

## **.0103 PETITIONS - PART 260**

(a) All rulemaking petitions for changes in this Subchapter shall be made in accordance with 15A NCAC 24B .0101.

(b) In applying the federal requirements incorporated by reference in this Rule, "15A NCAC 24B .0101" shall be substituted for references to 40 CFR 260.20.

(c) 40 CFR 260.21 through 260.41 (Subpart C), "Rulemaking Petitions," are incorporated by reference including subsequent amendments and editions, except that amendments and editions promulgated after October 15, 2008 are not incorporated by reference.

### **SUBPART C - PETITIONS**

#### 260.21 Petitions for equivalent testing or analytical methods.

- (a) Any person seeking to add a testing or analytical method to Part 261, 264, or 265 of this chapter may petition for a regulatory amendment under this section and section 260.20. To be successful, the person must demonstrate to the satisfaction of the Administrator that the proposed method is equal to or superior to the corresponding method prescribed in Part 261, 264, or 265 of this chapter, in terms of its sensitivity, accuracy, and precision (i.e., reproducibility).
- (b) Each petition must include, in addition to the information required by section 260.20(b):
- (1) A full description of the proposed method, including all procedural steps and equipment used in the method;
  - (2) A description of the types of wastes or waste matrices for which the proposed method may be used;
  - (3) Comparative results obtained from using the proposed method with those obtained from using the relevant or corresponding methods prescribed in Part 261, 264, or 265 of this chapter;
  - (4) An assessment of any factors which may interfere with, or limit the use of, the proposed method; and
  - (5) A description of the quality control procedures necessary to ensure the sensitivity, accuracy and precision of the proposed method.
- (c) After receiving a petition for an equivalent method, the Administrator may request any additional information on the proposed method which he may reasonably require to evaluate the method.
- (d) If the Administrator amends the regulations to permit use of a new testing method, the method will be incorporated by reference in Section 260.11 and added to "Test Methods for Evaluating of Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, U.S. Environmental Protection Agency, Office of Solid Waste, Washington, DC 20460.
- F.R. 30230, 6/25/2009 amendment to 260.21(d) will become effective October 2009.  
Office of Solid Waste will read, Office of Resource Conservation and Recovery.]

#### 260.22 Petition to amend Part 261 to exclude a waste produced at a particular facility.

- (a) Any person seeking to exclude a waste at a particular generating facility from the lists in Subpart D of Part 261 may petition for a regulatory amendment under this section and Section 260.20. To be successful:
- (1) The petitioner must demonstrate to the satisfaction of the Administrator that the waste produced by a particular generating facility does not meet any of the criteria under which the waste was listed as a hazardous or an acutely hazardous waste; and
  - (2) Based on a complete application, the Administrator must determine, where he has a reasonable basis to believe that factors (including additional constituents) other than those for which the waste was listed could cause the waste to be a hazardous waste, that such factors do not warrant retaining the waste as a hazardous waste. A waste which is so excluded, however, still may be a hazardous waste by operation of Subpart C of Part 261.
- (b) The procedures in this Section and Section 260.20 may also be used to petition the Administrator for a regulatory amendment to exclude from Section 261.3(a)(2)(ii) or (c), a waste which is described in these Sections and is either a waste listed in Subpart D, or is derived from a waste listed in Subpart D. This exclusion may only be issued for a particular generating, storage, treatment, or disposal facility. The petitioner must make the same demonstration as required by paragraph (a) of this section. Where the waste is a mixture of solid waste and one or more listed hazardous wastes or is derived from one or more hazardous wastes, his demonstration must be made with respect to the waste mixture as a whole; analyses must be conducted for not only those constituents for which the listed waste contained in the mixture was listed as hazardous, but also for factors (including additional constituents) that could

cause the waste mixture to be a hazardous waste. A waste which is so excluded may still be a hazardous waste by operation of Subpart C of Part 261.

- (c) If the waste is listed with codes "I", "C", "R", or "E", in Subpart D,
  - (1) The petitioner must show that the waste does not exhibit the relevant characteristic for which the waste was listed as defined in Section 261.21, Section 261.22, Section 261.23, or Section 261.24 using any applicable methods prescribed therein. The petitioner also must show that the waste does not exhibit any of the other characteristics defined in Section 261.21, Section 261.22, Section 261.23, or Section 261.24 using any applicable methods prescribed therein;
  - (2) Based on a complete application, the Administrator must determine, where he has a reasonable basis to believe that factors (including additional constituents) other than those for which the waste was listed could cause the waste to be hazardous waste, that such factors do not warrant retaining the waste as a hazardous waste. A waste which is so excluded, however, still may be a hazardous waste by operation of Subpart C of Part 261.
- (d) If the waste is listed with code "T" in Subpart D,
  - (1) The petitioner must demonstrate that the waste:
    - (i) Does not contain the constituent or constituents (as defined in Appendix VII of part 261 of this chapter) that caused the Administrator to list the waste; or
    - (ii) Although containing one or more of the hazardous constituents (as defined in Appendix VII of Part 261) that caused the Administrator to list the waste, does not meet the criterion of section 261.11(a)(3) when considering the factors used by the Administrator in Section 261.11(a)(3)(i) through (xi) under which the waste was listed as hazardous; and
  - (2) Based on a complete application, the Administrator must determine, where he has a reasonable basis to believe, that factors (including additional constituents) other than those for which the waste was listed could cause the waste to be a hazardous waste, that such factors do not warrant retaining the waste as a hazardous waste; and
  - (3) The petitioner must demonstrate that the waste does not exhibit any of the characteristics defined in Section 261.21, Section 261.22, Section 261.23, and Section 261.24 using any applicable methods prescribed therein;
  - (4) A waste which is so excluded, however, still may be a hazardous waste by operation of Subpart C of Part 261.
- (e) If the waste is listed with the code "H" in Subpart D,
  - (1) The petitioner must demonstrate that the waste does not meet the criterion of Section 261.11(a)(2); and
  - (2) Based on a complete application, the Administrator must determine, where he has a reasonable basis to believe that additional factors (including additional constituents) other than those for which the waste was listed could cause the waste to be a hazardous waste, that such factors do not warrant retaining the waste as a hazardous waste; and
  - (3) The petitioner must demonstrate that the waste does not exhibit any of the characteristics defined in Section 261.21, Section 261.22, Section 261.23, and Section 261.24 using any applicable methods prescribed therein;
  - (4) A waste which is so excluded, however, still may be a hazardous waste by operation of Subpart C of Part 261.
- (f) [Reserved for listing radioactive wastes.]
- (g) [Reserved for listed infectious wastes.]
- (h) Demonstration samples must consist of enough representative samples, but in no case less than four samples, taken over a period of time sufficient to represent the variability or the uniformity of the waste.
- (i) Each petition must include, in addition to the information required by Section 260.20(b):
  - (1) The name and address of the laboratory facility performing the sampling or tests of the waste;
  - (2) The names and qualifications of the persons sampling and testing the waste;
  - (3) The dates of sampling and testing;
  - (4) The location of the generating facility;
  - (5) A description of the manufacturing processes or other operations and feed materials producing the waste and an assessment of whether such processes, operations, or feed materials can or might produce a waste that is not covered by the demonstration;
  - (6) A description of the waste and an estimate of the average and maximum monthly and annual quantities of waste covered by the demonstration;
  - (7) Pertinent data on and discussion of the factors delineated in the respective criterion for listing a hazardous waste, where the demonstration is based on the factors in section 261.11(a)(3);
  - (8) A description of the methodologies and equipment used to obtain the representative samples;
  - (9) A description of the sample handling and preparation techniques, including techniques used for extraction, containerization and preservation of the samples;
  - (10) A description of the tests performed (including results);

- (11) The names and model numbers of the instruments used in performing the tests; and
- (12) The following statement signed by the generator of the waste or his authorized representative:  
 "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this demonstration and all attached documents, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."
- (j) After receiving a petition for an exclusion, the Administrator may request any additional information which he may reasonably require to evaluate the petition.
- (k) An exclusion will only apply to the waste generated at the individual facility covered by the demonstration and will not apply to waste from any other facility.
- (l) The Administrator may exclude only part of the waste for which the demonstration is submitted where he has reason to believe that variability of the waste justifies a partial exclusion.

260.23 Petitions to amend 40 CFR part 273 to include additional hazardous wastes.

- (a) Any person seeking to add a hazardous waste or a category of hazardous waste to the universal waste regulations of part 273 of this chapter may petition for a regulatory amendment under this section, 40 CFR 260.20, and subpart G of 40 CFR part 273.
- (b) To be successful, the petitioner must demonstrate to the satisfaction of the Administrator that regulation under the universal waste regulations of 40 CFR part 273: Is appropriate for the waste or category of waste; will improve management practices for the waste or category of waste, and will improve implementation of the hazardous waste program. The petition must include the information required by 40 CFR 260.20(b). The petition should also address as many of the factors listed in 40 CFR 273.81 as are appropriate for the waste or category of waste addressed in the petition.
- (c) The Administrator will grant or deny a petition using the factors listed in 40 CFR 273.81. The decision will be based on the weight of evidence showing that regulation under 40 CFR part 273 is appropriate for the waste or category of waste, will improve management practices for the waste or category of waste, and will improve implementation of the hazardous waste program.
- (d) The Administrator may request additional information needed to evaluate the merits of the petition.

260.30 Variances from classification as a solid waste.

In accordance with the standards and criteria in Section 260.31 and the procedures in Section 260.33, the Administrator may determine on a case-by-case basis that the following recycled materials are not solid wastes:

- (a) Materials that are accumulated speculatively without sufficient amounts being recycled (as defined in Section 261.1(c)(8) of this chapter);
- (b) Materials that are reclaimed and then reused within the original production process in which they were generated; and
- (c) Materials that have been reclaimed but must be reclaimed further before the materials are completely recovered.

260.31 Standards and criteria for variances from classification as a solid waste.

- (a) The Administrator may grant requests for a variance from classifying as a solid waste those materials that are accumulated speculatively without sufficient amounts being recycled if the applicant demonstrates that sufficient amounts of the material will be recycled or transferred for recycling in the following year. If a variance is granted, it is valid only for the following year, but can be renewed, on an annual basis, by filing a new application. The Administrator's decision will be based on the following criteria:
  - (1) The manner in which the material is expected to be recycled, when the material is expected to be recycled, and whether this expected disposition is likely to occur (for example, because of past practice, market factors, the nature of the material, or contractual arrangements for recycling);
  - (2) The reason that the applicant has accumulated the material for one or more years without recycling 75 percent of the volume accumulated at the beginning of the year;
  - (3) The quantity of material already accumulated and the quantity expected to be generated and accumulated before the material is recycled;

- (4) The extent to which the material is handled to minimize loss;
  - (5) Other relevant factors.
- (b) The Administrator may grant requests for a variance from classifying as a solid waste those materials that are reclaimed and then reused as feedstock within the original production process in which the materials were generated if the reclamation operation is an essential part of the production process. This determination will be based on the following criteria:
- (1) How economically viable the production process would be if it were to use virgin materials, rather than reclaimed materials;
  - (2) The extent to which the material is handled before reclamation to minimize loss;
  - (3) The time periods between generating the material and its reclamation, and between reclamation and return to the original primary production process;
  - (4) The location of the reclamation operation in relation to the production process;
  - (5) Whether the reclaimed material is used for the purpose for which it was originally produced when it is returned to the original process, and whether it is returned to the process in substantially its original form;
  - (6) Whether the person who generates the material also reclaims it;
  - (7) Other relevant factors.
- (c) The Regional Administrator may grant requests for a variance from classifying as a solid waste those materials that have been reclaimed but must be reclaimed further before recovery is completed if, after initial reclamation, the resulting material is commodity-like (even though it is not yet a commercial product, and has to be reclaimed further). This determination will be based on the following factors:
- (1) The degree of processing the material has undergone and the degree of further processing that is required;
  - (2) The value of the material after it has been reclaimed;
  - (3) The degree to which the reclaimed material is like an analogous raw material;
  - (4) The extent to which an end market for the reclaimed material is guaranteed;
  - (5) The extent to which the reclaimed material is handled to minimize loss;
  - (6) Other relevant factors.

260.32 Variance to be classified as a boiler.

In accordance with the standards and criteria in Section 260.10 (definition of "boiler"), and the procedures in Section 260.33, the Administrator may determine on a case-by-case basis that certain enclosed devices using controlled flame combustion are boilers, even though they do not otherwise meet the definition of boiler contained in Section 260.10, after considering the following criteria:

- (a) The extent to which the unit has provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases; and
- (b) The extent to which the combustion chamber and energy recovery equipment are of integral design; and
- (c) The efficiency of energy recovery, calculated in terms of the recovered energy compared with the thermal value of the fuel; and
- (d) The extent to which exported energy is utilized; and
- (e) The extent to which the device is in common and customary use as a "boiler" functioning primarily to produce steam, heated fluids, or heated gases; and
- (f) Other factors, as appropriate.

260.33 Procedures for variances from classification as a solid waste or to be classified as a boiler.

The Administrator will use the following procedures in evaluating applications for variances from classification as a solid waste or applications to classify particular enclosed controlled flame combustion devices as boilers:

- (a) The applicant must apply to the Administrator for the variance. The application must address the relevant criteria contained in Section 260.31 or Section 260.32.
- (b) The Administrator will evaluate the application and issue a draft notice tentatively granting or denying the application. Notification of this tentative decision will be provided by newspaper advertisement or radio broadcast in the locality where the recycler is located. The Administrator will accept comment on the tentative decision for 30 days, and may also hold a public hearing upon request or at his discretion. The Administrator will issue a final decision after receipt of comments and after the hearing (if any).

260.40 Additional regulation of certain hazardous waste recycling activities on a case-by-case basis.

- (a) The Regional Administrator may decide on a case-by-case basis that persons accumulating or storing the recyclable materials described in Section 261.6(a)(2)(iii) of this Chapter should be regulated under Section 261.6 (b) and (c) of this chapter. The basis for this decision is that the materials are being accumulated or stored in a manner that does not protect human health and the environment because the materials or their toxic constituents have not been adequately contained, or because the materials being accumulated or stored together are incompatible. In making this decision, the Regional Administrator will consider the following factors:
- (1) The types of materials accumulated or stored and the amounts accumulated or stored;
  - (2) The method of accumulation or storage;
  - (3) The length of time the materials have been accumulated or stored before being reclaimed;
  - (4) Whether any contaminants are being released into the environment, or are likely to be so released; and
  - (5) Other relevant factors.
- The procedures for this decision are set forth in Section 260.41 of this chapter.

260.41 Procedures for case-by-case regulation of hazardous waste recycling activities.

The Regional Administrator will use the following procedures when determining whether to regulate hazardous waste recycling activities described in Section 261.6(a)(2)(iii) under the provisions of Section 261.6 (b) and (c), rather than under the provisions of Subpart F of Part 266 of this Chapter.

- (a) If a generator is accumulating the waste, the Regional Administrator will issue a notice setting forth the factual basis for the decision and stating that the person must comply with the applicable requirements of Subparts A, C, D, and E of Part 262 of this chapter. The notice will become final within 30 days, unless the person served requests a public hearing to challenge the decision. Upon receiving such a request, the Regional Administrator will hold a public hearing. The Regional Administrator will provide notice of the hearing to the public and allow public participation at the hearing. The Regional Administrator will issue a final order after the hearing stating whether or not compliance with Part 262 is required. The order becomes effective 30 days after service of the decision unless the Regional Administrator specifies a later date or unless review by the Administrator is requested. The order may be appealed to the Administrator by any person who participated in the public hearing. The Administrator may choose to grant or to deny the appeal. Final Agency action occurs when a final order is issued and Agency review procedures are exhausted.
- (b) If the person is accumulating the recyclable material as a storage facility, the notice will state that the person must obtain a permit in accordance with all applicable provisions of Parts 270 and 124 of this chapter. The owner or operator of the facility must apply for a permit within no less than 60 days and no more than six months of notice, as specified in the notice. If the owner or operator of the facility wishes to challenge the Regional Administrator's decision, he may do so in his permit application, in a public hearing held on the draft permit, or in comments filed on the draft permit or on the notice of intent to deny the permit. The fact sheet accompanying the permit will specify the reasons for the Agency's determination. The question of whether the Regional Administrator's decision was proper will remain open for consideration during the public comment period discussed under Section 124.11 of this chapter and in any subsequent hearing.

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