

Dated: September 2, 2003.
 Donald S. Welsh,
 Regional Administrator, Region III.

■ For the reasons set forth in the preamble, 40 CFR part 261 is 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.

Appendix IX of Part 261—[Amended]

■ 2. Table 1 of Appendix IX of Part 261 is amended to add the following waste stream in alphabetical order by facility to read as follows:

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

TABLE 1.—WASTES EXCLUDED FROM NON-SPECIFIC SOURCES

Facility	Address	Waste description
* * * * *	* * * * *	* * * * *
Southeastern Public Service Authority (SPSA) and Onyx Environmental Service (Onyx).	Suffolk, Virginia	Combustion ash generated from the burning of spent solvent methyl ethyl ketone (Hazardous Waste Number F005) and disposed in a Subtitle D landfill. This is a one-time exclusion for 1410 cubic yards of ash and is effective after September 11, 2003. (1) <i>Reopener Language</i> (a) If SPSA and/or Onyx discovers that any condition or assumption related to the characterization of the excluded waste which was used in the evaluation of the petition or that was predicted through modeling is not as reported in the petition, then SPSA and/or Onyx must report any information relevant to that condition or assumption, in writing, to the Regional Administrator and the Virginia Department of Environmental Quality within 10 calendar days of discovering that information. (b) Upon receiving information described in paragraph (a) of this section, regardless of its source, the Regional Administrator will determine whether the reported condition requires further action. Further action may include repealing the exclusion, modifying the exclusion, or other appropriate action deemed necessary to protect human health or the environment. (2) <i>Notification Requirements</i> In the event that the delisted waste is transported off-site for disposal, SPSA/Onyx must provide a one-time written notification to any State Regulatory Agency to which or through which the delisted waste described above will be transported at least sixty (60) calendar days prior to the commencement of such activities. Failure to provide such notification will be deemed to be a violation of this exclusion and may result in revocation of the decision and other enforcement action.
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 281

[FRL–7557–4]

Pennsylvania: Final Approval of State Underground Storage Tank Program

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Commonwealth of Pennsylvania (Commonwealth or State) has applied for final approval of its underground storage tank (UST) program under Subtitle I of the Resource Conservation and Recovery Act (RCRA). The Environmental Protection Agency (EPA) has reviewed Pennsylvania's application and has made a determination that the Commonwealth's UST program satisfies all of the

requirements necessary to qualify for final approval.

EFFECTIVE DATE: Final approval of Pennsylvania's UST program shall be effective on September 11, 2003.

FOR FURTHER INFORMATION CONTACT: Carletta Parlin, Mailcode 3WC21, RCRA State Programs Branch, U.S. EPA Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103–2029, telephone number (215) 814–3380.

SUPPLEMENTARY INFORMATION:

A. Background

Section 9004 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6991c, authorizes EPA to approve state underground storage tank programs to operate in lieu of the Federal UST program. EPA may approve a state program if the Agency finds pursuant to RCRA section 9004(b), 42 U.S.C. 6991c(b), that the state's program is "no less stringent" than the Federal program in all seven elements set forth at RCRA section 9004(a) (1) through (7), 42 U.S.C. 6991c(a)(1) through (7), meets the notification requirements of RCRA

section 9004(a)(8), 42 U.S.C. 6991c(a)(8), and also provides for adequate enforcement of compliance with UST standards in accordance with RCRA section 9004(a), 42 U.S.C. 6991c(a).

On November 25, 2002, Pennsylvania submitted to EPA a complete program application, in accordance with 40 CFR part 281, seeking authorization of its UST program. On January 3, 2003, EPA published a proposed rule announcing its tentative determination to approve Pennsylvania's UST program. EPA announced that the proposed rule was subject to a thirty-day public comment period. The public comment period ended on February 13, 2003. Further, EPA stated that if it received adverse comments on its intent to authorize Pennsylvania's UST program, it would subsequently publish a final determination responding to such comments and announce its final decision as to whether or not to authorize Pennsylvania's program. EPA received adverse written comments during the public comment period. Today's action responds to those

adverse public comments EPA received and announces EPA's final determination to approve Pennsylvania's UST program.

B. What Were the Comments and Responses to EPA's Proposal?

Two parties submitted written comments regarding EPA's tentative approval of Pennsylvania's UST program during the 30-day public comment period. One party requested that EPA conduct a public hearing, but later withdrew that request. A third party submitted comments and requested a public hearing after the close of the comment period. EPA had already taken steps to cancel the tentatively scheduled public hearing and, as a result, no public hearing was held on EPA's tentative determination to approve Pennsylvania's UST Program. All three sets of comments EPA received questioned EPA's tentative decision to approve the Commonwealth of Pennsylvania's UST program asserting that Pennsylvania does not provide for adequate public participation.

Collectively, the three parties submitting comments asserted that Pennsylvania's UST program has deficiencies in three areas: (1) Public notification of releases from USTs, (2) public participation in UST cleanup activities, and (3) public involvement in UST enforcement cases initiated by the Pennsylvania Department of Environmental Protection (PADEP). EPA's responses to each of these comments are set forth below. EPA has determined that none of the concerns raised warrants disapproval of Pennsylvania's UST program.

1. Comments Regarding Public Notification of UST Releases

All three parties asserted that Pennsylvania's UST Program does not meet the federal requirements for state program approval at 40 CFR 281.35(f) regarding public notification of UST releases. This regulation provides as follows: "In accordance with § 280.67, the state must notify the affected public of all confirmed releases requiring a plan for soil and ground water remediation, and upon request provide or make available information to inform the interested public of the nature of the release and the corrective measures planned or taken."

The referenced regulation at 40 CFR 280.67(a) states the following: "For each confirmed release that requires a corrective action plan, the implementing agency must provide notice to the public by means designed to reach those members of the public

directly affected by the release and the planned corrective action. This notice may include, but is not limited to, public notice in local newspapers, block advertisements, public service announcements, publication in a state register, letters to individual households, or personal contacts by field staff."

One of the parties noted as follows: "The Commonwealth acknowledges in the General Counsel and Attorney General Verification and Legal Statement included with the application that EPA does not believe notifying the municipality satisfies the objective of §§ 281.35(f) and 280.67 to 'notify the affected public.'" Two of the commenters expressed their concern about Pennsylvania using the State Program Approval Memorandum of Agreement (MOA) with EPA to address an inadequate public notification process for UST releases, which they perceive as a "flaw" or "deficiency" in Pennsylvania's UST Program.

During the review of Pennsylvania's UST Program, EPA did discuss public notification procedures for UST releases with PADEP. In its assessment, EPA recognized that, in accordance with § 245.305(e) of Pennsylvania's UST regulations, owners and operators are required to inform the Commonwealth and affected municipalities of confirmed releases. EPA believes this is a suitable first step toward public notification, because once local and state governments are informed, they can subsequently take steps to notify the affected public. During its review, EPA asked PADEP to clarify how such notification to the state would result in notification of the public directly affected by UST releases. EPA recognized that, pursuant to § 245.305(g) of Pennsylvania's rules, PADEP may "implement reasonable procedures to provide the public with appropriate information." For the purpose of state program approval, PADEP has the legal authority to notify the affected public of UST releases. However, EPA recognized that this authority provided PADEP with a certain discretion of the type contemplated when EPA published its original UST regulations at § 280.67 on September 23, 1988 (see 53 FR 37180-37181). Specifically, EPA noted in the preamble to its regulations that "* * * mandating public participation for all CAPs (*Corrective Action Plans*) could divert implementing agency resources from other cleanup activities such as oversight of ongoing cleanup operations." The preamble went on to say: "EPA agrees with the party who urged that implementing agencies strike a balance between the involvement of

the public and the sometimes competing need to protect human health and the environment through quick and effective responses to an UST release. To acknowledge these sometimes conflicting objectives, the final rule for public participation establishes a flexible approach that ensures public access to available information on UST cleanups, although the public need not be involved, as a matter of routine, in all CAPs."

During EPA's evaluation of the Commonwealth's UST program, PADEP described to EPA that it intended to exercise its discretion to notify the public about UST releases by posting relevant information on the internet. Although the internet was not in existence at the time EPA published its regulations in 1988, today, EPA believes the internet is a powerful and effective mechanism for providing the public with information. EPA believes that providing public access to information about UST releases on the internet is a means designed to reach those members of the public directly affected by the release and the planned corrective action. The internet has revolutionized how the public can gain access to all kinds of information. The internet can be accessed from home, at work, at school, and at local libraries. Information on the internet can be updated more easily, timely and cost-effectively than printed publications. One party who provided comments on EPA's proposed state program approval decision stated that he: "* * * supports the use of the internet to educate and inform the public about DEP's regulatory programs and the status of confirmed releases and planned cleanups* * *" PADEP and EPA have dedicated significant resources to provide the public with timely and comprehensive information about their numerous programs through the internet. Recognizing the need for PADEP to balance its responsibilities to clean up expeditiously UST releases and inform the public, EPA and PADEP used the MOA to specify and clarify how PADEP will exercise its discretion in striking this balance and to acknowledge formally PADEP's commitment to internet notification of UST releases. EPA does not believe that use of the MOA to describe Pennsylvania's approach to public notification is intended to "fix" a flaw or deficiency in Pennsylvania's UST program, but rather the MOA is an appropriate means to define how PADEP will exercise its responsibilities, within its discretion and authorities, to

notify the public of UST releases under an EPA-authorized UST program.

To establish specific provisions in the MOA to define appropriate public notification, EPA and PADEP relied on provisions of 40 CFR 280.67(a). Therefore, the MOA provides the following commitments: "In addition to placing notices of confirmed releases requiring corrective action on its internet site, DEP agrees to use additional mechanisms to notify the affected public of those releases, which may have the potential to cause a more immediate or serious risk to public health and the environment. Furthermore, DEP agrees to use additional methods of public notification and outreach as a particular situation may warrant. Pursuant to 40 CFR 280.67 (Public Participation), such notices may include, but are not limited to, public notice in local newspapers, block advertisements, public service announcements, publication in the Pennsylvania Bulletin, letters to individual households, and/or personal contacts by field staff." Having drawn the provisions for the MOA directly from EPA's regulations, EPA is satisfied that PADEP's authorities and procedures for public notification of UST releases, as prescribed in the MOA, meet the requirements for state program approval found at 40 CFR 281.35(f).

On a separate but related point, one commenter referenced RCRA section 9004(a) stating that RCRA enumerates "* * * criteria that a State Program must meet in order to receive delegation of authority." EPA points out that, beyond the federal regulations discussed extensively above, section 9004 of RCRA does not include any independent requirements for States to include public notification in their UST Programs in order to be approved by EPA.

The commenter who supported using the internet to inform the public did note, however, that, the internet "* * *" is no substitute for direct notice by DEP to the affected public." EPA points out, however that neither RCRA nor its implementing regulations requires "direct notice to the affected public." These regulations state that notice to the public must be designed "* * *" to reach those members of the public directly affected by the release and the planned corrective action" but not necessarily by a direct (or personal) notice as was suggested by the commenter.

One commenter expressed a concern over a failed attempt to access PADEP's information about a particular fuel distribution facility via the internet and questioned the effectiveness of PADEP's

internet notification process. EPA is aware that PADEP had experienced some technical difficulties with its Web site and Internet access while efforts were underway to upgrade its system. Such temporary difficulties with gaining access to electronic data systems during maintenance activities are not uncommon. In May and August 2003, EPA Region III accessed PADEP's Web site and determined site accessibility, as well as the scope and content of site information about UST releases, to be complete and acceptable for public notification purposes.

The final comment regarding inadequate public notification of UST releases asserted that federal regulations require "the affected public be notified of all confirmed releases." EPA disagrees, since EPA's state program approval regulations do not require state programs to have provisions to notify the public of *all* confirmed releases, only those requiring a plan for soil and ground water remediation. See 40 CFR 281.35(f) which states that "In accordance with § 280.67, the state must notify the affected public of *all confirmed releases requiring a plan for soil and ground water remediation*" * * * (emphasis added).

Summary: With respect to public comments alleging deficiencies in Pennsylvania's program regarding public notification of UST releases, EPA has determined that Pennsylvania's UST program, as described in its State Program Approval Application, provides for adequate notification procedures to inform the public about confirmed UST releases requiring a plan for remediation. PADEP's reliance on the internet to post information on UST releases has been determined by EPA to be an acceptable means of informing the public.

2. Comments Regarding Public Participation in UST Cleanup Activities

The second set of concerns voiced by all three commenters related to the public's inability to be informed about, and to participate in, corrective measure activities. With regard to concerns about "public notification" of planned corrective measure activities, EPA refers to its previous discussion which addresses this issue. The MOA commits PADEP to maintain on its internet site the status of all corrective measures planned or taken, and PADEP agrees to make information available to the public, upon request, about the nature of identified releases and corrective measures planned or taken.

With regard to public participation in the corrective action process, EPA notes that its regulations focus on public

notification, yet rely on state administrative procedures to provide the public the opportunity to participate in the decision-making process associated with cleaning up UST releases. The preamble to EPA's September 23, 1988 UST regulations (53 FR 37233) states, "EPA does not intend to prescribe the nature and extent of the public involvement procedures to be followed by the state. Rather, EPA's intention is that a forum be provided that is in keeping with the state's administrative procedures for the interested public to express its views on the proposed corrective actions for *serious* (emphasis added) UST releases." The preamble goes on to say that this objective is intended to be met by ensuring states provide for open access to information on UST releases and planned corrective actions. Pennsylvania's UST program meets this obligation by providing for the public availability of this information. The MOA is PADEP's assurance that such information will be available via the internet for notification purposes, and more detailed information on site activities will be made available upon public request. PADEP has also agreed in the MOA to expand its method of public notification and involvement activities, as particular situations may warrant, specifically in those instances where releases may have the potential to cause an immediate or "serious risk" to public health and the environment. EPA believes there is adequate opportunity for the public to be notified of UST releases and to participate in UST cleanup activities.

Summary: EPA has evaluated Pennsylvania's UST authorities and PADEP's commitment in the MOA to provide for public notification of UST releases and public access to related information. Based on EPA's State Program Approval regulations and relevant preamble language which rely on a state's own administrative procedures for the interested public to express its views on proposed corrective actions, EPA has determined that Pennsylvania's UST program meets EPA's state program approval requirements for public notification and public involvement regarding UST releases and their cleanups.

3. Comments Regarding Public Involvement in UST Enforcement Cases

The third area on which EPA received comments related to public participation in Pennsylvania's enforcement process. One commenter questioned whether the Commonwealth's program meets the state program approval requirements of

40 CFR 281.42 ("Requirements for public participation"), which provides that "Any state administering a program must provide for public participation in the state enforcement process by providing *any one of the following three options*: (emphasis added) (a) Authority that allows intervention analogous to Federal Rule 24(a)(2), and assurance by the appropriate state enforcement agency that it will not oppose intervention under the state analogue to Rule 24(a)(2) on the ground that the applicant's interest is adequately represented by the State. (b) * * * (c) * * *" The Commonwealth chose the option set forth in 40 CFR 281.42(a) to support its State Program Approval Application. The party submitting the comments stated that "* * * it is not clear how the affected public is supposed to receive notice when such actions are taken so they may decide whether to exercise their right to intervene" and suggested that the Commonwealth * * * should be required to publish notice in the Pennsylvania Bulletin whenever a formal enforcement action is commenced and when it is resolved."

In its application for program approval, the Commonwealth provided an explanation of how its authorities meet the requirements of 40 CFR 281.42(a), but it did not discuss any procedures it may have for public notice of enforcement actions. Such notice is not required for state program approval, as such notice is not a component of Rule 24(a)(2) of the Federal Rules of Civil Procedure. Therefore, the lack of a provision in Pennsylvania's regulations to provide for public notice of enforcement actions and the absence of a related discussion in Pennsylvania's UST State Program Approval Application are not valid reasons for EPA to disapprove Pennsylvania's UST Program.

Summary: Since PADEP is not required to provide for, or explain in its State Program Approval Application, how the public is notified about enforcement actions initiated by the state, EPA has determined that this is no basis for disapproving Pennsylvania's UST program.

Conclusion: Based on the above responses to all of the adverse comments received, EPA sees no basis for disapproving Pennsylvania's UST program pursuant to 40 CFR part 281 and is hereby proceeding with a final determination to approve Pennsylvania's UST program.

Statutory and Executive Order Reviews

This rule will only approve State underground storage tank requirements

pursuant to RCRA Section 9004 and imposes no requirements other than those imposed by State law (*see* Supplementary Information, section A. Background). Therefore, this rule complies with applicable executive orders and statutory provisions as follows:

1. *Executive Order 12866: Regulatory Planning Review*—The Office of Management and Budget has exempted this rule from its review under Executive Order 12866. 2. *Paperwork Reduction Act*—This rule will not impose an information collection burden under the Paperwork Reduction Act. 3. *Regulatory Flexibility Act*—After considering the economic impacts of today's rule on small entities under the Regulatory Flexibility Act, I certify that this proposed rule will not have a significant economic impact on a substantial number of small entities. 4. *Unfunded Mandates Reform Act*—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. 5. *Executive Order 13132: Federalism*—Executive Order 13132 does not apply to this rule because it will not have federalism implications (*i.e.*, 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). 6. *Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*—Executive Order 13175 does not apply to this rule because it will not have tribal implications (*i.e.*, substantial direct effects 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). 7. *Executive Order 13045: Protection of Children from Environmental Health & Safety Risks*—This rule is not subject to Executive Order 13045 because it is not economically significant and it is not based on health or safety risks. 8. *Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use*—This rule is not subject to Executive Order 13211 because it is not a significant regulatory action as defined in Executive Order 12866. 9. *National Technology Transfer Advancement Act*—EPA approves State programs as long as they meet criteria

required by RCRA, so it would be inconsistent with applicable law for EPA, in its review of a State program, to require the use of any particular voluntary consensus standard in place of another standard that meets the requirements of RCRA. Thus, section 12(d) of the National Technology Transfer and Advance Act does not apply to this rule. 10. *Congressional Review Act*—EPA will submit a report containing this rule and other information required by the Congressional Review Act (5 U.S.C. 801 *et seq.*) to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication 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). This action will be effective September 11, 2003.

List of Subjects in 40 CFR Part 281

Environmental protection, Administrative practice and procedures, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: This document is issued under the authority of section 9004 of the Resource Conservation and Recovery Act as amended 42 U.S.C. 6991c.

Thomas Voltaggio,

Acting Regional Administrator,

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MD Docket No. 03-83; FCC 03-184]

Assessment and Collection of Regulatory Fees for Fiscal Year 2003; Correction

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: The Commission corrects the *Assessment and Collection of Regulatory Fees for Fiscal Year 2003, Report and Order*, adopted on July 21, 2003 and released on July 25, 2003.

DATES: Effective September 11, 2003.

FOR FURTHER INFORMATION CONTACT: Roland Helvajian, Office of Managing Director, (202) 418-0444.

SUPPLEMENTARY INFORMATION: The Office of the Managing Director wishes to make the following correction in our