

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #1

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WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: WV Department of Environmental Protection - Division of Air Quality TITLE NUMBER: 45

RULE TYPE: Legislative CITE AUTHORITY: W. Va. Code §22-5-4 and 22-18-6

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 45CSR25

TITLE OF RULE BEING AMENDED: Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

DATE OF PUBLIC HEARING: July 11, 2011 TIME: 6:00 p.m.

LOCATION OF PUBLIC HEARING: West Virginia Department of Environmental Protection
Dolly Sods Conference Room (Room 1125)
601 57th Street, S.E.
Charleston, WV 25304

COMMENTS LIMITED TO: ORAL WRITTEN BOTH


DATE WRITTEN COMMENT PERIOD ENDS: July 11, 2011 TIME: 7:00 p.m.

WRITTEN COMMENTS MAY BE MAILED TO:
The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

Public Information Office
West Virginia Department of Environmental Protection
601 57th Street, S.E.
Charleston, WV 25304

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL


Authorized Signature

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY**

BRIEFING DOCUMENT

Rule Title: 45CSR25 - "Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities."

A. AUTHORITY: W.Va. Code §§22-5-4 and 22-18-6.

B. SUMMARY OF RULE:

This rule establishes and adopts emission standards for the treatment, storage and disposal of hazardous waste promulgated by the United States Environmental Protection Agency (U.S. EPA) pursuant to the Resource Conservation and Recovery Act, as amended (RCRA). This rule codifies general procedures and criteria to implement emission standards set forth in 40 CFR Parts 260, 261, 262, 264, 265, 266, 270 and 279, as listed in Table 25-A of the rule. The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to these standards. Any person who constructs, reconstructs, modifies or operates any hazardous waste treatment, storage, or disposal facility must comply with the West Virginia Hazardous Waste Management System, the codified federal emission standards, and this rule.

45CSR25 establishes a program of regulation over the treatment, storage, and disposal of hazardous wastes in order to achieve and maintain such levels of air quality as will protect the public health and safety and the environment from the effects of improper, inadequate, or unsound treatment, storage, or disposal of hazardous wastes.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

Promulgation of this rule will enable the Department of Environmental Protection to continue to be the primary enforcement authority for the RCRA Hazardous Waste Management System in West Virginia. Revisions to this rule are necessary to maintain consistency with current federal regulations, the Division of Water and Waste Management's Hazardous Waste Management System rule 33CSR20, and to fulfill the State's responsibilities under the CAA.

Revisions to the rule include annual incorporation by reference updates. Citations with respect to authority to promulgate rules have been revised for accuracy and consistency. "Former Rules" under subsection 1.6 has been revised to correct the rule title. The fee schedule for hazardous waste management facilities has been moved into a table format.

Other miscellaneous revisions are included which correct formatting errors, provide missing information, or are stylistic in nature.

This revised rule incorporates by reference the provisions of 40 CFR Parts 260, 261, 262, 264, 265, 266, 270 and 279 promulgated as of June 1, 2011, including: Withdrawal of the Emission-Comparable Fuel Exclusion Under RCRA.

D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:

A federal counterpart to this proposed rule exists. In accordance with the Secretary's recommendation, and with limited exception, the Division of Air Quality proposes that the rule incorporate by reference the federal counterparts. Because the proposed rule incorporates by reference the federal counterpart, no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with W.Va. Code §§22-1A-1 and 3(c), the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

At its June 2, 2011 meeting, the Environmental Protection Advisory Council reviewed and discussed this rule. (See attached minutes for Council's discussion).

ENVIRONMENTAL PROTECTION ADVISORY COUNCIL

MEETING MINUTES

June 2, 2011

I. CALL TO ORDER

Kristin A. Boggs, Ex Officio Chair designated by Secretary Randy Huffman, called to order the regular meeting of the DEP Advisory Council at 1:35 p.m. on June 2, 2011 at the headquarters of the West Virginia Department of Environmental Protection, 601 57th Street Southeast, Charleston, West Virginia. Agendas were distributed.

II. ROLL CALL

Members present: Lisa Dooley, Jackie Hallinan, Ted Hapney, Larry Harris, Bill Raney, and Rick Roberts. Karen Price was absent.

The meeting was also attended by the following DEP personnel and invited guests: Lisa A. McClung, Deputy Cabinet Secretary; Kathy Cosco, Chief Communication Officer; James L. Mason, Division of Air Quality; Donald W. Martin, Division of Land Restoration; Charles W. Armstead, Division of Water & Waste Management; and David L. Johnston, Division of Water & Waste Management. Sherrie A. Armstrong and John Ailes of Bailey & Glasser attended the meeting at Ms. Boggs' invitation to fulfill Dr. Harris' request at the March 17 meeting that the DEP provide some information on the implications of the *West Virginia Highlands Conservancy v. Huffman* decision.

Also in attendance were the following members of the public: Don Garvin of the Ohio Valley Environmental Coalition; Don Gasper of Trout Unlimited; and Rosa Rose.

III. OLD BUSINESS

Minutes of the March 17, 2011 Meeting. The minutes were emailed and provided to Council in hard copy. Mr. Raney moved for approval of the minutes, Ms. Dooley seconded the motion, and it was carried by acclamation of Council.

IV. SPECIAL PRESENTATION

Ms. Armstrong, who – along with Benjamin L. Bailey - represented the DEP in the Fourth Circuit Court of Appeals in *West Virginia Highlands Conservancy v. Huffman* (the “special rec” or “bond forfeiture” cases), gave a brief overview of the possible consequences of the decision rendered in that case. John Ailes of Bailey & Glasser also participated in the presentation. In sum, an unintended consequence of this ruling could be that watershed groups, which volunteer their time and resources to clean up pre-law mine sites, could be required to get NPDES permits.

Dr. Harris suggested that a way out for Good Samaritan watershed groups would be to partner with the State and let the State obtain the NPDES permits. Mr. Ailes then opined

that the chilling effect on beneficial partnerships between citizen groups and the regulatory agencies it is one of the unintended consequences of the ruling and that this is an opportunity for the DEP to look into rulemaking to address some of these issues.

Ms. Dooley asked if the agency could waive the permit application fees for Good Samaritan groups like some municipalities waive business license fees, and DEP did not foreclose that possibility. That is one of the issues that could be addressed in future rulemaking.

Mr. Roberts asked if this ruling would apply to AML, and Ms. Armstrong answered that we do not think so, since AML is governed by a separate set of rules.

Mr. Raney asked if this ruling could apply to other industrial discharges, and Ms. Armstrong answered no.

V. PROPOSED 2012 LEGISLATIVE RULES

Division of Air Quality

- ❖ 45 CSR 8 – *Ambient Air Quality Standards* – Annual incorporation by reference amendments to the NAAQS, including Primary National Ambient Air Quality standard for sulfur dioxide.
- ❖ 45 CSR 14 – *Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration* – Revisions to the rule incorporate changes to the federal counterpart, “Prevention of Significant Deterioration for Particulate Matter Less Than 2.5 Micrometers – Increments, Significant Impact Levels and Significant Monitoring Concentration.”
 - ◆ Dr. Harris asked the following questions regarding this rule: What is a PAL? Are there any in West Virginia? Would it apply to the TransGas facility in Mingo County? On behalf of the Division of Air Quality, James L. Mason answered that a PAL is a plant-wide applicability unit, and it may apply to the TransGas facility, but TransGas would have to apply for it. Mr. Mason was unsure if there were any PALs in West Virginia, but he advised the Council he would get back to them with a response.¹
- ❖ 45 CSR 16 – *Standards of Performance for New Stationary Sources* – Annual incorporation by reference amendments to the NSPS.

¹ Mr. Mason has determined since the June 2 meeting that, because the TransGas facility is a synthetic minor source, 45CSR14 did not apply to the permitting process. If TransGas were to become a major source, 45CSR14 may then apply. Mr. Mason also determined that there are no permitted PALs in West Virginia at this time.

- ❖ 45 CSR 18 – *Combustion of Solid Waste* – The revised rule incorporates by reference the amended Standards of Performance for New Commercial and Industrial Solid Waste Incineration Units and sets forth emission guidelines for existing commercial and industrial solid waste incineration units. The new CISWI language was pulled from the proposed rule based on EPA’s recent delay of the rule’s effective date.
- ❖ 45 CSR 19 – *Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution Which Cause or Contribute to Nonattainment* – Revisions to the rule include new significant impact levels promulgated by EPA.
 - ◆ Mr. Raney inquired whether Marcellus pads fall under this rule. The short answer, as provided by Mr. Garvin and Deputy Secretary McClung, is no.
- ❖ 45 CSR 25 – *Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities* – Revisions to the rule include annual incorporation-by-reference updates.
- ❖ 45 CSR 30 – *Requirements for Operating Permits* – Revisions to the rule implement the provisions of EPA’s final Greenhouse Gas Tailoring Rule. Language is added that is intended to rescind elements of the Tailoring Rule if a court, Congress, EPA or the President finds that GHGs are not subject to regulation. In order to effect the provisions of the Tailoring Rule as soon as practicable, and in accordance with EPA-mandated timelines, West Virginia has adopted this rule as an emergency rule.
 - ◆ Dr. Harris asked what an alternative operating scenario is, and Mr. Mason explained that, once an operating system is approved, the permittee can propose something different and, if it is allowed by the rule, the Secretary can approve it as an alternative operating scenario. Dr. Harris then asked what “approved replicatable methodology” is, and Mr. Mason clarified that approved replicatable methodology (“ARM”) goes along with alternative operating scenarios: we want reproducible science, and the ARM is used to prove how the permittee plans to meet its permit limits.
 - ◆ Mr. Mason also clarified for Council that the rescission language amended into the rule in the emergency rulemaking process is only applicable to greenhouse gases and not any other pollutant.
- ❖ 45 CSR 34 – *Emission Standards for Hazardous Air Pollutants* – Annual incorporation-by-reference revisions to the Hazardous Air Pollutant rule.
- ❖ 45 CSR 35 – *Requirements for Determining Conformity of General Federal Actions to Applicable Air Quality Implementation Plans (General Conformity)* – This revised rule incorporates by reference the following provisions of 40 CFR 93: Revisions to the General Conformity Regulations.
- ❖ 45 CSR 42 – *Greenhouse Gas Emissions Inventory Program* – DAQ is proposing to repeal this rule because on October 30, 2009, EPA promulgated standardized greenhouse

reporting requirements, “Mandatory Reporting of Greenhouse Gases.” Because 45 CSR 42 was promulgated before the EPA finalized its mandatory greenhouse gas reporting requirements, and the rule’s approach to greenhouse gas reporting was significantly different from EPA’s final approach, the DAQ has determined that sources subject to EPA’s Mandatory Reporting of Greenhouse Gases shall not be also subject to the differing requirements of this State rule. To further eliminate this conflict, the DEP will take steps to amend W. Va. Code § 22-5-19, which authorizes the Secretary to propose legislative rules establishing a Greenhouse Gas Inventory Program. Such amendment to the Code will provide for the Cabinet Secretary to allow reporting under EPA’s Mandatory Reporting of Greenhouse Gases to satisfy greenhouse gas reporting requirements in West Virginia.

DIVISION OF LAND RESTORATION

- ❖ 60 CSR 3 – *Voluntary Remediation and Redevelopment Rule* – This rule is being revised to update the *de minimus* clean-up standards. This change is necessary, because the toxicological profiles for many chemicals in the federal IRIS database have been revised, which necessitates changes to the *de minimus* table.

Division of Water & Waste Management

- ❖ 33 CSR 1 – *Solid Waste Management Rule* – Revisions to this rule are to add the definition of “covered electronic devices” to the list of defined terms and to add covered electronic devices as an unacceptable waste banned from disposal in the State’s landfills. This revision is necessary due to the passage of Senate Bill 298 on March 12, 2010, which amended and reenacted W. Va. Code § 22-15A-25 to ban certain electronic devices from landfill disposal.
- ❖ 33 CSR 20 – *Hazardous Waste Management Rule* – Revisions to the rule include annual incorporation-by-reference updates from the federal counterpart. Further, DWWM proposes to amend the rule to reflect that the authority it previously transferred to the Division of Highways to regulate hazardous waste on the highways has been transferred by statute to the Public Service Commission when the Weights & Measures Section was transferred from the DOH to the PSC.

Dr. Harris moved that the proposed 2012 Legislative rules be approved for submission to the Legislature; Mr. Hapney seconded the motion; Mr. Raney objected only on the basis that the DAQ rules are complex and difficult to understand, and he wants to make sure DEP is not simply adopting federal recommendations without adequate consideration to the needs of the economy of West Virginia. The motion to approve the rule was then carried by acclamation of Council.

VI. OTHER BUSINESS

- ❖ Ms. Hallinan advised the DEP to keep pushing Marcellus regulations.
- ❖ Dr. Harris expressed serious concerns about the Marcellus permits issued in Monongalia County close to a public drinking water intake. Specifically, he opined that allowing natural gas drilling so close to a water intake is the most irresponsible siting he has ever seen and that once there has been accident, it is too late to do anything. He advised DEP that Morgantown is considering a moratorium on Marcellus drilling. He finally advised DEP that there should be a public comment period on Marcellus well work permits.
- ❖ The next Advisory Council meeting will be **Thursday, September 22, 2011 at 1:30 p.m.**

VII. ADJOURNMENT

Mr. Hapney moved that the meeting be adjourned, Ms. Hallinan seconded the motion, Dr. Harris objected, based on Ms. Boggs' failure to allow public comment at the meeting, and the motion carried by acclamation of Council. The meeting was adjourned at 2:30 p.m.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 45CSR25 - "Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities"

Type of Rule: Legislative Interpretive Procedural

Agency: Division of Air Quality

Address: 601 57th Street SE

Charleston, WV 25304

Phone Number: (304) 926-047

Email: tammy.l.mowrer@wv.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

No impact above that resulting from currently applicable federal emission standards.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR

Effect of Proposal	2012 Increase/Decrease (use "-")	2013 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	\$ 0	\$ 0	\$ 0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs & Alterations	0	0	0
Assets	0	0	0
Equipment	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

Rule Title: 45CSR25 - "Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities"

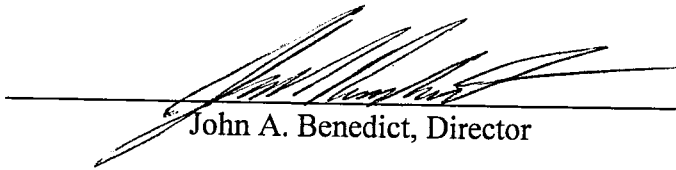
3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

The above estimates reflect that there will be no anticipated changes in costs to administer this rule.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: June 1, 2011



John A. Benedict, Director

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TITLE 45
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
AIR QUALITY

SECRETARY OF STATE

SERIES 25
CONTROL OF AIR POLLUTION FROM HAZARDOUS WASTE
TREATMENT, STORAGE AND DISPOSAL FACILITIES

§45-25-1. General.

1.1. Scope.

1.1.a. This rule establishes and adopts a program of regulation over air emissions and emission standards for the treatment, storage and disposal of hazardous waste promulgated by the United States Environmental Protection Agency (U.S. EPA) pursuant to the Resource Conservation and Recovery Act, as amended (RCRA). This rule codifies general procedures and criteria to implement emission standards set forth in the 40 CFR Parts 260, 261, 262, 264, 265, 266, 270 and 279 as listed in Table 25-A. The Secretary hereby adopts these standards by reference. The Secretary also adopts associated reference methods, performance specifications and other test methods which are appended to these standards.

1.1.b. The purpose of this rule is to achieve and maintain such levels of air quality that will protect the public health and safety and the environment from the effects of improper, inadequate, or unsound treatment, storage, or disposal of hazardous waste. Further, all persons engaged in the treatment, storage, or disposal of hazardous waste shall give careful consideration to the effects of the resultant emissions on the air quality or the areas affected by such hazardous waste or constituent thereof in such quantities as to cause ambient air concentrations which may be injurious to human health or welfare which would interfere with the enjoyment of life or property.

1.1.c. Neither compliance with the provisions of this rule nor the absence of specific language to cover particular situations constitutes approval or implies consent or condonement of any emission which is released in any locality in a manner or amount as to cause or contribute to statutory air pollution. Neither does it exempt nor excuse any person from complying with other applicable laws, ordinances, regulations, or orders of governmental entities having jurisdiction over hazardous waste treatment, storage or disposal facilities.

1.1.d. This rule is promulgated pursuant to W.Va. Code §§~~22-18-1 et seq.~~, and ~~22-5-1 et seq~~ §§22-5-4 and 22-18-6. Recognizing that each article has its own enforcement sections, it is the intent of the Secretary that enforcement shall be implemented in accordance with W.Va. Code §22-18-1 et seq., where practicable.

1.1.e. Permit applications shall be processed in accordance with the permitting procedures as set forth in W.Va. Code §22-18-1 et seq., 33CSR20, and this rule.

1.2. Authority. -- W.Va. Code §§22-5-4 and ~~22-18-1 et seq~~ 22-18-6.

1.3. Filing Date. -- ~~June 16, 2011~~.

1.4. Effective Date. -- ~~June 16, 2011~~.

1.5. Incorporation By Reference.

1.5.a. Federal Counterpart Regulation. -- The Secretary has determined that a federal counterpart regulation exists, and in accordance with the Secretary's recommendation, with limited exception, this rule incorporates by reference the provisions contained in 40 CFR Parts 260, 261, 262, 264, 265, 266, 270 and 279 as listed in Table 25-A, effective ~~June 16, 2011~~ June 1, 2011.

1.5.b. This rule incorporates by reference the provisions contained in 33CSR20, "Hazardous Waste Management System" that are in effect on the date this rule becomes effective, except for any provision in 33CSR20 which incorporates by reference the Code of Federal Regulations.

1.6. Former Rules. -- This legislative rule amends 45CSR25 "~~To Prevent and Control of~~ Prevent and Control of Air Pollution From Hazardous Waste Treatment, Storage, or and Disposal Facilities" which was filed ~~April 30, 2010~~ June 16, 2011, and which became effective ~~June 1, 2010~~ June 16, 2011.

§45-25-2. Definitions.

2.1. "Air Pollutants" means solids, liquids, or gases which, if discharged into the air, may result in statutory air pollution.

2.2. "Air Pollution", "statutory air pollution" has the meaning ascribed to it in W.Va. Code §22-5-2.

2.3. "Air Pollution Control Equipment" means any equipment used for collecting or converting hazardous waste emissions for the purpose of preventing or reducing emissions of these materials into the open air from hazardous waste treatment, storage, or disposal facilities.

2.4. "Best Available Control Technology" or "BACT", means an emission standard based on the maximum degree of reduction for each pollutant which would be emitted from any hazardous waste treatment, storage or disposal facility which the Secretary, on a case-by-case basis, taking into account energy, environmental and economic impacts and other costs, determines is achievable for the facility through application of production processes or available methods, systems, or techniques. If the Secretary determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard or combination thereof may be prescribed instead to satisfy the requirement for the application of best available control technology. The standard shall, to the extent possible, set forth the emission reduction achievable by implementation of the design, equipment, work practice or operational standard, and shall provide for compliance by means which achieve equivalent results.

2.5. "CAA" means the federal Clean Air Act, as amended; 42 U.S.C. §7401 et seq.

2.6. "CFR" means the Code of Federal Regulations published by the Office of the Federal Register, National Archives and Records Service, General Services Administration.

2.7. "Department of Environmental Protection" or "DEP" means that Department of the West Virginia Department of Environmental Protection which is created by the provisions of W.Va. Code §22-1-1 et seq.

2.8. "Facility mailing list" means the mailing list for a facility maintained by U.S. EPA in accordance with 40 CFR §124.10(c)(1)(ix).

2.9. "Hazardous waste" means a hazardous waste as defined in 40 CFR §261.3.

2.10. "Infectious Medical Waste" shall have the meaning ascribed to it in 64CSR56 "Infectious Medical Waste", (July 1, 1999), promulgated by the West Virginia Division of Health.

2.11. "Pathological Waste" means waste material consisting of only human or animal remains, anatomical parts or tissue, the bags or containers used to collect and transport the waste material, and animal bedding (if applicable).

2.12. "RCRA" means the federal Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act, as amended; 42 U.S.C. §6901 et seq.

2.13. "RCRA Permit" means "West Virginia hazardous waste permit". The following additional requirements shall apply to obtain a hazardous waste management permit in West Virginia. All references in 40 CFR Part 270 to 40 CFR Part 124 shall be deemed to be references to the applicable provisions of subsections 5.1 through 5.14. To the extent of any inconsistency with 40 CFR Part 270, the specific provisions contained herein shall govern.

2.14. "Secretary" means the Secretary of the West Virginia Department of Environmental Protection or other person to whom the Secretary has delegated authority or duties pursuant to W.Va. Code §§22-1-6 or 22-1-8.

2.15. "U.S. EPA" means the United States Environmental Protection Agency.

2.16. Other words or phrases not herein defined and used in this rule shall have the meaning as ascribed in W.Va. Code §§~~22-5-1 et seq. 22-5-2~~, or ~~22-18-1 et seq. 22-18-3~~, or 33CSR20 "Hazardous Waste Management System" governing the State Hazardous Waste Management Act.

§45-25-3. Adoption of Standards.

3.1. The Secretary hereby adopts and incorporates by reference the definitions, lists, tables, appendices, conditions, or requirements from 33CSR20 "Hazardous Waste Management System", effective ~~May 1, 2010~~ June 1, 2011, except for any provisions in 33CSR20 which incorporate by reference the Code of Federal Regulations. In case of a conflict between the Division of Air Quality and the Division of Water and Waste Management as to whether a material is a waste and if so, whether the material is a hazardous waste, the Secretary has final administrative authority to resolve the conflict.

3.2. Unless otherwise indicated, the Secretary hereby adopts and incorporates by reference the provisions contained in 40 CFR Parts 260, 261, 262, 264, 265, 266, 270 and 279 as listed in Table 25-A, effective ~~June 16, 2010~~ June 1, 2011, with the following modifications:

3.2.a. Whenever the term "United States" is used, it shall also mean the State of West Virginia;

3.2.b. Whenever the terms "Administrator," "Regional Administrator," "Assistant Administrator for

Solid Waste and Emergency Response” or “Secretary” are used, the term means the Secretary of the West Virginia Department of Environmental Protection;

3.2.c. Whenever the term “Environmental Protection Agency” is used the term also means the West Virginia Department of Environmental Protection; and

3.2.d. The distance provisions of 40 CFR §265.382 apply only to the open burning or open detonation of military explosives in a manner that presents an uncontrolled fragment release hazard. The applicable distance provisions of the American Table of Distances for Commercial Explosives, effective June 19, 1991, and of the Department of Defense Contractors Safety Manual for Ammunition and Explosives (DOD 4145.26-M), as amended April 11, 1988, apply otherwise.

§45-25-4. Requirements.

4.1. Owners and operators of hazardous waste treatment, storage, and disposal facilities regulated by the provisions of this rule shall maintain a list of all permits or construction approvals received or applied for under any of the following programs and their counterpart programs administered by the Secretary, where appropriate:

4.1.a. Hazardous Waste Management Program under RCRA and 33CSR20;

4.1.b. Prevention of Significant Deterioration (PSD) Program under 45CSR14 or the CAA;

4.1.c. Nonattainment program under 45CSR19 or the CAA;

4.1.d. National Emission Standards for Hazardous Air Pollutants (NESHAP) preconstruction approval under 45CSR34 or the CAA;

4.1.e. Standards of Performance for New Stationary Sources under 45CSR16 or the CAA; and

4.1.f. Other relevant air pollution control permits including local permits.

4.2. Owners and operators of hazardous waste treatment, storage and disposal facilities covered under this rule must comply with the personnel training requirements as specified by 40 CFR §264.16.

4.3. Owners and operators of hazardous waste tanks, containers, surface impoundments, landfills, waste piles, land treatment, miscellaneous units, thermal treatment units, incinerators, and boiler and industrial furnace facilities must design, construct, maintain, and operate these facilities to minimize the possibility of a fire, explosion, or any unplanned, sudden, or non-sudden release of hazardous waste constituents to the air which could threaten human health or the environment.

4.4. Owners and operators of hazardous waste management facilities that treat, store, or dispose of ignitable or reactive wastes, or mix incompatible waste or incompatible wastes and other materials shall comply with the general requirements for ignitable, reactive, or incompatible wastes set forth in 40 CFR §264.17.

4.5. The owners and operators of the hazardous waste treatment, storage and disposal facilities shall

manage all hazardous waste placed in a container in accordance with the applicable air emission requirements as listed in Table 25-A.

4.6. The owners and operators of the hazardous waste treatment, storage and disposal facilities shall manage all hazardous waste placed in a tank in accordance with the applicable air emission requirements as listed in Table 25-A.

4.7. The owners and operators of the hazardous waste treatment, storage and disposal facilities shall manage all hazardous waste placed in a surface impoundment in accordance with the applicable air emission requirements as listed in Table 25-A.

4.8. The owners and operators of the hazardous waste treatment, storage and disposal facilities shall manage all hazardous waste placed in a miscellaneous unit in accordance with the applicable air pollution standard requirements of 40 CFR 264 including but not limited to subparts AA, BB, and CC.

4.9. A hazardous waste pile must be fully enclosed or otherwise designed to prevent dispersal of the waste by wind.

4.10. Hazardous waste landfills must be covered or otherwise managed to prevent wind dispersal of the waste.

4.11. All landfills, surface impoundments, and land treatment facilities shall be located, designed, constructed, operated, maintained, and closed in a manner that will assure protection of human health and the environment. Protection of human health and the environment shall include prevention of adverse effects on air quality considering:

4.11.a. The volume and physical and chemical characteristics of the waste in the facility, including its potential for volatilization and wind dispersal;

4.11.b. The existing quality of the air, including other sources of contamination and their cumulative impact on the air;

4.11.c. The potential for health risks caused by human exposure to waste constituents;

4.11.d. The potential damage to wildlife, crops, vegetation, and physical structures caused by exposure to waste constituents;

4.11.e. The potential for interference with the enjoyment of life or property; and

4.11.f. The persistence and permanence of the potential adverse effects.

4.12. Owners and operators of hazardous waste treatment, storage, or disposal facilities shall utilize best available control technology ("BACT") to limit the discharge of hazardous waste constituents to the atmosphere during:

4.12.a. Process turn-arounds;

- 4.12.b. Cleaning of process equipment;
- 4.12.c. Planned process shutdowns; and
- 4.12.d. Tank truck, railroad tank car, and barge cleaning.

4.13. The Secretary may, on a case-by-case basis, establish performance standards for hazardous waste combustion for control of emissions of metals, hydrogen halides, and elemental halogen, based on a finding that the standards are necessary to limit the emission rates of these constituents to levels which do not pose an unacceptable risk to human health and environment. The Secretary may require the following data from the permit applicant:

4.13.a. Emissions of POHCs, hazardous combustion by-products, metals and hydrogen halides, including:

- 4.13.a.1. Mass emission rates from the stack, and
- 4.13.a.2. Concentration in the gas stream exiting the stack; and

4.13.b. Air dispersion estimates for those substances, including:

- 4.13.b.1. Meteorological data, and
- 4.13.b.2. Description of the air dispersion models, and
- 4.13.b.3. Assumptions underlying the air dispersion models used; and

4.13.c. Expected human and environmental exposure, including:

- 4.13.c.1. Topographic considerations,
- 4.13.c.2. Population distributions,
- 4.13.c.3. Population activities, and
- 4.13.c.4. Modes, intensity, and duration of exposure; and

4.13.d. Consequences of exposure, including:

- 4.13.d.1. Dose-response curves for carcinogens,
- 4.13.d.2. Health effects based on human or animal studies for other toxic constituents,
- 4.13.d.3. Potential for accumulation of toxic constituents in the human body, and
- 4.13.d.4. Statements of expected risk to individuals or populations.

4.14. Emergency Permit. -- Notwithstanding any other provision in 40 CFR §270.61, in the event the Secretary finds an imminent and substantial danger to human health or the environment, the Secretary may issue a temporary permit to a facility to allow treatment, storage, or disposal of hazardous waste at a non-permitted facility, or hazardous waste not covered by the permit for a facility with an effective permit. This emergency permit:

4.14.a. May be oral or written. If oral, it shall be followed within five (5) days by written emergency permit;

4.14.b. Shall not exceed ninety (90) days in duration;

4.14.c. Shall clearly specify the hazardous wastes to be received, and the manner and location of the treatment, storage, or disposal;

4.14.d. May be terminated by the Secretary at any time without prior notice if it is determined that termination is appropriate to protect human health or the environment; and

4.14.e. Shall be accompanied by public notice and include the following:

4.14.e.1. Name and address of the office granting the emergency authorization,

4.14.e.2. Name and location of the permitted hazardous waste management facility,

4.14.e.3. A brief description of the wastes involved,

4.14.e.4. A brief description of the action authorized and reasons for authorizing it,

4.14.e.5. Duration of the emergency permit; and

4.14.f. Shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of this rule.

4.15. Pathological Waste Incinerators. -- The owner and operator of a pathological waste incinerator is not subject to the requirements of this rule unless the incinerator is charged with any mixture of infectious medical waste and hazardous waste listed in 40 CFR 261 Subpart D. The owner and operator of a pathological waste incinerator shall design, construct and operate the facility in accordance with all applicable rules promulgated by the Secretary including, but not limited to, this rule, 45CSR6, 45CSR13, 45CSR14, 45CSR18, 45CSR19, 45CSR30 and 45CSR34, as applicable.

§45-25-5. Permit Process.

5.1. Pre-application Public Meeting and Notice.

5.1.a. Applicability. -- The requirements of subsection 5.1 shall apply to West Virginia hazardous waste management Part B permit applications seeking initial permits for hazardous waste management units. These requirements shall also apply to West Virginia hazardous waste management Part B permit applications seeking renewal of permits for hazardous waste management units, where the renewal

application is proposing a significant change in facility operations. A “significant change” is any change that would qualify as a Class 3 permit modification pursuant to 40 CFR §270.42. These requirements do not apply to permit modifications under 40 CFR §270.42 or to applications that are submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility.

5.1.b. Prior to the submission of a West Virginia hazardous waste management Part B permit application for a facility, the applicant must hold at least one meeting with the public in order to solicit questions from the community and inform the community of proposed hazardous waste management activities. The applicant shall post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.

5.1.c. The applicant shall submit a summary of the meeting, along with the list of attendees and their addresses developed under subdivision 5.1.b, and copies of any written comments or materials submitted at the meeting, to the Secretary as a part of the Part B application, in accordance with 40 CFR §270.14(b).

5.1.d. The applicant must provide public notice of the pre-application meeting at least thirty (30) days prior to the meeting. The applicant must maintain, and provide to the Secretary upon request, documentation of the notice.

5.1.d.1. The applicant shall provide public notice in all of the following forms:

5.1.d.1.A. A newspaper advertisement. -- The applicant shall publish a notice, fulfilling the requirements in paragraph 5.1.d.2, in a newspaper of general circulation in the county or equivalent jurisdiction that hosts the proposed location of the facility. In addition, the Secretary shall instruct the applicant to publish the notice in newspapers of general circulation in adjacent counties or equivalent jurisdictions, where the Secretary determines that the publication is necessary to inform the affected public. The notice must be published as a display advertisement;

5.1.d.1.B. A visible and accessible sign. -- The applicant shall post a notice on a clearly marked sign at or near the facility, fulfilling the requirements in paragraph 5.1.d.2. If the applicant places the sign on the facility property, then the sign must be large enough to be readable from the nearest point where the public would pass by the site;

5.1.d.1.C. A broadcast media announcement. -- The applicant shall broadcast a notice, fulfilling the requirements in paragraph 5.1.d.2, at least once on at least one local radio station or television station. The applicant may employ another medium with prior approval of the Secretary; and

5.1.d.1.D. A notice to the permitting agency. -- The applicant shall send a copy of the newspaper notice to the Secretary and the Secretary shall forward copies to the appropriate units of State and local government having jurisdiction over the area where the facility is, or is proposed to be, located; and to each state agency having any authority under State law with respect to the construction or operation of the facility.

5.1.d.2. The notices required under paragraph 5.1.d.1 must include:

5.1.d.2.A. The date, time, and location of the meeting;

5.1.d.2.B. A brief description of the purpose of the meeting;

5.1.d.2.C. A brief description of the facility and proposed operations, including the address or a map (e.g., a sketched or copied street map) of the facility location;

5.1.d.2.D. A statement encouraging people to contact the facility at least seventy-two (72) hours before the meeting if they need special access to participate in the meeting; and

5.1.d.2.E. The name, address, and telephone number of a contact person for the applicant.

5.2. Public Notice Requirements at the Application Stage.

5.2.a. Applicability. -- The requirements of subsection 5.2 shall apply to all West Virginia hazardous waste management Part B permit applications seeking initial permits for hazardous waste management units. These requirements shall also apply to hazardous waste management Part B permit applications seeking renewal of permits for hazardous waste management units upon the expiration of the existing permit. These requirements do not apply to permit modifications under 40 CFR §270.42 or permit applications submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility.

5.2.b. Notification at application submittal. -- The Secretary shall provide public notice as required in subsection 5.2 when a Part B permit application has been submitted. The Secretary shall provide public notice to:

5.2.b.1. The applicant;

5.2.b.2. All persons on a mailing list developed under subparagraph 5.8.d.1.D;

5.2.b.3. The appropriate units of state and local government having jurisdiction over the area where the facility is proposed to be located; and to each state agency having any authority under State law with respect to the construction or operation of the facility, that a Part B permit application has been submitted to the Secretary and is available for review; and

5.2.b.4. Any person otherwise entitled to receive notice under subdivision 5.2.b may waive the right to receive notice for any classes and categories of permits.

5.2.c. The notice shall be published within a reasonable period of time after the application is received by the Secretary. The notice must include:

5.2.c.1. The name and telephone number of the applicant's contact person;

5.2.c.2. The name and telephone number of the Secretary's contact office, and a mailing address to which information, opinions, and inquiries may be directed throughout the permit review process;

5.2.c.3. An address to which people can write in order to be put on the facility mailing list;

5.2.c.4. The location where copies of the permit application and any supporting documents can

be viewed and copied;

5.2.c.5. A brief description of the facility and proposed operations, including the address or a map (e.g., a sketched or copied street map) of the facility location on the front page of the notice; and

5.2.c.6. The date that the application was submitted.

5.2.d. Concurrent with the notice required under subdivision 5.2.b, the Secretary must place the permit application and any supporting documents in a location accessible to the public in the vicinity of the facility or at the Secretary's office.

5.3. Information Repository.

5.3.a. Applicability. -- The following requirements apply to all applicants seeking West Virginia hazardous waste management permits for hazardous waste management units.

5.3.b. The Secretary may assess the need, on a case-by-case basis, for an information repository. When assessing the need for an information repository, the Secretary shall consider a variety of factors, including: the level of public interest; the type of facility; the presence of an existing repository; and the proximity to the nearest copy of the administrative record. If the Secretary determines, at any time after submittal of a permit application, that there is a need for a repository, then the Secretary shall notify the facility that it must establish and maintain an information repository.

5.3.c. The information repository shall contain all documents, reports, data, and information deemed necessary by the Secretary to fulfill the purposes for which the repository is established. The Secretary shall have the discretion to limit the contents of the repository.

5.3.d. The information repository shall be located and maintained at a site chosen by the facility. If the Secretary finds the site unsuitable for the purposes and persons for which it was established, due to problems with the location, hours of availability, access, or other relevant considerations, then the Secretary shall specify a more appropriate site.

5.3.e. The Secretary shall specify requirements for informing the public about the information repository. At a minimum, the Secretary shall require the facility to provide a written notice about the information repository to all individuals on the facility mailing list.

5.3.f. The facility owner/operator shall be responsible for maintaining and updating the repository with appropriate information throughout a time period specified by the Secretary. The Secretary may close the repository at his or her discretion, based on the factors in subdivision 5.3.b.

5.4. Application for a Permit.

5.4.a. Any person who requires a permit shall complete, sign, and submit to the Secretary an appropriate application. Applications are not required for hazardous waste permits by rule pursuant to 40 CFR §270.60. The Secretary shall not begin the processing of a permit until the applicant has fully complied with the application requirements for that permit. Permit applications must comply with the signature and certification requirements of 40 CFR §270.11.

5.4.b. The Secretary shall review every application for completeness. Each application submitted by a new hazardous waste management facility, should be reviewed for completeness by the Secretary within 30 days of its receipt. Each application submitted by an existing hazardous waste management facility (both Part A and Part B of the application), should be reviewed for completeness within 60 days of receipt. Upon completing the review, the Secretary shall notify the applicant in writing whether the application is complete. If the application is incomplete, the Secretary shall list the information necessary to make the application complete. When the application is for an existing hazardous waste management facility, the Secretary shall specify in the notice of deficiency a date for submitting the necessary information. The Secretary shall notify the applicant that the application is complete upon receiving this information. After the application is completed, the Secretary may request additional information from the applicant but only when necessary to clarify, modify or supplement previously submitted materials. The request for additional information will not render an application incomplete.

5.4.c. If the applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under the applicable statutory provisions of W. Va. Code §§22-18-1 et seq. and 22-5-1 et seq.

5.4.d. If the Secretary decides that a site visit is necessary for any reason in conjunction with the processing of an application, he or she shall notify the applicant and a date shall be scheduled.

5.4.e. The effective date of an application is the date on which the Secretary notifies the applicant that the application is complete as provided for in subdivision 5.4.b.

5.4.f. For each application the Secretary shall, no later than the effective date of the application, prepare and mail to the applicant a project decision schedule. The schedule shall specify target dates by which the Secretary intends to:

5.4.f.1. Prepare a draft permit;

5.4.f.2. Give public notice;

5.4.f.3. Complete the public comment period, including any public hearing; and

5.4.f.4. Issue a final permit.

5.5. Modification, Revocation and Reissuance, or Termination of Permits.

5.5.a. Permits may be modified, revoked and reissued, or terminated either at the request of an interested person (including the permittee) or upon the Secretary's initiative. However, permits may only be modified, revoked and reissued, or terminated for the reasons specified in 40 CFR §§270.41 or 270.43. All requests shall be in writing and contain facts or reasons supporting the request.

5.5.b. If the Secretary decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice, comment, or hearings. Denials by the Secretary may be appealed to the Air Quality Board in accordance with W. Va. Code §22B-1-1 et seq.

5.5.b.1. If the Secretary tentatively decides to modify or revoke and reissue a permit under 40 CFR §§270.41 or 270.42(c), he or she shall prepare a draft permit under subsection 5.6 incorporating the proposed changes. The Secretary may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of a revoked and reissued permit, the Secretary shall require the submission of a new application.

5.5.b.2. In a permit modification, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

5.5.b.3. "Classes 1 and 2 Modifications" as defined in 40 CFR §§270.42(a) and (b) are not subject to the requirements of this subsection.

5.5.c. If the Secretary tentatively decides to terminate a permit under 40 CFR §270.43, he or she shall issue a Notice of Intent to Terminate. A Notice of Intent to Terminate is a type of draft permit which follows the same procedures as any draft permit prepared under subsection 5.6.

5.6. Draft Permits.

5.6.a. Once an application is complete, the Secretary shall tentatively decide whether to prepare a draft permit or to deny the application.

5.6.b. If the Secretary tentatively decides to deny the permit application, he or she shall issue a Notice of Intent to Deny. A Notice of Intent to Deny the permit application is a type of draft permit which follows the same procedures as a draft permit. If the Secretary's final decision is that the tentative decision to deny the permit application was incorrect, he or she shall withdraw the Notice of Intent to Deny and proceed to prepare a draft permit.

5.6.c. If the Secretary tentatively decides to issue a permit, he or she shall prepare a draft permit that contains the following information:

5.6.c.1. All conditions under 40 CFR §§270.30 and 270.32;

5.6.c.2. All compliance schedules under 40 CFR §270.33;

5.6.c.3. All monitoring requirements under 40 CFR §270.31; and

5.6.c.4. Standards for treatment, storage, disposal and other permit conditions under 40 CFR §270.30.

5.6.d. All draft permits prepared by the Secretary shall be accompanied by a fact sheet if required under subdivision 5.7.a and shall be based on the administrative record, publicly noticed and made available for public comment.

5.6.e. In addition to the requirements of subsection 5.6, public notice of the preparation of a draft

permit shall be given by the methods contained in 40 CFR §§270.2, 270.14, 270.30, 270.62, and 270.66.

5.7. Fact Sheet.

5.7.a. A fact sheet shall be prepared for each draft permit which the Secretary finds is the subject of wide-spread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, and methodological and policy questions considered in preparing the draft permit. The Secretary shall send the fact sheet to the applicant and, on request, to any other person.

5.7.b. The fact sheet shall include when applicable:

5.7.b.1. A brief description of the type of facility or activity which is the subject of the draft permit;

5.7.b.2. The type and quantity of waste, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged;

5.7.b.3. A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record;

5.7.b.4. Reasons why any requested variances or alternatives to required standards do or do not appear justified;

5.7.b.5. A description for reaching a final decision on a draft permit including;

5.7.b.5.A. The beginning and the ending dates of the comment period and the address where comments will be received;

5.7.b.5.B. Procedures for requesting a hearing and the nature of that hearing; and

5.7.b.5.C. Any other procedures by which the public may participate in the final decision;
and

5.7.b.6. Name and telephone number of a person to contact for additional information.

5.8. Public Notice of Permit Actions and Public Comment Period.

5.8.a. Scope. — The Secretary shall give public notice if the following actions have occurred:

5.8.a.1. A draft permit has been prepared; and

5.8.a.2. A hearing has been scheduled.

5.8.b. No public notice is required when a request for permit modification, revocation and reissuance, or termination is denied under subsection 5.5. Written notice of that denial shall be given to the requester and to the permittee.

5.8.c. Timing. -- Public notice of the preparation of a draft permit, including a Notice of Intent to Deny a Permit Application, required under subdivision 5.8.a shall allow at least forty-five (45) days for public comment. Public notice of a public hearing shall be given at least thirty (30) days before the hearing. Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.

5.8.d. Methods. -- Public notice of activities described in subdivision 5.8.a shall be provided by the following methods:

5.8.d.1. By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his or her rights to receive notice for any classes and categories of permits):

5.8.d.1.A. The applicant;

5.8.d.1.B. Any other agency which the Secretary knows has issued or is required to issue a RCRA, UIC, PSD (or other permit under the Clean Air Act), W.Va. Code §22-5-1 et. seq., NPDES, 33 U.S.C. §1344, or sludge management permit for the same facility or activity;

5.8.d.1.C. Federal and state agencies with jurisdiction over fish, shell fish and wildlife resources and over coastal zones management plans, the advisory council on historic preservation, and the state historic preservation office, as applicable;

5.8.d.1.D. Persons on a mailing list developed by:

5.8.d.1.D.i. Including those who request in writing to be on the list;

5.8.d.1.D.ii. Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

5.8.d.1.D.iii. Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in regional and state funded newsletters, environmental bulletins, or state law journals. The Secretary may update the mailing lists from time to time by requesting written indications of continued interest from those listed. The Secretary may delete from the lists the name of any person who fails to respond to the request;

5.8.d.1.E. To any unit of local government having jurisdiction over the area where the facility is proposed to be located; and

5.8.d.1.F. To each state agency having any authority under state law with respect to the construction or operation of the facility.

5.8.d.2. Publication of a notice in a daily or weekly major local newspaper of general circulation and broadcast over local radio stations;

5.8.d.3. In a manner constituting legal notice to the public under state laws; and

5.8.d.4. Any other method reasonably calculated to give actual notice of the action in question to the person potentially affected by it, including press releases or any other forum or medium to elicit public participation.

5.8.e. Public notices. -- All public notices issued shall contain the following minimum information:

5.8.e.1. Name and address of the office processing the permit action for which notice is being given;

5.8.e.2. Name and address of the permittee or the permit applicant and, if different, of the facility or activity regulated by the permit;

5.8.e.3. A brief description of the business conducted at the facility or activity described in the permit application or the draft permit;

5.8.e.4. Name, address and telephone number of a person from who interested persons may obtain further information, including copies of the draft permit and fact sheet and the application;

5.8.e.5. A brief description of the comment procedures required by subsections 5.9 and 5.10 and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final decision;

5.8.e.6. The location of the administrative record, the times that which the record shall be open for public inspection; and

5.8.e.7. Any additional information considered necessary or proper.

5.8.f. Public notices for hearings. -- In addition to the general public notice described in subdivision 5.8.e, the public notice of a hearing shall contain the following information:

5.8.f.1. Reference to the date of previous public notices relating to the permit;

5.8.f.1.A. Date, time, and place of the hearing; and

5.8.f.1.B. A brief description of the nature and purpose of the hearing, including the applicable rules and procedures;

5.8.g. In addition to the general public notice described in subdivision, all persons identified in subparagraphs 5.8.d.1.A, 5.8.d.1.B, and 5.8.d.1.C shall be mailed a copy of the fact sheet, the permit application and the draft permit, as applicable.

5.9. Public Comments and Requests for Public Hearing. -- During the public comment period provided under subsection 5.8, any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in subsection 5.13.

5.10. Public Hearings.

5.10.a. The Secretary shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit.

5.10.b. The Secretary may also hold a public hearing at his or her discretion, whenever, for instance, a hearing might clarify one or more issues involved in the permit decision.

5.10.c. The Secretary shall hold a public hearing whenever he or she receives written notice of opposition to a draft permit and a request for a hearing within forty-five (45) days of public notice under subdivision 5.8.c; whenever possible the Secretary shall schedule a hearing at a location in convenient to the nearest population center to the proposed facility.

5.10.d. Public notice of the hearing shall be given as specified in subsection 5.8.

5.10.e. Whenever a public hearing will be held the Secretary shall designate a presiding officer for the hearings who shall be responsible for its scheduling and orderly conduct.

5.10.f. Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under subsection 5.8 shall automatically be extended to the close of any public hearing. The hearing officer may also extend the comment period by so stating at the hearing.

5.10.g. A tape recording or written transcript of the hearing shall be made available to the public.

5.11. Reopening of the Public Comment Period.

5.11.a. If any data, information, or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the Secretary may take one or more of the following actions:

5.11.a.1. Prepare a new draft permit, appropriately modified, under subsection 5.6;

5.11.a.2. Prepare a revised fact sheet under subsection 5.7 and reopen the comment period; and

5.11.a.3. Reopen or extend the comment period under subsection 5.11 to give interested persons an opportunity to comment on the information or arguments submitted.

5.11.b. Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under subsection 5.8 shall define the scope of the reopening.

5.11.c. Public notice of any of the above actions shall be issued under subsection 5.8.

5.12. Issuance and Effective Date of Permit.

5.12.a. After the close of the public comment period on a draft permit the Secretary shall issue a final permit decision. The Secretary shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. The notice shall include reference to the procedures for appealing a decision on the permit. A final permit decision means a final decision to issue, deny, modify, or revoke and reissue, or terminate a permit.

5.12.b. A final permit decision shall become effective thirty (30) days after the service of Notice of Decision unless:

5.12.b.1. A later effective date is specified in the decision;

5.12.b.2. Review is requested or an evidentiary hearing is requested; or

5.12.b.3. No comments requested change in the draft permit, in which case the permit shall become effective immediately upon issuance.

5.13. Response to Comments.

5.13.a. At the time that any final permit decision is issued, the Secretary shall issue a response to comments. This response shall:

5.13.a.1. Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

5.13.a.2. Briefly describe and respond to all significant comments on the draft permit or the permit application raised during the public comment period, or during any hearing.

5.13.b. The response to comments shall be available to the public.

5.14. Administrative Record.

5.14.a. The provisions of a draft permit prepared under subsection 5.6 shall be based on the administrative record consisting of:

5.14.a.1. The application and any supporting data furnished by the applicant;

5.14.a.2. The draft permit or notice of intent to deny the application or to terminate the permit;

5.14.a.3. The fact sheet if required;

5.14.a.4. All documents cited in the fact sheet; and

5.14.a.5. Other documents contained in the supporting file for the draft permit.

5.14.b. The Secretary shall base final permit decisions on the administrative record consisting of:

5.14.b.1. Administrative record for the draft permit;

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5.14.b.2. All comments received during the public comment period provided under subsection 5.5, including any extension or reopening under subsection 5.11;

5.14.b.3. The tape or transcript of any hearing(s) held under subsection 5.10;

5.14.b.4. Any written material submitted at the hearing;

5.14.b.5. The response to comments required by subsection 5.13 which identified and supports any change made in the draft permit and any new material placed in the record under subsection 5.13;

5.14.b.6. Other documents contained in the supporting file for the permit;

5.14.b.7. An addendum to the fact sheet if needed; and

5.14.b.8. The final permit.

5.14.c. The administrative record shall be complete on the date the final permit is issued.

5.14.d. Material readily available at the issuing agency office or published material that is generally available, and that is included in the administrative record under subdivisions 5.14.a and 5.14.b, need not be physically included with the rest of the record as long as it is specifically referred to in the fact sheet or in the addendum to the fact sheet.

5.15. Public Access to Information.

5.15.a. Any record, report, or information and any permit, permit application, and related documentation within the Secretary's possession shall be available to the public for inspection and copying; provided, however, that upon a satisfactory showing to the Secretary that the records, reports, permit documentation, or information, or any part hereof would, if made public, divulge methods or processes or activities entitled to protection as trade secrets, the Secretary shall consider, treat, and protect the records as confidential pursuant to W.Va. Code §§22-18-1-et seq. and 22-5-1-et seq.

5.15.b. It shall be the responsibility of the person claiming any information as confidential under the provision of subdivision 5.15.a to comply with the requirements of 45CSR31.

5.16. The provisions of 40 CFR §270.12 are excepted from incorporation by reference. Availability of information provided under this rule is controlled by the provisions of W.Va. Code, §§22-18-1 et seq. and 22-5-1 et seq.

§45-25-6. Exclusions and Exemptions.

6.1. Wastes and materials excluded in 33CSR20 are excluded from the requirements of this rule.

6.2. Except for recyclable materials exempt pursuant to 33CSR§20-3, hazardous wastes that are stored prior to recycling are subject to all applicable provisions of section 4.

6.3. The provisions of 62 Federal Register 52622-52642, dated October 8, 1997 (Project XL Site-

Specific Rulemaking for Merck & Co., Inc., Stonewall Plant, Elkton, VA: Final Rule) are hereby excluded. These provisions include 40 CFR §§264.1030(d), 264.1050(g), 264.1080(e), 265.1030(c), 265.1050(f), and 265.1080(e).

6.4. Any pathological waste incinerator not subject to this rule under subsection 4.15 shall be subject to 45CSR6 or 45CSR18, as applicable.

§45-25-7. Application Fee.

7.1. Any person who applies for a permit for the construction and/or operation of an air emitting hazardous waste treatment, storage, or disposal facility shall submit as part of the application a money order or cashier's check payable to the "Air Pollution Control Fund" of the State Treasury. The fee shall be determined by the schedule set forth below:

<u>Activity</u>	<u>Fee</u>
a. Hazardous Waste Management Facilities:	\$5,000
b. Class 2, 3 Modifications or Renewals of Permits and 40 CFR §270.41 for Hazardous Waste Management Facilities	\$1,000
c. Class 1 Modifications	\$ 500

<u>Activity</u>	<u>Fee</u>
<u>Hazardous Waste Management Facilities</u>	<u>\$5,000</u>
<u>Class 2, 3 Modifications or Renewals of Permits and 40 CFR §270.41 for Hazardous Waste Management Facilities</u>	<u>\$1,000</u>
<u>Class 1 Modifications</u>	<u>\$ 500</u>

7.2. These application fees shall be in addition to any fee required under any other rule of the West Virginia Department of Environmental Protection.

§45-25-8. Inconsistency Between Rules.

8.1. In the event of any inconsistency between this rule and any other rule of the West Virginia Department of Environmental Protection, the inconsistency shall be resolved by the determination of the Secretary and the determination shall be based upon the application of the more stringent provision, term, condition, method or rule.

TABLE 25-A

Item No.	CFR No.	Part No.	Subpart No.	Title
1.	40 CFR	- 264, 265	- O	- Incinerator
2.	40 CFR	- 270.19	- B	- Specific Requirements for Incinerators
		- 270.42	- D	- Permit Modification at the Request of the Permittee
			- Appendix	- Appendix I
3.	40 CFR	- 270.62	- F	- Hazardous Waste Incinerator Permits
4.	40 CFR	- 270.72	- G	- Changes During Interim Status
5.	40 CFR	- 264	- X	- Miscellaneous Units
6.	40 CFR	- 270.23	- B	- Specific Requirements for Miscellaneous Units
7.	40 CFR	- 264, 265	- AA	- Air Emission Standards for Process Vents
8.	40 CFR	- 270.24	- B	- Specific Requirements for for Process Vents
9.	40 CFR	- 264, 265	- BB	- Air Emission Standards for Equipment Leaks
10.	40 CFR	- 270.25	- B	- Specific Requirements for Equipment Leaks
11.	40 CFR	- 264, 265	- CC	- Air Emission Standards for
		264.179, 265.178	I	Tanks, Surface
		264.200, 265.202	J	Impoundments, and Containers
		264.232, 265.231	K	
		265	- Appendix	- Appendix VI
12.	40 CFR	- 270.14(b)	- B	- General Information Requirements
13.	40 CFR	- 270.27	- B	- Specific Requirements for Air Emissions Control for Tanks, Surface Impoundments and Containers
14.	40 CFR	- 265	- P	- Thermal Treatment

45CSR25

Item No.	CFR No.	Part No.	Subpart No.	Title
15.	40 CFR	- 266	- H - Appendices	- Hazardous Waste Burned in Boilers and Industrial Furnaces - Appendix 1 to XIII
16.	40 CFR	- 270.22	- B	- Specific Requirements for Boilers and Industrial Furnaces Burning Hazardous Wastes
17.	40 CFR	- 270.66	- F	- Permits for Boiler and Industrial Furnaces Burning Hazardous Waste
18.	40 CFR	- 279.23	- C	- On-site Burning In Space Heater
19.	40 CFR	- 279	- G	- Standards for Used Oil Burners Who Burn Off-Specification Used Oil for Energy Recovery
20.	40 CFR	- 261.6	- A	- Requirements for Recyclable Materials
		261.4	- <u>A</u>	- Exclusions
21.	40 CFR	- 261.7	- <u>A</u>	- Residues of hazardous waste to empty containers
-22.	40 CFR	- 261.38	- E	- Comparable/Syngas Fuel Exclusions/Exemptions
-23.	40 CFR	- 262.34	- C	- Accumulation Time
-24.	40 CFR	- 260.11	- B	- References
-25.	40 CFR	- 264.15	- B	- General Inspection Requirement
26.	40 CFR	- 264.73	- E	- Operating Records
-27.	40 CFR	- 270.235	- I	- Options for Incinerators and Cement and Lightweight Aggregate Kilns to Minimize Emissions from Startup, Shutdown, and Malfunction Events.
28.	40 CFR	- 264.17	- B	- General Requirements for Ignitable, Reactive, or Incompatible Wastes.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations

Executive Order 12898 (59 FR 7629) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment.

K. Congressional Review Act

The Congressional Review Act (CRA), 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 the 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). This rule will be effective sixty days from the date of publication in the Federal Register if no adverse comment is received.

List of Subjects in 40 CFR Part 228

Environmental protection, Water pollution control.

Authority: This action is issued under the authority of Section 102 of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1401, 1411, 1412.

Dated: June 3, 2010.

Dennis J. McLerran,
Regional Administrator, Region 10.

■ For the reasons set out in the preamble, EPA amends chapter I, title 40 of the Code of Federal Register as follows:

PART 228—[AMENDED]

■ 1. The authority citation for part 228 continues to read as follows:

Authority: 33 U.S.C. 1412 and 1418.

■ 2. Section 228.15 is amended by revising paragraphs (n)(3) and (n)(4) to read as follows:

§ 228.15 Dumping sites designated on a final basis.

* * * * *

(n) * * *
(3) Coos Bay, OR Dredged Material Site F

(i) **Location:** 43°22'54.8887" N., 124°19'28.9905" W.; 43°21'32.8735" N., 124°20'37.7373" W.; 43°22'51.4004" N., 124°23'32.4318" W.; 43°23'58.4014" N., 124°22'35.4308" W. (NAD 83).

(ii) **Size:** 4.45 kilometers long and 2.45 kilometers wide.

(iii) **Depth:** Ranges from 6 to 51 meters.

(iv) **Primary Use:** Dredged material determined to be suitable for ocean disposal.

(v) **Period of Use:** Continuing Use.
(vi) **Restriction:** Disposal shall be limited to dredged material determined to be suitable for unconfined disposal; Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP); Monitoring, as specified in the SMMP, is required.

(4) Coos Bay, OR Dredged Material Site H

(i) **Location:** 43°23'53" N., 124°22'48" W.; 43°23'42" N., 124°23'01" W.; 43°24'16" N., 124°23'26" W.; 43°24'05" N., 124°23'38" W.

(ii) **Size:** 0.13 square nautical mile.
(iii) **Depth:** Averages 55 meters.
(iv) **Primary Use:** Dredged material.
(v) **Period of Use:** Continuing use.
(vi) **Restriction:** Disposal shall be limited to dredged material in the Coos Bay area of type 2 and 3, as defined in the site designation final EIS.

* * * * *

[FR Doc. 2010-14242 Filed 6-14-10; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[EPA-HQ-RCRA-2005-0017; FRL-9160-9]

RIN 2050-AG57

Withdrawal of the Emission-Comparable Fuel Exclusion Under RCRA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final action withdraws the conditional exclusion from regulations promulgated on December 19, 2008 under subtitle C of the Resource Conservation and Recovery Act (RCRA) for so-called Emission Comparable Fuel (ECF). These are fuels produced from hazardous secondary materials which, when burned in industrial boilers under specified conditions, generate emissions that are comparable to emissions from burning fuel oil in those boilers. EPA is withdrawing this conditional exclusion because the Agency has concluded that ECF is more appropriately classified as a hazardous waste. The exclusions for comparable fuel and synthesis gas fuel are not addressed or otherwise affected by this final rule.

DATES: This final rule is effective June 15, 2010.

ADDRESSES: The official public docket is identified by Docket ID No. EPA-HQ-RCRA-2005-0017. All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the RCRA Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave.,

NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the RCRA Docket is (202) 566-0270.

FOR FURTHER INFORMATION CONTACT:

Mary Jackson, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery, Mailcode: 5302P, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308-8453; fax number: (703) 308-8433; e-mail address: jackson.mary@epa.gov.

SUPPLEMENTARY INFORMATION:

General Information

A. Does this action apply to me?

Categories and entities potentially affected by this action include:

EXAMPLE OF POTENTIALLY AFFECTED ENTITIES

NAICS code	Industry description
3241 ..	Petroleum and Coal Products Manufacturing.
3251 ..	Basic Chemical Manufacturing.
3252 ..	Resin, Synthetic Rubber, and Artificial Synthetic Fibers and Filaments Manufacturing.
3254 ..	Pharmaceutical and Medicine Manufacturing.
3255 ..	Paint, Coating, and Adhesive Manufacturing.
3259 ..	Other Chemical Product and Preparation Manufacturing.
3273 ..	Cement Manufacturing.
4884 ..	Support Activities for Road Transportation.
5614 ..	Business Support Services.
5622 ..	Waste Treatment and Disposal.
9281 ..	National Security and International Affairs.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be impacted by this action. This table lists examples of the types of entities EPA is aware of that could potentially be regulated by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, *etc.*, is affected by this action, you should examine the applicability criteria in this final rule. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Docket Copying Costs

You may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies are 15 cents/page.

C. How do I obtain a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of today's final rule will also be available on the Internet. Following the Administrator's signature, a copy of this document will be posted at <http://www.epa.gov/hwcmact>. This Web site also provides other information related to the NESHAP for hazardous waste combustors.

D. Index of Contents

The information presented in this preamble is organized as follows:

- I. Statutory Authority
- II. Background
 - A. What is the intent of the rule?
 - B. Who is affected by the rule?
- III. Final Rule
- IV. State Authority
 - A. Applicability of the Rule in Authorized States
 - B. Effect on State Authorization
- V. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review
 - B. Paperwork Reduction Act
 - C. Regulatory Flexibility Act
 - D. Unfunded Mandates Reform Act
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
 - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - I. National Technology Transfer and Advancement Act
 - J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
 - K. Congressional Review Act

I. Statutory Authority

This regulation is promulgated under the authority of sections 1004 and 2002 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6903 and 6912.

II. Background

A. What is the intent of the rule?

This rule withdraws the conditional exclusion from regulation under subtitle

C of RCRA for Emission Comparable Fuel, as codified at § 261.38.¹ The conditional exclusion stated that hazardous secondary materials that meet all of the hazardous constituent specifications applicable to comparable fuel, except concentration limits for oxygenates and hydrocarbons, and that are stored and burned under prescribed conditions, are not discarded and, thus, are not solid wastes. The fundamental premise of the ECF rule is that ECF is no more hazardous than burning fuel oil, because combustion of this material will have comparable emissions. However, to ensure that the material does not pose greater risks, EPA felt compelled to promulgate a very detailed set of conditions—the equivalent of a detailed regulatory scheme—for both the storage and combustion of ECF. As discussed in the proposed rule, (Withdrawal of the ECF Exclusion Proposed Rule (74 FR 64643, December 8, 2009)), the existing subtitle C permitting process provides for the necessary review on the operation of the combustion units and the storage units to assure that the appropriate storage and combustion conditions are met.

This rule does not affect the exclusions for comparable fuel and synthesis gas fuel that were promulgated in 1998² (also codified in § 261.38). In addition, this rule does not affect the clarifications and revisions to the conditions for comparable fuel that EPA promulgated concurrently with the ECF exclusion.³

B. Who is affected by the rule?

Entities that generate, burn, and store ECF would be potentially affected by this final rule. The rationale for the exclusion was that ECF is not a solid (and hazardous) waste as generated, and hence is not subject to the subtitle C regulations. Under today's rule, ECF is again classified as a hazardous waste, and all entities managing such hazardous secondary materials are again subject to all applicable subtitle C hazardous waste standards. Since the ECF exclusion was promulgated in December 2008 and became effective in January 2009, and since we are not aware that any States have adopted or applied for authorization for this rule, we would expect that very few facilities, if any, were managing hazardous secondary materials pursuant to this rule.

¹ See 73 FR 77954 (December 19, 2008).

² See 63 FR 33782 (June 19, 1998).

³ See 73 FR at 77963-64.

III. Final Rule

On December 8, 2009, EPA proposed to withdraw the conditional exclusion for ECF under 261.38, including the exclusion itself in § 261.38(a), the specifications and associated conditions applicable to ECF under § 261.38(a), the implementation conditions applicable to ECF under § 261.38(b), the storage and burning conditions for ECF under § 261.38(c), the provisions for failure to comply with the conditions for the ECF exclusion under § 261.38(d)(2), the alternative storage conditions for ECF under § 261.38(e), and the notification of closure of an ECF storage unit under § 261.38(f). EPA received no major comments on the proposed rule to withdraw the ECF exclusion, and therefore today's action makes final, with no changes, the withdrawal of the conditional exclusion for ECF under § 261.38, as previously described. (The one comment that EPA received on the proposal, along with EPA's response to the comment are contained in the docket to today's final rule.) Information on the intent and rationale of the exclusion can be found in the Withdrawal of the ECF Exclusion Proposed Rule (74 FR 64643, December 8, 2009) and is part of the record for this final rule.

As noted above, this rule does not affect the exclusions for comparable fuel or synthesis gas fuel, including the specifications and associated conditions for these materials under § 261.38(a), the implementation conditions applicable to these materials under § 261.38(b), and the provision for failure to comply with the conditions for exclusion of these materials under § 261.38(d)(1).

Finally, today's final rule does not affect the clarifications and revisions to the conditions for comparable fuel that EPA promulgated concurrently with the ECF exclusion; specifically: (1) Clarification that comparable fuel that is spilled or leaked and that no longer meets the conditions of the exclusion must be managed as a hazardous waste if it exhibits a hazardous waste characteristic or if it is otherwise a listed hazardous waste (§ 261.38(b)(15)); (2) clarification that comparable fuel tank systems and container storage units become subject to the RCRA hazardous waste facility standards if not cleaned of liquids and accumulated solids within 90 days of ceasing operations as a comparable fuel storage unit (§ 261.38(b)(13)); (3) waiver of the RCRA closure requirements for tank systems and container storage units that were used only to store hazardous wastes that are subsequently excluded as comparable fuel (§ 261.38(b)(14)); (4)

clarification that boiler residues, including bottom ash and emission control residue, from burning comparable fuel would be subject to regulation as hazardous waste if they exhibit a hazardous waste characteristic (§ 261.38(b)(12)); and (5) a condition⁴ requiring that the one-time notice by the generator to regulatory officials must include an estimate of the average and maximum monthly and annual quantity of comparable fuel for which an exclusion is claimed (§ 261.38(b)(2)(i)(A)).

IV. State Authority

A. Applicability of the Rule in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer their own hazardous waste programs in lieu of the Federal program within the State. Following authorization, EPA retains enforcement authority under sections 3008, 3013, and 7003 of RCRA, although authorized States have primary enforcement responsibility. The standards and requirements for State authorization are found at 40 CFR part 271.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in that State, since only the State was authorized to issue RCRA permits. When new, more stringent Federal requirements were promulgated, the State was obligated to enact equivalent authorities within specified time frames. However, the new Federal requirements did not take effect in an authorized State until the State adopted the Federal requirements as State law.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized States at the same time that they take effect in unauthorized States. EPA is directed by the statute to implement these requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While

⁴ Please note that this condition applies prospectively to generators that newly claim the comparable fuel exclusion after December 19, 2008 and to generators that must submit a revised notification after December 19, 2008 because of a substantive change in the information required by the notice.

States must still adopt HSWA related provisions as State law to retain final authorization, EPA implements the HSWA provisions in authorized States until the States do so.

Authorized States are required to modify their programs only when EPA enacts Federal requirements that are more stringent or broader in scope than the existing Federal requirements. RCRA section 3009 allows the States to impose standards more stringent than those in the Federal program (*see also* 40 CFR 271.1). Therefore, authorized States may, but are not required to, adopt Federal regulations, both HSWA and non-HSWA, that are considered less stringent than previous Federal regulations.

B. Effect on State Authorization

By removing the ECF provisions, while maintaining the more stringent conditions applicable to comparable fuel in today's notice, it leads to final regulations that are considered to be more stringent than the current requirements; these provisions were not promulgated under the authority of HSWA. Therefore, States that have adopted the exclusion are required to modify their programs to remove the exclusion for ECF because they must conform to Federal regulations that are more stringent than the authorized State regulations. States that adopted the comparable fuel exclusion promulgated on June 19, 1998 and codified at § 261.38, but that have not adopted the ECF exclusion, will still need to revise their programs to adopt the more stringent conditions applicable to comparable fuel (*see* 73 FR at 77963–64) that were promulgated concurrently with the ECF exclusion on December 19, 2008.

Section 271.21(e)(2) of EPA's State authorization regulations (40 CFR part 271) requires that States with final authorization modify their programs to reflect Federal program changes and submit the modifications to EPA for approval. The deadline by which the States will need to modify their programs is determined by the date of promulgation of a final rule in accordance with § 271.21(e)(2). Once EPA approves the modification, the State requirements would become RCRA subtitle C requirements.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR

51735, October 4, 1993) and is therefore not subject to review under the EO. Our impact assessment⁵ suggests that lost benefits would be, at most, \$6.6 million per year. If fewer States were to have adopted the December 2008 exclusion rule, the value of lost benefits would be smaller.

B. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them.

The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 1361.15. Withdrawing the ECF exclusion will result in an increase in the reporting and recordkeeping burden for ECF generators and burners, back to the level prior to promulgation of the exclusion. That is, under the ECF conditional exclusion, because ECF was no longer classified as a hazardous waste, the generator and burner were not required to comply with the paperwork, reporting, and recordkeeping requirements under the subtitle C hazardous waste regulations. However, ECF generators and burners were subject to an annual public reporting and recordkeeping burden for the collection of information required under the conditional exclusion. Thus, overall, the reporting and recordkeeping burden for ECF generators and burners resulted in a net annual reduction of 32,900 hours (assuming that all authorized States adopted the rule, which has not occurred) and a savings of \$1.3 million in capital and operation and maintenance costs (based on the same assumption). Therefore, withdrawing the ECF conditional exclusion will result in a reporting and recordkeeping burden of 32,900 hours and a cost of \$1.3 million in capital, and operation and maintenance costs, again assuming full adoption by authorized States. However, since we believe this has not occurred, the new burden would be significantly less. If authorized States have not adopted the rule, withdrawing the ECF conditional exclusion will not change the reporting and recordkeeping burden from what existed prior to promulgation of the conditional exclusion. OMB has previously approved the information collection

⁵ *Assessment of the Potential Costs, Benefits, and Other Impacts of the Withdrawal of the Emission-Comparable Fuel Exclusion Under RCRA—Final Rule*, May 11, 2010.

requirements contained in the existing regulations at 40 CFR 261.38 under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0073. Burden is defined at 5 CFR 1320.3(b). EPA has established a public docket for this final rule, which includes the ICR prepared in support of the final action. The Docket ID number is EPA–HQ–RCRA–2005–0017.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business, as defined by Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this final rule are facilities that generate, burn on-site, and store ECF. We have determined that the affected ECF generators are not owned by small governmental jurisdictions or nonprofit organizations. Therefore, only small businesses were analyzed for small entity impacts. A small entity is defined either by the number of employees or by the dollar amount of sales. The level at which a business is considered small is determined for each North American Industrial Classification System (NAICS) code by the Small Business Administration.

We have determined that this final rule is projected to result in increased costs to companies that may have started to use the conditional exclusion, as identified in the ECF Final Rule, although we suspect that very few facilities, if any, have actually begun to comply with this rule. However, any cost impacts to potentially affected small entities are not expected to be significant. The May 14, 2008 economic assessment⁶ identified 34 facilities projected to take advantage of the ECF final rule (*see* Appendix E to the economic assessment document). Based on the corporate ownership of these facilities, one facility was confirmed as a small business based on the Small Business Administration size standards.⁷ The size category of one other facility was undetermined. All other facilities were found to be owned by large businesses or the Federal government (*e.g.*, DOE). For the one identified small business and the one of undetermined size, impacts to these companies was estimated to be up to a maximum of one percent of gross annual revenues. This impact estimate was based on the average annual gross revenues for the NAICS category (2002 Census data) and the average cost savings per generator, as reported in Exhibit 15 of the revised assessment.⁸ This impact finding assumes both "small businesses" have fully implemented the ECF final rule and would therefore experience cost increases as a result of this withdrawal. However, as discussed above, we suspect that very few facilities, if any, have begun to comply with this rule.

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Total annual cost impacts of this action are not expected to exceed \$6.6 million. Thus, this final rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. No

⁶ USEPA, "Assessment of the Potential Costs, Benefits, and Other Impacts of the Expansion of the RCRA Comparable Fuel Exclusion-Final Rule," May 14, 2008.

⁷ http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.

⁸ USEPA, "Revised Assessment of the Potential Costs, Benefits, and Other Impacts of the Expansion of the RCRA Comparable Fuel Exclusion-Final Rule," July 15, 2009.

small governments are known to own or manage any of the potentially affected entities.

E. Executive Order 13132: Federalism

This action 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. This rulemaking primarily and directly affects generators and burners of ECF. There are no State and local government bodies that would incur direct compliance costs by this rulemaking. Thus, Executive Order 13132 does not apply to this final rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This final rule will neither impose substantial direct compliance costs on Tribal governments nor preempt Tribal law. Thus, Executive Order 13175 does not apply to this action.

Although Executive Order 13175 does not apply to this action, EPA specifically solicited comment on the proposed action from Tribal officials. No comments were received.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the Agency does not believe the environmental health or safety risks addressed by this final rule present a disproportionate risk to children. This action's health and risk assessments are contained in the original document(s) that established these materials as hazardous waste.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement

Act of 1995 ("NTTAA"), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

Because EPA is withdrawing the conditional exclusion for ECF under § 261.38, EPA is not using any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This action reverses the ECF final rule thereby reinstating the more stringent management requirements for these materials.

K. Congressional Review Act

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). This rule will be effective June 15, 2010.

List of Subjects in 40 CFR Part 261

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

Dated: June 7, 2010.

Lisa P. Jackson,
Administrator.

■ For the reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations 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. 6903, 6912(b), 6925.

■ 2. Section 261.4 is amended by revising paragraph (a)(16) to read as follows:

§ 261.4 Exclusions.

(a) * * *

(16) Comparable fuels or comparable syngas fuels that meet the requirements of § 261.38.

* * * * *

■ 3. Section 261.38 is revised to read as follows:

§ 261.38 Exclusion of comparable fuel and syngas fuel.

(a) *Specifications for excluded fuels.* Wastes that meet the specifications for comparable fuel or syngas fuel under paragraphs (a)(1) or (a)(2) of this section, respectively, and the other requirements of this section, are not solid wastes.

(1) *Comparable fuel specifications.*—(i) *Physical specifications.*—(A) *Heating value.* The heating value must exceed 5,000 Btu/lbs. (11,500 J/g).

(B) *Viscosity.* The viscosity must not exceed: 50 cS, as-fired.

(ii) *Constituent specifications.* For compounds listed in Table 1 to this section, the specification levels and, where non-detect is the specification, minimum required detection limits are: (see Table 1 of this section).

(2) *Synthesis gas fuel specifications.*—Synthesis gas fuel (i.e., syngas fuel) that is generated from hazardous waste must:

(i) Have a minimum Btu value of 100 Btu/Scf;

(ii) Contain less than 1 ppmv of total halogen;

(iii) Contain less than 300 ppmv of total nitrogen other than diatomic nitrogen (N₂);

(iv) Contain less than 200 ppmv of hydrogen sulfide; and

(v) Contain less than 1 ppmv of each hazardous constituent in the target list of appendix VIII constituents of this part.

(3) *Blending to meet the specifications.* (i) Hazardous waste shall not be blended to meet the comparable fuel specification under paragraph (a)(1) of this section, except as provided by paragraph (a)(3)(ii) of this section:

(ii) *Blending to meet the viscosity specification.* A hazardous waste blended to meet the viscosity specification for comparable fuel shall:

(A) As generated and prior to any blending, manipulation, or processing, meet the constituent and heating value specifications of paragraphs (a)(1)(i)(A) and (a)(1)(ii) of this section;

(B) Be blended at a facility that is subject to the applicable requirements of parts 264, 265, or 267 or § 262.34 of this chapter; and

(C) Not violate the dilution prohibition of paragraph (a)(6) of this section.

(4) *Treatment to meet the comparable fuel specifications.* (i) A hazardous waste may be treated to meet the specifications for comparable fuel set forth in paragraph (a)(1) of this section provided the treatment:

(A) Destroys or removes the constituents listed in the specification or raises the heating value by removing or destroying hazardous constituents or materials;

(B) Is performed at a facility that is subject to the applicable requirements of parts 264, 265, or 267, or § 262.34 of this chapter; and

(C) Does not violate the dilution prohibition of paragraph (a)(6) of this section.

(ii) Residuals resulting from the treatment of a hazardous waste listed in subpart D of this part to generate a comparable fuel remain a hazardous waste.

(5) *Generation of a syngas fuel.* (i) A syngas fuel can be generated from the processing of hazardous wastes to meet the exclusion specifications of paragraph (a)(2) of this section provided the processing:

(A) Destroys or removes the constituents listed in the specification or raises the heating value by removing or destroying constituents or materials;

(B) Is performed at a facility that is subject to the applicable requirements of parts 264, 265, or 267, or § 262.34 of this

chapter or is an exempt recycling unit pursuant to § 261.6(c); and

(C) Does not violate the dilution prohibition of paragraph (a)(6) of this section.

(ii) Residuals resulting from the treatment of a hazardous waste listed in subpart D of this part to generate a syngas fuel remain a hazardous waste.

(6) *Dilution prohibition.* No generator, transporter, handler, or owner or operator of a treatment, storage, or disposal facility shall in any way dilute a hazardous waste to meet the specifications of paragraphs (a)(1)(i)(A) or (a)(1)(ii) of this section for comparable fuel, or paragraph (a)(2) of this section for syngas.

(b) *Implementation.*—(1) *General.*—(i) Wastes that meet the specifications provided by paragraph (a) of this section for comparable fuel or syngas fuel are excluded from the definition of solid waste provided that the conditions under this section are met. For purposes of this section, such materials are called excluded fuel; the person claiming and qualifying for the exclusion is called the excluded fuel generator and the person burning the excluded fuel is called the excluded fuel burner.

(ii) The person who generates the excluded fuel must claim the exclusion by complying with the conditions of this section and keeping records necessary to document compliance with those conditions.

(2) *Notices.* (i) *Notices to State RCRA and CAA Directors in authorized States or regional RCRA and CAA Directors in unauthorized States.* (A) The generator must submit a one-time notice, except as provided by paragraph (b)(2)(i)(C) of this section, to the Regional or State RCRA and CAA Directors, in whose jurisdiction the exclusion is being claimed and where the excluded fuel will be burned, certifying compliance with the conditions of the exclusion and providing the following documentation:

(1) The name, address, and RCRA ID number of the person/facility claiming the exclusion;

(2) The applicable EPA Hazardous Waste Code(s) that would otherwise apply to the excluded fuel;

(3) The name and address of the units meeting the requirements of paragraphs (b)(3) and (c) of this section, that will burn the excluded fuel;

(4) An estimate of the average and maximum monthly and annual quantity of material for which an exclusion would be claimed, except as provided by paragraph (b)(2)(i)(C) of this section; and

(5) The following statement, which shall be signed and submitted by the

person claiming the exclusion or his authorized representative:

Under penalty of criminal and civil prosecution for making or submitting false statements, representations, or omissions, I certify that the requirements of 40 CFR 261.38 have been met for all comparable fuels identified in this notification. Copies of the records and information required at 40 CFR 261.38(b)(8) are available at the generator's facility. Based on my inquiry of the individuals immediately responsible for obtaining the information, the information is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

(B) If there is a substantive change in the information provided in the notice required under this paragraph, the generator must submit a revised notification.

(C) Excluded fuel generators must include an estimate of the average and maximum monthly and annual quantity of material for which an exclusion would be claimed only in notices submitted after December 19, 2008 for newly excluded fuel or for revised notices as required by paragraph (b)(2)(i)(B) of this section.

(ii) *Public notice.* Prior to burning an excluded fuel, the burner must publish in a major newspaper of general circulation local to the site where the fuel will be burned, a notice entitled "Notification of Burning a Fuel Excluded Under the Resource Conservation and Recovery Act" and containing the following information:

(A) Name, address, and RCRA ID number of the generating facility(ies);

(B) Name and address of the burner and identification of the unit(s) that will burn the excluded fuel;

(C) A brief, general description of the manufacturing, treatment, or other process generating the excluded fuel;

(D) An estimate of the average and maximum monthly and annual quantity of the excluded fuel to be burned; and

(E) Name and mailing address of the Regional or State Directors to whom the generator submitted a claim for the exclusion.

(3) *Burning.* The exclusion applies only if the fuel is burned in the following units that also shall be subject to Federal/State/local air emission requirements, including all applicable requirements implementing section 112 of the Clean Air Act:

(i) Industrial furnaces as defined in § 260.10 of this chapter;

(ii) Boilers, as defined in § 260.10 of this chapter, that are further defined as follows:

(A) Industrial boilers located on the site of a facility engaged in a

manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes; or

(B) Utility boilers used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale;

(iii) Hazardous waste incinerators subject to regulation under subpart O of parts 264 or 265 of this chapter and applicable CAA MACT standards.

(iv) Gas turbines used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale.

(4) *Fuel analysis plan for generators.* The generator of an excluded fuel shall develop and follow a written fuel analysis plan which describes the procedures for sampling and analysis of the material to be excluded. The plan shall be followed and retained at the site of the generator claiming the exclusion.

(i) At a minimum, the plan must specify:

(A) The parameters for which each excluded fuel will be analyzed and the rationale for the selection of those parameters;

(B) The test methods which will be used to test for these parameters;

(C) The sampling method which will be used to obtain a representative sample of the excluded fuel to be analyzed;

(D) The frequency with which the initial analysis of the excluded fuel will be reviewed or repeated to ensure that the analysis is accurate and up to date; and

(E) If process knowledge is used in the determination, any information prepared by the generator in making such determination.

(ii) For each analysis, the generator shall document the following:

(A) The dates and times that samples were obtained, and the dates the samples were analyzed;

(B) The names and qualifications of the person(s) who obtained the samples;

(C) A description of the temporal and spatial locations of the samples;

(D) The name and address of the laboratory facility at which analyses of the samples were performed;

(E) A description of the analytical methods used, including any clean-up and sample preparation methods;

(F) All quantitation limits achieved and all other quality control results for the analysis (including method blanks, duplicate analyses, matrix spikes, etc.), laboratory quality assurance data, and the description of any deviations from analytical methods written in the plan or from any other activity written in the plan which occurred;

(G) All laboratory results demonstrating whether the exclusion specifications have been met; and

(H) All laboratory documentation that support the analytical results, unless a contract between the claimant and the laboratory provides for the documentation to be maintained by the laboratory for the period specified in paragraph (b)(9) of this section and also provides for the availability of the documentation to the claimant upon request.

(iii) Syngas fuel generators shall submit for approval, prior to performing sampling, analysis, or any management of an excluded syngas fuel, a fuel analysis plan containing the elements of paragraph (b)(4)(i) of this section to the appropriate regulatory authority. The approval of fuel analysis plans must be stated in writing and received by the facility prior to sampling and analysis to demonstrate the exclusion of a syngas. The approval of the fuel analysis plan may contain such provisions and conditions as the regulatory authority deems appropriate.

(5) *Excluded fuel sampling and analysis.* (i) *General.* For wastes for which an exclusion is claimed under the specifications provided by paragraphs (a)(1) or (a)(2) of this section, the generator of the waste must test for all the constituents in appendix VIII to this part, except those that the generator determines, based on testing or knowledge, should not be present in the fuel. The generator is required to document the basis of each determination that a constituent with an applicable specification should not be present. The generator may not determine that any of the following categories of constituents with a specification in Table 1 to this section should not be present:

(A) A constituent that triggered the toxicity characteristic for the constituents that were the basis for listing the hazardous secondary material as a hazardous waste, or constituents for which there is a treatment standard for the waste code in 40 CFR 268.40;

(B) A constituent detected in previous analysis of the waste;

(C) Constituents introduced into the process that generates the waste; or

(D) Constituents that are byproducts or side reactions to the process that generates the waste.

Note to paragraph (b)(5): Any claim under this section must be valid and accurate for all hazardous constituents; a determination not to test for a hazardous constituent will not shield a generator from liability should that constituent later be found in the excluded fuel above the exclusion specifications.

(ii) *Use of process knowledge.* For each waste for which the comparable fuel or syngas exclusion is claimed where the generator of the excluded fuel is not the original generator of the hazardous waste, the generator of the excluded fuel may not use process knowledge pursuant to paragraph (b)(5)(i) of this section and must test to determine that all of the constituent specifications of paragraphs (a)(1) and (a)(2) of this section, as applicable, have been met.

(iii) The excluded fuel generator may use any reliable analytical method to demonstrate that no constituent of concern is present at concentrations above the specification levels. It is the responsibility of the generator to ensure that the sampling and analysis are unbiased, precise, and representative of the excluded fuel. For the fuel to be eligible for exclusion, a generator must demonstrate that:

(A) The 95% upper confidence limit of the mean concentration for each constituent of concern is not above the specification level; and

(B) The analyses could have detected the presence of the constituent at or below the specification level.

(iv) Nothing in this paragraph preempts, overrides or otherwise negates the provision in § 262.11 of this chapter, which requires any person who generates a solid waste to determine if that waste is a hazardous waste.

(v) In an enforcement action, the burden of proof to establish conformance with the exclusion specification shall be on the generator claiming the exclusion.

(vi) The generator must conduct sampling and analysis in accordance with the fuel analysis plan developed under paragraph (b)(4) of this section.

(vii) *Viscosity condition for comparable fuel.* (A) Excluded comparable fuel that has not been blended to meet the kinematic viscosity specification shall be analyzed as-generated.

(B) If hazardous waste is blended to meet the kinematic viscosity specification for comparable fuel, the generator shall:

(1) Analyze the hazardous waste as-generated to ensure that it meets the constituent and heating value specifications of paragraph (a)(1) of this section; and

(2) After blending, analyze the fuel again to ensure that the blended fuel meets all comparable fuel specifications.

(viii) Excluded fuel must be re-tested, at a minimum, annually and must be retested after a process change that could change its chemical or physical

properties in a manner than may affect conformance with the specifications.

(6) (Reserved)

(7) *Speculative accumulation.*

Excluded fuel must not be accumulated speculatively, as defined in § 261.1(c)(8).

(8) *Operating record.* The generator must maintain an operating record on site containing the following information:

(i) All information required to be submitted to the implementing authority as part of the notification of the claim:

(A) The owner/operator name, address, and RCRA ID number of the person claiming the exclusion;

(B) For each excluded fuel, the EPA Hazardous Waste Codes that would be applicable if the material were discarded; and

(C) The certification signed by the person claiming the exclusion or his authorized representative.

(ii) A brief description of the process that generated the excluded fuel. If the comparable fuel generator is not the generator of the original hazardous waste, provide a brief description of the process that generated the hazardous waste;

(iii) The monthly and annual quantities of each fuel claimed to be excluded;

(iv) Documentation for any claim that a constituent is not present in the excluded fuel as required under paragraph (b)(5)(i) of this section;

(v) The results of all analyses and all detection limits achieved as required under paragraph (b)(4) of this section;

(vi) If the comparable fuel was generated through treatment or blending, documentation of compliance with the applicable provisions of paragraphs (a)(3) and (a)(4) of this section;

(vii) If the excluded fuel is to be shipped off-site, a certification from the burner as required under paragraph (b)(10) of this section;

(viii) The fuel analysis plan and documentation of all sampling and analysis results as required by paragraph (b)(4) of this section; and

(ix) If the generator ships excluded fuel off-site for burning, the generator must retain for each shipment the following information on-site:

(A) The name and address of the facility receiving the excluded fuel for burning;

(B) The quantity of excluded fuel shipped and delivered;

(C) The date of shipment or delivery;

(D) A cross-reference to the record of excluded fuel analysis or other information used to make the

determination that the excluded fuel meets the specifications as required under paragraph (b)(4) of this section; and

(E) A one-time certification by the burner as required under paragraph (b)(10) of this section.

(9) *Records retention.* Records must be maintained for a period of three years.

(10) *Burner certification to the generator.* Prior to submitting a notification to the State and Regional Directors, a generator of excluded fuel who intends to ship the excluded fuel off-site for burning must obtain a one-time written, signed statement from the burner:

(i) Certifying that the excluded fuel will only be burned in an industrial furnace, industrial boiler, utility boiler, or hazardous waste incinerator, as required under paragraph (b)(3) of this section;

(ii) Identifying the name and address of the facility that will burn the excluded fuel; and

(iii) Certifying that the State in which the burner is located is authorized to exclude wastes as excluded fuel under the provisions of this section.

(11) *Ineligible waste codes.* Wastes that are listed as hazardous waste because of the presence of dioxins or furans, as set out in appendix VII of this part, are not eligible for these exclusions, and any fuel produced from or otherwise containing these wastes remains a hazardous waste subject to the full RCRA hazardous waste management requirements.

(12) *Regulatory status of boiler residues.* Burning excluded fuel that was otherwise a hazardous waste listed under §§ 261.31 through 261.33 does not subject boiler residues, including bottom ash and emission control residues, to regulation as derived-from hazardous wastes.

(13) *Residues in containers and tank systems upon cessation of operations.* (i) Liquid and accumulated solid residues that remain in a container or tank system for more than 90 days after the container or tank system ceases to be operated for storage or transport of excluded fuel product are subject to regulation under parts 262 through 265, 267, 268, 270, 271, and 124 of this chapter.

(ii) Liquid and accumulated solid residues that are removed from a container or tank system after the container or tank system ceases to be operated for storage or transport of excluded fuel product are solid wastes subject to regulation as hazardous waste if the waste exhibits a characteristic of hazardous waste under §§ 261.21

through 261.24 or if the fuel were otherwise a hazardous waste listed under §§ 261.31 through 261.33 when the exclusion was claimed.

(iii) Liquid and accumulated solid residues that are removed from a container or tank system and which do not meet the specifications for exclusion under paragraphs (a)(1) or (a)(2) of this section are solid wastes subject to regulation as hazardous waste if:

(A) The waste exhibits a characteristic of hazardous waste under §§ 261.21 through 261.24; or

(B) The fuel were otherwise a hazardous waste listed under §§ 261.31 through 261.33. The hazardous waste code for the listed waste applies to these liquid and accumulated solid residues.

(14) *Waiver of RCRA Closure Requirements.* Interim status and permitted storage and combustion units, and generator storage units exempt from the permit requirements under § 262.34 of this chapter, are not subject to the closure requirements of 40 CFR Parts 264, 265, and 267 provided that the storage and combustion unit has been used to manage only hazardous waste that is subsequently excluded under the conditions of this section, and that afterward will be used only to manage fuel excluded under this section.

(15) *Spills and leaks.* (i) Excluded fuel that is spilled or leaked and that therefore no longer meets the conditions of the exclusion is discarded and must be managed as a hazardous waste if it exhibits a characteristic of hazardous waste under §§ 261.21 through 261.24 or if the fuel were otherwise a hazardous waste listed in §§ 261.31 through 261.33.

(ii) For excluded fuel that would have otherwise been a hazardous waste listed in §§ 261.31 through 261.33 and which is spilled or leaked, the hazardous waste code for the listed waste applies to the spilled or leaked material.

(16) Nothing in this section preempts, overrides, or otherwise negates the provisions in CERCLA Section 103, which establish reporting obligations for releases of hazardous substances, or the Department of Transportation requirements for hazardous materials in 49 CFR parts 171 through 180.

(c) *Failure to comply with the conditions of the exclusion.* An excluded fuel loses its exclusion if any person managing the fuel fails to comply with the conditions of the exclusion under this section, and the material must be managed as hazardous waste from the point of generation. In such situations, EPA or an authorized State agency may take enforcement action under RCRA section 3008(a).

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Table 1 to § 261.38--Detection and Detection Limit Values for Comparable Fuel Specification

Chemical name	CAS No.	Concentration Limit (mg/kg at 10,000 Btu/lb)	Minimum Required Detection Limit (mg/kg)
Total Nitrogen as N.....	NA	4900	.....
Total Halogens as Cl.....	NA	540	.....
Total Organic Halogens as Cl.....	NA	(*)	.....
Polychlorinated biphenyls, total [Aroclors, total]	1336-36-3	ND	1.4
Cyanide, total.....	57-12-5	ND	1
Metals:			
Antimony, total.....	7440-36-0	12	.....
Arsenic, total.....	7440-38-2	0.23	.....
Barium, total.....	7440-39-3	23	.....
Beryllium, total.....	7440-41-7	1.2	.....
Cadmium, total.....	7440-43-9	1.2	.....
Chromium, total.....	7440-47-3	2.3	.....
Cobalt.....	7440-48-4	4.6	.....
Lead, total.....	7439-92-1	31	.....
Manganese.....	7439-96-5	1.2	.....
Mercury, total.....	7439-97-6	0.25	.....
Nickel, total.....	7440-02-0	58	.....
Selenium, total.....	7782-49-2	0.23	.....
Silver, total.....	7440-22-4	2.3	.....
Thallium, total.....	7440-28-0	23	.....
Hydrocarbons:			
Benzo[a]anthracene.....	56-55-3	2400	.....
Benzene.....	71-43-2	4100	.....
Benzo[b]fluoranthene.....	205-99-2	2400	.....
Benzo[k]fluoranthene.....	207-08-9	2400	.....
Benzo[a]pyrene.....	50-32-8	2400	.....
Chrysene.....	218-01-9	2400	.....
Dibenzo[a,h]anthracene.....	52-70-3	2400	.....
7,12-Dimethylbenz[a]anthracene.....	57-97-6	2400	.....
Fluoranthene.....	206-44-0	2400	.....
Indeno(1,2,3-cd)pyrene.....	193-39-5	2400	.....
3-Methylcholanthrene.....	56-49-5	2400	.....
Naphthalene.....	91-20-3	3200	.....
Toluene.....	108-88-3	36000	.....
Oxygenates:			
Acetophenone.....	98-86-1	2400	.....
Acrolein.....	107-02-8	39	.....
Allyl alcohol.....	107-18-6	30	.....
Bis(2-ethylhexyl)phthalate [Di-2-ethylhexyl phthalate]	117-81-7	2400	.....
Butyl benzyl phthalate.....	85-68-7	2400	.....
o-Cresol [2-Methyl phenol].....	95-48-7	2400	.....
m-Cresol [3-Methyl phenol].....	108-39-4	2400	.....
p-Cresol [4-Methyl phenol].....	106-44-5	2400	.....
Di-n-butyl phthalate.....	84-74-2	2400	.....

Diethyl phthalate.....	84-66-2	2400	.....
2,4-Dimethylphenol.....	105-67-9	2400	.....
Dimethyl phthalate.....	131-11-3	2400	.....
Di-n-octyl phthalate.....	117-84-0	2400	.....
Endothall.....	145-73-3	100	.....
Ethyl methacrylate.....	97-63-2	39	.....
2-Ethoxyethanol [Ethylene glycol monoethyl ether]	110-80-5	100	.....
Isobutyl alcohol.....	78-83-1	39	.....
Isosafrole.....	120-58-1	2400	.....
Methyl ethyl ketone [2-Butanone].....	78-93-3	39	.....
Methyl methacrylate.....	80-62-6	39	.....
1,4-Naphthoquinone.....	130-15-4	2400	.....
Phenol.....	108-95-2	2400	.....
Propargyl alcohol [2-Propyn-1-ol].....	107-19-7	30	.....
Safrole.....	94-59-7	2400	.....
Sulfonated Organics:			
Carbon disulfide.....	75-15-0	ND	39
Disulfoton.....	298-04-4	ND	2400
Ethyl methanesulfonate.....	62-50-0	ND	2400
Methyl methanesulfonate.....	66-27-3	ND	2400
Phorate.....	298-02-2	ND	2400
1,3-Propane sultone.....	1120-71-4	ND	100
Tetraethylthiopyrophosphate [Sulfotepp].....	3689-24-5	ND	2400
Thiophenol [Benzenethiol].....	108-98-5	ND	30
O,O,O-Triethyl phosphorothioate.....	126-68-1	ND	2400
Nitrogenated Organics:			
Acetonitrile [Methyl cyanide].....	75-05-8	ND	39
2-Acetylaminofluorene [2-AAF].....	53-96-3	ND	2400
Acrylonitrile.....	107-13-1	ND	39
4-Aminobiphenyl.....	92-67-1	ND	2400
4-Aminopyridine.....	504-24-5	ND	100
Aniline.....	62-53-3	ND	2400
Benzidine.....	92-87-5	ND	2400
Dibenz[a,j]acridine.....	224-42-0	ND	2400
O,O-Diethyl O-pyrazinyl phosphorothioate [Thionazin]	297-97-2	ND	2400
Dimethoate.....	60-51-5	ND	2400
p-(Dimethylamino) azobenzene [4-Dimethylaminoazobenzene]	60-11-7	ND	2400
3,3[prime]-Dimethylbenzidine.....	119-93-7	ND	2400
α,α-Dimethylphenethylamine.....	122-09-8	ND	2400
3,3[prime]-Dimethoxybenzidine.....	119-90-4	ND	100
1,3-Dinitrobenzene [m-Dinitrobenzene].....	99-65-0	ND	2400
4,6-Dinitro-o-cresol.....	534-52-1	ND	2400
2,4-Dinitrophenol.....	51-28-5	ND	2400
2,4-Dinitrotoluene.....	121-14-2	ND	2400
2,6-Dinitrotoluene.....	606-20-2	ND	2400
Dinoseb [2-sec-Butyl-4,6-dinitrophenol].....	88-85-7	ND	2400
Diphenylamine.....	122-39-4	ND	2400
Ethyl carbamate [Urethane].....	51-79-6	ND	100
Ethylenethiourea (2-Imidazolidinethione).....	96-45-7	ND	110

Famphur.....	52-85-7	ND	2400
Methacrylonitrile.....	126-98-7	ND	39
Methapyrilene.....	91-80-5	ND	2400
Methomyl.....	16752-77-5	ND	57
2-Methylactonitrile, [Acetone cyanohydrin]....	75-86-5	ND	100
Methyl parathion.....	298-00-0	ND	2400
MNNG (N-Metyl-N-nitroso-N[prime]-nitroguanidine)	70-25-7	ND	110
1-Naphthylamine, [α -Naphthylamine].....	134-32-7	ND	2400
2-Naphthylamine, [β -Naphthylamine].....	91-59-8	ND	2400
Nicotine.....	54-11-5	ND	100
4-Nitroaniline, [p-Nitroaniline].....	100-01-6	ND	2400
Nitrobenzene.....	98-96-3	ND	2400
p-Nitrophenol, [p-Nitrophenol].....	100-02-7	ND	2400
5-Nitro-o-toluidine.....	99-55-8	ND	2400
N-Nitrosodi-n-butylamine.....	924-16-3	ND	2400
N-Nitrosodiethylamine.....	55-18-5	ND	2400
N-Nitrosodiphenylamine, [Diphenylnitrosamine]..	86-30-6	ND	2400
N-Nitroso-N-methylethylamine.....	10595-95-6	ND	2400
N-Nitrosomorpholine.....	59-89-2	ND	2400
N-Nitrosopiperidine.....	100-75-4	ND	2400
N-Nitrosopyrrolidine.....	930-55-2	ND	2400
2-Nitropropane.....	79-46-9	ND	2400
Parathion.....	56-38-2	ND	2400
Phenacetin.....	62-44-2	ND	2400
1,4-Phenylene diamine, [p-Phenylenediamine]....	106-50-3	ND	2400
N-Phenylthiourea.....	103-85-5	ND	57
2-Picoline [alpha-Picoline].....	109-06-8	ND	2400
Propylthioracil, [6-Propyl-2-thiouracil].....	51-52-5	ND	100
Pyridine.....	110-86-1	ND	2400
Strychnine.....	57-24-9	ND	100
Thioacetamide.....	62-55-5	ND	57
Thiofanox.....	39196-18-4	ND	100
Thiourea.....	62-56-6	ND	57
Toluene-2,4-diamine [2,4-Diaminotoluene].....	95-80-7	ND	57
Toluene-2,6-diamine [2,6-Diaminotoluene].....	823-40-5	ND	57
o-Toluidine.....	95-53-4	ND	2400
p-Toluidine.....	106-49-0	ND	100
1,3,5-Trinitrobenzene, [sym-Trinitrobenzene]....	99-35-4	ND	2400
Halogenated Organics:			
Allyl chloride.....	107-05-1	ND	39
Aramite.....	140-57-8	ND	2400
Benzal chloride [Dichloromethyl benzene].....	98-87-3	ND	100
Benzyl chloride.....	100-44-77	ND	100
bis(2-Chloroethyl)ether [Dichoroethyl ether]...	111-44-4	ND	2400
Bromoform [Tribromomethane].....	75-25-2	ND	39
Bromomethane [Methyl bromide].....	74-83-9	ND	39
4-Bromophenyl phenyl ether [p-Bromo diphenyl ether]	101-55-3	ND	2400
Carbon tetrachloride.....	56-23-5	ND	39
Chlordane.....	57-74-9	ND	14

p-Chloroaniline.....	106-47-8	ND	2400
Chlorobenzene.....	108-90-7	ND	39
Chlorobenzilate.....	510-15-6	ND	2400
p-Chloro-m-cresol.....	59-50-7	ND	2400
2-Chloroethyl vinyl ether.....	110-75-8	ND	39
Chloroform.....	67-66-3	ND	39
Chloromethane [Methyl chloride].....	74-87-3	ND	39
2-Chloronaphthalene [beta-Chloronaphthalene]...	91-58-7	ND	2400
2-Chlorophenol [o-Chlorophenol].....	95-57-8	ND	2400
Chloroprene [2-Chloro-1,3-butadiene].....	1126-99-8	ND	39
2,4-D [2,4-Dichlorophenoxyacetic acid].....	94-75-7	ND	7
Diallate.....	2303-16-4	ND	3400
1,2-Dibromo-3-chloropropane.....	96-12-8	ND	39
1,2-Dichlorobenzene [o-Dichlorobenzene].....	95-50-1	ND	2400
1,3-Dichlorobenzene [m-Dichlorobenzene].....	541-73-1	ND	2400
1,4-Dichlorobenzene [p-Dichlorobenzene].....	106-46-7	ND	2400
3,3[prime]-Dichlorobenzidine.....	91-94-1	ND	2400
Dichlorodifluoromethane [CFC-12].....	75-71-8	ND	39
1,2-Dichloroethane [Ethylene dichloride].....	107-06-2	ND	39
1,1-Dichloroethylene [Vinylidene chloride].....	75-35-4	ND	39
Dichloromethoxy ethane [Bis(2-chloroethoxy)methane]	111-91-1	ND	2400
2,4-Dichlorophenol.....	120-83-2	ND	2400
2,6-Dichlorophenol.....	87-65-0	ND	2400
1,2-Dichloropropane [Propylene dichloride].....	78-87-5	ND	39
cis-1,3-Dichloropropylene.....	10061-01-5	ND	39
trans-1,3-Dichloropropylene.....	10061-02-6	ND	39
1,3-Dichloro-2-propanol.....	96-23-1	ND	30
Endosulfan I.....	959-98-8	ND	1.4
Endosulfan II.....	33213-65-9	ND	1.4
Endrin.....	72-20-8	ND	1.4
Endrin aldehyde.....	7421-93-4	ND	1.4
Endrin Ketone.....	53494-70-5	ND	1.4
Epichlorohydrin [1-Chloro-2,3-epoxy propane]...	106-89-8	ND	30
Ethylidene dichloride [1,1-Dichloroethane].....	75-34-3	ND	39
2-Fluoroacetamide.....	640-19-7	ND	100
Heptachlor.....	76-44-8	ND	1.4
Heptachlor epoxide.....	1024-57-3	ND	2.8
Hexachlorobenzene.....	118-74-1	ND	2400
Hexachloro-1,3-butadiene [Hexachlorobutadiene].	87-68-3	ND	2400
Hexachlorocyclopentadiene.....	77-47-4	ND	2400
Hexachloroethane.....	67-72-1	ND	2400
Hexachlorophene.....	70-30-4	ND	59000
Hexachloropropene [Hexachloropropylene].....	1888-71-7	ND	2400
Isodrin.....	465-73-6	ND	2400
Kepone [Chlordecone].....	143-50-0	ND	4700
Lindane [gamma-BHC] [gamma-Hexachlorocyclohexane].....	58-89-9	ND	1.4
Methylene chloride [Dichloromethane].....	75-09-2	ND	39
4,4[prime]-Methylene-bis(2-chloroaniline).....	101-14-4	ND	100
Methyl iodide [Iodomethane].....	74-88-4	ND	39

Pentachlorobenzene.....	608-93-5	ND	2400
Pentachloroethane.....	76-01-7	ND	39
Pentachloronitrobenzene [PCNB] [Quintobenzene] [Quintozene].	82-68-8	ND	2400
Pentachlorophenol.....	87-88-5	ND	2400
Pronamide.....	23950-58-5	ND	2400
Silvex [2,4,5-Trichlorophenoxypropionic acid]..	93-72-1	ND	7
2,3,7,8-Tetrachlorodibenzo-p-dioxin [2,3,7,8-TCDD]	1746-01-6	ND	30
1,2,4,5-Tetrachlorobenzene.....	95-94-3	ND	2400
1,1,2,2-Tetrachloroethane.....	79-35-4	ND	39
Tetrachloroethylene [Perchloroethylene].....	127-18-4	ND	39
2,3,4,6-Tetrachlorophenol.....	58-90-2	ND	2400
1,2,4-Trichlorobenzene.....	120-82-1	ND	2400
1,1,1-Trichloroethane [Methyl chloroform].....	71-56-6	ND	39
1,1,2-Trichloroethane [Vinyl trichloride].....	79-00-5	ND	39
Trichloroethylene.....	79-01-6	ND	39
Trichlorofluoromethane [Trichloromonofluoromethane].....	75-69-4	ND	39
2,4,5-Trichlorophenol.....	95-95-4	ND	2400
2,4,6-Trichlorophenol.....	88-06-2	ND	2400
1,2,3-Trichloropropane.....	96-18-4	ND	39
Vinyl Chloride.....	75-01-4	ND	39

Notes:

NA--Not Applicable.

ND--Nondetect.

(^a) 25 or individual halogenated organics listed below.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA-HQ-SFUND-1999-0013; FRL-9162-3]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Partial Deletion of the Many Diversified Interests, Inc. Superfund Site

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) Region 6 is publishing a direct final Notice of Deletion of the soils of Operable Unit 1 and the underlying ground water of the approximately 8-acre western portion of Operable Unit 1 of the Many Diversified Interests, Inc. (MDI) Superfund Site located in Houston, Texas (Harris County), from the National Priorities List (NPL). The NPL, promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution

Contingency Plan (NCP). This direct final partial deletion is being published by EPA with the concurrence of the State of Texas, through the Texas Commission on Environmental Quality, because EPA has determined that all appropriate response actions at these identified parcels under CERCLA have been completed. However, this partial deletion does not preclude future actions under Superfund.

This partial deletion pertains to the soils of Operable Unit 1 and the underlying ground water of the approximately 8-acre western portion of Operable Unit 1 of the MDI Superfund Site. Operable Unit 2, Operable Unit 3, and the ground water underlying the remainder of Operable Unit 1 will remain on the NPL and are not being considered for deletion as part of this action.

DATES: This direct final partial deletion is effective August 16, 2010 unless EPA receives adverse comments by July 15, 2010. If adverse comments are received, EPA will publish a timely withdrawal of the direct final partial deletion in the **Federal Register** informing the public that the partial deletion will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-SFUND-1999-0013, by one of the following methods:

- <http://www.regulations.gov>: Follow internet on-line instructions for submitting comments.

- *E-mail:* Rafael Casanova, casanova.rafael@epa.gov.

- *Fax:* 214-665-6660.

- *Mail:* Rafael A. Casanova; U.S.

Environmental Protection Agency, Region 6; Superfund Division (6SF-RA); 1445 Ross Avenue, Suite 1200; Dallas, Texas 75202-2733.

- *Hand Delivery:* U.S. Environmental Protection Agency, Region 6; 1445 Ross Avenue, Suite 700; Dallas, Texas 75202-2733; Contact: Rafael A. Casanova (214) 665-7437. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-AFUND-1999-0013. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is