

Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that Order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have considered the environmental impact of this rule and concluded that under figure 2-1, paragraph (34)(g) of Commandant Instruction M16475.1D, this rule is categorically excluded from further environmental documentation because this rule is not expected to result in any significant adverse environmental impact as described in the National Environmental Policy Act of 1969 (NEPA). A "Categorical Exclusion Determination" is available for inspection or copying where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1(g), 6.04-1, 6.04-6, and 160.5; 49 CFR 1.46.

2. A new temporary § 165.T08-064 is added to read as follows:

§ 165.T08-064 Regulated Navigation Area; Lower Mississippi River Mile 529.8 to 537.0, Greenville, Mississippi.

(a) *Definitions.* Construction vessels are defined as those vessels contracted for by the Army Corps of Engineers to perform bendway weir construction work and other vessels engaged in construction of the new Greenville Highway Bridge.

(b) *Location.* The following area is a regulated navigation area: the waters of the Lower Mississippi River from mile 529.8 to mile 537.0, extending the entire width of the river.

(c) *Effective date.* This section is effective from 12 a.m. on July 11, 2002 to 12 a.m. on November 30, 2002.

(d) *Regulations.* (1) All vessels other than construction vessels are prohibited from transiting through this area from 6 a.m. to 6 p.m., daily, unless authorized by the Captain of the Port Memphis or his designated representative. Vessels authorized to transit during these times must proceed at minimum safe speed when passing the bridge construction site.

(2) From 6 p.m. to 6 a.m. and at any other time the Captain of the Port Memphis authorizes vessels to transit through the area the following restrictions apply.

(i) Vessels may not meet or overtake other vessels within the regulated navigation area.

(ii) When downbound vessels reach mile 539.0, they shall make a broadcast in the blind on VHF-FM channel 13 announcing their estimated time of arrival at mile 537.0. When upbound vessels reach mile 528.3 they shall make a broadcast in the blind on VHF-FM channel 13 announcing their estimated time of arrival at mile 529.8. If a downbound vessel is already in the regulated navigation area the upbound vessel shall adjust its speed to avoid a

meeting situation within the regulated area.

(iii) All vessels shall contact the Army Corps of Engineers on-scene vessel prior to entering the regulated navigation area. They shall continually monitor VHF-FM channel 13 while in and approaching the Regulated Navigation Area.

(iv) No vessel may transit between the caissons and the bank at mile 530.8.

(3) Deviation from this rule is prohibited unless specifically authorized by the Captain of the Port Memphis, or his designated representative. They may be contacted via VHF-FM channel 13 or 16, or via telephone at (901) 544-3941.

Dated: July 11, 2002.

R.J. Casto,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[Docket #: Id-00-001; FRL-7251-3]

Clean Air Act Finding of Attainment; Portneuf Valley PM-10 Nonattainment Area, Idaho

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA has determined that the Portneuf Valley nonattainment area has attained the National Ambient Air Quality Standards for particulate matter with an aerodynamic diameter of less than or equal to 10 microns by the attainment date of December 31, 1996, as required by the Clean Air Act.

EFFECTIVE DATE: This rule will become effective on August 26, 2002.

ADDRESSES: Copies of all information supporting this action are available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Pacific Standard Time at EPA Region 10, Office of Air Quality, 10th Floor, 1200 Sixth Avenue, Seattle, Washington 98101. A reasonable fee may be charged for copies.

FOR FURTHER INFORMATION CONTACT: Steven Body, EPA, Region 10, Office of Air Quality (OAQ-107), 1200 Sixth Avenue, Seattle, Washington 98101, (206) 553-0782.

SUPPLEMENTARY INFORMATION:

I. Background

On December 6, 2000, EPA solicited public comment on a proposal to find that the Portneuf Valley nonattainment area has attained the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter of less than or equal to 10 microns (PM-10) by the attainment date of December 31, 1996, as required by the Clean Air Act. See 65 FR 76203. On December 21, 2000, EPA granted a request to extend the comment period to January 19, 2001. See 65 FR 80397.

Although the finding at issue in the proposal was whether the area attained the PM-10 standards by the December 31, 1996 attainment date, EPA also discussed air quality data subsequent to the attainment date. During the end of December 1999 and the beginning of January 2000, there was a significant air pollution episode in the Portneuf Valley and Fort Hall PM-10 nonattainment areas during which three levels above the level of the 24-hour PM-10 NAAQS were reported at the Federal Reference Method (FRM) sampler at the Garrett and Gould monitoring station. None of the other monitoring stations in the Portneuf Valley area reported levels above the level of the 24-hour PM-10 standard during this time period. As discussed in the proposal, although these three exceedances were of concern to EPA, they did not represent a violation of the 24-hour PM-10 standard because three exceedances in three years results in an expected exceedance rate of 1.0 for the three-year period from 1997 to 1999. The 24-hour standard is attained when the expected exceedance rate is less than or equal to 1.0.

II. Air Quality Data Since Proposal

Because of concerns in the community regarding whether the Portneuf Valley area had in fact attained the PM-10 standards, including public comments received on the proposal, and the fact that a single exceedance at the Garrett and Gould FRM monitor during 2000 or 2001 would constitute a violation of the 24-hour PM-10 standard, EPA delayed taking final action on EPA's December 2000 proposal until air quality data for 2000 and 2001 was available. There have been no additional exceedances of the 24-hour PM-10 standard in 2000 or 2001 at the FRM sampler at Garrett and Gould. Therefore, the expected exceedance rate for the site is 1.0 for the years 1999, 2000, and 2001, just below the rate that would represent a violation of the 24-hour PM-10 standard. Therefore, the 24-hour PM-10 standard is attained at the Garrett and Gould FRM

sampler as of December 31, 2001. There have been no exceedances of the 24-hour standard at the FRM sampler at the Sewage Treatment Plant in 2000 or 2001.¹

In the beginning of 2001, IDEQ installed a continuous PM-10 sampler (TEOM) at the Garrett and Gould monitoring site. IDEQ has reported that a level of 166 ug/m³ was recorded at this TEOM sampler on May 5, 2001, which would represent an exceedance of the 24-hour PM-10 standard. IDEQ has flagged this exceedance as attributable to a high wind natural event under EPA's policy entitled "Areas Affected by Natural Events," dated May 30, 1996 (EPA's Natural Events Policy), and requested that this exceedance not be considered in determining the attainment status of the area. This exceedance is still under evaluation by EPA, both in terms of the value of the exceedance² and whether the exceedance qualifies as a natural event under EPA's Natural Events Policy. In any event, the exceedance at the TEOM sampler does not, in and of itself or in connection with the three exceedances that occurred at the Garrett and Gould FRM sampler in 1999, constitute a violation of the 24-hour PM-10 standard. For purposes of determining a violation of the 24-hour PM-10 standard, each sampler is evaluated separately. In other words, for there to be a violation of the 24-hour PM-10 standard, the data collected from a single sampler must document an expected annual exceedance rate of greater than 1.0 averaged over a three-year period. See Memorandum from Gerald A. Emison, Director, Office of Air Quality Planning and Standard, EPA, entitled "Revision to Policy on the Use of PM-10 measurement Data," dated November 21, 1988. For this reason, EPA believes that the Portneuf Valley PM-10 nonattainment area continues to attain the PM-10 NAAQS when considering PM-10 data collected through 2001.

III. Major Issues Raised by Commenters

EPA received four comment letters in response to the proposal, one supporting the proposed action and three objecting to the proposed action. The following is a summary of the issues raised in the adverse comments on the proposal, along with EPA's response to those issues.

¹ Operation of the FRM monitors at Idaho State University and Chubbuck School was discontinued in the summer of 1999.

² There are questions regarding how to "gap fill" for periods when the TEOM sampler did not operate on May 5, 2001.

A. Air Quality in the Portneuf Valley Area

All three adverse commenters disputed the characterization of the Portneuf Valley area as being in attainment of the PM-10 standards. These commenters stated that the air quality in the area is very poor, especially during the winter and during inversions. The commenters further stated that the poor air quality results in adverse health effects for the citizens of Pocatello, such as headaches, sinus infections, sore throats, burning eyes, and respiratory problems.

It is certainly correct that poor air quality can cause or aggravate health problems. However, the scope of the action that was proposed, is very narrow; the only issue is whether the Portneuf Valley area has attained the PM-10 standards as of December 31, 1996, the attainment date for the area. Under sections 179(c)(1) and 188(b)(2) of the Clean Air Act (CAA), such a finding is based exclusively upon measured air quality levels over the most recent and complete three calendar year period preceding the attainment date, not on health data. See 40 CFR part 50 and appendix K. EPA finds that monitored air quality data in the Portneuf Valley nonattainment area shows attainment of the PM-10 NAAQS as of the attainment date of December 31, 1996.

Although EPA is finding that the Portneuf Valley area has attained the PM-10 standards, the area will continue to be designated nonattainment for PM-10 until the State of Idaho (Idaho or IDEQ) completes all planning obligations required by the CAA. These obligations include maintaining compliance with the PM-10 NAAQS, developing and submitting a State Implementation Plan (SIP) that provides the regulatory framework for attaining the PM-10 NAAQS, and developing and submitting a maintenance plan that will assure maintenance of the PM-10 standards for an additional 10-year period. Both the SIP and maintenance plan must demonstrate that the PM-10 NAAQS is protected at all places in the Portneuf Valley nonattainment area at all times.

EPA also notes that one of the major sources of particulate matter and particulate precursor gasses in the area, the FMC/Astaris elemental phosphorus facility, just across the border from the Portneuf Valley PM-10 nonattainment area, has recently shut down manufacturing operations resulting in significantly reduced emissions of PM-10. EPA estimates that almost 400 tons

per year of PM-10 have been eliminated from this shutdown.

B. Planning for the Portneuf Valley Area

One commenter expressed concern that the Portneuf Valley area has no SIP in place that shows how the area will demonstrate attainment with the NAAQS for the next 10 years. The commenter states that EPA should not be moving to upgrade the nonattainment status of the Portneuf Valley area until such time as Idaho has an approved SIP that outlines a plan for improvement of air quality and that ensures compliance with air quality standards for the next decade.

As discussed above, this finding of attainment under section 179(c)(1) and 188(b)(2) of the CAA is based exclusively upon measured air quality levels over the most recent and complete three calendar year period preceding the attainment date. The status of the area's planning efforts are not relevant to a determination of attainment under section 179(c)(1) and 188(b)(2) of the CAA. In order for the Portneuf Valley PM-10 nonattainment area to be redesignated from nonattainment to attainment, however, Idaho must complete all planning obligations required by the CAA, including maintaining compliance with the PM-10 NAAQS, developing and submitting a SIP that provides the regulatory framework for attaining the PM-10 NAAQS, and developing and submitting a maintenance plan that assures maintenance of the PM-10 standards for an additional 10-year period. Although IDEQ has not yet completed its planning efforts for the area, EPA believes that Idaho has made substantial progress in its planning efforts, especially the nonattainment planning requirements under section 189 of the CAA.

C. Secondary Aerosols

One commenter stated that neither EPA nor IDEQ has any plan to deal with secondary aerosols (or their precursors) and that secondary aerosols constitute a large portion of overall air pollution in the area. The measured air quality data relied on in this action includes PM-10 contributions from secondary aerosols and their precursors. This data shows that secondary aerosols are not causing a violation of the PM-10 standards. As discussed above, the status of the area's planning efforts are not relevant to a determination of attainment under section 179(c)(1) and 188(b)(2) of the CAA.

D. December 1999 Data

One commenter noted the air pollution episode that occurred at the end of December 1999, suggesting this information should preclude a finding of attainment. As discussed above, the FRM at Garret and Gould recorded three exceedances of the 24-hour standard in 1999, there were no exceedances at this monitor during 1997, 1998, 2000, or 2001. Thus, the expected exceedance rate for each three-year period including 1999 is 1.0 and does not represent a violation of the 24-hour PM-10 NAAQS. In any event, the finding at issue in this action is whether the area attained the PM-10 standards as the attainment date of December 31, 2001.

IV. Implications of Today's Action

As discussed above, EPA finds that the Portneuf Valley PM-10 nonattainment area attained the PM-10 NAAQS by December 31, 1996, the attainment date for the area. This finding of attainment should not be confused, however, with a redesignation to attainment under CAA section 107(d) because the State has not, for the Portneuf Valley area, submitted a SIP or maintenance plan as required under section 175(A) of the CAA or met the other CAA requirements for redesignations to attainment. The designation status in 40 CFR part 81 will remain moderate nonattainment for the Portneuf Valley PM-10 nonattainment area until such time as Idaho meets the CAA requirements for redesignations to attainment.

V. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule 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 rule approves pre-existing 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).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does 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). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. 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. 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.*).

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 promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and

the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 23, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: July 12, 2002.

L. John Iani,

Regional Administrator, Region 10.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SW-FRL-7250-8]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA (also, "the Agency" or "we" in this preamble) is granting a petition submitted by Ormet Primary Aluminum Corporation (Ormet) to exclude (or "delist") vitrified spent potliner (VSP), generated and treated at the Ormet facility in Hannibal, Ohio from the lists of hazardous wastes. Spent potliners from primary aluminum reduction are listed as hazardous waste number K088 under the Resource Conservation and Recovery Act (RCRA).

Today's action conditionally excludes the petitioned waste from the list of hazardous wastes only if the waste is disposed of in a Subtitle D landfill which is permitted, licensed, or registered by a State to manage industrial solid waste.

EFFECTIVE DATE: This rule is effective on July 25, 2002.

ADDRESSES: The RCRA regulatory docket for this final rule, number R5-ORMT-01, is located at the U.S. EPA Region 5, 77 W. Jackson Blvd., Chicago, IL 60604, and is available for viewing from 8 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. Call Todd Ramaly at (312) 353-9317 for appointments. The public may copy material from the regulatory docket at \$0.15 per page.

FOR FURTHER INFORMATION CONTACT: For technical information concerning this document, contact Todd Ramaly at the address above or at (312) 353-9317.

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

- I. Background
 - A. What Is a Delisting Petition?
 - B. What Regulations Allow a Waste to Be Delisted?
- II. Ormet's Delisting Petition
 - A. What Waste Did Ormet Petition EPA to Delist?
 - B. What Information Must the Generator Supply?
 - C. What Information Did Ormet Submit to Support This Petition?
- III. EPA's Evaluation and Final Rule
 - A. What Decision Is EPA Finalizing and Why?
 - B. What Are the Terms of This Exclusion?
 - C. When Is the Delisting Effective?
 - D. How Does This Action Affect the States?
- IV. Public Comment Received on the Proposed Exclusion and EPA's Responses
- V. Regulatory Impact
- VI. Congressional Review Act

I. Background

A. What Is a Delisting Petition?

A delisting petition is a request from a generator to exclude waste from the list of hazardous wastes under RCRA regulations. In a delisting petition, the petitioner must show that waste generated at a particular facility does not meet any of the criteria for which EPA listed the waste as set forth in Title 40, Code of Federal Regulations (CFR) 261.11 and in the background document for the waste. A petitioner must demonstrate that the waste does not exhibit any of the hazardous waste characteristics (that is, ignitability, reactivity, corrosivity, and toxicity) and must present sufficient information for us to decide whether any factors other than those for which the waste was listed warrant retaining it as a hazardous waste.

A generator remains obligated under RCRA to confirm that its waste remains nonhazardous based on the hazardous waste characteristics even if EPA has "delisted" the wastes.

B. What Regulations Allow a Waste to Be Delisted?

Under 40 CFR 260.20 and 260.22, a generator may petition the EPA to remove its wastes from hazardous waste control by excluding it from the lists of hazardous wastes contained in §§ 261.31 and 261.32. Specifically, § 260.20 allows any person to petition the Administrator to modify or revoke any provision of parts 260 through 266, 268, and 273 of Title 40 of the Code of Federal Regulations. 40 CFR 260.22 provides a generator the opportunity to petition the Administrator to exclude a waste on a "generator specific" basis from the hazardous waste lists.

II. Ormet's Delisting Petition

A. What Waste Did Ormet Petition EPA To Delist?

On April, 8, 1994, Ormet submitted an up front petition to exclude vitrified spent potliner, K088, generated at its Hannibal Ohio plant from the list of hazardous wastes contained in 40 CFR 261.31. In December 1999, Ormet submitted a revised petition to exclude an annual volume of 8,500 cubic yards of K088 generated under full scale operation. K088 is defined as spent potliners from primary aluminum reduction.

B. What Information Must the Generator Supply?

A generator must provide sufficient information to allow the EPA to determine that the waste does not meet any of the criteria for which it was listed as a hazardous waste. In addition, where there is a reasonable basis to believe that factors other than those for which the waste was listed (including additional constituents) could cause the waste to be hazardous, the Administrator must determine that such factors do not warrant retaining the waste as hazardous.

C. What Information Did Ormet Submit To Support This Petition?

To support its petition, Ormet submitted descriptions and schematic diagrams of its manufacturing and vitrification processes and detailed chemical and physical analysis of the vitrified potliner.

III. EPA's Evaluation and Final Rule

A. What Decision Is EPA Finalizing and Why?

Today the EPA is finalizing an exclusion for 8500 cubic yards of vitrified spent potliner generated and treated annually at the Ormet facility in Hannibal, Ohio.