Bayer demonstrates for two consecutive quarters complete attainment of all specified limits, then Bayer may request approval of EPA to reduce the frequency of testing to annually. If, after review of performance of the treatment system, EPA finds that annual testing is adequately protective of human health and the environment, then EPA may authorize Bayer to reduce the quarterly comprehensive sampling frequency to an annual basis. If the annual testing of the wastes does not meet the delisting levels in paragraph (1), Bayer must notify EPA according to

sampling results that support the rationale that the delisting exclusion should not be withdrawn.

The exclusion is effective upon publication in the **Federal Register** but the change in waste classification as “non-hazardous” cannot begin until two consecutive quarters of verification sampling comply with the levels specified in paragraph (1). The waste classification as “non-hazardous” is also not authorized, if Bayer fails to perform the quarterly and yearly testing as specified herein. Should Bayer fail to conduct the quarterly/yearly testing as specified herein, then disposal of spent carbon as delisted waste may not occur in the following quarter(s)/year(s) until Bayer obtains the written approval of EPA.

(4) Changes in Operating Conditions

Paragraph (4) would allow Bayer the flexibility of modifying its processes (for example, changes in equipment or change in operating conditions) to improve its treatment processes. However, Bayer must prove the effectiveness of the modified process and request approval from EPA. Bayer must manage wastes generated during the new process demonstration as hazardous waste through verification sampling within 30 days of start-up.

(5) Data Submittals

To provide appropriate documentation that the Bayer facility is correctly managing the spent carbon, Bayer must compile, summarize, and keep delisting records on-site for a minimum of five years. It should keep all analytical data obtained pursuant to paragraph (3), including quality control information, for five years. Paragraph (5) requires that Bayer furnish these data upon request for inspection by any employee or representative of EPA or the State of Texas.

If the proposed exclusion is made final, then it will apply only to 7,728 cubic yards per calendar year of spent carbon generated at the Bayer facility after successful verification testing.

EPA would require Bayer to submit additional verification data under any of the following circumstances:

(a) If Bayer significantly alters the manufacturing process treatment system except as described in paragraph (4).

(b) If Bayer uses any new manufacturing or production process(es), or significantly changes the

Bayer must submit a modification to the petition complete with full sampling and analysis for circumstances where the waste volume changes and/or additional waste codes are added to the waste stream. EPA will publish an amendment to the exclusion if the changes are acceptable.

Bayer must manage waste volumes greater than 7,728 cubic yards of spent carbon as hazardous waste until EPA grants a revised exclusion. When this exclusion becomes final, the management by Bayer of the spent carbon covered in this petition would be relieved from Subtitle C jurisdiction. Bayer may not classify the waste as non-hazardous until the revised exclusion is finalized.

(6) Reopener

The purpose of paragraph (6) is to require Bayer to disclose new or different information related to a condition at the facility or disposal of the waste, if it is pertinent to the delisting. Bayer must also use this procedure if the waste sample in the annual testing fails to meet the levels found in paragraph (1). This provision will allow EPA to reevaluate the exclusion, if a source provides new or additional information to EPA. EPA will evaluate the information on which it based the decision to see if it is still correct or if circumstances have changed so that the information is no longer correct or would cause EPA to deny the petition, if presented.

This provision expressly requires Bayer to report differing site conditions or assumptions used in the petition in addition to failure to meet the annual testing conditions within 10 days of discovery. If EPA discovers such information itself or from a third party, it can act on it as appropriate. The language being proposed is similar to those provisions found in RCRA regulations governing no-migration petitions at § 268.6.

It is EPA's position that it has the authority under RCRA and the Administrative Procedures Act (APA), 5 U.S.C. 551 (1978) *et seq.*, to reopen a delisting decision. EPA may reopen a delisting decision when it receives new information that calls into question the assumptions underlying the delisting.

EPA believes a clear statement of its authority in delisting is merited in light of EPA's experience. See the **Federal Register** notice regarding Reynolds Metals Company at 62 FR 37694 (July

conducting the TCLP, leading EPA to repeal the delisting. If an immediate threat to human health and the environment presents itself, EPA will continue to address these situations on a case-by-case basis. Where necessary, EPA will make a good cause finding to justify emergency rulemaking. See APA section 553 (b)(3)(B).

B. What happens, if Bayer violates the terms and conditions?

If Bayer violates the terms and conditions established in the exclusion, EPA will start procedures to withdraw the exclusion. Where there is an immediate threat to human health and the environment, EPA will evaluate the need for enforcement activities on a case-by-case basis. EPA expects Bayer to conduct the appropriate waste analysis and comply with the criteria explained above in paragraph (1) of the exclusion.

V. Public Comments

A. How may I as an interested party submit comments?

EPA is requesting public comments on this proposed decision. Please send three copies of your comments. Send two copies to the Chief, Corrective Action and Waste Minimization Section, Multimedia Permitting and Planning Division, U. S. Environmental Protection Agency Region 6, 1445 Ross Avenue, Dallas, Texas 75202. Send a third copy to the Industrial Hazardous Waste Permits Division, Technical Evaluation Team, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, TX 78711–3087. Identify your comments at the top with this regulatory docket number: R6–TXDEL–FY06–Bayer-Spent Carbon. You may submit your comments electronically to Michelle Peace at peace.michelle@epa.gov.

B. How may I review the docket or obtain copies of the proposed exclusion?

You may review the RCRA regulatory docket for this proposed rule at the U. S. Environmental Protection Agency Region 6, 1445 Ross Avenue, Dallas, TX 75202. It is available for viewing in EPA Freedom of Information Act Review Room from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. Call (214) 665–6444 for appointments. The public may copy material from any regulatory docket at no cost for the first 100 pages and at

Under Executive Order 12866, “Regulatory Planning and Review” (58 FR 51735, October 4, 1993), this rule is not of general applicability and therefore is not a regulatory action subject to review by the Office of Management and Budget (OMB). This 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.*) because it applies to a particular facility only. Because this rule is of particular applicability relating to a particular facility, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202, 204, and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Because this rule will affect only a particular facility, it will not significantly or uniquely affect small governments, as specified in section 203 of UMRA. Because this rule will affect only a particular facility, this proposed rule does not have federalism implications. It 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, “Federalism,” (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this rule. Similarly, because this rule will affect only a particular facility, this proposed rule does not have tribal implications, as specified in Executive Order 13175, “Consultation and

13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The basis for this belief is that the Agency used the DRAS program, which considers health and safety risks to infants and children, to calculate the maximum allowable concentrations for this rule. This 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. This rule does not involve technical standards; 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, “Civil Justice Reform,” (61 FR 4729, February 7, 1996), in issuing this rule, 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 Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency

section 801 the following types of rules (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding this action under section 801 because this is a rule of particular applicability.

List of Subjects in 40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Authority: Sec. 3001(f) RCRA, 42 U.S.C. 6921(f).

Dated: February 3, 2006.

William Rhea,
Acting Director, Multimedia Planning and Permitting Division.

For the reasons set out in the preamble, 40 CFR part 261 is proposed to be amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, and 6938.

2. In Table 2 of Appendix IX of Part 261 add the following waste stream in alphabetical order by facility to read as follows:

Appendix IX to Part 261—Waste Excluded Under §§ 260.20 and 260.22

TABLE 2.—WASTE EXCLUDED FROM SPECIFIC SOURCES

Facility	Address	Waste Description
* Bayer Material Science	* Baytown, TX	* Spent Carbon (EPA Hazardous Waste Numbers K027, K104, K111, and K112) generated at a maximum rate of 7,728 cubic yards per calendar year after [publication date of the final rule]. For the exclusion to be valid, Bayer must implement a verification testing program that meets the following Paragraphs: (1) Delisting Levels: All concentrations for those constituents must not exceed the maximum allowable concentrations in mg/l specified in this paragraph. Spent Carbon Leachable Concentrations (mg/l): Antimony–0.251; Arsenic–0.385, Barium–8.93; Beryllium–0.953; Cadmium–0.687; Chromium–5.0; Cobalt–2.75; Copper–128.0; Cyanide–1.65; Lead–5.0; Mercury–0.0294; Nickel–3.45; Selenium–0.266 ; Tin–2.75; Vanadium–2.58; Zinc–34.2; Aldrin–0.0000482; Acetophenone–87.1; Aniline–2.82; Benzene–0.554; Bis(2-ethylhexyl)phthalate–0.342; Benzyl alcohol–261; Butylbenzylphthalate–3.54; Chloroform–0.297; Di-n-octyl phthalate–0.00427; 2,4-Dinitrotoluene–0.0249; 2,6-Dinitrotoluene–0.0249 Diphenylamine–1.43; 1,4-Dioxane–14.6; Di-n-butyl phthalate–2.02; Kepone–0.000373; 2-Nitrophenol–87.9; N-Nitrodiphenylamine–3.28; Phenol–52.2; 2,4-Toluenediamine–0.00502; Toluene diisocyanate–0.001. (2) Waste Holding and Handling: (A) Waste classification as non-hazardous can not begin until compliance with the limits set in paragraph (1) for spent carbon has occurred for two consecutive quarterly sampling events.

paragraph (1) for the spent carbon, Bayer must do the following:

- (i) Notify EPA in accordance with paragraph (6) and
- (ii) Manage and dispose the spent carbon as hazardous waste generated under Subtitle C of RCRA.

(3) Testing Requirements:

Upon this exclusion becoming final, Bayer may perform quarterly analytical testing by sampling and analyzing the spent carbon as follows:

(A) Quarterly Testing:

- (i) Collect two representative composite samples of the spent carbon at quarterly intervals after EPA grants the final exclusion. The first composite samples may be taken at any time after EPA grants the final approval. Sampling should be performed in accordance with the sampling plan approved by EPA in support of the exclusion.
- (ii) Analyze the samples for all constituents listed in paragraph (1). Any composite sample taken that exceeds the delisting levels listed in paragraph (1) for the spent carbon must be disposed as hazardous waste in accordance with the applicable hazardous waste requirements.
- (iii) Within thirty (30) days after taking its first quarterly sample, Bayer will report its first quarterly analytical test data to EPA. If levels of constituents measured in the samples of the spent carbon do not exceed the levels set forth in paragraph (1) of this exclusion for two consecutive quarters, Bayer can manage and dispose the non-hazardous spent carbon according to all applicable solid waste regulations.

(B) Annual Testing:

- (i) If Bayer completes the quarterly testing specified in paragraph (3) above and no sample contains a constituent at a level which exceeds the limits set forth in paragraph (1), Bayer may begin annual testing as follows: Bayer must test two representative composite samples of the spent carbon for all constituents listed in paragraph (1) at least once per calendar year.
 - (ii) The samples for the annual testing shall be a representative composite sample according to appropriate methods. As applicable to the method-defined parameters of concern, analyses requiring the use of SW-846 methods incorporated by reference in 40 CFR 260.11 must be used without substitution. As applicable, the SW-846 methods might include Methods 0010, 0011, 0020, 0023A, 0030, 0031, 0040, 0050, 0051, 0060, 0061, 1010A, 1020B, 1110A, 1310B, 1311, 1312, 1320, 1330A, 9010C, 9012B, 9040C, 9045D, 9060A, 9070A (uses EPA Method 1664, Rev. A), 9071B, and 9095B. Methods must meet Performance Based Measurement System Criteria in which the Data Quality Objectives are to demonstrate that samples of the Bayer spent carbon are representative for all constituents listed in paragraph (1).
 - (iii) The samples for the annual testing taken for the second and subsequent annual testing events shall be taken within the same calendar month as the first annual sample taken.
 - (iv) The annual testing report should include the total amount of waste in cubic yards disposed during the calendar year.
- (4) Changes in Operating Conditions: If Bayer significantly changes the process described in its petition or starts any processes that generate(s) the waste that may or could affect the composition or type of waste generated (by illustration, but not limitation, changes in equipment or operating conditions of the treatment process), it must notify EPA in writing and it may no longer handle the wastes generated from the new process as non-hazardous until the wastes meet the delisting levels set in paragraph (1) and it has received written approval to do so from EPA.

Bayer must submit a modification to the petition complete with full sampling and analysis for circumstances where the waste volume changes and/or additional waste codes are added to the waste stream.

(5) Data Submittals:

Bayer must submit the information described below. If Bayer fails to submit the required data within the specified time or maintain the required records on-site for the specified time, EPA, at its discretion, will consider this sufficient basis to reopen the exclusion as described in paragraph (6). Bayer must:

- (A) Submit the data obtained through paragraph 3 to the Chief, Corrective Action and Waste Minimization Section, Multimedia Planning and Permitting Division, U. S. Environmental Protection Agency Region 6, 1445 Ross Ave., Dallas, Texas, 75202, within the time specified. All supporting data can be submitted on CD-ROM or some comparable electronic media.
- (B) Compile records of analytical data from paragraph (3), summarized, and maintained on-site for a minimum of five years.
- (C) Furnish these records and data when either EPA or the State of Texas requests them for inspection.
- (D) Send along with all data a signed copy of the following certification statement, to attest to the truth and accuracy of the data submitted:

"Under civil and criminal penalty of law for the making or submission of false or fraudulent statements or representations (pursuant to the applicable provisions of the Federal Code, which include, but may not be limited to, 18 U.S.C. 1001 and 42 U.S.C. 6928), I certify that the information contained in or accompanying this document is true, accurate and complete.

(their) truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification that this information is true, accurate and complete.

If any of this information is determined by EPA in its sole discretion to be false, inaccurate or incomplete, and upon conveyance of this fact to the company, I recognize and agree that this exclusion of waste will be void as if it never had effect or to the extent directed by EPA and that the company will be liable for any actions taken in contravention of the company's RCRA and CERCLA obligations premised upon the company's reliance on the void exclusion."

(6) Reopener

(A) If, anytime after disposal of the delisted waste Bayer possesses or is otherwise made aware of any environmental data (including but not limited to leachate data or ground water monitoring data) or any other data relevant to the delisted waste indicating that any constituent identified for the delisting verification testing is at level higher than the delisting level allowed by the Division Director in granting the petition, then the facility must report the data, in writing, to the Division Director within 10 days of first possessing or being made aware of that data.

(B) If either the quarterly or annual testing of the waste does not meet the delisting requirements in paragraph 1, Bayer must report the data, in writing, to the Division Director within 10 days of first possessing or being made aware of that data.

(C) If Bayer fails to submit the information described in paragraphs (5),(6)(A) or (6)(B) or if any other information is received from any source, the Division Director will make a preliminary determination as to whether the reported information requires EPA action to protect human health and/or the environment. Further action may include suspending, or revoking the exclusion, or other appropriate response necessary to protect human health and the environment.

(D) If the Division Director determines that the reported information requires action by EPA, the Division Director will notify the facility in writing of the actions the Division Director believes are necessary to protect human health and the environment. The notice shall include a statement of the proposed action and a statement providing the facility with an opportunity to present information as to why the proposed EPA action is not necessary. The facility shall have 10 days from the date of the Division Director's notice to present such information.

(E) Following the receipt of information from the facility described in paragraph (6)(D) or (if no information is presented under paragraph (6)(D)) the initial receipt of information described in paragraphs (5), (6)(A) or (6)(B), the Division Director will issue a final written determination describing EPA actions that are necessary to protect human health and/or the environment. Any required action described in the Division Director's determination shall become effective immediately, unless the Division Director provides otherwise.

* * * * *

[FR Doc. 06-1398 Filed 2-13-06; 8:45 am]
BILLING CODE 6560-50-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA-P-7913]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency (FEMA), Department of Homeland Security.

ACTION: Proposed rule.

SUMMARY: Technical information or comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed below. The BFEs and modified

BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

ADDRESSES: The proposed BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2903.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director has resolved any appeals resulting from this notification.

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also