WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE 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.V. Code §22-5-4

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 25

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

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

DATE OF PUBLIC HEARING: July 18, 2005 TIME: 6:00 p.m.

LOCATION OF PUBLIC HEARING: West Virginia Department of Environmental Protection
Cooper's Rock Conference Room
601 57th Street, S.E.
Charleston, WV 25304

COMMENTS LIMITED TO: ORAL ___, WRITTEN ___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

John A. Benedict, Director
WV Department of Environmental Protection
Division of Air Quality
601 57th Street, S.E.
Charleston, WV 25304

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.

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Stephanie R. Timmermeyer
Authorized Signature
Stephanie R. Timmermeyer, Director

#13.40

DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY

BRIEFING DOCUMENT

Rule Title: 45CSR25 - "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or 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 the Code of Federal Regulations 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 Program, 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.

This revised rule incorporates by reference the following provisions of 40 CFR Part 262 promulgated as of June 1, 2005: National Environmental Performance Track Program.

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 State RCRA Hazardous Waste Management Program promulgated by U.S. EPA as of June 1, 2005. Promulgation of this rule by the Legislature is necessary for the State to maintain consistency with current federal regulations, the Office of Waste Management's hazardous waste rule 33CSR20, and to fulfill it's responsibilities under the CAA, as amended. Revisions to the rule include annual incorporation by reference updates, general language clarification and correction.

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 8, 2005 meeting, the Environmental Protection Advisory Council reviewed and discussed this proposed rule. The Council's comments are contained in the attached minutes.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

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

Type of Rule: ___X__ Legislative _____Interpretive _____Procedural

Agency: Division of Air Quality

Address: 601 57th Street SE
Charleston, WV 25304

Phone Number: 926-0475 Email: tmowrer@wvdep.org

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	2006 Increase/Decrease (use "-")	2007 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 - "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or 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 15, 2005

Signature of Agency Head or Authorized Representative

John A. Benedict, Director

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Wednesday - June 8, 2005
601 57th Street, SE, Charleston, WV
Dolly Sods Conference Room – 1st Floor

ATTENDEES:

Advisory Council Members:
Larry Harris
Jackie Hallinan
Rick Roberts
Lisa Dooley
Bill Raney
Karen Price

DEP:
Stephanie R. Timmermeyer, Cabinet Secretary
Karen G. Watson, Assistant General Counsel
Ken Ellison, Director - Division of Land Restoration
Lisa McClung, Director – Division of Water and Waste Management
John Benedict, Director – Division of Air Quality
Mike Zeto, WVDEP
Charlie Sturey, WVDEP
Jessica Greathouse, Chief Communication Officer – WVDEP – Public Information Office
James Martin, Chief, WVDEP - Office of Oil & Gas
Brett Loflin, WV Oil and Gas Conservation Commission
Dave Bassage- WVDEP
Greg Adolpson – WVDEP
Jim Mason – WVDEP
Fred Durham – WVDEP
Jim Mason – WVDEP
Mike Johnson – WVDEP

VISITORS:

Linda Tennant, Spilman, Thomas, Battle
Don Garvin – WVEC
Bob Asplund - Dominion

Karen Watson, WVDEP – Assistant General Counsel, called the meeting to order at 10:00 a.m.

Proposed rules for the 2006 legislative session are as follows:

- **45CSR1 "Control and Reduction of Nitrogen Oxides from Non-Electric Generating Units as a Means to Mitigate Transport of Ozone Precursors"**

  This rule partially fulfills the State's obligations in response to U.S. EPA's final rule, *Findings of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group region for Purposes of Reducing Regional Transport of Ozone* 27 Oct 1998, herein referred to as the *NO_x SIP Call*). Essentially, the federal rule requires that large emitters of Nitrogen Oxides (NO_x) significantly reduce emissions and constrains them to set budgets, starting in 2004 and maintaining them thereafter. Flexibility is built in through market-based "cap and trade" provisions which allow sources to buy/sell NO_x emission allowances from /to other program participants. For example, a source which has emitted NO_x in excess of its NO_x allowance allocation may purchase NO_x allowances under the federal NO_x Budget Trading Program to obtain the needed NO_x emission allowances to cover its actual NO_x emissions during an ozone season. Conversely, a source which emits fewer tons of NO_x than its NO_x allowance allocation may either bank or sell (trade) the excess NO_x allowances to another sources which needs them to cover its excess NO_x emissions.

  45CSR1 applies to large fossil fuel-fired stationary sources (large industrial boilers) with heat inputs greater than 250 mmBtu/hr. The Department of Environmental Protection, Division of Air Quality (DAQ) addresses Electric Generation Units (EGUs) in a separate rulemaking, 45CSR26. 45CSR1 also applies to large cement kilns and internal combustion engines which emitted more than one ton per day of NO_x from May 1 through September 30, 1995, although these sources are not subject to the NO_x Budget Trading Program.

  Comments:

  How will this relate to the new rule 40?

  Rule 40 will repeal Rule 1 in 2009.

  Are these kinds of trading effective in lowering NO_x emission?

  Yes, West Virginia has dropped from one of the highest to one of the lowest states.

  If one is testing, how do you see which sources account for improvement?

  Have CEMS on stacks so we can analyze data.

- **45CSR15 – "Emission Standards for Hazardous Air Pollutants Pursuant to 40CFR Part 61"**

  This rule establishes and adopts national emission standards for hazardous air pollutant (NESHAPO) and other regulatory requirements promulgated by the United States Environmental Protection Agency (USEPA) pursuant to 40CFR part 61 and section 112 of the federal clean Air Act, as amended (CAA). This rule codifies general procedures and

criteria to implement emission standards for stationary sources that emit (or have the potential to emit) one or more to the eight substances listed as hazardous air pollutants in 40 CFR §61.01(a). The rule incorporated by reference the NESHAP standards of 40 CFR Parts 61 and 65 (consolidated Federal Air Rule), to the extent referenced in 40CFR part 61, promulgated as of June 1, 2005. The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to these standards and contained in 40 CSR parts 61 and 65. Any person who constructs, reconstructs, modifies or operates any source subject to the provisions of 40 CFR Part 61 must comply with the applicable NESHAPS and this rule.

45CSR15, in conjunction with 45CSR34, establishes general provisions for emission standards for hazardous air pollutants (NESHAP) and other regulatory requirements promulgated by USEPA pursuant to section 112 of the federal Clean Air Act, as amended. 45CSR34 incorporates hazardous air pollutant standards codified by USEPA under 40CFR part 63 whereas 45CSR15, incorporates hazardous air pollutant standards promulgated by USEPA under 40 CFR Part 61.

This revised rule incorporates by reference the following new or revised NESHAP standards promulgated as of June 1, 2005: National Emission Standards for Hazardous Air Pollutants for Asbestos.

No Comments

- **45CSR16 – "Standards of Performance for New Stationary Sources Pursuant to 40CFR Part 60"**

This rule establishes and adopts national standards of performance for new stationary sources and other regulatory requirements promulgated by the United States Environmental Protection Agency (USEPA) pursuant to section 111(b) of the federal Clean Air Act, as amended (CAA). This rule codifies general procedures and criteria to implement standards of performance for new stationary sources set forth in 40 CFR Part 60. The rule incorporates by reference New Sources Performance Standards (NSPS) promulgated as of June 1, 2005. The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to such standards. Any person who constructs, modifies, reconstructs or operates an affected facility after the effective date of any NSPS under 40 CFR Part 60 must comply with the applicable NSPS and this rule.

This revised rule incorporates by reference the following new or revised NSPS standards promulgated as of July 1, 2005: Standards of performance for Industrial-Commercial-Institutional Steam Generating units; Stationary Gas Turbines: Steel Plants; and new and Existing Stationary Sources: Electric Utility Steam Generating Units (CAMR).

No Comments

- **45CSR25 – "To Prevent and Control Air Pollution from Hazardous Waste Treatment Storage or Disposal Facilities."**

  This rule establishes and adopts national standards of performance for new stationary sources and other regulatory requirements promulgated by the United States Environmental Protection Agency (USEPA) 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 Code of Federal Regulations 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 Program, 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.

  This revised rule incorporates by reference the following provisions of 40 CFR Part 262 promulgated as of June 1, 2005: National Environmental Performance Track Program.

  Comments:

  What does the term "constituents" mean and how does one decide whether a source has prevented emissions that would cause harm under section 1.1.b of the rule?

  > *Look at the definition of "hazardous waste" and prevention language is meant to set forth overall purpose of the rule.*

  Does the agency consult with DHHR or other public health officials?

  > *No, the agency uses a risk-based approach and has a toxicologist employed. It also looks to EPA.*

- **45CSR33 – "Acid Rain Provisions and Permits"**

  This rule establishes and adopts the general provisions and operating permit program requirements for affected sources under the Acid Rain Program promulgated by the4 United States Environmental Protection Agency (USEPA) undertitle IV of the Clean Air Act, as amended (CAA). The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to these provisions. Under the Acid Rain Program and 45CSR33, no person may construct, modify, or operate or

cause to be constructed, modified, or operated, an Acid Rain Source in violation of 40CFR Parts 72 through 77.
Title IV of the CAA requires each state to implement an operating permit system conforming to Title IV and Title V of the CAA, as amended. 45CSR33 incorporates by reference the federal counterpart regulation 40 CFR Parts 72 through 77. USEPA approved West Virginia's Acid Rain Program with its approval of the state's Title V Operating Permit Program on December 15, 1995.

This revised rule incorporates by reference the following revisions to 40CFR Parts 72 through 77 promulgated as of June 1, 2005: Permits Regulation, Sulfur Dioxide Allowance System, Sulfur Dioxide Opt-Ins, continuous Emission Monitoring, Excess Emissions (CAIR & CAMR).

No Comments

- **45CSR34 – "Emission Standards for Hazardous Air Pollutants For Source Categories Pursuant to 40 CFR Part 63**

This rule establishes and adopts national emission standards for hazardous air pollutants (NESHAP) and other regulatory requirements promulgated by the United States Environmental Protection Agency (U.S. EPA) pursuant to section 112 of the federal Clean Air Act, as amended (CAA). This rule codifies general procedures and criteria to implement emission standards for stationary sources that emit, or have the potential to emit, one or more of the hazardous air pollutants set forth in section 112(b) of the CAA. The rule incorporates by reference the NESHAP standards of 40 CFR Parts 63 and 65 (Consolidated Federal Air Rule), to the extent referenced in 40 CFR Part 63, promulgated as of June 1, 2005. The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to these standards and contained in 40 CFR Parts 63 and 65. Any person who constructs, reconstructs, modifies or operates any source subject to the provisions of 40 CFR Part 63 must comply with the applicable NESHAPS and this rule.

45CSR34, in conjunction with 45CSR15, establishes general provisions for emission standards for hazardous air pollutants and other regulatory requirements promulgated by U.S. EPA pursuant to section 112 of the federal Clean Air Act, as amended. 45CSR34 incorporates hazardous air pollutant standards codified by U.S. EPA under 40 CFR Part 63 whereas 45CSR15 incorporates hazardous air pollutant standards promulgated by U.S. EPA under 40 CFR Part 61.

This revised rule incorporates by reference the following new or revised NESHAP standards promulgated as of June 1, 2005: National Environmental Performance Track Program, National Emission Standards for Hazardous Air Pollutants for Source Categories, Chromium Emissions From Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks, Plywood & Composite Wood Products; Effluent Limitations Guidelines and Standards for Timber Products Point Source Category; List of HAPs, Lesser Quantity Designations, Source Category List, Printing, Coating & Dyeing of Fabrics and Other Textiles, Stationary Combustion Turbines, Solvent Extraction for Vegetable Oil Production, Industrial,

Commercial, Institutional Boilers and Process Heaters, Secondary Aluminum Production, Coke Ovens: Pushing, Quenching, and Battery Stacks, List of Hazardous Air Pollutants, Petition Process, Lesser Quantity Designations, Source Category List; Petition to Delist of Ethylene Glycol Monobutyl Ether, Organic Hazardous Air Pollutants from Synthetic Organic Chemical Manufacturing Industry and Other Processes Subject to the Negotiated Regulation for Equipments Leaks, Coke Ovens: Pushing, Quenching, and Battery Stacks, Leather Finishing Operations, Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units, Revision of December 2000 Regulatory Finding on the Emissions of HAPs from Electric Utility Steam Generating Units & Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from Section 112(c) List, Generic MACT; Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations, Coke Oven Batteries, Miscellaneous Coating Manufacturing, Pharmaceuticals Production, Asphalt Processing & Asphalt Roofing Manufacturing and Iron and Steel Foundries.

No Comments

- **45CSR37 – "Mercury Budget Trading Program to Reduce Mercury Emissions"**

This rule establishes the general provisions and designated representative, permitting, allowance and monitoring provisions for the Mercury (Hg) Budget Trading Program, as a means of reducing national mercury emissions, pursuant to the federal Clean Air Mercury Rule (CAMR) established under Section 111 of the Clean Air Act (CAA) and 40 CFR 60, Subpart HHHH.

This rule partially fulfills the State's obligations in response to the United States Environmental Protection Agency's (U.S. EPA) final rule, *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units* (15 March 2005, at FR XXXXX). The federal rule establishes standards of performance for mercury (Hg) for new and existing coal-fired electric utility steam generating units (utility units). This rule establishes a mechanism by which Hg emissions from new and existing coal-fired utility units are capped at specific nation-wide levels. U.S. EPA has specified that annual Hg emission reductions be implemented in two phases. The first phase of Hg reductions starts in 2010 and the second phase begins in 2018, and continues thereafter. Flexibility is built in through market-based "cap and trade" provisions which allow sources to buy or sell Hg emission allowances from or to other program participants.

45CSR37 applies to coal-fired electric utility steam generating units that have greater than 25 MW_e generating capacity.

Comments:

How will this affect Industrial boilers?

The rule does not cover these sources.

What kind of monitoring is required?

Have to install CEMS.

What happens when there is litigation?

If court remands, we would withdraw the rule.

Does the rule apply to natural gas-fired units?

No, only coal-fired.

Does the rule establish new fees?

No.

John Benedict informed the Council of the following reductions:

Nationally

2010 – 22%
2018 – 69%

WV:

2010 – 43%
2018 – 77%

- **45CSR39 – "Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Nitrogen Oxides"**

This rule establishes general provisions and the designated representative, permitting, allowance, monitoring, and opt-in provisions for the state CAIR NO_X Annual Trading Program pursuant to the federal Clean Air Interstate Rule (CAIR) under Section 110 of the Clean Air Act (CAA), 40 CFR Part 96, Subparts AA through II, and 40 CFR §51.123 for state implementation plans as a means of mitigating interstate transport of fine particulates and nitrogen oxides (NO_X).

This rule partially fulfills the State's obligations in response to the United States Environmental Protection Agency's (U.S. EPA) final rule, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_X SIP Call* (12 May 2005, at FR 25162). The federal rule requires that large emitters of NO_X reduce annual emissions through the constraint of set

budgets. U.S. EPA is specifying that annual NO_X emission reductions be implemented in two phases. The first phase of NO_X reductions starts in 2009; the second phase starts in 2015, and continues thereafter. The NO_X emission reduction requirements are based on controls that are known to be highly cost effective for electric generating units. Flexibility is built in through market-based "cap and trade" provisions which allow sources to buy or sell NO_X emission allowances from or to other program participants. Reducing upwind NO_X emissions will assist downwind $PM_{2.5}$ and 8-hour ozone nonattainment areas in achieving the National Ambient Air Quality Standards (NAAQS).

45CSR39 applies to large fossil fuel-fired electric generating units that have greater than 25 MW_e generating capacity. The CAIR NO_X Ozone Season Trading Program requirements are set forth in 45CSR40.

Comments:

How will this affect industrial boilers?

It will not. It only affects electric utilities.

Is there a set-aside provision?

Yes.

Agency should consider using the money to clean up streams impacted by acid rain.

- **45CSR40 – "Control of Ozone Season Nitogen Oxide Emissions to Mitigate Interstate Transport of Ozone and Nit5rogen Oxides"**

This rule establishes the general provisions and the designated representative, permitting, allowance, monitoring, and opt-in provisions for the state CAIR NO_X Ozone Season Trading Program pursuant to the federal Clean Air Interstate Rule (CAIR) under Section 110 of the Clean Air Act (CAA), 40 CFR Part 96, Subparts AAAA through IIII, and 40 CFR §51.123 for state implementation plans as a means of mitigating interstate transport of ozone and nitrogen oxides (NO_X).

This rule partially fulfills the State's obligations in response to the United States Environmental Protection Agency's (U.S. EPA) final rule, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_X SIP Call* (12 May 2005, at FR 25162). The federal rule requires that large emitters of NO_X reduce ozone season emissions through the constraint of set budgets. U.S. EPA is specifying that ozone season NO_X emission reductions be implemented in two phases. The first phase of ozone season NO_X reductions starts in 2009; the second phase starts in 2015, and continues thereafter. The NO_X emission reduction requirements are based on controls that are known to be highly cost effective for electric generating units and large industrial boilers. Flexibility is built in through market-

based "cap and trade" provisions which allow sources to buy or sell NO_X emission allowances from or to other program participants. Reducing upwind ozone season NO_X emissions will assist downwind 8-hour ozone nonattainment areas in achieving the National Ambient Air Quality Standards (NAAQS).

Because CAIR subsumes the ozone season NO_X SIP Call trading program, existing NO_X SIP Call rules 45CSR1 and 45CSR26 and their ozone season NO_X reduction provisions must be "sunsetted" by January 1, 2009. Therefore, 45CSR40 contains a repeal clause which effectively "sunsets" these rules, meeting the approvability requirement for implementing CAIR.

45CSR40 applies to large fossil fuel-fired electric generating units that have greater than 25 MW_e generating capacity and large fossil fuel-fired industrial boilers with a heat input greater than 250 mmBtu/hr. This rule also applies to affected cement kilns and internal combustion engines, by retaining the NO_X SIP Call ozone season NO_X emission reduction requirements for these sources from 45CSR1. These existing requirements do not provide for inclusion in any cap and trade program for cement kilns and internal combustion engines. The CAIR NO_X Annual Trading Program requirements are set forth in 45CSR39.

No Comments.

- **33CSR41 – "Control of Annual Sulfur Dioxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Sulfur Dioxide"**

This rule establishes general provisions and the designated representative, permitting, allowance, monitoring, and opt-in provisions for the state CAIR SO_2 Trading Program pursuant to the federal Clean Air Interstate Rule (CAIR) under Section 110 of the Clean Air Act (CAA), 40 CFR Part 96, Subparts AAA through III, and 40 CFR §51.124 for state implementation plans as a means of mitigating interstate transport of fine particulates and sulfur dioxide (SO_2).

This rule partially fulfills the State's obligations in response to the United States Environmental Protection Agency's (U.S. EPA) final rule, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_X SIP Call* (12 May 2005, at FR 25162). The federal rule requires that large emitters of SO_2 reduce annual emissions based upon the implementation of retirement ratios for SO_2 allowances allocated under the Acid Rain Program. U.S. EPA is specifying that annual SO_2 emission reductions be implemented in two phases. The first phase of SO_2 reductions starts in 2010 and requires retiring SO_2 allowances at a 2:1 ratio; the second phase starts in 2015 and requires retiring SO_2 allowances at a 2.86:1 ratio, and continues thereafter. The SO_2 emissions reductions requirements are based on controls that are known to be highly cost effective for electric generating units. Flexibility is built in through market-based "cap and trade" provisions which allow sources to buy or sell SO_2 emission allowances from or to other program participants. Reducing upwind SO_2 emissions will assist downwind $PM_{2.5}$ and 8-hour ozone nonattainment

areas in achieving the National Ambient Air Quality Standards (NAAQS).

45CSR41 applies to large fossil fuel-fired electric generating units that have greater than 25 MW_e generating capacity.

How was the fiscal note derived?

It is based on how many persons will be necessary to implement the rule.

When will these rules be filed with EPA?

September of 2006 for the CAIR rules and November 2006 for the mercury rule.

- **33CSR1 – "Solid Waste Management Rule"**

This legislative rule establishes requirements for the siting (including location standards), financial assurance, installation, establishment, construction, design, groundwater monitoring, modification, operation, permitting, closure and post-closure care of any solid waste facility that processes, recycles, composts, transfers or disposes of solid waste pursuant to W. Va. Code §22-15-1 et seq. The rule revision will clarify that the State Division of Highways is subject to an exemption from permitting for its construction/demolition wastes associated with highway construction. The rule will also clarify that the beneficial reuse of clean bituminous concrete (asphalt) is not subject to permitting requirements, just as the beneficial reuse of Portland cement is not subject to permitting.

Comments:

Has the agency worked with the Division of Highways on the rule?

Yes.

- **33-CSR20 – "Hazardous Waste Management"**

The purpose of this rule is to provide for the regulation of the generation, treatment, storage, and disposal of hazardous waste to the extent necessary for the protection of the public health and safety and the environment. The rule changes pick up two new federal regulations.

No Comments.

- **35CSR3 – "Coalbed Methane Wells Rule"**

This rule applies to coalbed methane wells. The rule changes are necessary to conform to recent statutory revisions related to spacing. The changes also address new technology allowing for the horizontal drilling of wells.

Comments:

Are operators required to sample both water quality and quantity?

Just quality.

A question was raised about the 100' and 1000' distance requirements from water wells and the agency explained how these provisions work.

A comment was made that landowners are confused by the rule's requirements and some further explanations would be helpful.

- **39CSR1 – "Rules of the Commission"**

The rule is designed to prevent waste, protect correlative rights and to conserve oil and gas in the State of West Virignia and is applicable to all activities subject to the jurisdiction of the Oil and Gas Conservation Commission. Where special field rules apply, the special field rules shall govern to the extent of any conflict. The rule changes are to clarify the agency can enter consent agreements and establish escrow accounts.

No comments.

- **60CSR8 "Environmental Excellence Program Rule"**

This legislative rule establishes the eligibility, procedures, standards and legal documents required for establishing a voluntary environmental excellence program, consisting of incentives to reward facilities that go beyond regulatory requirements.

Comments:

Will the reports that are filed be shared with the public?

Yes, they will be posted on the internet.

Will people pay the $1000 fee?

From pre-comments, most are willing to pay some amount. The administrative fund will cover the agency's operating costs.

A comment was made that there should be more programs like this, where companies are rewarded for good performance.

Lisa McClung, Director of DWWM, presented several rules under the water program that will be filed in the future. One was the concentrated animal feeding operation (CAFO) rule that was withdrawn by the agency in the 2005 session. As soon as EPA repromulgates its rule, the State will need to do so, perhaps by an emergency rule.

Then the new law transferring the authority to adopt water quality standards to the DEP was discussed. A question was raised concerning the public's involvement in the process. Ms. McClung responded that the process would be somewhat different from the agency's normal rulemaking.

Karen Watson then presented a list of bills passed by the Legislature during the 2005 regular session and signed by the Governor as follows:

1. **SB 428. Creating the Revitalization Environmental Action Plan.**

This legislation transfers the litter control and recycling programs from DNR to DEP and transfers the waste tire remediation program from DOH to DEP. The legislation was amended by the House to require the excess funds to be transferred to the state road fund rather than the solid waste reclamation and environmental response fund. SB 428 bill also incorporates the provisions of Senate Bill 42 at 22-15A-12(f) and (k). These provisions provide liability protection on waste tire remediation to bona fide purchasers of property containing waste tires.

2. **SB 603. Higher Education Bill – Brownfield Assistance Centers.**

This legislation creates a provision in W.Va. Code § 18B11-7 that authorizes Marshall University and West Virginia University to each create Brownfield Assistance Centers for the purpose of acquiring and developing property; seeking federal brownfield assistance funds; and providing assistance to municipalities and local governments for brownfields development.

Comments:

The Council discussed the funding mechanisms under the new law.

3. **HB 3354. Oil and Gas Permit Fee Increase.**

This legislation increases the permit fees for shallow wells from $250 to $400; the permit fees for deep wells from $250 to $650; and the reclamation fees for all well activity from $100 to $150. This legislation also includes some technical amendments to the statutes governing oil and gas and coal bed methane drilling and production. As introduced, the legislation increased the permit fees for coal bed methane wells from $250 to $650 but the legislation was amended by the Senate to eliminate this permit fee increase. In total, this legislation will generate approximately $350,000 for the Office of Oil and Gas.

4. **SB 406. Uniform Environmental Covenant Act.**

This legislation clarifies that environmental covenants containing affirmative obligations issued pursuant to the Voluntary Remediation and Redevelopment Act or other federal or state response actions are enforceable and perpetual; provides notice requirements for those placing environmental covenants on real property; and authorizes the department and local governments to enforce environmental covenants.

Comments:

A question was raised as to local governments.

The agency responded that they are included and have authority under the new law.

5. **HB 2723. Environmental Rules Bundle.**

This legislation consolidates the rules proposed by DEP and EQB. The DEP rules include revisions to the air, waste, water and mining programs. The EQB's rule relates to water quality standards. The EQB's rule was amended to eliminate Fill Hollow Creek in Preston County that the Board recommended to be included on the Tier 2.5 list. Tier 2.5 waters are waters of special concern and include naturally reproducing trout streams.

6. **HB 3236. Thin Seam Coal Tax Applicability.**

This legislation clarifies that the special tax on coal production and the special reclamation tax apply to coal produced from thin seams.

7. **HB 2333. Environmental Good Samaritan Act.**

This legislation protect landowners, groups and individuals who volunteer to reclaim abandoned mineral extraction lands and abate water pollution caused by abandoned mine lands from civil and environmental liability provided such activities are approved by the department and implemented in accordance with the plans approved by the department.

8. **HB 3033. Continuation of Special Reclamation Tax.**

This legislation extends the temporary special reclamation tax of seven cents for an additional eighteen months thereby maintaining the total special reclamation tax at fourteen cents per ton of coal produced. The legislation also requires the Secretary to evaluate and consider additional bonding mechanisms, such as full cost bonding and the creation of a water quality trust fund.

9. **SB 154. Beneficial Reuse of Water Treatment Plant Sludge.**

This legislation authorizes the beneficial reuse of water treatment plant sludge and requires the department to develop rules establishing criteria for the beneficial reuse of water treatment plant sludge.

10. **SB 287. Transfer of Rulemaking Authority for Water Quality Standards.**

This legislation transfers the authority to promulgate water quality standards and the authority to grant remining variances from the Environmental Quality Board to the department.

11. **SB 748. Credit for Mitigation.**

This legislation authorizes the secretary to grant credit for mitigation required by the Corps of Engineers pursuant to permit issued under Section 404 of the Clean Water Act when such mitigation satisfies mitigation required by the West Virginia Water Pollution Control Act.

12. SB 700. Creation of the Community Infrastructure Investment Program.

This legislation authorizes department to grant approval for the construction of privately financed water and sewage treatment facilities without the requirement of a certificate of need and convenience from the Public Service Commission provided that the project results in economic development and improvement of water quality. This legislation also authorizes municipal utilities and public service districts to enter into community service agreements with private developers for the purpose of constructing or expanding public utilities. This legislation also requires the secretary to promulgate emergency rules to implement the program.

Comments:

Two members expressed interest in the future rulemaking efforts and any stakeholders group.

13. HB 3356. Increasing authority of the Solid Waste Management.

This legislation requires the SWMB to conduct biannual performance reviews of county and regional solid waste authorities and grants the SWMB with the authority to supersede or exercise the powers granted to county or regional solid waste authorities that operate a solid waste facility

14. SB 455. Financing of Environmental Control Activities.

This Legislation authorizes the public service commission to review and approve the use of environmental control bonds for environmental control activities by certain qualified electric utilities.

The next meeting date was scheduled for September 15, 2005 – 1:00 p.m. – 3:00 p.m. – Trish will contact everyone with room location and agenda.

Karen Watson adjourned meeting.

TITLE 45
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY

SERIES 25
TO PREVENT AND CONTROL AIR POLLUTION FROM HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITIES

§45-25-1. General.

1.1. Scope.

1.1.a. This rule establishes and adopts ~~a program of regulation over air emissions from~~ emission standards for the treatment, storage and disposal of hazardous ~~wastes~~ 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 Code of Federal Regulations 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 ~~in order~~ to achieve and maintain such levels of air quality ~~as~~ 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 ~~wastes~~ waste. Further, all persons engaged in the treatment, storage, or disposal of hazardous waste or any constituent thereof, will prevent ~~shall give careful consideration to the effects of the resultant~~ emissions ~~on~~ to the air ~~quality or the areas affected by such any hazardous waste or constituent thereof~~ in ~~such~~ quantities ~~as to~~ which cause ambient air concentrations ~~which~~ that may be injurious to human health or welfare ~~which~~ or would interfere with the enjoyment of life or property.

~~1.1.b. The requirements of this rule apply to all owners and operators of hazardous waste treatment, storage, and disposal facilities as provided in the federal rules that are incorporated by reference herein.~~

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 ~~such~~ a manner or amount as to cause or contribute to statutory air pollution. Neither does it exempt nor excuse ~~anyone~~ 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. Recognizing that each ~~Chapter~~ article has its own enforcement sections, it is the intent of the Secretary that enforcement ~~shall~~ will be implemented in accordance with W.Va. Code §22-18-1 et seq., where practicable.

1.1.e. Permit applications ~~shall~~ will 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.

1.3. Filing Date. -- ~~May 20, 2005~~.

1.4. Effective Date. -- ~~June 1, 2005~~.

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~~ this rule incorporates by reference the provisions contained in the Code of Federal Regulations as listed in Table 25-A: ~~Unless otherwise indicated, where reference to a federal regulation or standard appears in this rule, such regulation or standard will for purposes of this rule, be construed as that version which was in effect as of July 1, 2004~~, effective June 1, 2005.

1.5.b. This rule ~~also~~ incorporates by reference the provisions contained in 33CSR20, effective ~~June 1, 2005~~ June 1, 2006, except for any ~~provisions~~ provision in 33CSR20 which incorporate by reference the Code of Federal Regulations.

1.5.c. This rule incorporates by reference the provisions of 40 CFR 262 as amended and finalized at 69 Federal Register 62217 (October 25, 2004).

1.6. Former Rules. -- This legislative rule amends 45CSR25 "To Prevent and Control Air Pollution From Hazardous Waste Treatment, Storage, or Disposal" which was filed ~~April 30, 2004~~ May 20 2005, and which became effective ~~June 1, 2004~~ June 1, 2005.

§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 ~~emissions limitation~~ 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 ~~such~~ 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. ~~Such~~ The standard ~~shall~~ will, to the ~~degree~~ extent possible, set forth the ~~emissions~~ emission reduction achievable by implementation of ~~such~~ the design, equipment, work practice or ~~operation~~ operational standard, and ~~shall~~ must 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. "CWA" means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act), Public Law 92-500, as amended by Public Law 95-217 and Public Law 95-576; 33 U.S.C. §1251 et seq.

2.8. "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.

~~2.9. "EPA" means the United States Environmental Protection Agency.~~

~~2.10.~~2.9. "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).

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

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

2.12. "Particulate Matter" means any material, except uncombined water, that exists in a finely divided form as a liquid or solid.

2.13. "Pathological Waste Incinerator" means an incinerator used to thermally treat infectious medical waste.

2.14. "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.

2.15. "RCRA Permit" means "West Virginia hazardous waste permit". The following additional requirements ~~shall~~ will apply to obtain a hazardous waste management permit in West Virginia. All references in 40 CFR Part 270 to 40 CFR Part 124 ~~shall~~ will 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 control~~ will govern.

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

2.17. "Steady State" means that all conditions at all points in the thermal treatment process are in stable, normal operating conditions.

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

~~2.18.~~2.19. Other words or phrases not herein defined and used in this rule ~~shall~~ will have the meaning as ascribed in W.Va. Code §§22-5-1 et seq., or 22-18-1 et seq., or 33CSR20 "Hazardous Waste Management Regulations" governing the State Hazardous Waste Management Act.

§45-25-3. Adoption ~~By Reference~~ of Standards.

3.1. The Secretary hereby adopts and incorporates by reference the ~~Definitions~~ definitions, lists, tables, appendices, conditions, or requirements from 33CSR20 "Hazardous Waste Management Rule", effective ~~June 1, 2005~~ June 1, 2006, ~~are hereby adopted by reference~~, except for any provisions in 33CSR20 which incorporate by reference the Code of Federal Regulations.

~~3.1.a.~~ 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 the Code of Federal Regulations, effective ~~July 1, 2004~~ June 1, 2005, as listed in Table 25-A, ~~are hereby adopted by reference,~~ with the following modifications:

3.2.a. Whenever the term "United States"

is used, it ~~shall~~ will 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~~ will maintain a listing of all permits or construction approvals received or applied for under any of the following programs and their counterpart programs administered by the ~~State~~ 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 ~~and 45CSR19~~;

4.1.d. National Emission Standards for Hazardous Air Pollutants (NESHAP) preconstruction approval under 45CSR15, 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 ~~shall~~ must comply with the personnel training requirements as specified by 40 CFR §264.16. An outline of the training program and a description of how the training program is designed to meet actual job tasks must be submitted to the Secretary with Part B of the permit application.

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 ~~such~~ 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, must prevent reactions which:

4.4.a. Produce uncontrolled toxic mists, fumes, dust or gases in sufficient quantities to threaten human health or the environment, and

4.4.b. Produce uncontrolled flammable fumes or gases in sufficient quantities to pose a risk of fire or explosion.

4.5. The owners and operators of the hazardous waste treatment, storage and disposal facilities ~~shall~~ must 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~~ must 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~~ must 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~~ must 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~~ must 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~~ must 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 ~~such~~ the potential adverse effects.

4.12. Owners and operators of hazardous waste treatment, storage, or disposal facilities ~~shall~~ must 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 incinerators for control of emissions of metals, hydrogen halides, and elemental halogen, based on a finding that ~~such~~ 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~~ must be followed within five (5) days by written emergency permit;

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

4.14.c. ~~Shall~~ Must 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~~ Must be accompanied by public notice as described under section 7 and ~~shall~~ 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~~ Will 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 regulation. However, mixtures of infectious medical waste and hazardous waste listed in 40 CFR 261 Subpart D are subject to the requirements of this rule and the owner and operator of ~~such a facility shall~~ a pathological waste incinerator must design, construct and operate the facility in accordance with all other applicable regulations promulgated by the Secretary including, but not limited to, 45CSR6 and 45CSR13.

§45-25-5. Permit Process.

5.1. Pre-application Public Meeting and Notice

5.1.a. Applicability. -- The requirements of subsection 5.1 ~~shall~~ will apply to West Virginia hazardous waste management Part B permit applications seeking initial permits for hazardous waste management units. These requirements ~~shall~~ will also apply to West Virginia hazardous waste management Part B permit applications seeking renewal of permits for ~~such~~ 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~~ will 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~~ will 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 ~~permitting agency~~ 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 ~~permitting agency~~ Secretary upon request, documentation of the notice.

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

5.1.d.1.A. A newspaper advertisement. -- The applicant ~~shall~~ will 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~~ will instruct the applicant to publish the notice in newspapers of general circulation in adjacent counties or equivalent jurisdictions, where the Secretary determines that ~~such~~ 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~~ will 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~~ will 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~~ will send a copy of the newspaper notice to the ~~permitting agency~~ Secretary and the Secretary ~~shall~~ will 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~~ will apply to all West Virginia hazardous waste management Part B permit applications seeking initial permits for hazardous waste management units. These requirements ~~shall~~ will also apply to hazardous waste management Part B permit applications seeking renewal of permits for ~~such~~ 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~~ will provide public notice as required in subsection 5.2 when a Part B permit application has been submitted. The Secretary ~~shall~~ will 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; ~~and~~

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~~ will 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 ~~permitting agency~~ 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 ~~permitting agency~~ 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~~ will 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~~ will notify the facility that it must establish and maintain an information repository.

5.3.c. The information repository ~~shall~~ will 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~~ will have the discretion to limit the contents of the repository.

5.3.d. The information repository ~~shall~~ will 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~~ will specify a more appropriate site.

5.3.e. The Secretary ~~shall~~ will specify requirements for informing the public about the information repository. At a minimum, the Secretary ~~shall~~ will 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~~ must 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~~ will 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~~ will 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~~ will notify the applicant in writing whether the application is complete. If the application is incomplete, the Secretary ~~shall~~ will list the information necessary to make the application complete. When the application is for an existing hazardous waste management facility, the Secretary ~~shall~~ will specify in the notice of deficiency a date for submitting the necessary information. The Secretary ~~shall~~ will 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. ~~Request~~ The request for ~~such~~ 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~~ will notify the applicant and a date ~~shall~~ will 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~~ will, no later than the effective date of the application, prepare and mail to the applicant a project decision schedule. The schedule ~~shall~~ will 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~~ must be in writing and ~~shall~~ contain facts or reasons supporting the request.

5.5.b. If the Secretary decides the request is not justified, he or she ~~shall~~ will 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~~ will 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~~ will require the submission of a new application.

5.5.b.2. In a permit modification, only those conditions to be modified ~~shall~~ will be reopened when a new draft permit is prepared. All other aspects of the existing permit ~~shall~~ will 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~~ must 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~~ will 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~~ will 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~~ will 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~~ will 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~~ will 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, ~~and/or~~ disposal and other permit conditions under 40 CFR §270.30.

5.6.d. All draft permits prepared by the Secretary ~~shall~~ must be accompanied by a fact sheet if required under subdivision 5.7.a and ~~shall~~ will 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~~ will 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~~ will 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~~ will 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~~ will send the fact sheet to the applicant and, on request, to any other person.

5.7.b. The fact sheet ~~shall~~ must 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~~ will 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~~ must allow at least forty-five (45) days for public comment. Public notice of a public hearing ~~shall~~ must 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~~ will 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 ~~public~~ publication in the public press and in ~~such publications as~~ 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 ~~such~~ 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 ~~such~~ 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. ~~All public~~ Public notices. -- All public notices issued ~~shall~~ must 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; ~~and~~

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 will 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~~ must 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~~ will 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 ~~Hearings~~ 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~~ must be in writing and ~~shall~~ state the nature of the issues proposed to be raised in the hearing. All comments ~~shall~~ will be considered in making the final decision and ~~shall~~ will be answered as provided in subsection 5.13.

5.10. Public Hearings.

5.10.a. The Secretary ~~shall~~ will 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, ~~such~~ a hearing might clarify one or more issues involved in the permit decision.

5.10.c. The Secretary ~~shall~~ will 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~~ will 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~~ will be given as specified in subsection 5.8.

5.10.e. Whenever a public hearing will be held the Secretary ~~shall~~ will designate a presiding officer for the hearings who ~~shall~~ will 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~~ will 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~~ will 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~~ will be limited to the substantial new questions that caused its reopening. The public notice under subsection 5.8 ~~shall~~ will define the scope of the reopening.

5.11.c. Public notice of any of the above actions ~~shall~~ will 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~~ will issue a final permit decision. The Secretary ~~shall~~ will notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. The notice ~~shall~~ will 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~~ will 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~~ will 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~~ will issue a response to comments. This response ~~shall~~ will:

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~~ will be available to the public.

5.14. Administrative Record.

5.14.a. The provisions of a draft permit prepared under subsection 5.6 ~~shall~~ will 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~~ will base final permit decisions on the administrative record consisting of:

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

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 ~~such~~ 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~~ will 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 ~~records, reports,~~ record, report, or information and any permit, permit ~~applications~~ application, and related documentation within the Secretary's possession ~~shall~~ will be available to the public for inspection and copying; provided, however, that upon a satisfactory showing to the Secretary that ~~such~~ 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~~ will consider, treat, and protect ~~such~~ 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~~ will be the responsibility of the person claiming any information as confidential under the provision of ~~subsection 5.15~~ 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).

§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~~ must submit as part of ~~said~~ the application a money order or cashier's check payable to the "Air Pollution Control Fund" of the State Treasury. ~~Such~~ The fee ~~shall~~ will be determined by the schedule set forth below:

Activity	Fee
a. Hazardous Waste Management Facilities:	
Treatment design capacity more than 1,000 ton/yr	$5,000
Treatment design capacity less than 1,000 ton/yr	$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

7.2. These application fees ~~shall~~ will 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, ~~such~~ the inconsistency ~~shall~~ will be resolved by the determination of the Secretary and ~~such~~ the determination ~~shall~~ will 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, 265 264.179, 265.178 264.200, 265.202 264.232, 265.231	CC I J K	Air Emission Standards for Tanks, Surface Impoundments, and Containers
		265	Appendix	Appendix VI
12.	40 CFR	270.14(b)(5)	A	General Information
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

Item No.	CFR No.	Part No.	Subpart No.	Title
15.	40 CFR	266	H	Hazardous Waste Burned in Boilers and Industrial Furnaces
			Appendices	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	270.14(b)(22)	B	Permit Application
21.	40 CFR	270.1(c)(2)(viii)(C)	A	General Information
22.	40 CFR	270.30(m)	B	Information repository
23.	40 CFR	261.6(c)(1)	A	Requirements for Recyclable Materials
		261.4		Exclusions
24.	40 CFR	261.38	D	Comparable/Syngas Fuel Exclusion
25.	40 CFR	262.34~~(a)(1)(i) & 262.34(a)(1)(ii)~~	C	Accumulation Time
26.	40 CFR	260.11	B	References
27.	40 CFR	264.15(b)(4)	B	General Inspection Requirement
28.	40 CFR	264.73(b)(6)	E	Operating Records
29.	40 CFR	270.235	I	Options for Incinerators and Cement and Lightweight Aggregate Kilns to Minimize Emissions from Startup, Shutdown, and Malfunction Events.

PART 52—[AMENDED]

■ 1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph(c)(322)to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(322) New and amended plan for the following agency was submitted on December 9, 2003, by the Governor's designee.

(i) Incorporation by reference.

(A) Kern County Air Pollution Control District.

(*1*) East Kern County Ozone Attainment Demonstration, Maintenance Plan and Redesignation Request, adopted on May 1, 2003: Chapter 5—"Regional Forecast," including emissions inventory summary (Table 5–1) and motor vehicle emissions budgets (Table 5–2); Chapter 6—"Emission Control Measures," including contingency measures (Table 6–1); and Appendix B—"Emission Inventories."

PART 81—[AMENDED]

■ 1. The authority citation for Part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. In § 81.305, the California Ozone (1-Hour Standard) table is amended by revising the entry for the East Kern County area to read as follows:

§ 81.305 California.

* * * * *

CALIFORNIA—OZONE

[1-Hour Standard]

Designated area	Designation		Classification	
	Date [1]	Type	Date [1]	Type
* * * * * * *				
East Kern County:				
That portion of Kern County that lies east and south of a line described below: Beginning at the Kern-Los Angeles County boundary and running north and east along the northwest boundary of the Rancho La Liebre Land Grant to the point of intersection with the range line common to Range 16 West and Range 17 West, San Bernardino Base and Meridian; north along the range line to the point of intersection with the Rancho El Tejon Land Grant boundary; then southeast, northeast, and northwest along the boundary of the Rancho El Tejon Grant to the northwest corner of Section 3, Township 11 North, Range 17 West; then west 1.2 miles; then north to the Rancho El Tejon Land Grant boundary; then northwest along the Rancho El Tejon line to the southeast corner of Section 34, Township 32 South, Range 30 East, Mount Diablo Base and Meridian; then north to the northwest corner of Section 35, Township 31 South, Range 30 East, then northeast along the boundary of the Rancho El Tejon Land Grant to the southwest corner of Section 18, Township 31 South, Range 31 East; then east to the southeast corner of Section 13, Township 31 South, Range 31 East; then north along the range line common to Range 31 East and Range 32 East, Mount Diablo Base and Meridian, to the northwest corner of Section 6, Township 29 South, Range 32 East; then east to the southwest corner of Section 31, Township 28 South, Range 32 East; then north along the range line common to Range 31 East and Range 32 East to the northwest corner of Section 6, Township 28 South, Range 32 East, then west to the southeast corner of Section 36, Township 27 South, Range 31 East, then north along the range line common to Range 31 East and Range 32 East to the Kern-Tulare County Boundary.	6/21/04	Attainment ...	.....	
* * * * * * *				

[1] This date is November 15, 1990, unless otherwise noted.

* * * * *

[FR Doc. 04–9036 Filed 4–21–04; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 63 and 262

[OA–2004–0001; FRL–7650–6]

RIN 2090–AA13

National Environmental Performance Track Program

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final rule.

SUMMARY: EPA is issuing regulations applicable only to members of EPA's National Environmental Performance Track Program (Performance Track, or the Program). Today's action includes a revision to the Resource Conservation and Recovery Act (RCRA) regulations to allow hazardous waste generators who are members of Performance Track up to 180 days, and in certain cases 270 days, to accumulate their hazardous waste without a RCRA permit or interim status; and simplified reporting requirements for facilities that are members of Performance Track and governed by Maximum Available Control Technology (MACT) provisions of the Clean Air Act (CAA). Today's final rule reflects EPA's response to comments filed by the public, interested stakeholders and associations, the Performance Track Participants Association, and Performance Track members. These provisions are intended to serve as incentives for facility membership in the National Environmental Performance Track Program while ensuring the current level of environmental protection provided by the relevant RCRA and MACT provisions.

DATES: This final rule is effective on April 22, 2004.

ADDRESSES: EPA has established a docket for this action under Docket ID No. OA–2004–0001. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Office of Environmental Information Docket, EPA/DC, EPA West, Room B102, 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 Office of Environmental Information Docket is (202) 566–1752. In addition to being available in the docket, an electronic copy of this final rule will also be available on the Worldwide Web through the National Environmental Performance Track (Performance Track) Web site at *http://www.epa.gov/performancetrack.*

FOR FURTHER INFORMATION CONTACT: Mr. Robert D. Sachs, Performance Incentives Division, Office of Business and Community Innovation, Office of Policy, Economics and Innovation, Office of Administrator, Mail Code 1808T, United States Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20460; telephone number 202–566–2884; fax number 202–566–0966; e-mail address: *sachs.robert@epa.gov,* or Mr. Chad Carbone, Performance Incentives Division, Office of Business and Community Innovation, Office of Policy, Economics and Innovation, Office of Administrator, Mail Code 1808T, United States Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20460; telephone number 202–566–2178; fax number 202–566–0292; e-mail address: *carbone.chad@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Categories and entities potentially regulated by this action include all entities regulated by EPA, pursuant to its authority under the various environmental statutes, who voluntarily decide to join the Performance Track Program. Thus, potential respondents may fall under any North American Industry Classification System (NAICS) Code. The following table lists the Primary NAICS Codes for all current Performance Track members.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is eligible to be regulated by this action, you should carefully examine the qualifying criteria for the Performance Track Program at *www.epa.gov/performancetrack.* If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

PRIMARY NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (NAICS) CODES OF CURRENT PERFORMANCE TRACK MEMBERS

Industry group	SIC	NAICS
Surgical Appliance and Supplies Manufacturing		339113
Laboratory Apparatus and Furniture Manufacturing		339111
Pharmaceutical Preparation Manufacturing		325412
All Other Miscellaneous Chemical Product and Preparation Manufacturing		325998
Fossil Fuel Electric Power Generation		221112
Dry Cleaning and Laundry Services (except Coin-Operated)		812320
Heating Oil Dealers		454311
Paper (except Newsprint) Mills		322121
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing		334220
Surgical and Appliance and Supplies Manufacturing		339113
Research and Development in the Physical, Engineering, and Life Sciences		541710
Plastics Material and Resin Manufacturing		325211
Wood Preservation		321114
All Other Basic Organic Chemical Manufacturing		325199
Ball and Roller Bearing Manufacturing		332991
Tire Manufacturing (except Retreading)		326211
Semiconductor and Related Device Manufacturing		334413
All Other Motor Vehicle Parts Manufacturing		336399
Fruit and Vegetable Canning		311421
Paperboard Mills		322130
Commercial Screen Printing		323113
Unlaminated Plastics Film and Sheet (except Packaging) Manufacturing		326113
Electronic Computer Manufacturing		334111
Other Motor Vehicle Electrical and Electronic Equipment Manufacturing		336322
Surgical and Medical Instrument Manufacturing		339112
Ophthalmic Goods Manufacturing		339115
All Other Miscellaneous Manufacturing		339999
Hydroelectric Power Generation		221111
Electric Bulk Power Transmission and Control		221121
Electric Power Distribution		221122
Medicinal and Botanical Manufacturing		325411
All Other Miscellaneous Nonmetallic Mineral Product Manufacturing		327999
Printed Circuit Assembly (Electronic Assembly) Manufacturing		334418
Motor Vehicle Body Manufacturing		336211
Dry, Condensed, and Evaporated Dairy Product Manufacturing		311514

PRIMARY NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (NAICS) CODES OF CURRENT PERFORMANCE TRACK MEMBERS—Continued

Industry group	SIC	NAICS
Carpet and Rug Mills		314110
Cut Stock, Re-sawing Lumber, and Planing		321912
All Other Basic Inorganic Chemical Manufacturing		325188
Soap and Other Detergent Manufacturing		325611
Custom Compounding of Purchased Resins		325991
All Other Plastics Product Manufacturing		326199
Concrete Block and Brick Manufacturing		327331
Iron and Steel Mills		331111
Aluminum Die-Casting Foundries		331521
Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers		332812
Farm Machinery and Equipment Manufacturing		333111
Office Machinery Manufacturing		333313
Pump and Pumping Equipment Manufacturing		333911
Electron Tube Manufacturing		334411
Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing		334511
Instrument Manufacturing for Measuring and Testing Electricity and Electrical Signals		334515
Prerecorded Compact Disc (except Software), Tape, and Record Reproducing		334612
Magnetic and Optical Recording Media Manufacturing		334613
Motor and Generator Manufacturing		335312
Motor Vehicle Transmission and Power Train Parts Manufacturing		336350
Aircraft Manufacturing		336411
Guided Missile and Space Vehicle Manufacturing		336414
Sporting and Athletic Goods Manufacturing		339920
Solid Waste Combustors and Incinerators		562213
National Security		928110
Potash, Soda, and Borate Mineral Mining		212391
Malt Manufacturing		311213
Cigarette Manufacturing		312221
Canvas and Related Product Mills		314912
Reconstituted Wood Product Manufacturing		321219
Wood Window and Door Manufacturing		321911
Pulp Mills		322110
Nonfolding Sanitary Food Container Manufacturing		322215
Synthetic Organic Dye and Pigment Manufacturing		325132
Synthetic Rubber Manufacturing		325212
Noncellulosic Organic Fiber Manufacturing		325222
In-Vitro Diagnostic Substance Manufacturing		325413
Adhesive Manufacturing		325520
Polish and Other Sanitation Good Manufacturing		325612
Surface Active Agent Manufacturing		325613
Printing Ink Manufacturing		325910
Rubber Product Manufacturing for Mechanical Use		326291
All Other Rubber Product Manufacturing		326299
Plate Work Manufacturing		332313
Metal Can Manufacturing		332431
Other Ordnance and Accessories Manufacturing		332995
Printing Machinery and Equipment Manufacturing		333293
Food Product Machinery Manufacturing		333294
Optical Instrument and Lens Manufacturing		333314
Photographic and Photocopying Equipment Manufacturing		333315
Turbine and Turbine Generator Set Units Manufacturing		333611
Bare Printed Circuit Board Manufacturing		334412
Electronic Capacitor Manufacturing		334414
Automatic Environmental Control Manufacturing for Residential, Commercial, and Appliance Use		334512
Instruments and Related Products Manufacturing for Measuring, Displaying, and Controlling Industrial Process Variables		334513
Other Communication and Energy Wire Manufacturing		335929
Current-Carrying Wiring Device Manufacturing		335931
Automobile Manufacturing		336111
Truck Trailer Manufacturing		336212
Gasoline Engine and Engine Parts Manufacturing		336312
Motor Vehicle Air Conditioning Manufacturing		336391
Dental Equipment and Supplies Manufacturing		339114
Musical Instrument Manufacturing		339992
Other Nonhazardous Waste Treatment and Disposal		562219
Industrial Launderers		812332
Regulation and Administration of Transportation Programs		926120
Space Research and Technology		927110

Entities potentially affected by this final action also include state, local, and Tribal governments that have been authorized to implement these regulations.

Outline. The information presented in this preamble is organized as follows.

II. Overview

A. What Is the History of This Action?

EPA announced the National Environmental Performance Track Program on June 26, 2000. The Program is designed to recognize and encourage top environmental performers—those who go beyond compliance with regulatory requirements to attain levels of environmental performance and management that provide greater benefit to people, communities, and the environment. The Program is based upon the experiences of EPA, states, businesses, and community and environmental groups with new approaches that achieve high levels of environmental protection with greater efficiency. This experience includes: EPA's Common Sense Initiative, designed to improve environmental results by tailoring strategies for six industry sectors; the national Environmental Leadership Program and EPA Region I's Star Track Program, designed as new ways to encourage businesses to do better than required; and many performance track-type programs in states such as Texas, Oregon, Wisconsin, New Jersey, and Virginia.

EPA currently is implementing the Performance Track Program, formerly known as the Achievement Track Program. The Program is designed to recognize facilities that consistently meet their legal requirements, that have implemented management systems to monitor and improve performance, that have voluntarily achieved environmental improvements beyond compliance, and that publicly commit to specific environmental improvements and to report on their progress in doing so. A complete description of the Performance Track Program, its requirements, and other program materials are available on EPA's Web site (*www.epa.gov/performancetrack*) or by calling the Performance Track Information Center toll free at 1–888–339–PTRK (7875).

Performance Track is a voluntary program. Decisions to accept and remove facilities are wholly discretionary to EPA, and applicants or potential applicants have no legal right to challenge EPA's decision. EPA has held seven Performance Track application periods—between August 2000 and October 2000; between February 2001 and April 2001; between August 2001 and October 2001; between February 2002 and April 2002; between August 2002 and October 2002; between February 2003 and April 2003; and between August 2003 and October 2003. In the future, EPA plans to continue holding two application periods each year. There have been 508 facility applicants to Performance Track since its inception. A total of 409 facilities have been accepted into the Program as members. There are currently 344 members in the Program. Generally, facilities that are no longer members (65) have either closed, experienced a change in ownership, or have been dropped from membership in Performance Track for failing to continue to meet program standards.

Today's final rule establishes several regulatory incentives that are enforceable legal requirements for facilities that are members of the Performance Track Program and have taken all other steps required for the applicability or implementation of the individual regulatory incentives. Full eligibility and other Program requirements can be found at the Performance Track Web site (*www.epa.gov/performancetrack*). The Agency believes that, because of the stringency of the Program criteria, facilities in Performance Track should receive the non-regulatory and regulatory benefits outlined in the Program Description (and summarized below). Specifically, for acceptance in Performance Track, facilities must:

- Have adopted and implemented an environmental management system (EMS) that includes specific elements;
- Be able to demonstrate environmental achievements and commit to continued improvement in particular environmental categories;
- Engage the public and report on their environmental performance; and
- Have a record of sustained compliance with environmental requirements.

In addition, Performance Track is designed so that EPA and other stakeholders can monitor and track the implementation of the benefits currently being offered to Program members, as well as those being considered. Member facilities commit to providing annual reports on the status of their efforts to achieve their commitments to improvements in specific environmental categories.

This reporting commitment and other activities to engage the public result in a high level of scrutiny that will aid in monitoring the activities of the Performance Track Program. EPA analyzes these data and publishes a program report annually. This report can be found at *www.epa.gov/performancetrack*. Last, facilities are accepted into Performance Track for a

period of three years. To continue receiving the benefits associated with the Program, facilities must renew their membership, which requires developing additional, continuing commitments to environmental performance improvements.

In its efforts to promote improved environmental performance through the National Environmental Performance Track, EPA is evaluating additional regulatory incentives that could be applied to qualifying facilities. Today's rule is one step among several in developing incentives that will promote participation in the Program and the associated environmental benefits. These incentives will include both those that will be implemented through rulemaking (such as the regulatory changes issued today) and those that may be accomplished through policy, guidance, or administrative action by EPA or the states.

EPA proposed today's rule on August 13, 2002 (67 FR 52674), and the public comment period remained open until November 12, 2002. EPA received comments from 26 different groups. These included 10 Government entities and States; one public sector association; three nongovernmental organizations; seven industry trade associations; and five industry representatives. The majority of comments were supportive and made positive suggestions to improve the Program. Responses to comments are included throughout this preamble where EPA describes the content of the rule (*see* Section III. A. and B.).

B. How Have Stakeholders Been Involved?

During the development of the Performance Track Program and subsequent to its announcement in June 2000, EPA held many meetings with a wide array of stakeholders. Stakeholders included companies, non-governmental organizations, states, associations, and others. Over the course of these meetings, EPA has discussed a broad range of issues, including any incentives that would reward Performance Track members, as well as incentives that would motivate non-Performance Track facilities to implement environmental improvements that would qualify them for membership in the Program.

This rule grew out of the stakeholders' collective interest in promoting incentives for participating facilities. Since the inception of the Program, EPA has held four meetings with state regulators: May 2000 in Denver, February 2001 in Chicago, November 2001 in Charleston, and January 2003 in Denver. At each of these meetings, break-out sessions were held to solicit feedback from state personnel on potential incentives to be offered to Performance Track members.

On December 12, 2000, EPA held a "Charter Event" for the first round of Performance Track members. At this meeting EPA held a series of breakout discussions. During these sessions, ideas about incentives that could become part of the regulatory framework were discussed.

Similarly, on October 30, 2001 EPA met with a variety of stakeholders including associations, non-governmental organizations, and states to discuss EPA's "Innovations Strategy." During this meeting EPA held a specific breakout session on incentives that could be made available for Performance Track members.

In addition, EPA has had discussions regularly with individual Performance Track participants and the Performance Track Participants Association (PTPA), which comprises 165 members. The PTPA is a nonprofit organization that provides a forum for corporations, trade associations, and public entities dedicated to improving their environmental performance through the vehicle of the Performance Track Program. The PTPA meets regularly for member events, and convenes a member conference annually. The PTPA also has an Incentives Workgroup that focuses on identifying and advocating incentives for Performance Track members.

EPA is also working with 23 trade organizations through the Performance Track network to further enhance participation in the Program. Performance Track Network Partners join in a partnership to educate top environmental performers about the value of participating in Performance Track. This partnership increases information available to top environmental performers and provides greater opportunities to them. Network Partners include the following organizations: Academy of Certified Hazardous Waste Managers, American Chemistry Council, American Furniture Manufacturers Association, American Textile Manufactures Institute, Associated General Contractors (AGC) of America, the Auditing Roundtable, Cement Kiln Recycling Coalition, Global Environment & Technology Foundation Public Entity EMS Resource (PEER) Center, Greening of Industry Network (GIN), International Carwash Association, National Association of Chemical Distributors, National Paint and Coatings Association, National Defense Industrial Association, National Pollution Prevention Roundtable, National Ready Mixed Concrete Association, National Stone, Sand and Gravel Association, NORA (an Association of Responsible Recyclers), North American Die Casting Association, Screenprinting and Graphic Imaging Association International, Steel Manufacturers Association (SMA), Synthetic Organic Chemical Manufacturers Association (SOCMA), Voluntary Protection Programs Participants' Association, and Wildlife Habitat Council.

C. What Incentives for Members Are Envisioned?

The Performance Track Program Description at *http://www.epa.gov/performancetrack/*, (publication number EPA–240–F–01–002) provides a list of incentives the Agency originally intended to make available to member facilities. EPA currently offers several incentives that are available to members when they enter the Program (*e.g.*, recognition, networking opportunities, low priority for routine inspection). EPA is also in the process of developing other incentives in areas of the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), and the Clean Air Act (CAA). These incentives include policy, guidance, and regulatory approaches. In some cases, other actions also must be completed before a facility may take advantage of an incentive. For example, states are responsible for implementing parts of many federal environmental programs. In such cases, states may need to revise regulations, seek EPA approval of a revised program, re-issue permits, or take other actions. EPA has made funds available to approximately 20 states to identify where existing state laws may need to be revised to support the National Environmental Performance Track. EPA maintains ongoing contact with State regulators to keep them apprised of new developments, and learn about their approaches. Further information is available at *epa.gov/performancetrack/benefits/index.htm*.

In the Program Description, EPA also committed to propose specific regulatory changes as incentives for membership in the Performance Track. The changes in today's final rule fulfill one aspect of EPA's follow up on this commitment.

EPA is issuing today's regulatory changes to encourage membership in the Program and to acknowledge and further promote realization of the environmental and other benefits resulting from the actions of member facilities. EPA excluded incentives that would involve a relaxation of substantive standards of performance or

that would require statutory change. EPA identified incentives that would apply broadly to different types of facilities, that reduce the reporting and other operating costs of the current system, and that can be implemented nationally.

EPA believes it is important to offer the kinds of incentives described here for several reasons. First, the achievements of these facilities deserve public recognition. Second, some of the reporting and other administrative requirements that apply to the broader regulated community may not be needed for Performance Track facility members because they have implemented appropriate environmental management systems, have consistently met their regulatory commitments, and have agreed to make information regarding their performance publicly available. Third, these incentives may offer the opportunity for member facilities to apply their resources to achieving even better environmental performance. And finally, the availability of these incentives should encourage other facilities to make environmental improvements that will enable them to qualify for membership.

In this final rule, EPA is changing certain regulatory provisions of the CAA and RCRA. These incentives provisions are applicable exclusively to members of Performance Track. They include:

- Reducing the frequency of reports required under the CAA, and in some circumstances submitting an annual certification in lieu of an annual report. In this incentive, first EPA reduces the frequency of required MACT reporting for all eligible Performance Track facilities to an interval that is twice the length of the regular reporting period. This incentive does not apply to major air sources, but it does apply to area air sources if they are not required to hold CAA Title V permits. The second part of this air incentive provides Performance Track facilities with three options to submit an annual certification that all required monitoring and recordkeeping requirements have been met in lieu of the periodic report. For major air sources and area sources required to hold CAA Title V permits however, reports must still be submitted at least semi-annually in order to meet CAA Title V statutory requirements.
- Allowing large quantity hazardous waste generators who are members of the Performance Track up to 180 days (and 270 days if the waste must be transported 200 miles or more) to accumulate hazardous waste without a RCRA permit or interim status, provided that these generators meet certain conditions. This incentive will result in fewer loads of hazardous waste being transported.

EPA also proposed changes to certain Clean Water Act regulations (CWA) in August 2002. The incentives proposed streamlined reporting requirements for Publicly Owned Treatment Works (POTWs). EPA has decided not to adopt the changes proposed in this rulemaking. This decision is based primarily on public comments that such changes should be offered to all POTWs, not only Performance Track members. The agency will continue to consider this matter.

EPA acknowledges comments received on another potential regulatory incentive—the opportunity for Performance Track Facilities to consolidate reporting under various environmental statutes into a single report. Comments included recommendations for a pilot program with a cross-section of facilities, facility sizes, and states and the need to ensure compliance and include performance metrics in exchange for any consolidated reporting incentive. EPA will continue to explore the potential for this incentive with EPA's Office of Environmental Information.

The incentives in today's final rule are part of a broad series of incentives that EPA is currently developing and intends to provide for Performance Track members in the future. That is, EPA continues to seek, analyze, develop, and implement new incentives that apply only to its Performance Track members. As an example, on May 15, 2003, EPA proposed a MACT rule (68 FR 26249) that would further promote improved environmental performance through incentives that are only available to facilities participating in the Performance Track program. Also, on October 29 2003, EPA published a Notice of Data Availability (NODA) in RCRA (69 FR 61662) as part of EPA's burden reduction initiative. The NODA supplemented EPA's January 17, 2002 proposal entitled "Resource Conservation and Recovery Act Burden Reduction Initiative" at 67 FR 2518. This provision proposes to decrease the frequency of facility self-inspections for certain types of storage units for Performance Track member facilities.

D. What Is EPA's Rationale for This Rule?

EPA believes that facilities who demonstrate top environmental performance through membership in the Performance Track Program should be provided with incentives, recognition and rewards for such behavior. By providing regulatory incentives only available to members of Performance Track, EPA believes membership in the Program will increase over time. As membership increases, so will the number of environmental commitments members make, and therefore the quantity of improvements to the environment. Each facility member of Performance Track commits to quantified, measurable environmental goals that are identified as significant in their environmental management system. Members also commit to report to EPA on an annual basis with the quantified results of progress towards their commitments. As these goals are achieved, and in some cases exceeded, impacts to the environment are reduced, notably in some cases in areas that are not regulated by EPA or States. These quantified, incremental environmental improvements and required reporting are the core of EPA's Performance Track Program.

It is critically important to EPA that members of Performance Track are truly top environmental performers. Regulatory incentives of the nature envisioned by EPA for Performance Track members should be available only to top environmental performers. To ensure that members of Performance Track fit this general criterion, EPA developed specific criteria for applicants to meet in order to be accepted. These are described in moderate detail below.

Facilities must satisfy the four entry criteria to be accepted into the Performance Track:

(1) Facilities must be in compliance with applicable Federal, State, Local, and Tribal environmental regulations.

(2) Facilities must operate a well-designed environmental management system (EMS) as part of their overall management system.

(3) Facilities must demonstrate a record of environmental improvements for the previous two years beyond the minimums required of them. Facilities also must take additional future actions and commit to further improvements in the succeeding three years.

(4) Facilities must engage the public, and each year must report publicly on their progress toward meeting the goals that they have chosen, as well as summarize their compliance and the performance of their EMS. EPA makes the applications and annual performance reports of each facility member available to the public.

These criteria are the key to generating environmental improvements; they were designed to work as an integrated approach. No single criterion, standing alone, would provide EPA with the necessary

assurance that the changes finalized here will lead to increased compliance or performance. However, the Agency believes that these criteria in combination ensure that facilities eligible for regulatory incentives are both capable of and committed to maintaining beyond-compliance environmental performance and that any lapses will be rare and quickly corrected by facility management. Further, the Agency and the public will continue to receive information on facility compliance and performance. Nothing in this final rule will compromise the ability of the Agency to investigate and take action on suspected environmental violations.

History of Sustained Compliance With Environmental Regulations: EPA believes that a strong compliance history is a critical factor in defining performance in the Performance Track. EPA, in cooperation with State, local, and Tribal authorities to the extent possible, reviews the compliance history of all applicants. Performance Track members must have a record of compliance with environmental laws and be in compliance with all applicable environmental requirements. They also commit to maintaining the level of compliance needed to qualify for the Program.

EPA screens all applications consistent with EPA's *Compliance Screening for EPA Partnership Programs: Policy Overview* (located at *http://www.epa.gov/performancetrack/program/guidance.pdf*). In evaluating an applicant's compliance record, EPA, along with its state partners, consults available databases and enforcement information sources. EPA encourages applicants to assess their own compliance record as they make decisions regarding participation in this program. Applicants can check their compliance record with EPA's Enforcement and Compliance History Online (ECHO) database located at (*http://www.epa.gov/echo*).

Participation in the Performance Track is denied if the compliance screen identifies any of the following criminal or civil activity issues under Federal or State law:

Criminal Activity

- Corporate criminal conviction or plea for environmentally-related violations of criminal laws involving the corporation or a corporate officer within the past 5 years.
- Criminal conviction or plea of employee at the same facility for environmentally-related violations of criminal laws within the past 5 years.
- Ongoing criminal investigation/prosecution of corporation, corporate officer, or employee at the same facility for violations of environmental law.

Civil Activity

- Three or more significant violations at the facility in the past 3 years.
- Unresolved, unaddressed Significant Non-Compliance (SNC) or Significant Violations (SV) at the facility.
- Planned but not yet filed judicial or administrative action at the facility.
- Ongoing EPA- or state-initiated litigation at the facility.
- Situation where a facility is not in compliance with the schedule and terms of an order or decree.

Environmental Management Systems: To satisfy the second program criterion, a Performance Track member facility must have a mature environmental management system. These systems integrate environmental considerations into routine decision-making at facilities, establish work practices that consistently reduce environmental risks and releases, evaluate environmental performance, and set management priorities based on the environmental impacts of individual facilities. Because they organize and consolidate information on a facility's environmental obligations and potential weaknesses for management, an EMS often improves the facility's compliance record and reduces accidents. However, many EMS frameworks address unregulated environmental impacts as well as regulated impacts. Thus, an EMS provides a facility with the ability to assess and mitigate impacts that are most significant for the facility or that pose the most risk to the ecosystem and community surrounding the facility. An EMS allows a facility to take additional environmental mitigation actions that are highly effective and appropriate, providing better environmental results as well as more flexibility than the existing regulatory structure alone.

The EMS provisions in Performance Track are designed to ensure that member facilities will continue not only to meet their regulatory obligations, but also to perform better than required by regulation. The Performance Track criterion specifies that a qualifying facility must have an EMS that includes detailed elements in the following categories: Environmental policy (including compliance with both legal requirements and voluntary commitments), planning, implementation and operation, checking and corrective action, and management review. Additionally, qualifying EMSs must have been in full operation for at least one review cycle (generally one year) and must have been audited. The EMS requirements are described in more detail in EPA's National Environmental Performance Track Program description at *www.epa.gov/PerformanceTrack.*

Past and future environmental improvements: Facilities must demonstrate their commitment to continuous environmental improvement. To do this, facilities must identify accomplishments in specific categories. The categories are: energy use, water use, materials use, air emissions (including greenhouse gases), waste, discharges to water, accidental releases, habitat preservation/restoration, and product performance. Past improvements must have been beyond regulatory requirements. In addition, Performance Track facilities must make use of their EMSs to set and commit to achieving environmental performance goals that go beyond regulatory requirements and that mitigate some facility-selected significant environmental impacts. These performance goals must be chosen among the specific categories identified above, including both regulated and unregulated environmental impacts.

Because these performance goals and accomplishments go beyond regulatory requirements and, in some cases, well beyond areas covered by existing environmental regulations, EPA believes that facilities that qualify for Performance Track have demonstrated a serious commitment to real environmental improvement. By virtue of their willingness to undertake greater environmental responsibilities, these facilities have earned the confidence that they will maintain compliance with regulatory requirements under the streamlined procedures outlined in this final rule.

Public commitments: To satisfy the fourth Program criterion, Performance Track facilities publicly disclose progress toward their commitments and other performance information each year in an annual progress report, including summary information regarding their EMS and compliance with legal requirements. Because these commitments and the performance reporting go beyond those required by current regulation, communities have access to more information about the performance of local facilities. This public scrutiny also provides an incentive for firms to make meaningful commitments and achieve them.

EPA believes that facilities that make the choice to apply and to demonstrate their commitments to environmental

improvements in the public spotlight impose upon themselves a unique and particularly strong set of pressures to deliver this heightened level of performance.

In time, EPA expects the Performance Track Program to produce additional environmental gains as a result of the more efficient use of the resources of federal, state, and local environmental authorities. Because EPA expects the entry criteria to result in member facilities that are carrying out their environmental obligations in a manner beyond what is required of them, EPA believes that other authorities will be able to shift enforcement and compliance resources to other facilities in the regulated community. EPA believes this resource reallocation may bring further environmental improvements, as limited compliance resources are applied more effectively.

The regulatory changes EPA is issuing today will enable eligible Performance Track members to reduce their reporting or other compliance costs.

1. What Environmental Benefits Will the Performance Track Program Bring to Society?

Over the past three years the Performance Track program has already produced substantial environmental benefits beyond its member facilities' legal requirements. Some of these environmental benefits include reducing: energy use by 1.1 million mmBtus, water use by 475 million gallons, hazardous materials use by 908 tons, emissions of volatile organic compounds by 329 tons, emissions of air toxics by 57 tons, emissions of nitrogen oxides by 152 tons, discharges to water of biochemical oxygen demand, chemical oxygen demand, and total suspended solids by 1,327 tons, toxic discharges to water by 5,543 tons, solid waste by 150,000 tons, and hazardous waste by 692 tons. Member facilities in the Program have also increased their use of reused and recycled materials by 10,823 tons and have preserved or restored 2,698 acres of wildlife habitat. In addition to these benefits, which should continue to increase, with additional membership into the Program, EPA believes that the refocusing of resources made possible by the Program may lead to additional environmental benefits as well as increased compliance by non-member facilities. The public recognition and administrative burden relief offered by Performance Track, to the extent that they affect company's bottom lines, may also influence company decisions to undertake additional non-regulatory projects that go beyond regulatory requirements. The public will be able to judge the nature and magnitude of these environmental benefits by examining the annual reports that Performance Track facilities are required to prepare and make public.

2. How Will These Incentives Maximize the Benefits of the Performance Track Program?

Incentives play a crucial role in maximizing the environmental benefits of any voluntary program. Facilities must perceive a benefit to themselves that is at least equal to their perceived costs of membership in a voluntary program. These costs include the administrative burden of membership, as well as any costs incurred in meeting the substantive requirements of the Program. Facility members of the Performance Track Program also face the additional risk of adverse public reaction if they fail to meet their environmental goals or if their audits of compliance or EMS performance reveal problems. These public risks are unique to Performance Track facilities. Facilities participating in other EPA voluntary programs, as well as facilities that do not participate in any voluntary program, may and do keep audit information confidential. Improved public information about the environmental performance of facilities is an important component and public benefit of the Performance Track Program and it significantly raises the costs perceived by facility managers for internal oversights or lapses.

As more benefits to facility members in the Performance Track Program become available and increase, more facilities will be encouraged to apply. Increased program incentives may also generate environmental benefits from non-members. If facilities that do not currently meet the Performance Track Program criteria believe that membership would benefit them, they may work to improve their management systems and environmental performance to become eligible.

3. Will These Incentives Undercut Existing Environmental Protections?

The incentives in today's rule do not undercut existing environmental protections. EPA believes the 180-day accumulation period for hazardous waste and the reporting changes for MACT standards will have no direct deleterious effects on the environmental performance of Performance Track facilities. EPA and other regulatory bodies will receive compliance information from Performance Track facilities less frequently; however, all recordkeeping requirements remain in effect. As a safeguard, EPA and the other governmental authorities retain their ability to take enforcement actions against any facility that fails to comply with permits or other obligations. The risk of a public removal from this Program for failure to comply adds an extra incentive to comply with Program requirements. EPA believes that this, and the fact that facilities may be perceived by the public and by governmental offices as better environmental performers than their competitors, reduces the risk that any environmental damages will result from this program or the regulatory changes EPA is adopting.

4. How Does the Performance Track Program Design Limit Membership to a Uniquely Appropriate Set of Facilities?

EPA designed the Performance Track Program to generate improvements in environmental performance of facilities. EPA believes that the entry criteria and ongoing obligations for continued membership in Performance Track (as summarized in the introduction to section D) will bring about benefits to the environment such as decreased releases of pollutants to the air, water, and land; greater efficiency in energy and raw material usage; and decreased risks of accidental releases of hazardous substances. These incremental environmental benefits will stem from the facilities' activities that are tied to their membership in Performance Track, which justifies making available to this category of facilities the benefits of the modified requirements issued today.

Further, EPA believes that there are controls and safeguards built into the Performance Track Program that reduce the possibility a facility will receive the benefits of today's modified requirements without the facility delivering improved environmental performance.

EPA's announcement of this Program (*www.epa.gov/PerformanceTrack*) describes how applications are reviewed and facilities that meet the entry criteria are selected. It also summarizes other steps EPA takes in running the Program, including conducting site visits at up to 20 percent of the member facilities each year, and the removal of facilities found not to be meeting the commitments they have made. EPA believes this approach is capable of identifying the set of facilities that belong in the Program and differentiating them from tens of thousands of other facilities in the United States. EPA also believes that the combination of the administrative controls of the Performance Track Program and the public reporting voluntarily accepted by program

members will, as a rule, be effective in limiting membership to only such facilities that deliver improved environmental performance.

III. Final Rulemaking Changes

A. Maximum Achievable Control Technology (MACT)

1. Definition of Pollution Prevention

As part of the MACT provision in today's rule, EPA is defining the term "Pollution Prevention." The Pollution Prevention Act (42 U.S.C. 13102) defines "source reduction." EPA equates Pollution Prevention with source reduction. In today's rule, the statutory definition of source reduction is adopted as the definition of Pollution Prevention. Thus, EPA defines Pollution Prevention to mean source reduction.

In its August 13, 2002 proposal (67 FR 52674), EPA included a definition of Pollution Prevention (P2). The proposed regulatory definition was taken from EPA's guidance from May 1992, and later elaborated upon by then Administrator Carol Browner in "P2 Policy Statement: New Directions for Environmental Protection" issued on June 14, 1993 (found at *http://www.epa.gov/p2/p2policy/definitions.htm*). EPA's Policy Statement definition of P2 is not identical to the statutory definition of P2. The Policy Statement of P2 adds a few clauses to the statutory definition of P2, and removes another.

Consistent with EPA's Policy Statement definition of P2, the 2002 proposal did not include the following clause from the statutory definition: "The term 'source reduction' does not include any practice which alters the physical, chemical, or biological characteristics or the volume of a hazardous substance, pollutant, or contaminant through a process or activity which itself is not integral to and necessary for the production of a product or the providing of a service." Although this clause from the statute was not included in the 2002 proposal, it was still applicable since EPA cited the statute.

In addition, the language in the 2002 proposal included an additional clause that is not part of the statute, again taken from EPA's Policy Statement definition of P2: "and other practices that reduce or eliminate the creation of pollutants through: Increased efficiency in the use of raw materials, energy, water, or other resources, or protection of natural resources by conservation."

Subsequently, EPA changed its approach in a proposed rule on May 15, 2003. In that action, EPA proposed the statutory definition of P2 verbatim (68 FR 26249). This change stemmed from EPA's conclusion that the statutory definition of P2 was more appropriate for this rule than the Policy Statement definition.

The May 2003 proposed rule was intended primarily to provide alternative compliance options for major sources who reduce their Hazardous Air Pollutants. Also in that proposal were two provisions applicable only to Performance Track members. Since the 2003 proposal included provisions for Performance Track members, EPA provided the public with the opportunity to comment on the interface between the 2003 proposed definition of P2 and Performance Track.

EPA received public comments on the 2002 proposal, but no commenters suggested changes to the P2 definition language. Public comments discussed how the P2 provision was used in this rule. One commenter suggested that all regulated entities that achieve MACT or better through pollution prevention measures be eligible for reporting reductions. Another commenter supported the proposed reporting reductions based on pollution prevention activities. One commenter suggested that EPA reduce or eliminate MACT if a source exceeded its performance goal, or if a major source lowered emissions to below major thresholds through pollution prevention or operational changes.

EPA also received comments on the 2003 proposal, and like the 2002 proposal, there were no comments that directly addressed the definition of P2 as it relates to Performance Track. There were, however, many comments that discussed how the definition of P2 is used in the 2003 proposal. EPA will address these comments when it takes final action on that proposed rule in the future since none of those comments had any relevance to today's rule.

Therefore, today EPA is adopting the definition of P2 that was proposed on May 15, 2003, without modification because it is the most appropriate definition for today's regulatory action.

2. Reduced Frequency of Required Mact Reporting for All Eligible Performance Track Facilities

Facilities covered by the MACT provisions of the Clean Air Act must meet a variety of record-keeping, monitoring, and reporting requirements as specified in 40 CFR Part 63—National Emission Standards for Hazardous Air Pollutants for Source Categories.

For facility members in the Performance Track, EPA is reducing reporting frequency while assuring the continued availability of information required for assessing compliance with MACT standards.

Because of the high-level environmental performance of Performance Track facilities, EPA believes it is appropriate to provide these facilities the opportunity to reduce their reporting frequency under part 63. Since the underlying data required from these facilities will still be gathered, the Agency can still receive the information needed to identify any lapses in compliance.

Current MACT reporting requirements differentiate between facilities, based on facility performance, with respect to reporting frequency. For example, reporting frequency may be increased from semi-annually to quarterly for some reports based on the frequency of excursions outside of required performance parameters. The approach the Agency is adopting today applies a similar concept by reducing reporting frequency for top environmental performers.

Today's rule reduces the frequency of certain required periodic MACT reports for eligible Performance Track facilities. Periodic reports include a range of reports that are required to be sent in to the Permit Authority at intervals that range from quarterly, or more frequently if required by special circumstances, to semi-annually. The reports are different from records, which must be kept on site and incorporated into the periodic reports and other reports. There are general reporting requirements in 40 CFR part 63, subpart A, and additional reporting requirements under other subparts applying to specific categories of stationary sources that emit (or have the potential to emit) one or more hazardous air pollutants. Performance Track facilities that choose to take advantage of this incentive should notify their State Authority that the facility will submit reports on an annual, rather than semi-annual, basis.

Today's rule doubles the reporting intervals for these reports by amending 40 CFR 63.2 and 63.10, and adding a new 40 CFR 63.16. For major sources and area sources required to hold Title V permits, however, reports must still be submitted at least semi-annually to meet Title V permitting requirements specified in section 504(a) of the Clean Air Act. Public comments expressed concern about the applicability of this incentive, noting specifically that the six-month statutory reporting frequency floor for such air sources may limit the incentive to minor (or synthetic minor) air sources. EPA acknowledges these concerns. EPA is issuing this incentive provision as proposed because of its potential value to any current and future

Performance Track facilities that are regulated as minor sources and not required to hold Title V permits. This final rule does not revise other requirements concerning event reporting, record keeping, and monitoring. EPA also recognizes that because membership in Performance Track is for three years and Clean Air Act permits are for five years, coordination between these event cycles will be required.

3. Reporting Reductions for Performance Track Facilities That Achieve Mact or Better Emission Levels Through Pollution Prevention Methods Such as Process Changes

Today's rule also reduces the level of detail of the required reporting, under some circumstances, for those facilities that reduce emissions below 25 tons per year of aggregate hazardous air pollutant (HAP) emissions and 10 tons per year of any individual HAP, and that have reduced emissions to a level that is fully in compliance with the applicable MACT standard.

For those Performance Track facilities that are below the thresholds for major sources of HAPs (25 tons per year aggregate and 10 tons per year for an individual HAP), and that have reduced the levels of all HAP emissions to at least the level required by full compliance with the applicable standard, additional reductions in reporting requirements are available, depending on the nature of the requirement and the means the facility is using to meet the requirement. As above, however, for major sources, reports must still be submitted at least semi-annually to meet Title V permitting requirements.

For those facilities using pollution prevention technologies or techniques to meet MACT standards, reductions in reporting burden depend on the requirements of the part 63 standard, as well as facility performance.

(1) If the standard calls for control technology and the facility complies using control technology:

The facility can substitute a simplified annual report to meet all required reporting elements in the applicable part 63 periodic report, certifying that they are continuing to use the control technology to meet the emission standard, and are running it properly. The facility must still fulfill all monitoring and recordkeeping requirements.

(2) If the emission standard is based on performance of a particular control technology and the facility complies using P2:

The facility can substitute a simplified annual report to meet all required reporting elements in the applicable part 63 periodic report, certifying that they are continuing to use P2 to reduce HAP emissions to levels at or below the MACT standard requirements. The facility must still maintain records demonstrating the veracity of the certification.

(3) If the standard calls for pollution prevention and the facility complies by using pollution prevention and the facility reduces emissions by an additional 50% or greater than required by the standard:

The facility can substitute a simplified annual report, to meet all required reporting elements in the applicable Part 63 periodic report, certifying that they are continuing to use P2 to reduce HAP emissions to levels below the MACT standard. The facility must still maintain records demonstrating the veracity of the certification.

Performance Track facilities that choose to take advantage of this incentive should notify their State Authority that the facility will submit a simplified annual report to meet all required reporting elements covered by today's rule.

For each of the above alternatives, if the facility no longer meets the criteria for continued membership in the Program, the incentive will no longer apply.

B. 180-Day Accumulation Time for Performance Track Hazardous Waste Generators

1. Background

Today EPA is adopting provisions, with certain modifications in response to numerous public comments as discussed below, that allow large quantity hazardous waste generators who are members of the Performance Track Program up to 180 days (or up to 270 days in certain cases) to accumulate hazardous waste without a RCRA permit or without having interim status. This regulatory flexibility is intended to provide a benefit to current members of Performance Track, and an incentive for potential members to join the Program. EPA believes the regulatory flexibility provided in this rule will not compromise protection of human health and the environment at Performance Track facilities because of the strict nature of the requirements to become and remain a member of Performance Track. These requirements were described in Section I. D. of this document.

The RCRA incentives in today's rule are consistent with the general objectives of Performance Track, as discussed in Section I of this preamble. In addition, this aspect of the final rule may assist EPA in learning more about how accumulation times for hazardous waste generators may affect the ultimate disposition of hazardous wastes (*e.g.*, recycling vs. disposal), the economics of hazardous waste generation and accumulation, and the overall environmental performance of hazardous waste generator facilities. More specifically, EPA believes that additional accumulation time will allow generators to accumulate enough waste to make transportation to waste management facilities more cost-effective and efficient for the generator. EPA also believes that additional accumulation time may result in environmental benefits related to the reduction in the movement and handling of hazardous waste on-site, as well as fewer off-site shipments. This additional accumulation time for Performance Track members is consistent with the rationale used for the F006 (metal finishing) hazardous waste rule (65 FR 12377, March 8, 2000).

2. What Are the Current Requirements for Large Quantity Generator Accumulation?

The current standards under 40 CFR part 262 for generators of hazardous waste who generate greater than 1,000 kilograms of hazardous waste per month (or one kilogram or more of acute hazardous waste), known as large quantity generators (LQGs), limit the amount of time hazardous waste can be accumulated at the generator's facility without a RCRA permit. Under § 262.34, LQGs may accumulate hazardous waste on-site for up to 90 days without having to obtain a RCRA permit. The generator must comply with certain unit-specific standards (*e.g.*, tank, container, containment building, and drip pad standards) for accumulation units, and certain general facility requirements such as those for marking and labeling of containers, preparedness and prevention, and emergency response procedures. Generators may also petition the EPA Regional Administrator to grant an extension of up to 30 days to the 90-day accumulation time limit due to unforeseen, temporary, and uncontrollable circumstances, on a case-by-case basis (*see* § 262.34(b)).

Today's final rule does not make any changes to the existing regulations that apply generally to 90-day accumulation by LQGs; EPA did not solicit comment in its proposed rule on those provisions

or any other existing provision of § 262.34. This includes the provisions for extended accumulation times for F006 wastes, which are specified at § 262.34(g). Those provisions, which apply only to generators who accumulate F006 wastes, allow for extended accumulation times that are similar in many respects (including the time limits) to those in today's rule for Performance Track members. It is therefore possible that when today's rule is implemented a generator of F006 waste who is also a member in Performance Track could take advantage of extended accumulation times under either regulatory provision (*i.e.*, under § 262.34(g), (h) and (i), or under § 262.34(j), (k) and (l)).

3. What Is in Today's Final Rule?

Today's final rule allows LQGs of hazardous waste that are members of the Performance Track Program to accumulate hazardous waste at their facilities for longer than the 90 days currently specified in § 262.34, subject to certain limitations and conditions. The rule does not affect other existing generator requirements; for example, Performance Track members are required to manifest their hazardous waste shipments (*see* subpart B of part 262) and to comply with other generator requirements in part 262 (*e.g.*, packaging and labeling of waste shipments).

The requirements for Performance Track facility extended accumulation times are added as new paragraphs (j), (k) and (l) to § 262.34. The following is a discussion of each provision.

Time Limits. Section 262.34(j)(1) specifies that hazardous waste generators who are Performance Track members may accumulate hazardous wastes for an extended period of time—up to 180 days, or up to 270 days if the generator must transport waste, or offer waste for transportation, over a distance of 200 miles or more. Such generators do not need to have RCRA permits or to have interim status if they stay within these limits. Note that these extended accumulation time limits are consistent with the current limits for generators of F006 wastes (*see* § 262.34(g)).

Initial Notice. Under § 262.34(j)(2), Performance Track generators need to give prior notice to EPA or the authorized state agency of their intent to accumulate hazardous waste in excess of 90 days in accordance with this rule. These notices will assist EPA and state agencies in monitoring implementation of this incentive. Public comments to the proposal expressed concern that such notifications may place additional burden on facilities with dynamic waste streams if re-notifications are required for each new waste stream. EPA acknowledges this concern, clarifies that notifications are generally one-time events, and estimates that this burden will be of minimal impact to member facilities.

Notices filed under § 262.34(j)(2) must identify the generator and facility, specify when extended accumulation at the facility will begin, and include a description of the wastes that will be accumulated for extended time periods and the units that will be used for that purpose.

The initial notice must also include a statement that the facility has made all changes to its operations, procedures, and equipment necessary to accommodate extended time periods for accumulating hazardous wastes (§ 262.34(j)(2)(iii)). This addresses situations in which longer accumulation times may involve, for example, changing the design, location, or capacity of the unit(s) in which the wastes are accumulated. Such changes could affect how the facility addresses other generator requirements, such as those for personnel training or emergency response procedures. Including this statement in the notice helps ensure in advance that Performance Track members are aware of and have implemented any changes at the facility that may be needed to accommodate extended accumulation times.

For generators who intend to accumulate hazardous waste for up to 270 days because the waste must be transported, or offered for transport, more than 200 miles from the generating facility, the notice submitted by the generator must contain a certification that an off-site permitted or interim status hazardous waste treatment, storage, or disposal facility (TSD) capable of accepting the waste is not located within 200 miles of the generator. In response to comments received on this issue, EPA has clarified in this final rule the situations under which Performance Track generators may accumulate hazardous waste for up to 270 days without a permit. The provision for accumulation up to 270 days is intended to address situations where wastes must be transported for considerable distances to off-site facilities because a permitted or interim status TSD is not located within 200 miles, and where extended accumulation time may thereby enable the facility to more efficiently ship fewer, larger loads of wastes to those facilities.

Section 3001(d)(6) of RCRA allows small quantity generators to accumulate hazardous waste on-site without a permit or interim status for up to 270 days if the generator must transport the waste (or offer the waste for transport) more than 200 miles from the generating facility. While EPA does not necessarily consider the 200 mile exception under RCRA 3001(d)(6) for small quantity generators as an outer boundary on what would be permissible under today's rule, it does suggest that Congress was not comfortable with providing more flexibility for small quantity generators. Accordingly, EPA believes that the 200 mile exception is a reasonable boundary to maintain for large and small quantity generators under the Performance Track program. At least one commenter has stated that a 200 mile exception would encourage generators under the Performance Track program to utilize the closest treatment, storage or disposal facility, rather than the best facility. In response, EPA would like to note that any facility receiving hazardous waste from a generator under the Performance Track program must be a federally permitted or interim status facility and therefore should be able to handle the waste responsibly.

EPA also received one comment questioning the necessity of the certification requirement related to 270 day accumulation. Currently small quantity generators and generators of F006 wastes are able to accumulate wastes for up to 270 days without certifying to the absence, within 200 miles of the generator, of an off-site permitted or interim status hazardous waste treatment, storage, or disposal facility capable of accepting the waste. EPA has included the certification requirement in this incentive because this rule will allow significantly larger quantities of all hazardous wastes to be accumulated for up to 270 days than is authorized by current rules. The certification requirement is minimally burdensome and constitutes a reasonable trade-off in light of the breadth of operational flexibility that this rule affords to Performance Track members.

Standards for Accumulation Units. Another condition (§ 262.34(j)(3)) in today's rule requires Performance Track generators to accumulate hazardous wastes in storage units (such as containers, tanks, drip pads, and containment buildings) that meet the standards for storing hazardous wastes at RCRA interim status facilities (*see* subparts I, J, W, and DD of 40 CFR part 265, respectively). These are standard requirements for large quantity generators.

If Performance Track facilities use containers for extended accumulation of hazardous wastes, today's rule

additionally requires secondary containment systems for containers to prevent releases into the environment that might be caused by handling accidents, deterioration, or other circumstances. Secondary containment is a standard requirement for RCRA-permitted facilities that use containers to store hazardous wastes containing free liquids and certain listed hazardous wastes (*i.e.*, F020, F021, F023, F026, and F027). It is not, however, typically required for hazardous waste generators or interim status facilities. Public comments on the secondary containment requirement included support for the proposal, concerns about the costs of secondary containment, and recommendations for more stringent requirements. EPA believes that requiring secondary containment in the context of this rule is a reasonable, common-sense precaution to take in exchange for extending accumulation time limits and increasing the volume limit.

Volume Limit. Under § 262.34(j)(4), Performance Track member generators are allowed to accumulate no more than 30,000 kilograms of hazardous waste at the facility at any one time. The Agency has information that the typical capacity for a hazardous waste truck transport vehicle ranges from an average of approximately 16,400 kg to a maximum of approximately 27,300 kg.[1] In addition, generators shipping hazardous waste by rail may have capacities of approximately 50,000 kg.[2] While one public comment asked EPA to consider a significantly higher waste stream-specific accumulation limit, comments on balance did not support modifications to the proposal. EPA believes that a 30,000 kg waste accumulation limit is reasonable and appropriate in ensuring economical shipments of wastes in a wide range of transport vehicle sizes.

Recordkeeping, Labeling, and Marking. Section 262.34(j)(5) specifies the types of records that program members must maintain at their facilities as a condition for extended accumulation times. These records are primarily intended to document that the accumulation time limits are not exceeded. Retaining these records is a standard requirement for all LQGs of hazardous waste.

Similarly, § 262.24(j)(6) requires that tanks and container units used for extended accumulation be marked or labeled with the words "Hazardous Waste," and that containers be marked to indicate when the accumulation period begins. These are also standard conditions for hazardous waste generators, and are specified in this rule mainly for the sake of clarity.

General Facility Standards. Under current regulations, all hazardous waste generators are subject to certain general facility standards relating to personnel training, preparedness and prevention, and contingency plans and emergency procedures. These general facility requirements also apply to Performance Track generators, and have been included in this rule for the sake of clarity.

Pollution Prevention. The Agency sought comment on whether it is appropriate to require Performance Track facilities to implement pollution prevention practices as a condition for using extended accumulation times in § 262.34(j)(8). A public comment suggested this provision duplicates requirements at § 262.41(a)(6–7). EPA acknowledges the provisions in these two sections are similar. However, the existing provision § 262.41(a)(6–7) is intended for one purpose and today's § 262.34(j)(7) for another.

Final § 262.41(a)(6 and 7) state: "(6) A description of the efforts undertaken during the year to reduce the volume and toxicity of waste generated. (7) A description of the changes in volume and toxicity of waste actually achieved during the year in comparison to previous years to the extent such information is available for years prior to 1984." This provision is required as part of the Biennial report that RCRA generators must submit to the Agency or State.

Final § 262.34 (8) states: "The generator has implemented pollution prevention practices that reduce the amount of any hazardous substances, pollutants, or contaminants released to the environment prior to its recycling, treatment, or disposal; and" This new provision is required for RCRA generators who are members of Performance Track. The information must be submitted annually along with the Performance Track member's annual report to the Agency. Requiring this information as part of the annual report is consistent with the core provisions of the Performance Track program. Further, EPA believes any burden associated with this requirement is negligible.

Annual Report. Under final § 262.34(j), Performance Track generators accumulating their hazardous waste for more than 90 days are required to provide information regarding the impact of the additional accumulation time. This information will be submitted as part of the Annual Performance Report, currently required of all Performance Track members (*see www.epa.gov/PerformanceTrack*, or the document entitled "National Environmental Performance Track Program Guide," EPA 240–F–01–002). Specifically, the report must include, for the previous year, information on the quantity of each hazardous waste that was accumulated for extended time periods, the number of off-site waste shipments, identification of destination facilities and how the wastes were managed at those facilities, information on the impact of extended accumulation time limits on the facility's operations (including any cost savings that may have occurred), and information on any on-site or off-site spills or other environmental problems associated with handling these wastes. Certain public comments expressed concern about the burden imposed by the proposed additional reporting requirements. EPA does not believe that the additional reporting elements constitute an unreasonable burden upon Performance Track members. The information submitted in these reports will assist the Agency in evaluating the success of this Performance Track Program incentive, and may inform future Agency decisions pertaining to hazardous waste accumulation. The provisions of this rule are supplementary to the existing recordkeeping and reporting requirements applicable to Generators, such as those found at 40 CFR part 262, subpart D.

Accumulation Time Extensions. Today's final rule also adds a new paragraph (k) to § 262.34, to address extensions of accumulation time limits in certain situations. This provision is consistent with the current regulations that apply generally to LQGs (*see* § 262.34(b)), and has been included in today's rule for the sake of clarity. Specifically, it allows the overseeing agency the option of granting a Performance Track generator an additional 30 days of accumulation time, if such extra time is needed due to unforseen, temporary, and uncontrollable circumstances. Requests for such time extensions will be reviewed and approved (or disapproved) in the same manner as they currently are for non-Performance Track LQGs.

[1] Unit Cost Compendium, prepared by DPRA Incorporated, for USEPA, Office of Solid Waste, September 30, 2000 and personal communication with DPRA.

[2] Rail car capacities vary depending on whether the transport unit is a mail box car (from 160 cubic yards to 370 cubic yards), a rail gondola (from 15 cubic yards to 262 cubic yards), or a rail tanker (22,000 gallons), R.S. Means, *Environmental Remediation Estimating Methods*, 1997. In general, one cubic yard of solid equals 1.5 tons and one cubic yard of liquid equals 1 ton.

Withdrawal/Termination From Program. Final § 262.34(l) addresses situations in which a Performance Track facility that has been accumulating hazardous wastes for extended periods of time under this rule decides to withdraw from the Program, or when EPA has for some reason decided to terminate the generator's membership in the Program. In such cases, the generator will need to comply with the previously applicable regulations as soon as possible (the standard requirement for less-than-90-day accumulation by large quantity generators), but no later than six months after withdrawal or termination.

4. How Will Today's Rule Affect Applicability of RCRA Rules in Authorized States?

Under section 3006 of RCRA, EPA may authorize a qualified State to administer and enforce a hazardous waste program within the State in lieu of the federal program, and to issue and enforce permits in the State. (*See* 40 CFR part 271 for the standards and requirements for authorization.) Following authorization, a State continues to have enforcement responsibilities under its law to pursue violations of its hazardous waste program. EPA continues to have independent authority under RCRA sections 3007, 3008, 3013, and 7003.

After authorization, Federal rules written under RCRA provisions that predate the Hazardous and Solid Waste Amendments of 1984 (HSWA) no longer apply in the authorized state. New Federal requirements imposed by those rules that predate HSWA do not take effect in an authorized State until the State adopts the requirements as State law.

In contrast, under section 3006(g) of RCRA, new requirements and prohibitions imposed by HSWA take effect in authorized States at the same time they take effect in non-authorized States. EPA is directed to carry out HSWA requirements and prohibitions in authorized States until the State is granted authorization to do so.

Today's final rule is not promulgated under HSWA authorities. Consequently, it does not amend the authorized program for states upon promulgation, as EPA does not implement the rule. The authorized RCRA program will change when EPA approves a State's application for a revision to its RCRA program.

For today's Performance Track rule, EPA encourages States to expeditiously adopt Performance Track regulations and begin program implementation. To revise the federally-authorized RCRA program, States need to seek formal authorization for the Performance Track rule after program implementation. EPA encourages States to begin implementing this incentive as soon as it is allowable under State law, while the RCRA authorization process proceeds.[3]

IV. Summary of Environmental, Energy, and Economic Impacts

A. What Are the Cost and Economic Impacts?

Today's final action will reduce costs for the facilities eligible to take advantage of the rule. Most of these cost reductions result from reduced reporting hours burden for facilities, or reduced waste management costs.

EPA has completed seven enrollment periods for the Performance Track Program. There are currently a total of 344[4] facilities in the Program (mostly industrial facilities, but also a number of facilities in the service sector, several federal facilities and a POTW). The economic estimates for today's rule are based on the most recent data that EPA has obtained, and reflects Program membership through round six. EPA intends to solicit and to accept additional facilities into the Program generally, so therefore it is not possible to project cost and burden hour reductions with complete accuracy. Another factor that hinders such projections is that, just as membership in Performance Track is voluntary, it is up to the facilities themselves to decide which incentives apply to them and of which to avail themselves.

Maximum Achievable Control Technology: A total of 309[5] facilities have been accepted into the Performance Track program during the first six open enrollment periods. Of those facilities, EPA estimates that 93 facilities are likely to be eligible for the MACT incentive in today's rule. Performance Track facilities likely to be eligible for the MACT incentive include those members permitted as minor or synthetic minor air sources and in a NAICS sector likely to be to be subject to a MACT requirement. An analysis of EPA's IDEA database yielded 106 potential minor or synthetic minor air sources (*See http://www.epa.gov/compliance/planning/data/multimedia/idea/index.html*). EPA then screened out 13 Performance Track members in sectors unlikely to be subject to MACT requirements (*i.e.*, nine members in the Public Facilities and Institutions sector; two members in the Mining and Construction sector; and two members in the Wholesale Retail and Shipping sector). This analysis resulted in 93 eligible facilities in the current membership. EPA estimates the annual increase in Performance Track members likely to be eligible for the MACT incentive by applying the percentage eligible among the current membership (*i.e.*, 30 percent) to subsequent years.

Extended Accumulation Time for Hazardous Waste Generators: EPA estimates that 125 facilities are likely to be eligible for the RCRA incentives in today's rule.[6] The number of Performance Track facilities that could potentially be affected by the RCRA portion of the rule was assembled from the list of all Performance Track facilities that identified themselves as hazardous waste generators. EPA then relied on the RCRA 2001 Hazardous Waste Data (*i.e.*, Biennial Reporting System) to determine the quantity of waste generated by each facility per year (*See http://www.epa.gov/epaoswer/hazwaste/data/index.htm*). The next step involved excluding Performance Track facilities that are small quantity generators (SQGs), since SQGs may already accumulate hazardous waste for up to 180 days, and thus would not benefit from today's final rule. Again, EPA estimates the annual increase in Performance Track members likely to be eligible for the RCRA incentive by applying the percentage of the current membership to subsequent years.

Total Estimated Impact of Final Rule on Costs and Labor Hours

The estimated cost and hour burden for respondents for today's rule in total is negative 7,954 hours over the three years of the Information Collection Request, equating to a cost savings of $706,846. The estimated cost and hour burden for respondents for today's rule, disaggregated, is negative 16.6 hours per facility per year, that is, a reduction of 16.6 hours from current requirements. The costs are negative $1,350.80 per facility per year, that is, cost reductions/savings of $1350.80.

[3] EPA encourages States to take this approach for less stringent federal requirements where rapid implementation is important. For example, EPA encouraged States to implement State Corrective Action Management Unit Regulations, once adopted as a matter of State law, prior to authorization (*see* 58 FR 8677, February 16, 1993).

[4] The economic estimates for today's rule are based on the most recent data that EPA has obtained, and reflects Program membership through round six.

[5] 5 The economic estimates for today's rule are based on the most recent data that EPA has obtained, and reflects Program membership through round six.

[6] Memorandum dated December 5, 2003, from Industrial Economics, Incorporated (IEc) to EPA's Office of Policy, Economics, and Innovation.

B. What Are the Health, Environmental, and Energy Impacts?

EPA expects there to be no adverse effects on the environment from the direct impacts of today's rule changes. As discussed above, most of the changes relate to reporting or waste management, and do not in any way loosen the underlying environmental obligations of the Performance Track facilities. EPA expects that the reporting changes will not result in any of these facilities becoming more lax in their diligence.

EPA believes that its refocus of resources may lead to additional environmental compliance. Public recognition and relief from regulatory requirements, to the extent that they affect each company's bottom line, may influence company decisions to undertake regulatory projects that go beyond regulatory requirements. The public will be able to judge the nature and magnitude of these environmental benefits by examining the annual reports that Performance Track facilities are required to prepare and make public.

V. Effective Date for Today's Requirements

The changes contained in this final rule will take effect in the Federal MACT and RCRA programs on April 22, 2004. This rule cannot apply to sources complying with alternative requirements approved through the approval options in subpart E of the section, unless the source reapplies for and demonstrates that the equivalency demonstration for that source shows that this source would be eligible for this program (*see* 64 CFR 55810–55846, September 14, 2000).

This also means that these RCRA rules will apply on April 22, 2004, in any State without an authorized RCRA program, but will not apply in any State with an authorized RCRA program until EPA approves a State's application for a revision to its RCRA program. These rule changes apply only to members of the Performance Track, which is a voluntary program. The changes are intended to provide regulatory relief and do not impose new requirements. Because regulated entities will not need time to come into compliance, the rule changes made today will be effective upon publication.

VI. Administrative Requirements

A. Executive Order 12866, Regulatory Planning and Review

The estimated cost and hour burden for respondents for today's rule in total is negative 7,954 hours over the three years of the Information Collection Request, equating to a cost savings of $706,846. The estimated cost and hour burden for respondents for today's rule, disaggregated, is negative 16.6 hours per facility per year, that is, a reduction of 16.6 hours from current requirements. The costs are negative $1,350.80 per facility per year, that is, cost reductions/savings of $1350.80.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

The information collection requirements in this 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 collected pursuant to today's rule is a combination of new information, and a reduction of other information the Agency currently collects. This information will be used so that the Agency will know that facilities eligible for today's provisions are properly implementing them, and also that States have implemented them, if they so choose. This information will enable the Agency to assess compliance with today's final provisions. Responses to the information request are required by respondents to retain provided in today's rule under the Authority: 42 U.S.C. 7401, *et seq.*, and Authority: 42 U.S.C. 6906, 6912, 6922–6925, 6937, and 6938. Responses by States for today's provisions are voluntary.

The estimated cost and hour burden for respondents for today's rule in total is negative 7,954 hours over the three years of the Information Collection Request equating to a cost savings of $706,846. The estimated cost and hour burden for respondents for today's rule, disaggregated, is negative 16.6 hours per facility per year, that is, a reduction of 16.6 hours from current requirements. The costs are negative $1,350.80 per facility per year, that is, cost reductions/savings of $1350.80. The frequency of the responses are a combination of one-time and annual, that is, there are different types of responses required. For instance, if a Performance Track facility seeks to extend its storage time under today's provisions, a one time notification is required. In addition, the facility must provide certain information on an annual basis to the authorized State. The estimated mean number of annual respondents between 2004 and 2006 is 277. The Paperwork Reduction Act requires that the Agency report to the Office of Management and Budget only positive burden hours for Industry and States via its "83–I" reporting form. Therefore, the total burden hours reported to OMB is 8950. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

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. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rule 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 final rule on small entities, small entity is defined as: (1) A small business according to the Small Business Administration definition for the business's NAICS code; (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.

In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. Sections 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. Today's rule will relieve regulatory burden and result in cost savings to entities, including any small entities, that are members of the Performance Track Program. Many small entities (both businesses and governments) and their association representatives were invited to, and attended, the public hearings EPA conducted early in 2000 on the design of the Performance Track Program. EPA has therefore concluded that today's final rule will relieve regulatory burden for small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 04–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written Statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written Statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that 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. Participation by facilities in the Performance Track is voluntary, and so is participation by State or local government agencies. There are no significant or unique effects on State, local, or Tribal governments, however there may be some minor effects incurred by these entities. EPA projects these costs to be very low. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. Nevertheless, as discussed in section I B and elsewhere, EPA did engage these stakeholders in the process of developing the National Environmental Performance Track Program.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that 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."

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule provides incentives that States can adopt to provide benefits to their State member facilities in the National Performance Track Program. As a voluntary program, Performance Track allows States the option to adopt the provisions in this rule. Thus, Executive Order 13132 does not apply to this rule.

Stakeholders, including many States, were consulted during the development of the Performance Track Program. Many suggestions and ideas generated by States and other stakeholders provided the basis for some of the provisions in this rule. The stakeholder involvement process undertaken is fully discussed in Section I B of this document. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically sought comment on the proposed rule from State and local officials.

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications." "Policies that have Tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This final rule does not have Tribal implications. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Any effects that Tribes may accrue from this rule will result in cost savings. Thus, Executive Order 13175 does not apply to this rule. Stakeholder involvement is discussed in Section I. B. of this document. In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and Tribal governments, EPA specifically sought additional comment on the proposed rule from Tribal officials.

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

Executive Order 13045: "Protection of Children from Environmental Health & Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. In the proposed rule, EPA invited the public to submit or identify peer-reviewed studies and data, of which the agency may not be aware, that assessed results of early life exposure to the provisions of this rule. No such studies or data were identified.

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

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, EPA has concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs all Federal agencies to use voluntary consensus standards instead of government-unique standards in their regulatory and procurement activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (such as materials specifications, test methods, sampling procedures, business practices) that are developed or adopted by one or more voluntary consensus standards bodies. Examples of organizations generally regarded as voluntary consensus standards bodies include the American Society for Testing and Materials (ASTM), the National Fire Protection Association (NFPA), and the Society of Automotive Engineers (SAE). The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when an Agency does not use available and applicable voluntary consensus standards.

This final rule does not involve technical standards. Thus, the provisions of NTTAA do not apply to this rule and EPA is not considering the use of any voluntary consensus standards.

J. 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 final rule is effective on April 22, 2004.

VII. Statutory Authority

The statutory authority for the MACT portion of this action is provided by sections 101, 112, 114, 116, and 301 of the Clean Air Act as amended (42 U.S.C. 7401, 7412, 7414, 7416, and 7601). The statutory authority for the RCRA portion of this action is provided by sections 2002 and 3002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (42 U.S.C. 6912 and 6922).

VIII. Judicial Review

Under section 307(b)(1) of the Clean Air Act, judicial review of the MACT portion of this final rule is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by June 21, 2004. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Under section 307(b)(2) of the Clean Air Act, the requirements that are the subject of this final rule may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements. Under section 6976(a) of the Resource Conservation and Recovery Act, judicial review of the RCRA portion of this final rule is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by June 21, 2004. Under this same section 6976(a) of RCRA, the requirements that are the subject of this final rule may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

List of Subjects

40 CFR Part 63

Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 262

Exports, Hazardous materials transportation, Hazardous waste, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

Dated: April 14, 2004.

Michael O. Leavitt,

Administrator.

■ For the reasons stated in the preamble, we amend parts 63 and 262 of title 40, chapter I of the Code of the Federal Regulations as follows:

PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—[Amended]

■ 2. Section 63.2 is amended by adding, in alphabetical order, definitions for the terms *Pollution Prevention* and *Source at a Performance Track member facility* to read as follows:

§ 63.2 Definitions.

* * * * *

Pollution Prevention means *source reduction* as defined under the Pollution Prevention Act (42 U.S.C. 13101–13109). The definition is as follows:

(1) *Source reduction* is any practice that:

(i) Reduces the amount of any hazardous substance, pollutant, or

contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal; and

(ii) Reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants.

(2) The term *source reduction* includes equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, or inventory control.

(3) The term *source reduction* does not include any practice that alters the physical, chemical, or biological characteristics or the volume of a hazardous substance, pollutant, or contaminant through a process or activity which itself is not integral to and necessary for the production of a product or the providing of a service.

* * * * *

Source at a Performance Track member facility means a major or area source located at a facility which has been accepted by EPA for membership in the Performance Track Program (as described at *www.epa.gov/PerformanceTrack*) and is still a member of the Program. The Performance Track Program is a voluntary program that encourages continuous environmental improvement through the use of environmental management systems, local community outreach, and measurable results.

* * * * *

■ 3. Section 63.10 is amended by:

a. Revising paragraph (d)(1); and

b. Adding paragraph (e)(3)(i)(D).

The revision and addition read as follows:

§ 63.10 Recordkeeping and reporting requirements.

* * * * *

(d) * * * (1) Notwithstanding the requirements in this paragraph or paragraph (e) of this section, and except as provided in § 63.16, the owner or operator of an affected source subject to reporting requirements under this part shall submit reports to the Administrator in accordance with the reporting requirements in the relevant standard(s).

* * * * *

(e) * * *

(3) * * *

(i) * * *

(D) The affected source is complying with the Performance Track Provisions of § 63.16, which allows less frequent reporting.

* * * * *

■ 4. Section 63.16 is added to subpart A and reads as follows:

§ 63.16 Performance Track Provisions.

(a) Notwithstanding any other requirements in this part, an affected source at any major source or any area source at a Performance Track member facility, which is subject to regular periodic reporting under any subpart of this part, may submit such periodic reports at an interval that is twice the length of the regular period specified in the applicable subparts; provided, that for sources subject to permits under 40 CFR part 70 or 71 no interval so calculated for any report of the results of any required monitoring may be less frequent than once in every six months.

(b) Notwithstanding any other requirements in this part, the modifications of reporting requirements in paragraph (c) of this section apply to any major source at a Performance Track member facility which is subject to requirements under any of the subparts of this part and which has:

(1) Reduced its total HAP emissions to less than 25 tons per year;

(2) Reduced its emissions of each individual HAP to less than 10 tons per year; and

(3) Reduced emissions of all HAPs covered by each MACT standard to at least the level required for full compliance with the applicable emission standard.

(c) For affected sources at any area source at a Performance Track member facility and which meet the requirements of paragraph (b)(3) of this section, or for affected sources at any major source that meet the requirements of paragraph (b) of this section:

(1) If the emission standard to which the affected source is subject is based on add-on control technology, and the affected source complies by using add-on control technology, then all required reporting elements in the periodic report may be met through an annual certification that the affected source is meeting the emission standard by continuing to use that control technology. The affected source must continue to meet all relevant monitoring and recordkeeping requirements. The compliance certification must meet the requirements delineated in Clean Air Act section 114(a)(3).

(2) If the emission standard to which the affected source is subject is based on add-on control technology, and the affected source complies by using pollution prevention, then all required reporting elements in the periodic report may be met through an annual certification that the affected source is continuing to use pollution prevention to reduce HAP emissions to levels at or below those required by the applicable emission standard. The affected source must maintain records of all calculations that demonstrate the level of HAP emissions required by the emission standard as well as the level of HAP emissions achieved by the affected source. The affected source must continue to meet all relevant monitoring and recordkeeping requirements. The compliance certification must meet the requirements delineated in Clean Air Act section 114(a)(3).

(3) If the emission standard to which the affected source is subject is based on pollution prevention, and the affected source complies by using pollution prevention and reduces emissions by an additional 50 percent or greater than required by the applicable emission standard, then all required reporting elements in the periodic report may be met through an annual certification that the affected source is continuing to use pollution prevention to reduce HAP emissions by an additional 50 percent or greater than required by the applicable emission standard. The affected source must maintain records of all calculations that demonstrate the level of HAP emissions required by the emission standard as well as the level of HAP emissions achieved by the affected source. The affected source must continue to meet all relevant monitoring and recordkeeping requirements. The compliance certification must meet the requirements delineated in Clean Air Act section 114(a)(3).

(4) Notwithstanding the provisions of paragraphs (c)(1) through (3), of this section, for sources subject to permits under 40 CFR part 70 or 71, the results of any required monitoring and recordkeeping must be reported not less frequently than once in every six months.

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

■ 5. The authority citation for part 262 continues to read as follows:

Authority: 42 U.S.C. 6906, 6912, 6922–6925, 6937, and 6938.

■ 6. Section 262.34 is amended by adding paragraphs (j), (k), and (l) to read as follows:

§ 262.34 Accumulation time.

* * * * *

(j) A member of the Performance Track Program who generates 1000 kg or

greater of hazardous waste per month (or one kilogram or more of acute hazardous waste) may accumulate hazardous waste on-site without a permit or interim status for an extended period of time, provided that:

(1) The generator accumulates the hazardous waste for no more than 180 days, or for no more than 270 days if the generator must transport the waste (or offer the waste for transport) more than 200 miles from the generating facility; and

(2) The generator first notifies the Regional Administrator and the Director of the authorized State in writing of its intent to begin accumulation of hazardous waste for extended time periods under the provisions of this section. Such advance notice must include:

(i) Name and EPA ID number of the facility, and specification of when the facility will begin accumulation of hazardous wastes for extended periods of time in accordance with this section; and

(ii) A description of the types of hazardous wastes that will be accumulated for extended periods of time, and the units that will be used for such extended accumulation; and

(iii) A Statement that the facility has made all changes to its operations, procedures, including emergency preparedness procedures, and equipment, including equipment needed for emergency preparedness, that will be necessary to accommodate extended time periods for accumulating hazardous wastes; and

(iv) If the generator intends to accumulate hazardous wastes on-site for up to 270 days, a certification that a facility that is permitted (or operating under interim status) under part 270 of this chapter to receive these wastes is not available within 200 miles of the generating facility; and

(3) The waste is managed in:

(i) Containers, in accordance with the applicable requirements of 40 CFR part 265 subpart I; or

(ii) Tanks, in accordance with the requirements of 40 CFR part 265, subpart J, and § 265.200; or

(iii) Drip pads, in accordance with subpart W of 40 CFR part 265; or

(iv) Containment buildings, in accordance with subpart DD of 40 CFR part 265; and

(4) The quantity of hazardous waste that is accumulated for extended time periods at the facility does not exceed 30,000 kg; and

(5) The generator maintains the following records at the facility for each unit used for extended accumulation times:

(i) A written description of procedures to ensure that each waste volume remains in the unit for no more than 180 days (or 270 days, as applicable), a description of the waste generation and management practices at the facility showing that they are consistent with the extended accumulation time limit, and documentation that the procedures are complied with; or

(ii) Documentation that the unit is emptied at least once every 180 days (or 270 days, if applicable); and

(6) Each container or tank that is used for extended accumulation time periods is labeled or marked clearly with the words "Hazardous Waste," and for each container the date upon which each period of accumulation begins is clearly marked and visible for inspection; and

(7) The generator complies with the requirements for owners and operators in 40 CFR part 265, with § 265.16, and with § 268.7(a)(5). In addition, such a generator is exempt from all the requirements in subparts G and H of part 265, except for §§ 265.111 and 265.114; and

(8) The generator has implemented pollution prevention practices that reduce the amount of any hazardous substances, pollutants, or contaminants released to the environment prior to its recycling, treatment, or disposal; and

(9) The generator includes the following with its Performance Track Annual Performance Report, which must be submitted to the Regional Administrator and the Director of the authorized State:

(i) Information on the total quantity of each hazardous waste generated at the facility that has been managed in the previous year according to extended accumulation time periods; and

(ii) Information for the previous year on the number of off-site shipments of hazardous wastes generated at the facility, the types and locations of destination facilities, how the wastes were managed at the destination facilities (*e.g.*, recycling, treatment, storage, or disposal), and what changes in on-site or off-site waste management practices have occurred as a result of extended accumulation times or other pollution prevention provisions of this section; and

(iii) Information for the previous year on any hazardous waste spills or accidents occurring at extended accumulation units at the facility, or during off-site transport of accumulated wastes; and

(iv) If the generator intends to accumulate hazardous wastes on-site for up to 270 days, a certification that a facility that is permitted (or operating under interim status) under part 270 of this chapter to receive these wastes is not available within 200 miles of the generating facility; and

(k) If hazardous wastes must remain on-site at a Performance Track member facility for longer than 180 days (or 270 days, if applicable) due to unforseen, temporary, and uncontrollable circumstances, an extension to the extended accumulation time period of up to 30 days may be granted at the discretion of the Regional Administrator on a case-by-case basis.

(l) If a generator who is a member of the Performance Track Program withdraws from the Performance Track Program, or if the Regional Administrator terminates a generator's membership, the generator must return to compliance with all otherwise applicable hazardous waste regulations as soon as possible, but no later than six months after the date of withdrawal or termination.

[FR Doc. 04–9042 Filed 4–21–04; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SW–FRL–7651–4]

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

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is granting a petition submitted by OxyVinyls, LP (OxyVinyls) to exclude (or delist) a certain liquid waste generated by its Houston, TX Deer Park VCM Plant from the lists of hazardous wastes. This final rule responds to the petition submitted by OxyVinyls to delist K017, K019, and K020 Incinerator Offgas Treatment Scrubber Water generated from treating and neutralizing gasses generated in the firebox during the incineration process.

After careful analysis and use of the Delisting Risk Assessment Software (DRAS) EPA has concluded the petitioned waste is not hazardous waste. This exclusion applies to 919,990 cubic yards per year of the Incinerator Offgas Treatment Scrubber Water. Accordingly, this final rule excludes the petitioned waste from the requirements of hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA) when disposed of in accordance with TPDES regulations.

COLORADO.—PM–10—Continued

Designated Area	Designation		Classification	
	Date	Type	Date	Type
On the West—Beginning at the southwestern corner of section 23, T4N, R85W of the 6th P.M. North along the western border of sections 23, 14, 11, T4N, R85W. Thence, along the ridge which bisects sections 35, 36, 25, 24, 13, 14, 11, 12, 1, T5N, R85W, and sections 36, 25, 24, T6N, R85W. Thence heading northwest along the ridge which bisects sections 23, 15, 10, 9, 4, T6N, R85W of 6th P.M. Thence, heading northeast along the ridge which bisects sections 33, 34, 35, 36, 25, T7N, R85W and sections 30 and 10 of T7N, R84W. Thence, north along the N 1/2 of the western edge of section 19, to the NW corner of section 18, T7N, R84W.				
On the North—The northern boundary of sections 16, 17, 18, T7N, R84W of 6th P.M.				
* * * * * * *				

* * * * *

[FR Doc. 04–23840 Filed 10–22–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 262

[OA–2004–0004; FRL–7830–1]

RIN 2090–AA13

National Environmental Performance Track Program; Corrections

AGENCY: Environmental Protection Agency (EPA)

ACTION: Direct final rule; corrections.

SUMMARY: EPA is taking direct final action to revise and correct certain provisions in the Resource Conservation and Recovery Act (RCRA) program applicable only to members of the National Environmental Performance Track Program. The revisions concern the proposed rule published on August 13, 2002 (67 FR 52674), and the subsequent final rule published on April 22, 2004 (69 FR 21737). Both the proposal and the final rule contained an inconsistency between the preamble language and regulatory language. The final rule also inadvertently omitted three references to applicable regulatory provisions that were properly referenced in the proposed rule. The proposed and final rules cover provisions under both the Clean Air Act and RCRA. Today's direct final rule applies only to the RCRA provisions. The Clean Air Act provisions are unchanged.

The regulatory proposal of August 13, 2002 was published with a description in the preamble that was inconsistent with the proposed regulatory language. EPA used the word "or" in the preamble description of the provision requiring notice when a generator accumulates hazardous waste, while the subject regulatory language used the word "and." No public comment was received during the public comment period concerning the inconsistent language, and the April 2004 rule repeated the inconsistency between the preamble and the regulatory language.

Today's rule corrects the preamble language to clarify that the rule requires notification to both the Regional Administrator and the authorized State.

In addition, the April 2004 final rule did not include three applicable regulatory provisions that were included in the original preamble of August 13, 2002 (67 FR 52674) proposal. The applicable regulatory provisions omitted from the final rule were correctly published in the proposal. Today's rule corrects the April 2004 final rule to include the applicable regulatory provisions.

EPA is publishing today's direct final rulemaking to address the inconsistency between the preamble and regulatory language, and to correct the inadvertently omitted applicable regulatory provisions. The applicable regulatory provisions corrected and finalized today are the same as the language that was proposed in August 2002 and received public comment.

Today's corrections are being published as a direct final rule because EPA believes these revisions to be non-controversial and does not anticipate any adverse comment. We are approving these revisions to correct the earlier inconsistency and omissions.

DATES: This direct final rule is effective December 27, 2004 unless EPA receives adverse comments by November 24, 2004. If the Agency receives adverse comments it will withdraw this direct final rule by publishing a timely withdrawal in the **Federal Register**.

ADDRESSES: Submit your comments, identified by Docket ID No. OA–2004–0004, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- Mail: Mr. Robert D. Sachs, Environmental Protection Agency, Mail code 1807T, 1200 Pennsylvania Avenue, Washington, DC 20460 telephone number 202–566–2884; fax number 202–566–0966; e-mail address: *sachs.robert@epa.gov*.
- Hand Delivery: Office of Environmental Information Docket, Environmental Protection Agency, EPA West Building, Room B102, 1301 Constitution Ave., NW., Washington, DC 20460. 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. OA–2004–0004. 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.epa.gov/edocket*, 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 EDOCKET,

regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov websites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Office of Environmental Information Docket, EPA/DC, EPA West, Room B102, 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 Office of Environmental Information Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: Mr. Robert D. Sachs, Performance Incentives Division, Office of Business and Community Innovation, Office of Policy, Economics and Innovation, Office of Administrator, Mail Code 1807T, United States Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20460, telephone number 202–566–2884; fax number 202–566–0966; e-mail address: *sachs.robert@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Is There a Parallel Proposal to Today's Action?

There is a parallel proposal to today's action. EPA is publishing this rule without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comment, since these provisions were previously proposed, the Agency accepted public comment, and no comments were received concerning the subject issues today's action addresses. However, in the "Proposed Rules" section of today's **Federal Register** publication, we are publishing a separate document that will serve as the proposal to revise the RCRA provisions described in this action if adverse comments are filed. This rule will be effective on December 27, 2004 without further notice unless we receive adverse comment by November 24, 2004. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

B. Does This Action Apply to Me?

Categories and entities potentially regulated by this action include all entities regulated by EPA, pursuant to its authority under the various environmental statutes, who voluntarily decide to join the Performance Track Program. Thus, potential respondents may fall under any North American Industry Classification System (NAICS) Code. The following table lists the Primary NAICS Codes for all current Performance Track members.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is eligible to be regulated by this action, you should carefully examine the qualifying criteria for the Performance Track Program at *http://www.epa.gov/performancetrack.* If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

PRIMARY NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (NAICS) CODES OF CURRENT PERFORMANCE TRACK MEMBERS

Industry group	SIC	NAICS
Surgical Appliance and Supplies Manufacturing		339113
Laboratory Apparatus and Furniture Manufacturing		339111
Pharmaceutical Preparation Manufacturing		325412
All Other Miscellaneous Chemical Product and Preparation Manufacturing		325998
Fossil Fuel Electric Power Generation		221112
Dry Cleaning and Laundry Services (except Coin-Operated)		812320
Heating Oil Dealers		454311
Paper (except Newsprint) Mills		322121
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing		334220
Surgical and Appliance and Supplies Manufacturing		339113
Research and Development in the Physical, Engineering, and Life Sciences		541710
Plastics Material and Resin Manufacturing		325211
Wood Preservation		321114
All Other Basic Organic Chemical Manufacturing		325199
Ball and Roller Bearing Manufacturing		332991
Tire Manufacturing (except Retreading)		326211
Semiconductor and Related Device Manufacturing		334413
All Other Motor Vehicle Parts Manufacturing		336399
Fruit and Vegetable Canning		311421
Paperboard Mills		322130
Commercial Screen Printing		323113

PRIMARY NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (NAICS) CODES OF CURRENT PERFORMANCE TRACK MEMBERS—Continued

Industry group	SIC	NAICS
Unlaminated Plastics Film and Sheet (except Packaging) Manufacturing		326113
Electronic Computer Manufacturing		334111
Other Motor Vehicle Electrical and Electronic Equipment Manufacturing		336322
Surgical and Medical Instrument Manufacturing		339112
Ophthalmic Goods Manufacturing		339115
All Other Miscellaneous Manufacturing		339999
Hydroelectric Power Generation		221111
Electric Bulk Power Transmission and Control		221121
Electric Power Distribution		221122
Medicinal and Botanical Manufacturing		325411
All Other Miscellaneous Nonmetallic Mineral Product Manufacturing		327999
Printed Circuit Assembly (Electronic Assembly) Manufacturing		334418
Motor Vehicle Body Manufacturing		336211
Dry, Condensed, and Evaporated Dairy Product Manufacturing		311514
Carpet and Rug Mills		314110
Cut Stock, Re-sawing Lumber, and Planing		321912
All Other Basic Inorganic Chemical Manufacturing		325188
Soap and Other Detergent Manufacturing		325611
Custom Compounding of Purchased Resins		325991
All Other Plastics Product Manufacturing		326199
Concrete Block and Brick Manufacturing		327331
Iron and Steel Mills		331111
Aluminum Die-Casting Foundries		331521
Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers		332812
Farm Machinery and Equipment Manufacturing		333111
Office Machinery Manufacturing		333313
Pump and Pumping Equipment Manufacturing		333911
Electron Tube Manufacturing		334411
Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing		334511
Instrument Manufacturing for Measuring and Testing Electricity and Electrical Signals		334515
Prerecorded Compact Disc (except Software), Tape, and Record Reproducing		334612
Magnetic and Optical Recording Media Manufacturing		334613
Motor and Generator Manufacturing		335312
Motor Vehicle Transmission and Power Train Parts Manufacturing		336350
Aircraft Manufacturing		336411
Guided Missile and Space Vehicle Manufacturing		336414
Sporting and Athletic Goods Manufacturing		339920
Solid Waste Combustors and Incinerators		562213
National Security		928110
Potash, Soda, and Borate Mineral Mining		212391
Malt Manufacturing		311213
Cigarette Manufacturing		312221
Canvas and Related Product Mills		314912
Reconstituted Wood Product Manufacturing		321219
Wood Window and Door Manufacturing		321911
Pulp Mills		322110
Nonfolding Sanitary Food Container Manufacturing		322215
Synthetic Organic Dye and Pigment Manufacturing		325132
Synthetic Rubber Manufacturing		325212
Noncellulosic Organic Fiber Manufacturing		325222
In-Vitro Diagnostic Substance Manufacturing		325413
Adhesive Manufacturing		325520
Polish and Other Sanitation Good Manufacturing		325612
Surface Active Agent Manufacturing		325613
Printing Ink Manufacturing		325910
Rubber Product Manufacturing for Mechanical Use		326291
All Other Rubber Product Manufacturing		326299
Plate Work Manufacturing		332313
Metal Can Manufacturing		332431
Other Ordnance and Accessories Manufacturing		332995
Printing Machinery and Equipment Manufacturing		333293
Food Product Machinery Manufacturing		333294
Optical Instrument and Lens Manufacturing		333314
Photographic and Photocopying Equipment Manufacturing		333315
Turbine and Turbine Generator Set Units Manufacturing		333611
Bare Printed Circuit Board Manufacturing		334412
Electronic Capacitor Manufacturing		334414
Automatic Environmental Control Manufacturing for Residential, Commercial, and Appliance Use		334512
Instruments and Related Products Manufacturing for Measuring, Displaying, and Controlling Industrial Process Variables.		334513
Other Communication and Energy Wire Manufacturing		335929

PRIMARY NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (NAICS) CODES OF CURRENT PERFORMANCE TRACK MEMBERS—Continued

Industry group	SIC	NAICS
Current-Carrying Wiring Device Manufacturing		335931
Automobile Manufacturing		336111
Truck Trailer Manufacturing		336212
Gasoline Engine and Engine Parts Manufacturing		336312
Motor Vehicle Air Conditioning Manufacturing		336391
Dental Equipment and Supplies Manufacturing		339114
Musical Instrument Manufacturing		339992
Other Nonhazardous Waste Treatment and Disposal		562219
Industrial Launderers		812332
Regulation and Administration of Transportation Programs		926120
Space Research and Technology		927110

Entities potentially affected by this final action also include state, local, and Tribal governments that have been authorized to implement these regulations.

Outline. The information presented in this preamble is organized as follows:

II. Overview

A. What is the National Environmental Performance Track Program?

The National Environmental Performance Track Program is a voluntary EPA program that recognizes and rewards private and public facilities that demonstrate strong environmental performance beyond current requirements. The program is based on the premise that government should complement existing programs with new tools and strategies that not only protect people and the environment, but also capture opportunities for reducing cost and spurring technological innovation.

Since the program's inception in June 2000, Performance Track membership has grown and has produced solid results. Performance Track encourages participation by small, medium, and large facilities, and its members are located throughout the United States, including Puerto Rico. A broad range of industries are represented, with manufacturers of chemical, electronic and electrical, and medical equipment comprising nearly 40 percent of the members, and both large and small facilities. Over the last three years, Performance Track has received 508 applications and accepted 409. Currently there are 304 members.

Performance Track also provides recognition, regulatory flexibility, and other incentives that promote high levels of environmental performance and provides a learning network where best practices can be shared. In addition, the program encourages continuous environmental improvement through the use of environmental management systems, and fosters public outreach, community involvement, and performance measurement.

Once accepted, members remain in the program for three years, as long as they continue to meet the program criteria. After three years they may apply to renew their membership through a streamlined application process. Facilities applying to Performance Track must have: (1) An Environmental Management System in place for at least one full cycle that has been assessed by an independent party; (2) a history of sustained compliance; (3) past environmental achievements and a commitment to continuous environmental improvement; and (4) community outreach and annual reporting.

For a closer look at the activities and accomplishments of Performance Track members to date, as well as member's goals for future achievements, please refer to the program Web site at *http://www.epa.gov/performancetrack.*

B. What Is the History of This Action?

The revisions EPA is finalizing today concern the August 13, 2002 proposed rule (67 FR 52674), and April 22, 2004 final rule (69 FR 21737) that include provisions under both the Clean Air Act and RCRA. However, today's action applies only to the RCRA provisions. The provisions under the MACT program finalized at 69 FR 21737 are unchanged by today's action.

Today's action revises RCRA regulations to allow hazardous waste generators who are members of Performance Track to extend on-site storage of hazardous waste. Performance Track members may extend storage time to 180 days, and in certain cases 270 days, to accumulate their hazardous waste without a RCRA permit or interim status.

EPA is issuing today's direct final rule to correct one inconsistency and three omissions that were published in the

April 2004 final rule. Since there was a proposed rule on August 13, 2002 during which the Agency accepted public comment, and no comments were received with regard to the subject provisions being corrected today, EPA believes this to be a non-controversial revision and anticipates no adverse comments as a result of today's action.

C. What Is EPA's Rationale for This Rule?

EPA is publishing today's direct final rule solely to revise the inconsistency and omissions from the proposed rule (67 FR 52674), and final rule (69 FR 21737).

III. Final Rulemaking Changes: 180-Day Accumulation Time for Performance Track Hazardous Waste Generators

There are four provisions in today's direct final rule, and three corrections of typographical errors from the rule finalized on April 22, 2004 (69 FR 21737). The preamble section describing § 262.34(j)(2) is corrected, and the regulatory language in §§ 262.34(j)(3)(i), 262.34(j)(3)(ii), and 262.34(j)(7) are corrected to include applicable regulatory provisions that were unintentionally omitted from the April 22, 2004 final rule. There were also three typographical errors on 69 FR page 21748; these are corrected today as described below in section III A 5.

A. What are the Current Requirements for Large Quantity Generator Accumulation, and What Is in Today's Final Rule?

1. Standards for Facilities To Notify States and EPA

Section 262.34(j)(2), facility notification. The April 2004 preamble description of § 262.34(j)(2) is inconsistent with the regulatory language as finalized. Section 262.24(j)(2) requires a facility to submit a notification to the authorized State and the EPA. However, the preamble incorrectly described this notification to be submitted to the authorized State or EPA. The following paragraph replaces the April 22, 2004 preamble section at 69 FR 21747. The description of this section is entitled "Initial Notice."

The revised preamble section now reads as follows: "Initial Notice. Under § 262.34(j)(2), Performance Track generators need to give prior notice to EPA and the authorized State agency of their intent to accumulate hazardous waste in excess of 90 days in accordance with this rule. These notices will assist EPA and state agencies in monitoring implementation of this incentive. Public comments to the proposal expressed concern that such notifications may place an additional burden on facilities with dynamic waste streams if re-notifications are required for each new waste stream. EPA acknowledges this concern, clarifies that notifications are generally one-time events, and estimates that this burden will be of minimal impact to member facilities."

2. Standards for Waste Management in Containers

Section 262.34(j)(3)(i) of the regulatory language in the April 2004 final rule (69 FR 21754) inadvertently omitted a reference for compliance with subparts AA, BB, and CC of 40 CFR part 265 and 40 CFR 264.175 that was included in the preamble of the August 2002 proposal. The reference to subpart I remained in that section of the final rule. The omitted applicable regulatory provisions refer to compliance with RCRA secondary containment standards, and air emission standards for process vents; equipment leaks; and tanks, surface impoundments, and containers. This reference was included at the proposal stage (67 FR 52674), and inadvertently omitted from the final rule. Therefore, the regulatory language in Section 262.34(j)(3)(i) is amended today to read: "Containers, in accordance with the applicable requirements of subparts I, AA, BB, and CC of 40 CFR part 265 and 40 CFR 264.175; or * * *"

3. Standards for Waste Management in Tanks

Section 262.34(j)(3)(ii) of the regulatory language in the April 2004 final rule at 69 FR 21754 omitted the reference to comply with sections AA, BB, and CC of 40 CFR part 265, and omitted an exception to compliance with 40 CFR 265.197(c). The reference to subpart J remained in that section of the final rule. Subparts AA, BB, and CC of 40 CFR part 265 refer to compliance with air emission standards for process vents; equipment leaks; and tanks, surface impoundments, and containers; 40 CFR 265.197(c) refers to interim status standards for closure and post-closure care for tanks. These applicable regulatory provisions were included at the proposal stage (67 FR 52674), and inadvertently omitted from the final rule.

Also in section 262.34(j)(3)(ii), the reference to § 265.200 remained, but the clause "except for § 265.197(c)" was omitted. The effect of omitting § 265.197(c) is that it inadvertently required compliance with § 265.200 (waste analysis and trial tests for tanks), rather than waive the requirement to comply with § 265.200.

Therefore, the regulatory language in § 262.34(j)(3)(ii) is amended today to read: "Tanks, in accordance with the applicable requirements of subparts J, AA, BB, and CC of 40 CFR part 265 except for §§ 265.197(c) and 265.200; or * * *"

When EPA finalized the rule in April 2004, the **Federal Register** preamble section on pages 69 FR 21747–8 correctly described §§ 262.34(j)(3)(i) and 262.34(j)(3)(ii). Since EPA is today correcting the regulatory language, we are repeating the description of that preamble language for clarity.

The preamble section describing §§ 262.34(j)(3)(i) and 262.34(j)(3)(ii) continues to read as follows: "Standards for Accumulation Units. Condition (§ 262.34(j)(3)) in today's rule requires Performance Track generators to accumulate hazardous wastes in storage units (such as containers, tanks, drip pads, and containment buildings) that meet the standards for storing hazardous wastes at RCRA interim status facilities (see subparts I, J, W, and DD of 40 CFR part 265, respectively). These are standard requirements for large quantity generators.

If Performance Track facilities use containers for extended accumulation of hazardous wastes, today's rule additionally requires secondary containment systems for containers to prevent releases into the environment that might be caused by handling accidents, deterioration, or other circumstances. Secondary containment is a standard requirement for RCRA-permitted facilities that use containers to store hazardous wastes containing free liquids and certain listed hazardous wastes (*i.e.*, F020, F021, F023, F026, and F027). It is not, however, typically required for hazardous waste generators or interim status facilities. Public comments (received on the initial proposal 67 FR 52674) on the secondary containment requirement included support for the proposal, concerns about the costs of secondary containment, and recommendations for more stringent requirements. EPA believes that requiring secondary containment in the context of this rule is a reasonable, common-sense precaution to take in exchange for extending accumulation time limits and increasing the volume limit."

4. Standards for Preparedness and Prevention; and Contingency Plan and Emergency Procedures

Section 262.34(j)(7) of the regulatory language at 69 FR 21754 of the April 2004 final rule omitted a reference to comply with subparts C and D of Part 265. The second sentence of the

regulatory language was correct as published. Subparts C and D of 40 CFR Part 265 are provisions for preparedness and prevention, and contingency plan and emergency procedures. The reference to subparts C and D was included in the regulatory language at the proposal stage (67 FR 52674), and inadvertently omitted from the final rule. EPA is amending § 262.34(j)(7) today by correcting the omission that occurred in the final rule. To remain consistent with **Federal Register** publication guidelines, EPA is publishing both sentences of § 262.34(j)(7), even though the second sentence is unchanged from the April 2004 final rule. Therefore, the regulatory language in § 262.34(j)(7) is amended today to read: "The generator complies with the requirements for owners and operators in subparts C & D in 40 CFR part 265, and with §§ 265.16, and 268.7(a)(5). In addition, such a generator is exempt from all the requirements in Subparts G and H of part 265 of this chapter, except for §§ 265.111 and 265.114; and * * *"

The preamble section from the final rule at 69 FR 21737 that described § 262.34(j)(7) was correct as published. EPA repeats the preamble language here.

General Facility Standards. Under current regulations, all hazardous waste generators are subject to certain general facility standards relating to personnel training, preparedness and prevention, and contingency plans and emergency procedures.

These general facility requirements also apply to Performance Track generators, and have been included in this rule for the sake of clarity.

5. Typographical Corrections to the 2004 Preamble at 69 FR 21737

69 FR 21748, middle column, third line. This preamble paragraph as published refers to "§ 262.24(j)(6)." EPA clarifies that it should refer to § 262.34(j)(6).

69 FR 21748, middle column, the first paragraph under Pollution Prevention refers to § 262.34(j)(7), but should refer to § 262.34(j)(8).

69 FR 21748, middle column, the third paragraph under Pollution Prevention refers to § 262.34(8), but should refer to § 262.34(j)(8).

B. How Will Today's Final Rule Affect Applicability of RCRA Rules in Authorized States?

Under section 3006 of RCRA, EPA may authorize a qualified State to administer and enforce a hazardous waste program within the State in lieu of the Federal program, and to issue and enforce permits in the State. (*See* 40 CFR Part 271 for the standards and requirements for authorization.) Following authorization, a State continues to have enforcement responsibilities under its law to pursue violations of its hazardous waste program. EPA continues to have independent authority under RCRA sections 3007, 3008, 3013, and 7003.

After authorization, Federal rules written under RCRA provisions that predate the Hazardous and Solid Waste Amendments of 1984 (HSWA) no longer apply in the authorized state. New Federal requirements imposed by those rules that predate HSWA do not take effect in an authorized State until the State adopts the requirements as State law.

In contrast, under section 3006(g) of RCRA, new requirements and prohibitions imposed by HSWA take effect in authorized States at the same time they take effect in non-authorized States. EPA is directed to carry out HSWA requirements and prohibitions in authorized States until the State is granted authorization to do so.

Today's final rule is not promulgated under HSWA authorities. Consequently, it does not amend the authorized program for states upon promulgation, as EPA does not implement the rule. The authorized RCRA program will change when EPA approves a State's application for a revision to its RCRA program.

For today's Performance Track rule, EPA encourages States to expeditiously adopt Performance Track regulations and begin program implementation. To revise the Federally-authorized RCRA program, States need to seek formal authorization for the Performance Track rule after program implementation. EPA encourages States to begin implementing this incentive as soon as it is allowable under State law, while the RCRA authorization process proceeds.[1]

IV. Summary of Environmental, Energy, and Economic Impacts

Today's direct final rule corrects provisions finalized on April 22, 2004 (69 FR 21737). The economic impact of RCRA § 262.34(j) is not changed by today's rulemaking. That is, the economic analysis conducted by EPA for the Performance Track Rule published in April 2004 at 69 FR 21737 addresses completely the changes being made today.

A. What Are the Cost and Economic Impacts?

There are no cost or economic impacts as a result of today's rulemaking.

B. What Are the Health, Environmental, and Energy Impacts?

There are no health, environmental, or energy impacts to today's rulemaking. Today's changes do not loosen the underlying environmental obligations of Performance Track facilities.

V. Effective Date for Today's Requirements

The changes contained in this final rule will take effect on December 27, 2004. These rule changes apply only to members of the Performance Track, which is a voluntary program. The changes are intended to provide regulatory relief and do not impose new requirements.

VI. Administrative Requirements

A. Executive Order 12866, Regulatory Planning and Review

Today's direct final rule corrects provisions finalized on April 22, 2004 (69 FR 21737). The economic impact of RCRA § 262.34(j) is not changed by today's rulemaking. That is, the economic analysis conducted by EPA for the Performance Track Rule published in April 2004 at 69 FR 21737 addresses completely the changes being made today.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This rule makes corrections to a rule published in April 2004 (69 FR 21737), and requires no additional information collection requirements. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2010–0032, and EPA ICR number 1949.04. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672.

[1] EPA encourages States to take this approach for less stringent Federal requirements where rapid implementation is important. For example, EPA encouraged States to implement State Corrective Action Management Unit Regulations, once adopted as a matter of State law, prior to authorization (*see* 58 FR 8677, February 16, 1993).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

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 generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rule 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 final rule on small entities, small entity is defined as: (1) A small business according to the Small Business Administration definition for the business's NAICS code; (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. This final rule will not impose any requirements on small entities. Today's direct final rule corrects provisions finalized on April 22, 2004 (69 FR 21737) in 40 CFR § 262.34(j). The economic impact of RCRA § 262.34(j) is not changed by today's rulemaking. That is, the economic analysis conducted by EPA for the Performance Track rule published in April 2004 at 69 FR 21737 addresses completely the changes being made today.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 04–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written Statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written Statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that 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. Participation by facilities in the Performance Track is voluntary, and so is participation by State or local government agencies. There are no significant or unique effects on State, local, or Tribal governments. Today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that 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."

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule makes minor corrections to a final rule published in April 2004 at 69 FR 21737. Executive Order 13132 does not apply to this rule.

Stakeholders, including many States, were consulted during the development of the Performance Track Program. Many suggestions and ideas generated by States and other stakeholders provided the basis for some of the provisions in the performance track program. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically sought comment on the 2002 proposed rule from State and local officials.

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications." "Policies that have Tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This final rule does not have Tribal implications. It will not have substantial

direct effects on Tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule. In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and Tribal governments, EPA specifically sought additional comment on the 2002 proposed rule from Tribal officials.

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

Executive Order 13045: "Protection of Children From Environmental Health & Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, EPA has concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs all Federal agencies to use voluntary consensus standards instead of government-unique standards in their regulatory and procurement activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (such as materials specifications, test methods, sampling procedures, business practices) that are developed or adopted by one or more voluntary consensus standards bodies. Examples of organizations generally regarded as voluntary consensus standards bodies include the American Society for Testing and Materials (ASTM), the National Fire Protection Association (NFPA), and the Society of Automotive Engineers (SAE). The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when an Agency does not use available and applicable voluntary consensus standards.

This final rule does not involve technical standards. Thus, the provisions of NTTAA do not apply to this rule and EPA is not considering the use of any voluntary consensus standards.

J. 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 final rule is effective on December 27, 2004.

VII. Statutory Authority

The statutory authority for this action is provided by sections 2002 and 3002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (42 U.S.C. 6912 and 6922).

VIII. Judicial Review

Under section 6976(a) of the Resource Conservation and Recovery Act, judicial review of the RCRA-portion of this final rule is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by December 27, 2004. Under this same section 6976(a) of RCRA, the requirements that are the subject of this final rule may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

List of Subjects in 40 CFR Part 262

Exports, Hazardous materials transportation, Hazardous waste, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

Dated: October 19, 2004.

Michael O. Leavitt,

Administrator.

■ 40 CFR part 262 is amended as follows:

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

■ 1. The authority citation for part 262 continues to read as follows:

Authority: 42 U.S.C. 6906, 6912, 6922–6925, 6937, and 6938.

Subpart C—[Amended]

■ 2. Section 262.34 is amended by revising paragraphs (j)(3)(i), (j)(3)(ii), and (j)(7) to read as follows:

§ 262.34 Accumulation time.

* * * * *

(j) * * *

(3) * * *

(i) Containers, in accordance with the applicable requirements of subparts I, AA, BB, and CC of 40 CFR part 265 and 40 CFR 264.175; or

(ii) Tanks, in accordance with the applicable requirements of subparts J, AA, BB, and CC of 40 CFR part 265, except for §§ 265.197(c) and 265.200; or

* * * * *

(7) The generator complies with the requirements for owners and operators in subparts C and D in 40 CFR part 265, with § 265.16, and with § 268.7(a)(5). In addition, such a generator is exempt from all the requirements in subparts G and H of part 265 of this chapter, except for §§ 265.111 and 265.114; and

* * * * *

[FR Doc. 04–23842 Filed 10–22–04; 8:45 am]

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