WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #3

Do Not Mark In This Box

FILED

2004 AUG 27 A 11:39

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: WV Dept of Environmental Protection-Office of Waste Mgt TITLE NUMBER: 33

CITE AUTHORITY: W.V. Code Section 22-18-6

AMENDMENT TO AN EXISTING RULE: YES X NO ____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 20

TITLE OF RULE BEING AMENDED: 33 CSR 20 "Hazardous Waste Management Rule"

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ____

TITLE OF RULE BEING PROPOSED: ____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Authorized Signature

$25.50

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 27, 2004

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)*

WV Department of Environmental Protection
Division of Water and Waste Management
1356 Hansford Street
Charleston, WV 25301-1401
Telephone: 304-558-5989

LEGISLATIVE RULE TITLE: Hazardous Waste Management Rule 33 CSR 20

1. Authorizing statute(s) citation W.Va. Code §§22-18-6.

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

July 14, 2004.

b. What other notice, including advertising, did you give of the hearing?

DEP Calendar of Events, DEP Website
Secretary of State's Stateline
18 newspapers around the state

c. Date of Public Hearing(s) or Public Comment Period ended:

August 16, 2004.

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached Sign-in Sheet.

Number of comments received Comments attached

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

August 27, 2004.

f. **Name, title, address and phone/fax/email numbers** of agency person(s) to receive *all written correspondence* regarding this rule: (Please type)

Carroll Cather
Environmental Resource Specialist III
Division of Water and Waste Management
1356 Hansford Street
Charleston, WV 25301-1401
Telephone: 304-558-2505
Fax: 304-558-0256
Email: ccather@dep.state.wv.us.

g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

Not applicable.

b. Date of hearing or comment period.

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefore?

d. Attach findings and determinations and reasons:

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: Hazardous Waste Management 33 CSR 20

A. AUTHORITY: **WV Code §22-18-6**

B. SUMMARY OF RULE:

The proposed amendment adopts and incorporates by reference federal regulations pertaining to hazardous waste management 40 CFR parts 260 through 279 effective on July 1, 2004.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

This rule is proposed to adopt changes to federal hazardous waste management regulations into the State hazardous waste management rule, enabling the State hazardous waste program to maintain consistency with the federal program.

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

W.Va. Code Section §22-1-3 in conjunction with W.Va. Code Section §22-1-3a requires, in part, the Secretary of the Department of Environmental Protection, to determine if a new or amended environmental provision should be the same in substance as a counterpart federal regulation. If the new rule should be the same in substance, as the counterpart federal regulation, then the Secretary shall incorporate by reference, to the greatest extent possible, the federal counterpart rule. If the Secretary determines the rule should not be the same in substance as the federal counterpart rule, then the Secretary shall file a statement setting forth the difference between the proposed rule and the counterpart federal regulation. W.Va. Code Section §22-1-3a requires the Secretary to conduct the "stringency" determination and provide specific reasons for deviation of the proposed state rule from the federal counterpart regulation.

The proposed amendment to the rule will adopt additional federal counterpart regulations by reference.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with §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:

As its June 24, 2004 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: Title 33, Series 20, Hazardous Waste Management

Type of Rule: XX **Legislative** _____ **Interpretive** _____ **Procedural**

Agency Department of Environmental Protection

Address Office of Waste Management

1356 Hansford Street

Charleston, WV 25301-1401

---

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$ 0	$ 0	$ 0	$ 0	$ 0
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. **Explanation of above estimates:**

This amendment will adopt by reference federal regulations in effect as of July 1, 2004. Most changes to the rule are clarifications or technical corrections. These amendments are not projected to require additional operating expenses above the current level.

3. **Objectives of these rules:**

The objective of this rule is to stay in compliance with federal guidelines when implementing the State program. The consistency achieved in these revisions assures the State of maintaining its authorization status and, in turn, the continued receipt of federal funds that are vitally needed to implement the program.

Rule Title: Title 33, Series 20 Hazardous Waste Management

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Not anticipated to be appreciable.

B. Economic Impact on Political Subdivisions; Specific Industries, Specific groups of Citizens.

Not anticipated to be appreciable.

C. Economic Impact on Citizens/Public at Large.

N/A

FILED

2004 AUG 27 A 11: 39

OFFICE WEST VIRGINIA
SECRETARY OF STATE

TITLE 33
LEGISLATIVE RULES
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF WASTE MANAGEMENT

SERIES 20
HAZARDOUS WASTE MANAGEMENT RULE

§33-20-1. Scope and Authority.

1.1. Scope and Purpose. -- 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.

1.2. Authority. -- This rule is promulgated pursuant to the West Virginia Hazardous Waste Management Act, W. Va. Code, §22-18-6.

1.3. Filing Date. -- ~~April 8, 2004.~~

1.4. Effective Date. -- ~~April 8, 2004.~~

1.5. Incorporation by Reference. -- Whenever either federal statutes or regulations or state statutes or rules are incorporated by reference into this rule, the reference is to that statute or regulation in effect on July 1, ~~2002~~ 2004, unless otherwise noted in the text of this rule. This incorporation by reference is not intended to replace or abrogate federal authorities granted the Resource Conservation and Recovery Act of 1976.

1.5.a. In applying the federal requirements incorporated by reference throughout this rule, the following exceptions or substitutions apply, unless the context clearly requires otherwise or the referenced rule cannot be delegated to the state:

1.5.a.1. "Office of Waste Management, West Virginia Department of Environmental Protection" will be substituted for "Environmental Protection Agency."

1.5.a.2. "Director of the Office of Waste Management, West Virginia Department of Environmental Protection" will be substituted for "Administrator," "Regional Administrator," and "Director." In those sections that are not adopted by reference or that are not delegable to the state, "Administrator", "Regional Administrator", and "Director" will have the meaning defined in 40 CFR § 260.10.

1.5.a.3. Whenever the regulations require publication in the "Federal Register" compliance will be accomplished by publication in the "West Virginia Register," a part of the "State Register" created pursuant to the provisions of W. Va. Code, §29A-2-2 for those areas applicable and delegable to the state.

1.5.a.4. Whenever in the federal regulation reference is made to the Resource Conservation and Recovery Act of 1976 §3010, as amended (42 U.S.C. § 6930), the reference is to section 4 ~~of this rule~~. The notification requirements of the Resource Conservation and Recovery Act of 1976 §§ 3010 remain in effect and will be satisfied by compliance with section 4 ~~of this rule~~.

1.6. Cross Reference. -- Whenever a reference is cited in a provision incorporated by reference which cross reference was not incorporated by reference, the provisions of the applicable state law and rules, if any, control to the extent of any conflict or inconsistency. Where state rules are present and there is a question, the state rules govern. Where there are no state rules present, federal regulations govern. For example, cross reference to 40 CFR part 264 subpart O -- Incinerators, which was not incorporated by reference, would need to be referenced to the applicable West Virginia Department of Environmental Protection, ~~Division~~ Office of Air Quality rule, 45 CSR 25, "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities."

1.7. Inconsistencies with the West Virginia Code. -- In the event a provision of the Code of Federal Regulations incorporated by reference herein includes a section which is inconsistent with the West Virginia Code, the West Virginia Code controls to the extent federal law does not preempt the state law. In the event a provision of the Code of Federal Regulations incorporated by reference herein is beyond the scope of authority granted the Department of Environmental Protection pursuant to statute, or is in excess of the statutory authority, the provision will be and remain effective only to the extent authorized by the West Virginia Code.

1.8. Provisions Applied Prospectively. -- The provisions of this rule are to be applied prospectively. All orders, determinations, demonstrations, rules, permits, certificates, licenses, waivers, bonds, authorizations and privileges which have been issued, made, granted, approved or allowed to become effective by the Director, and which are in effect on the date this rule becomes effective, will continue in effect according to their terms unless modified, suspended or revoked in accordance with the law.

1.9. This rule references the provisions of West Virginia Department of Environmental Protection, ~~Division~~ Office of Air Quality rule, 45 CSR 25, "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities" effective on ~~July 1, 2003~~ June 1, 2005.

§33-20-2. Hazardous Waste Management System: General.

2.1. 40 CFR Part 260. -- The provisions of 40 CFR part 260 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

2.1.a. The definitions of terms used in this rule will have the meaning ascribed to them in 40 CFR parts 260, 261, 262, 263, 264, 265, 266, 267, 268, 270, 273 and 279 with the exceptions, modifications and additions set forth in this section.

2.1.a.1. "Full regulation" means those rules applicable to generators of greater than one thousand (1000) kilograms of non-acutely hazardous waste in a calendar month and/or who treat, store or dispose of hazardous waste at their facility.

2.2. 40 CFR § 260.2. B -- The provisions of 40 CFR § 260.2 are excepted from incorporation by reference. Availability of information provided under this rule is controlled by the provisions of W. Va. Code, §22-18-12.

2.3. 40 CFR § 260.21(d). B -- The provisions of 40 CFR § 260.21(d) are excepted from incorporation by reference.

2.4. Petitions for Waste Exclusions.

2.4.a. Any person seeking to exclude a waste at a particular generating facility from 40 CFR § 261.3 or 40 CFR part 261, subpart D, as incorporated by this rule, may petition the Director for an exclusion following the procedures established in 40 CFR § 260.20 and 40 CFR § 260.22. The Department of Environmental Protection will utilize EPA guidance in evaluating delisting petitions.

2.4.b. An initial non-refundable fee of $1,000.00 must accompany all petitions submitted under this rule. The petitioner must execute an agreement with the Director providing for the recovery of all reasonable costs incurred by the Department of Environmental Protection attributable to the review and investigation of the petition in excess of the initial fee submitted with the petition.

2.4.b.1. Recoverable costs will be determined by the number of hours worked under the agreement by the primary Department of Environmental Protection employee multiplied by 2.5 times the hourly rate of that employee and then adding direct expenses incurred by that employee. Costs related to independent contractors retained by the Department of Environmental Protection to assist in the review and investigation of petitions will be included as direct expenses.

2.4.b.2. Within thirty (30) calendar days of receiving a petition under this section, the

Department of Environmental Protection will send the petitioner an itemized list of estimated costs it expects to incur as a result of reviewing and investigating the petition. The list will include anticipated outside contractor costs.

2.4.b.3. If, upon review of the itemized list of estimated costs submitted by the Department of Environmental Protection, the petitioner determines not to continue the petition process, the petitioner, if he wishes to withdraw the petition, must submit a certified letter to the Director withdrawing the petition. If the letter is submitted within ten (10) days of the date of receipt of the Department of Environmental Protection's list of estimated costs, the petitioner will not be liable for any costs incurred in excess of the initial application fee.

2.4.c. Where the Administrator of the EPA has granted a petition to exclude hazardous waste from 40 CFR § 261.3 or 40 CFR part 261, subpart D, pursuant to 40 CFR § 260.22, the Director will accept the determination and amend this rule accordingly, provided:

2.4.c.1. Petitioner submits a copy of the petition submitted to the Administrator, including all demonstrative information and a copy of the Administrator's approval granting the exclusion pursuant to 40 CFR § 260.20(e); and

2.4.c.2. No scientifically supportable reasons for denying the petition are advanced which had not been presented to the Administrator.

2.5. Petitions to amend the regulations to include additional wastes as universal wastes.

2.5.a. Persons desiring to include a waste as a universal waste must petition the Director for an inclusion after having received approval from the Administrator of the Environmental Protection Agency. The petition will include:

2.5.a.1. A copy of the petition submitted to the Administrator of the Environmental Protection Agency pursuant to 40 CFR §260.23, including all demonstration information;

2.5.a.2. A copy of the Administrator's approval granting the petition under 40 CFR § 260.23 and 40 CFR § 260.20 and 40 CFR part 273; and

2.5.a.3. Any additional information which may be required for the Director to evaluate the petition.

2.5.b. Within one hundred and twenty (120) days of the filing of the petition the Director will decide whether to approve or to deny the petition and so advise the petitioner. Where a decision to deny a petition is made, the Director will notify the petitioner of the action in writing, setting forth the reasons therefor.

2.5.c. The Director will not deny a petition to include a waste as a universal waste that has been approved by the Administrator unless scientifically supportable reasons for the denial are advanced which had not been presented to the Administrator.

2.5.d. Any person may petition the Director to include a waste as a universal waste as follows:

2.5.d.1. Submit a petition to the Director demonstrating that regulation under the universal waste regulations of 40 CFR part 273 is appropriate for the waste or category of waste; will improve management practices for the waste or category of waste; and will improve implementation of the Hazardous Waste Program. The petition must also include information required by 40 CFR § 260.20(b), and include as many of the factors listed in 40 CFR § 273.81 as are appropriate for the waste or category of waste addressed in the petition.

2.5.d.2. The Director will grant or deny a petition using the factors listed in 40 CFR § 273.81. The decision will be based on the weight of evidence showing that regulation under 40 CFR part 273 is appropriate for the waste or category of waste, will improve management practices for the waste or category of waste, and will improve implementation of the Hazardous Waste Program.

2.5.d.3. The decision of the Director will be in writing and state the reasons to either grant or deny the petition. Any petitioner aggrieved by the decision of the Director may appeal the decision to the Environmental Quality Board in accordance with the provisions of W.Va. Code § 22-18-20.

§33-20-3. Identification and Listing of Hazardous Waste.

3.1. 40 CFR Part 261. -- The provisions of 40 CFR part 261 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

3.1.a. In order for a mixture of a waste and one or more hazardous wastes identified in 40 CFR § 261.3(a)(2)(iv) to be exempt from the definition of hazardous waste, the owner or operator must comply with the following:

3.1.a.1. Provide a certification in writing to the Director that groundwater monitoring complying with either 40 CFR part 265, subpart F or which is approved by the Director, is or will be in place at the wastewater treatment facility identified in 40 CFR § 261.3(a)(2)(iv). A time schedule for the installation of groundwater monitoring must be included. This requirement does not apply to wastewater treatment units or containers.

3.1.a.2. Before claiming an exemption, the owner or operator of each wastewater treatment facility receiving mixtures of wastes under 40 CFR § 261.3(a)(2)(iv) must notify the Director of the receipt of the wastes on a form prescribed by the Director.

3.1.a.3. Annually submit to the Director a list of hazardous wastes that are expected to be present in the mixture to be exempted.

3.2. The provisions of 40 CFR § 261.5 (f)(3)(iv) and (v) and 40 CFR § 261.5(g)(3)(iv) and (v) are excepted from incorporation by reference. Conditionally exempt small quantity generators must notify the Director of their hazardous waste activity in accordance with section 4 ~~of this rule~~.

§33-20-4. Notification of Hazardous Waste Activity Regulations.

4.1. Applicability. Any person that engages in a hazardous waste activity in the State of West Virginia must notify the Director of these activities when that activity begins, unless those activities are exempted from the requirements of this rule.

4.1.a. Any person as described in subsection 4.1 ~~of this rule~~ that has notified the EPA or is subject to the requirements to notify EPA as specified in volume 45, number 39 of the Federal Register, dated February 26, 1980, pages 12746 through 12754, is subject to the provision of section 4 ~~of this rule~~.

4.1.b. The purpose of section 4 ~~of this rule~~ is to provide a means for the State of West Virginia to utilize the information provided by all who complied with the notification requirements of EPA as described in subdivision 4.1.a ~~of this rule~~ or all who initiated hazardous waste activities subsequent to the requirements of EPA as referenced above in subdivision 4.1.a ~~of this rule~~ to notify the Director of their hazardous waste activities.

4.2. Notification. Any person that notified EPA of hazardous waste activities as referenced above in subsection 4.1. ~~of this rule~~ must provide a copy of that notification to the Director.

4.2.a. Any person involved in hazardous waste activities that did not comply with the notification requirements of EPA, as referenced above in subsection 4.1 ~~of this rule~~, but is subject to those requirements must notify the Director in writing of his hazardous waste activities within thirty (30) days of the effective date of this rule. Notification may be accomplished by the use of EPA Form 8700-12 or the provision of the same information in any other manner selected by the notifier.

4.2.b. Any person exempted from the federal notification requirements as specified in 40 CFR §§ 261.6(b) and 261.5, but subject to West

Virginia notification requirements, must notify the Director in writing of his hazardous waste activities on the date of initiation of these activities. Notification may be accomplished by use of EPA Form 8700-12 or the provision of the same information in any other manner selected by the notifier.

4.2.c. One notification form is required for each generator.

4.2.d. A notification form is required for each storage, treatment, disposal, or other facility. However, if one facility site includes more than one storage, treatment, or disposal activity, only one notification form for the entire facility site is required.

4.2.e. Generators that store, treat, or dispose of hazardous waste on-site must file a notification form for generation activities as well as storage, treatment, and disposal activities, unless those activities are exempted from the requirements of this rule.

4.2.f. New generators and those initiating activities subsequent to the EPA notification period referenced in subdivision 4.1.a ~~of this rule~~ must comply with the EPA identification number requirements and must provide a copy of their application for an EPA identification number to the Administrator.

§33-20-5. Standards Applicable to Generators of Hazardous Waste.

5.1. 40 CFR Part 262. -- The provisions of 40 CFR part 262 are hereby adopted and incorporated by reference with the modifications, exceptions and additions contained in this section.

5.2. 40 CFR § 262.10(g). -- The provisions of 40 CFR § 262.10(g) will be excepted from incorporation.

5.2.a. A person who generates a hazardous waste as defined by 40 CFR part 261 is subject to the compliance requirements and penalties prescribed in W. Va. Code, §22-18-1 et seq. if he or she does not comply with the requirements of this rule. This rule in no way abrogates the enforcement authority of the Resource Conservation and Recovery Act of 1976 § 3008.

5.2.b. All references to 40 CFR § 262.10(g) will be deemed references to subsection 5.2 ~~of this rule~~ and the subdivisions herein, as appropriate.

5.3. 40 CFR § 262.10(j). -- The provisions of 40 CFR § 262.10(j) (1) and (2) including Table 1 will be excepted from incorporation.

5.4. 40 CFR Part 262, Subpart E. -- The provisions of 40 CFR part 262, subpart E -- Exports of Hazardous Waste are hereby adopted and incorporated by reference. The substitution of terms in subdivision 1.5.a ~~of this rule~~ does not apply to the provisions of this subsection. In addition to the requirements contained therein, any person subject to the provisions of subpart E must file with the Director copies of all documentation, manifests, exception reports, annual reports or records, submitted to EPA, the Administrator or the Regional Administrator as required by and within the time frames set forth in subpart E.

5.5. 40 CFR Part 262, Subpart H. -- The provisions of 40 CFR part 262, subpart H -- Transfrontier Shipments of Hazardous Waste for Recovery within the OECD are hereby adopted and incorporated by reference. The substitution of terms in subdivision 1.6.a. ~~of this rule~~ does not apply to the provisions of this subsection. In addition to the requirements contained therein, any person subject to the provisions of subpart H must file with the Director copies of all documentation, manifests, exception reports, annual reports or records, submitted to EPA, the Administrator or the Regional Administrator as required by and within the time frames set forth in subpart H.

5.6. 40 CFR Part 262, Subpart I. -- The provisions of 40 CFR part 262, subpart I -- New York State Public Utilities will be excepted from incorporation.

5.7. 40 CFR Part 262, Subpart J. -- The provisions of 40 CFR part 262, subpart J -- University Laboratories XL Project -- Laboratory Environmental Management Standard will be

excepted from incorporation.

§33-20-6. Standards Applicable to Transporters of Hazardous Waste.

6.1. 40 CFR Part 263. -- The provisions of 40 CFR part 263 are hereby adopted and incorporated by reference insofar as those regulations relate to the transportation of hazardous waste by air and water.

6.2. The use of railroads for the transportation of hazardous waste is regulated by the West Virginia Public Service Commission rules, "Rules and Regulations Governing the Transportation of Hazardous Waste by Rail", 150 CSR 11. The use of the state highways for the transportation of hazardous waste is regulated under the West Virginia Division of Highways, "Transportation of Hazardous Wastes Upon the Roads and Highways", 157 CSR 7.

§33-20-7. Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities.

7.1. 45 CSR 25, ~~Division~~ Office of Air Quality, -- The standards in section 7 ~~of this rule~~ apply to owners and operators of all facilities which treat, store, or dispose of hazardous waste except as otherwise provided by law. In addition to the standards in section 7 of this rule, 45 CSR 25, "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities", ~~apply~~ applies to management facilities which may emit hazardous waste or the constituents thereof to the atmosphere including incineration facilities except as otherwise provided by law. For purposes of section 7 ~~of this rule~~, the following persons are considered to be incinerating hazardous waste:

7.1.a. Owners or operators of hazardous waste incinerators; and

7.1.b. Owners or operators of boilers or industrial furnaces used to destroy wastes.

7.2. 40 CFR Part 264. -- The provisions of 40 CFR part 264 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

7.3. Required Receipt of Identical Notification. -- The provisions of 40 CFR §§ 264.12(a)(1) and (2) are retained by the Environmental Protection Agency; however, the Director of the Office of Waste Management must receive identical notification.

7.4. Releases from Solid Waste Management Unit. -- The provisions of 40 CFR part 264, subpart F -- Releases from solid waste management units are incorporated by reference with the following modifications, exceptions and additions.

7.4.a. For purposes of 40 CFR § 264.92, reference to the "Regional Administrator" will be to the "Environmental Quality Board." The Environmental Quality Board establishes groundwater protection standards pursuant to the authority granted the board in W. Va. Code, §22-12-4.

7.4.b. For purposes of 40 CFR § 264.94 and subparagraphs thereof, the Environmental Quality Board rule on groundwater protection standards, 46 CSR 12 will apply as required pursuant to the authority granted the Environmental Quality Board in W. Va. Code, §22-12-4.

7.4.c. The provisions of 40 CFR § 264.99(g) are incorporated by reference with the following modifications:

7.4.c.1. The Director will specify in the facility permit the frequencies for collecting samples required under 40 CFR § 264.99(g). This frequency will not be less than once every five years.

7.5. Financial Requirement. -- The provisions of 40 CFR part 264, subpart H -- Financial Requirements are adopted and incorporated by reference with the following modifications:

7.5.a. The provisions of 40 CFR §§ 264.149 and 264.150 are excepted from incorporation by reference.

7.6. Provisions Relating to Incinerators. -- The provisions of 40 CFR §§ 264.341, 264.342, 264.343, 264.344, 264.345 and 264.347(a) relating to incinerators are excepted from incorporation by reference. Consult the rules of the ~~Division~~ Office of Air Quality regarding emissions from incinerators. The ~~Division~~ Office of Air Quality retains its authority to enforce the air monitoring items listed in 40 CFR §264.347(a) related to incinerating hazardous waste. The Office of Waste Management retains its authority to enforce 40 CFR §§ 264.347(b)(c)(d).

7.6.a. Consult the ~~Division~~ Office of Air Quality, 45 CSR 25, "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities."

7.7. 40 CFR Part 264, Subparts AA, BB, CC and 40 CFR § 264.1080(f); and 40 CFR § 264.1080(g). -- The provisions of 40 CFR § 264.1080(f); and 40 CFR § 264.1080(g) are hereby adopted and incorporated by reference and the remaining provisions of 40 CFR part 264, subparts AA, BB, and CC are excepted from incorporation by reference. Consult the rules of the ~~Division~~ Office of Air Quality regarding air emissions from process vents, equipment leaks, tanks, surface impoundments and containers.

§33-20-8. Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities.

8.1. 40 CFR Part 265. -- The provisions of 40 CFR part 265 are adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

8.2. 40 CFR §§ 265.12(a), 265.149 and 265.150. -- The provisions of 40 CFR §§ 265.12(a)(1) and (2), 265.149, and 265.150 are excepted from incorporation by reference. The Director of the Office of Waste Management must receive identical notification.

8.3. 40 CFR §§265.341, 265.345, 265.347 (a), 265.352. -- The provisions of 40 CFR §§ 265.341, 265.345, 265.347(a) and 265.352 relating to incinerators are excepted from incorporation by reference. Consult the rules of the ~~Division~~ Office of Air Quality regarding emissions from incinerators. The ~~Division~~ Office of Air Quality retains its authority to enforce the air monitoring items listed in 40 CFR §265.347(a) related to incinerating hazardous waste. The Office of Waste Management retains its authority to enforce 40 CFR §§ 265.347(b)(c)(d).

8.4. Thermal Treatment. -- The provisions of 40 CFR Part 265, Subpart P -- Thermal Treatment are incorporated by reference except for the provisions of 40 CFR § 265.375 and 40 CFR § 265.383 which are excepted from incorporation by reference. Consult the rules of the ~~Division~~ Office of Air Quality regarding emissions from thermal treatment units.

8.5. 40 CFR Part 265 Subparts AA, BB, CC and 40 CFR § 265.1080(f); and 40 CFR § 265.1080(g). -- The provisions of 40 CFR § 265.1080(f); and 40 CFR § 265.1080(g) are hereby adopted and incorporated by reference and the remaining provisions of 40 CFR part 265, subparts AA, BB, and CC are excepted from incorporation by reference. Consult the rules of the ~~Division~~ Office of Air Quality regarding air emission standards for process vents and air emmission standards for equipment leaks, and air emission standards for tanks, surface impoundments and containers.

§33-20-9. Standards for the Management of Specific Hazardous Wastes and Specific Types of Hazardous Waste Management Facilities.

40 CFR Part 266. -- The provisions of 40 CFR part 266 are hereby adopted and incorporated by reference. Consult the rules of the ~~Division~~ Office of Air Quality regarding Subpart H of this part.

§33-20-10. Land Disposal Restrictions.

10.1. 40 CFR Part 268. -- The provisions of 40 CFR part 268 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

10.2. 40 CFR §§ 268.5, 268.6, 268.10 - .13, 268.42(b) and 268.44. -- The provisions of 40 CFR §§ 268.5, 268.6, 268.10, 268.11, 268.12,

268.13, 268.42(b) and 268.44 are excepted from incorporation by reference.

10.3. Definition of Administrator in 40 CFR ~~Part~~ § 268.40(b). The term "Administrator" in 40 CFR § 268.40(b) will retain its meaning as defined in 40 CFR § 260.10.

§33-20-11. The Hazardous Waste Permit Program.

11.1. 40 CFR Part 270. -- The provisions of the 40 CFR part 270 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

11.2. 40 CFR § 270.2 Definitions.

11.2.a. Definition of "RCRA permit". -- For purposes of this section, the term "RCRA permit" means "West Virginia Hazardous Waste Management Permit". The following additional requirements will apply to obtain a Hazardous Waste Management Permit in West Virginia. All references in 40 CFR part 270 to 40 CFR part 124 will be deemed to be references to the applicable provisions of subsections 11.4 through 11.17 ~~of this rule~~. To the extent of any inconsistency with 40 CFR part 270, the specific provisions contained herein will control.

11.3. Application Fees.

11.3.a. Any person who applies for a permit for the construction or operation of a hazardous waste management facility, or both, must submit as part of the application a money order or cashier's check payable to "The Hazardous Waste Management Fund" of the state treasury. Persons required to obtain a permit-by-rule pursuant to this rule are not required to pay a permit application fee.

11.3.b. The fee will be determined by the schedule set forth in table 1 ~~of this rule~~. If the cumulative total of application fees imposed under this section equals or exceeds fifty thousand dollars ($50,000) then the person required to pay the fees may, at the person's option, elect to submit the fee payments in installments over a three year period. The installments submitted to the Department of Environmental Protection may not be less frequent than annually and the amount submitted annually may not be less than one-third of the total amount due.

11.3.c. The fee for permit renewal is the same as for an initial permit.

11.4. Pre-application Public Meeting and Notice

11.4.a. Applicability. The requirements of this subsection will apply to West Virginia Hazardous Waste Management Part B permit applicants seeking initial permits for hazardous waste management units. The requirements of this section will also apply to West Virginia Hazardous Waste Management Part B permit applicants seeking renewal of permits for those units, when the renewal application is proposing a significant change in facility operations. For the purposes of this section, a "significant change" is any change that would qualify as a Class 3 permit modification (See 40 CFR § 270.42 for a description of permit modifications). The requirements of this section 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.

11.4.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 must post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.

11.4.c. The applicant must submit a summary of the meeting, along with the list of attendees and their addresses developed under subsection 11.4.b, and copies of any written comments or materials submitted at the meeting, to the permitting agency as a part of the Part B application, in accordance with 40 CFR § 270.14(b).

11.4.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 upon request, documentation of the notice.

11.4.d.1. The applicant must provide public notice in all of the following forms:

11.4.d.1.A. A newspaper advertisement. The applicant must publish a notice, fulfilling the requirements in paragraph 11.4.d.2 ~~of this section~~, in a newspaper of general circulation in the county or equivalent jurisdiction that hosts the proposed location of the facility. In addition, the Director will instruct the applicant to publish the notice in newspapers of general circulation in adjacent counties or equivalent jurisdictions, where the Director determines that publication is necessary to inform the affected public. The notice must be published as a display advertisement.

11.4.d.1.B. A visible and accessible sign. The applicant must post a notice on a clearly marked sign at or near the facility, fulfilling the requirements in paragraph 11.5.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.

11.4.d.1.C. A broadcast media announcement. The applicant must broadcast a notice, fulfilling the requirements in paragraph 11.4.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 Director.

11.4.d.1.D. A notice to the permitting agency. The applicant must send a copy of the newspaper notice to the permitting agency and the Director 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.

11.4.d.2. The notices required under paragraph 11.4.d.1. ~~of this section~~ must include:

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

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

11.4.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;

11.4.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

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

11.5. Public Notice Requirements at the Application Stage.

11.5.a. Applicability. The requirements of this subsection apply to all West Virginia Hazardous Waste Management Part B permit applicants seeking initial permits for hazardous waste management units. The requirements of this section also apply to Hazardous Waste Management Part B permit applicants seeking renewal of permits for these units upon the expiration of the existing permit. The requirements of this section 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.

11.5.b. Notification. The Director will provide public notice as required in subsection 11.5 ~~of this rule~~ when a Part B permit application has been submitted. The Director will provide public notice to:

11.5.b.1. The applicant;

11.5.b.2. All persons on a mailing list

developed under subparagraph 11.11.d.1.D ~~of this rule~~; and

11.5.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 Director and is available for review.

11.5.b.4. Any person otherwise entitled to receive notice under subdivision 11.5.b ~~of this rule~~ may waive the right to receive notice for any classes and categories of permits.

11.5.c. The notice will be published within a reasonable period of time after the application is received by the Director. The notice must include:

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

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

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

11.5.c.4. The location where copies of the permit application and any supporting documents can be viewed and copied;

11.5.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

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

11.5.d. Concurrent with the notice required under subdivision 11.5.b, the Director 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's office.

11.6. Information Repository.

11.6.a. Applicability. The requirements of this section apply to all applicants seeking West Virginia Hazardous Waste Management Permits for hazardous waste management units.

11.6.b. The Director will assess the need, on a case-by-case basis, for an information repository. When assessing the need for an information repository, the Director 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 Director determines, at any time after submittal of a permit application, that there is a need for a repository, then the Director will notify the facility that it must establish and maintain an information repository.

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

11.6.d. The information repository will be located and maintained at a site chosen by the facility. If the Director 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 Director will specify a more appropriate site.

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

11.6.f. The facility owner/operator must be responsible for maintaining and updating the repository with appropriate information

throughout a time period specified by the Director. The Director will close the repository at his or her discretion, based on the factors in subdivision 11.6.b ~~of this section~~.

11.7. Application for a Permit.

11.7.a. Any person who requires a permit under this rule must complete, sign, and submit to the Director an application for each permit required under this rule. Applications are not required for hazardous waste permits by rule pursuant to 40 CFR § 270.60. The Director 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.

11.7.b. The Director will review for completeness every application. Each application submitted by a new hazardous waste management facility, will be reviewed for completeness by the Director 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), will be reviewed for completeness within 60 days of receipt. Upon completing the review, the Director will notify the applicant in writing whether the application is complete. If the application is incomplete, the Director will list the information necessary to make the application complete. When the application is for an existing hazardous waste management facility, the Director will specify in the notice of deficiency a date for submitting the necessary information. The Director will notify the applicant that the application is complete upon receiving this information. After the application is completed, the Director will request additional information from the applicant but only when necessary to clarify, modify or supplement previously submitted material. Request for additional information will not render an application incomplete.

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

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

11.7.e. The effective date of an application is the date on which the Director notifies the applicant that the application is complete as provided for in subdivision 11.7.b.

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

11.7.f.1. Prepare a draft permit;

11.7.f.2. Give public notice;

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

11.7.f.4. Issue a final permit.

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

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

11.8.b. If the Director decides the request is not justified, he or she 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 Director may be appealed to the Environmental Quality Board in accordance with section 15 ~~of this rule~~.

11.8.b.1. If the Director initially

decides to modify or revoke and reissue a permit under 40 CFR §§ 270.41 or 270.42 (c), he or she will prepare a draft permit under section 11.9 incorporating the proposed changes. The Director 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 Director will require the submission of a new application.

11.8.b.2. In a permit modification under this section, only those conditions to be modified will be reopened when a new draft permit is prepared. When a permit is revoked and reissued under this section, the entire permit is reopened During any revocation and reissuance proceeding the permittee must comply with all conditions of the existing permit until a new final permit is reissued.

11.8.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 section.

11.8.c. If the Director decides to terminate a permit under 40 CFR § 270.43, he or she 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 11.9 ~~of this rule~~.

11.9. Draft Permits.

11.9.a. Once an application is complete, the Director will decide whether to prepare a draft permit or to deny the application.

11.9.b. If the Director decides to deny the permit application, he or she 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 any draft permit prepared under this section. If the Director's final decision is that the initial decision to deny the permit application was incorrect, he or she will withdraw the Notice of Intent to Deny and proceed to prepare a draft permit.

11.9.c. If the Director decides to issue a draft permit, he or she will prepare a draft permit that contains the following information:

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

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

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

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

11.9.d. All draft permits prepared by the Director under this section will be accompanied by a fact sheet and will be based on the administrative record, publicly noticed and made available for public comment.

11.10. Fact Sheet

11.10.a. A fact sheet will be prepared for every draft permit for a hazardous waste management facility, which the Director finds is the subject of wide-spread public interest or raises major issues. The fact sheet will briefly set forth the principal facts and the significant factual, legal, and methodological and policy questions considered in preparing the draft permit. The Director will send the fact sheet to the applicant and to anyone who requests it.

11.10.b. The fact sheet will include when applicable:

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

11.10.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;

11.10.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;

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

11.10.b.5. A description of the process for reaching a final decision on a draft permit including:

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

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

11.10.b.5.C. Any other procedures by which the public participates in the final decision.

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

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

11.11.a. Scope. The Director will give public notice if the following actions have occurred:

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

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

11.11.b. No public notice is required when a request for permit modification, revocation and reissuance, or termination is denied under subsection 11.8 ~~of this rule~~. Written notice of that denial will be given to the requester and to the permittee.

11.11.c. Timing. Public notice of the preparation of a draft permit (including a Notice of Intent to Deny a Permit Application) required under subdivision 11.11.a ~~of this rule~~ will allow at least forty-five (45) days for public comment. Public notice of a public hearing will 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.)

11.11.d. Public notice of activities described in subdivision 11.11.a will be given by the following methods:

11.11.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):

11.11.d.1.A. The applicant;

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

11.11.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;

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

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

11.11.d.1.D.2. Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

11.11.d.1.D.3. Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in the publications as regional and state funded newsletters, environmental bulletins, or state law journals. The Director will update the mailing lists from time to time by requesting written indications of continued interest from

those listed. The Director will delete from the lists the name of any person who fails to respond to the request.

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

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

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

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

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

11.11.e. All public notices issued under this section will contain the following minimum information:

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

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

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

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

11.11.e.5. A brief description of the comment procedures required by subsections 11.12 and 11.13 ~~of this rule~~ 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.

11.11.e.6. The location of the administrative record, the times that the record will be open for public inspection; and

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

11.11.f. Public notices for hearings. In addition to the general public notice described in subdivision 11.11.e ~~of this section~~, the public notice of a hearing will contain the following information:

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

11.11.f.2. Date, time, and place of the hearing; and

11.11.f.3. A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

11.11.g. In addition to the general public notice described in subdivision 11.11.e ~~of this section~~, all persons identified in subparagraphs 11.11.d.1.A, 11.11.d.1.B, and 11.11.d.1.C ~~of this section~~ will be mailed a copy of the fact sheet, the permit application and the draft permit, as applicable.

11.12. Public Comments and Requests for Public Hearings.

During the public comment period provided under subsection 11.11. ~~of this rule~~, any interested person may submit written comments on the draft permit and may request a public hearing, if a hearing has not already been scheduled. A request for a public hearing must be in writing and must state the nature of the issues proposed to be raised in the hearing. All comments will be considered

in making the final decision and will be answered as provided in subsection 11.16 ~~of this rule~~.

11.13. Public Hearings.

11.13.a. The Director 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.

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

11.13.c. The Director 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 11.11.c ~~of this rule~~; whenever possible the Director will schedule a hearing under this section at a location convenient to the nearest population center to the proposed facility.

11.13.d. Public notice of the hearing will be given as specified in subsection 11.11 ~~of this rule~~.

11.13.e. Whenever a public hearing will be held the Director will designate a presiding officer for the hearing who will be responsible for its scheduling and orderly conduct.

11.13.f. Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits will be set upon the time allowed for oral statements, and the submission of statements in writing will be required. The public comment period under subsection 11.11 ~~of this rule~~ will automatically be extended to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

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

11.14. Reopening of the Public Comment Period.

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

11.14.a.1. Prepare a new draft permit, appropriately modified, under subsection 11.9 ~~of this rule~~.

11.14.a.2. Prepare a revised fact sheet under subsection 11.10. ~~of this rule~~ and reopen the comment period.

11.14.a.3. Reopen or extend the comment period under subsection 11.11 ~~of this rule~~ to give interested persons an opportunity to comment on the information or arguments submitted.

11.14.b. Comments filed during the reopened comment period must be limited to the substantial new questions that caused its reopening. The public notice under subsection 11.11 ~~of this rule~~ will define the scope of the reopening.

11.14.c. Public notice of any of the above actions will be issued under subsection 11.11 ~~of this rule~~.

11.15. Issuance and Effective Date of Permit.

11.15.a. After the close of the public comment period on a draft permit, the Director will issue a final permit decision. The Director will notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. The notice will include reference to the procedures for appealing a decision on the permit. For purposes of this section the final permit decision means a final decision to issue, deny, modify, or revoke and reissue, or terminate a permit.

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

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

11.15.b.2. Review is requested or evidentiary hearing is requested; or

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

11.16. Response to Comments.

11.16.a. At the time that any final permit decision is issued, the Director will issue a response to comments. This response will:

11.16.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

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

11.16.b. The response to comments will be available to the public.

11.17. Administrative Record.

11.17.a. The provisions of a draft permit prepared under subsection 11.9 ~~of this rule~~ will be based on the administrative records consisting of:

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

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

11.17.a.3. The fact sheet;

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

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

11.17.b. The Director will base final permit decisions on the administrative record consisting of:

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

11.17.b.2. All comments received during the public comment period provided under subsection 11.11 ~~of this rule~~ (including any extension or reopening under subsection 11.14 ~~of this rule~~);

11.17.b.3. The tape or transcript of any hearing(s) held under subsection 11.13 ~~of this rule~~;

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

11.17.b.5. The response to comments required by subsection 11.16 ~~of this rule~~ which identified and supports any change made in the draft permit and any new material placed in the record under that subsection;

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

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

11.17.b.8. The final permit.

11.17.c. The administrative record will be complete on the date the final permit is issued.

11.17.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 11.17.a and 11.17.b ~~of this rule~~, 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.

11.18. Public Access to Information.

11.18.a. Any records, reports, or information and any permit, permit applications, and related documentation within the Director's possession will be available to the public for inspection and copying; provided, however, that upon a satisfactory showing to the Director that

those 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 Director will consider, treat, and protect those records as confidential.

11.18.b. It will be the responsibility of the person claiming any information as confidential under the provisions of this subsection to clearly mark each page containing that information with the word "CONFIDENTIAL" and to submit an affidavit setting forth the reasons that the person believes that the information is entitled to protection.

11.18.c. Any document submitted to the Director which contains information for which claim of confidentiality is made must be submitted in a sealed envelope marked "CONFIDENTIAL" and addressed to the Director. The document must be submitted in two (2) separate parts. The first part must contain all information which is not deemed by the person preparing the report as confidential and must include appropriate cross-references to the second part which contains data, words, phrases, paragraphs, or pages and appropriate affidavits containing or relating to information which is claimed to be confidential.

11.18.d. No information will be protected as confidential information by the Director unless it is submitted in accordance with the provisions of subdivision 11.18.c ~~of this rule~~ and no information which is submitted in accordance with the provision of subdivision 11.18.c ~~of this rule~~ will be afforded protection as confidential information unless the Director finds that the protection is necessary to protect trade secrets. The person who submits information claimed to be confidential will receive written notice from the Director as to whether the information has been accepted as confidential or not.

11.18.e. All information which meets the tests of subdivision 11.18.d ~~of this rule~~ will be marked with the term "ACCEPTED" and will be protected as confidential information. If the person fails to satisfactorily demonstrate to the Director that information in the form presented meets the criteria of subdivision 11.18.d ~~of this rule~~, the Director will mark the information "REJECTED" and promptly return it to the person who submitted the information. The Director will retain a copy of the information for reference.

11.18.f. Nothing contained herein will be construed to restrict the release of relevant confidential information during situations declared to be emergencies by the Director or his designee.

11.18.g. Nothing in subsection 11.18 ~~of this rule~~ will be construed as limiting the disclosure of information by the department to any officer, employee, or authorized representative of the state or federal government concerned with effecting the purposes of this subsection.

11.18.h. Persons interested in obtaining information pursuant to this subsection must submit a request in accordance with the Environmental Quality Board rule 46 CSR 8.

11.19. 40 CFR §270.12. The provisions of 40 CFR §270.12 are excepted from incorporation by reference. Availability of information provided under this rule is controlled by the provision of W. Va. Code, §22-18-12 and subsection 11.18 ~~of this rule~~.

11.20. 40 CFR § 270.24. The provisions of 40 CFR § 270.24 are excepted from incorporation by reference. Consult the rules of the ~~Division~~ Office of Air Quality regarding emissions from process vents.

11.21. 40 CFR §§ 270.60(b) and 270.64. The provisions of 40 CFR §§ 270.60(b) and 270.64 are hereby adopted and incorporated by reference. Consult the rules of the Office of Water Resources and the Environmental Quality Board regarding additional requirements for underground injection wells.

11.22. 40 CFR §270.155. The provisions of 40 CFR §270.155 relating to the administrative appeal of a decision to approve or deny a Remedial Action Plan (RAP) application are hereby modified for the purposes of this rule as follows: Any commenter on the draft RAP or notice of intent to deny, or any participant in any public hearing(s) on the draft RAP, may appeal

the Director's decision to approve or deny the RAP application to the Environmental Quality Board under subsections 11.4 through 11.17 ~~of this rule~~. Any person who did not file comments, or did not participate in any public hearing(s) on the draft RAP, may petition for administrative review only to the extent of the changes from the draft to the final RAP decision. Appeals of a RAP may be made to the same extent as for final permit decisions under §11 ~~of this rule~~. The Director will give public notice of any grant of review of a RAP by the Environmental Quality Board through the same means used to provide notice under subsections 11.4 through 11.17 ~~of this rule~~.

§33-20-12. Deed and Lease Disclosure; Notice in Deed to Property.

12.1. Recording Requirement. -- The owner of the property on which a hazardous waste management facility is located must record, in accordance with state law, a notation on the deed or lease to the facility property -- or on some other instrument that is normally examined during title search -- that will in perpetuity notify any potential purchaser of the property that:

12.1.a. The land has been used to manage hazardous wastes; and

12.1.b. Its use is restricted under 40 CFR § 264.117(c).

12.2. Upon actual transfer of property which contains hazardous wastes that have been stored, treated, or disposed of, the previous owner must notify the Director in writing of the transfer.

12.3. Other Requirements. -- Nothing contained in this section ~~of this rule~~ will relieve any person from complying with the requirements on deed and lease disclosures set forth in W.Va. Code, § 22-18-21.

§33-20-13. Universal Waste Rule.

13.1. 40 CFR Part 273. -- The provisions of 40 CFR part 273 are hereby adopted and incorporated by reference with the modifications, exceptions and additions contained in this section.

13.2. 40 CFR §§ 273.20, 273.40, 273.56 -- The provisions of 40 CFR §§ 273.20, 273.40, and 273.56 relating to exports are hereby adopted and incorporated by reference. The substitution of terms in subdivision 1.6.a ~~of this rule~~ does not apply to the provisions of this subsection. In addition to the requirements contained therein, any person subject to the provisions of 40 CFR part 273 must file with the Director copies of all documentation, manifests, exception reports, annual reports or records, submitted to EPA, the Administrator or the regional Administrator as required by 40 CFR part 273.

13.3. 40 CFR § 273.70 -- The provisions of 40 CFR § 273.70 Imports are hereby adopted and incorporated by reference. Persons managing universal waste that is imported to West Virginia are subject to the requirements of this rule.

13.4. 40 CFR §§ 273.80 and 273.81 -- The provisions of 40 CFR §§ 273.80 and 273.81 are excepted from incorporation by reference. Consult the provisions of subdivision 2.5.d ~~of this rule~~ to petition to include a waste as a universal waste.

§33-20-14. Standards for the Management of Used Oil.

14.1. 40 CFR Part 279. -- The provisions of 40 CFR part 279 are hereby adopted and incorporated by reference with the exception contained in this section. Consult the rules of the ~~Division~~ Office of Air Quality regarding the burning of used oil.

14.2. 40 CFR § 279.82(b). -- The term EPA at 40 CFR § 279.82(b) will have the meaning of United States Environmental Protection Agency.

§33-20-15. ~~APPEAL RIGHTS~~ Appeal Rights.

Any person aggrieved or adversely affected by the failure or refusal of the Director to act within a reasonable time on an application for a permit or by the issuance or denial of or by the terms and conditions of a permit granted by the Director under the provisions of this rule, may appeal to the Environmental Quality Board in accordance with the provisions of W. Va. Code §22B-1-1 et seq.

TABLE 1
PERMIT APPLICATION FEE SCHEDULE

STORAGE

EPA CODE ACTIVITY	FEE	FEE
S01 Container	<100 tons capacity $2,500.00	>100 tons capacity $3,750.00
S02 Tank	<100 tons capacity $2,500.00	>100 tons capacity $3,750.00
S04 Surface Impoundment	<1,000 tons capacity $10,000.00	>1,000 tons capacity $12,500.00
S05 Drip Pad	$2,500.00	
S03 Waste Pile	<100 tons capacity $5,000.00	>100 tons capacity $7,500.00
S06 Waste Pile (Containment Bldg.)	<100 tons capacity $5,000.00	>100 tons capacity $7,500.00

DISPOSAL

EPA CODE ACTIVITY	FEE	FEE
D80 Landfill	<1,000 tons/year $15,000.00	>1,000 tons/year $25,000.00
D81 Land Application	<1,000 tons/year $15,000.00	>1,000 tons/year $25,000.00
D83 Surface Impoundment	<1,000 tons/year $15,000.00	>1,000 tons/year $25,000.00

TABLE 1
PERMIT APPLICATION FEE SCHEDULE
(CONTINUED)

TREATMENT

EPA CODE ACTIVITY	FEE	FEE
T01 Tank	<100 tons capacity $2,500.00	>100 tons capacity $3,750.00
T02 Surface Impoundment	<1,000 tons/year $10,000.00	>1,000 tons/year $12,500.00
T03 Incinerator	<1,000 tons/year $5,000.00	>1,000 tons/year $7,500.00
T80 thru T93 Boiler/Industrial Furnace	<1,000 tons/year $5,000.00	>1,000 tons/year $7,500.00
T04 Other	$5,000.00	$7,500.00
T-94 Containment Bldg. Treatment	$5,000.00	$7,500.00

EMERGENCY PERMITS

EPA CODE ACTIVITY	FEE
State and Federal	Nil
Others	$500.00

TABLE 1
PERMIT APPLICATION FEE SCHEDULE
(CONTINUED)

MISCELLANEOUS

EPA CODE ACTIVITY	FEE
Permit Modification under 40 CFR, 270.42 (Class I)	$ 500.00
Permit Modification under 40 CFR, 270.42 (Class II and III) HWIR Staging Pile	$ 1,250.00
Modification under 40 CFR, 270.41	$ 2,500.00
Post-Closure Care Permit	$15,000.00
Closure Plans	$ 1,500.00

TRANSCRIPT

Public meeting for proposed amendment to State Rule 33 CSR 20 "Hazardous Waste Management Rule" 6 p.m., Monday, August 16, 2004 DEP, 1356 Hansford Street, Charleston, WV

Richard Carter: Good evening. I'm Rich Carter with the West Virginia Department of Environmental Protection, Public Information Office. I'm the facilitator for this meeting. We're here tonight for a public hearing on Rules 33 CSR 20, Hazardous Waste Management Rule. The public hearing is today at 6 p.m. to take comments on the proposed changes to Rule 33 CSR 20, which regulates the generation, treatment, storage, and disposal of hazardous waste. The 33 CSR 20 rule proposed for 2005 adopts and incorporates by reference two years of federal regulations on hazardous waste management, and it's found in 40 CFR Parts 260 through 279. Those are federal. The federal regulations became effective on July 1, 2003 and on July 1, 2004, respectively. The state routinely amends our Rule 33 CSR 20 to pick up changes to the 40 CFR federal hazardous waste management regulations enabling the state hazardous waste program to maintain consistency with the federal program. The changes to the 40 CFR federal regulations covered by this proposed rule include the following areas: zinc fertilizers made from recycled hazardous materials, new treatment subcategories for radioactively contaminated cadmium-, mercury-, and silver-containing batteries, recycled used oil management standards, and the national environmental performance track program. The public comment period will be extended for 10 days at the end of this meeting which is

August 26th, and those are postmarked by so that you can have your written comments in as well as if you want to send a written comment in. And you send them here to the Public Information Office at 1356 Hansford Street, Charleston, WV 25301. So I guess we'll open it up to the public comment portion of the meeting and if you would come up here so that I can, this is for the transcriber and the best; this is the microphone, so the best that you can speak

Conni GratopLewis: Hi, I'm Conni GratopLewis with the West Virginia Environmental Council, and I'm not here to speak to the substance of the rule, because insofar as I understand it, and hazardous waste is not an area I'm particularly familiar with, it is just incorporating the federal language and therefore any comments about the substance of the rule would be better directed at; it's been better directed to the feds. However, I do think that the DEP can do a better job of informing and educating the public about the proposed rules. And I would recommend to you as I have recommended at other public hearings that a more inclusive effort be made to notify the public within that field as legal ads or sufficient legal notice to the general public, particularly in an area such as hazardous waste management, which does have implications for the health and welfare of the entire state.

Carroll Cather: Thank you.

Richard Carter: Thank you. Well, if there's no one else signed up at this time, we will wait around 10 more minutes to see if anybody shows up, but we'll close the public comment portion of the hearing and thank you for attending. We'll open it back up if someone does come.

I submit this transcript and swear that this is a true and accurate copy, to the best of my ability, of the public hearing held on Monday, August 16, 2004.

Anne Howell, Administrative Secretary, Public Information Office

August 24, 2004

Public Hearing on Rule 33CSR20 "Hazardous Waste Management Rule"

This Public Hearing is held at 6:00 pm on August 16, 2004 to take comments on proposed changes to Rule 33CSR20 which regulates the generation, treatment, storage and disposal of hazardous waste. The 33CSR20 Rule proposed for 2005 adopts and incorporates by reference two years of **federal regulations** on hazardous waste management found in 40 CFR Parts 260 through 279. The federal regulations became effective on July 1, 2003 and on July 1, 2004, respectively. The State routinely amends Rule 33CSR20 to pick up changes to the 40 CFR federal hazardous waste management regulations, enabling the State hazardous waste program to maintain consistency with the federal program. The changes to the 40 CFR federal regulations covered by this proposed rule include the following areas: zinc fertilizers made from recycled hazardous materials, new treatment subcategories for radioactively contaminated cadmium-, mercury- and silver-containing batteries, recycled used oil management standards, and the national environmental performance track program.

Public Meeting for proposed amendment to State rule 33 CSR 20 "Hazardous Waste Management Rule". West Virginia DEP at 1356 Hansford Street, Charleston, West Virginia, 25311. Monday, August 16, 2004 at 6 P.M.

Do you wish to speak?	NAME	ADDRESS	PHONE #
✓	Connie Griffiths WV Environmental Council	922 Quarrier St. Suite 308 Charleston, WV 25301	543-5811

Response to Public Comment at Rule Hearing for State Rule 33 CSR 20

The DEP appreciates the concern of the commenter regarding ways to advance public awareness and understanding of rules, however, the DEP, in addition to the required publication in the State Register and additional means of notice by advertisement through legal ads and press releases sent to newspapers, the agency took the following actions to notify the public of the hearing on this rule: (1) publication in agency newsletter Indepth, (2) email notification to subscribers of DEP's online mailing list (currently 800+ subscribers).

The DEP is open to suggestions for additional public involvement in rule-making and welcomes suggestions that will enhance public awareness and involvement.

There were no other comments regarding State Rule 33 CSR 20 proposed for 2005.

Zinc Fertilizers Made From Recycled Hazardou Secondary Materials

[Federal Register: July 24, 2002 (Volume 67, Number 142)]
[Rules and Regulations]
[Page 48393-48415]
From the Federal Register Online via GPO Access [wais.access.gpo.g
[DOCID:fr24jy02-12]

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Parts 261, 266, 268 and 271
[FRL-7248-3]
RIN 2050-AE69

Zinc Fertilizers Made From Recycled Hazardous Secondary Materials

AGENCY: Environmental Protection Agency.
ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today finali regulations under the Resource Conservation and Recovery Act (RCRA that apply to recycling of hazardous secondary materials to make z fertilizer products. This final rule establishes a more consistent regulatory framework for this practice, and establishes conditions excluding hazardous secondary materials that are used to make zinc fertilizers from the regulatory definition of solid waste. The rul also establishes new product specifications for contaminants in zi fertilizers made from those secondary materials.

DATES: This final rule is effective July 24, 2002, except for the amendment to 40 CFR 266.20(b), which eliminates the exemption from treatment standards for fertilizers made from recycled electric ar furnace dust. The effective date for that provision in today's fir rule is January 24, 2003.

ADDRESSES: Public comments and supporting materials are available viewing in the RCRA Docket Information Center (RIC), located at Cr Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, V The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excl Federal holidays. To review docket materials, it is recommended th the public make an appointment by calling 703-603-9230. The index some supporting materials are available electronically. See the SUPPLEMENTARY INFORMATION section for information on accessing the

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 261, 266, 268 and 271

[FRL-]

Zinc Fertilizers Made from Recycled Hazardous Secondary Materials

AGENCY: Environmental Protection Agency

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is today finalizing regulations under the Resource Conservation and Recovery Act (RCRA) that apply to recycling of hazardous secondary materials to make zinc fertilizer products. This final rule establishes a more consistent regulatory framework for this practice, and establishes conditions for excluding hazardous secondary materials that are used to make zinc fertilizers from the regulatory definition of solid waste. The rule also establishes new product specifications for contaminants in zinc fertilizers made from those secondary materials.

DATES: This final rule is effective on [insert date of publication], except for the amendment to 40 CFR 266.20(b), which eliminates the exemption from treatment standards for fertilizers made from recycled electric arc furnace dust. The effective date for that provision in today's final rule is [insert six months from date of publication].

ADDRESSES: Public comments and supporting materials are available for viewing in the RCRA Docket Information Center (RIC), located at Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. To review docket materials, it is recommended that the public make an appointment by calling 703 603-9230. The index and some supporting materials are available electronically. See the "Supplementary Information" section for

information on accessing them.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Hotline at 800 424-9346 or TDD 800 553-7672 (hearing impaired). In the Washington, DC, metropolitan area, call 703 412-9810 or TDD 703 412-3323. For more detailed information on specific aspects of this rulemaking, contact Dave Fagan, U.S. EPA (5301W), 1200 Pennsylvania Ave. NW., Washington, DC 20460, (703) 308-0603, or e-mail: fagan.david@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information.

A. *Regulated entities.* Entities potentially regulated by this action are expected to include manufacturers of zinc fertilizers, and the generators of hazardous secondary materials who will supply zinc-bearing feedstocks to those manufacturers. Some intermediate handlers, such as brokers, who manage hazardous secondary materials may also be affected by this rule.

B *How Can I Get Copies Of This Document and Other Related Information ?*

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. RCRA-2000-0054. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the OSWER Docket, 1235 Jefferson Davis Hwy, 1st Floor, Arlington, VA 22201. You may copy up to 100 pages from any docket at no charge. Additional copies cost $ 0.15 each.

2. *Electronic Access.* You may access this Federal Register document electronically through the EPA Internet under the "Federal Register" listings at http://www.epa.gov/fedrgstr/. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at http://www.epa.gov/edocket/ to

access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified above. Once in the system, select "search," then key in the appropriate docket identification number. This Federal Register document, along with a fact sheet and other relevant information, is also available on EPA's website at www.epa.gov/epaoswer/hazwaste/recycle/fertiliz/index.htm.

The index of comments received and supporting materials for this rulemaking are available from the RCRA Information Center. The official record for this action is in paper form. EPA has transferred all comments received electronically into paper form and has placed them in the official record, which also includes all comments submitted directly in writing. The official record is the paper record maintained at the address in "ADDRESSES" at the beginning of this document.

EPA's responses to the major comments received on this rulemaking are presented in the preamble to this final rule; other comments are addressed in a separate "Response to Comments" document which is also part of the official record for this rulemaking.

The contents of today's action are listed in the following outline:

F. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments

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

H. National Technology Transfer and Advancement Act of 1995

I.. Executive Order 12898

J. Executive Order 13211 (Energy Effects)

K. Congressional Review Act

I. Statutory Authority

These regulations are promulgated under the authority of sections 3001, 3002, 3003, and 3004 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C 6921, 6922, 6923 and 6924.

II. Background

A. *What is the purpose of today's final rule?*

Today's final rule puts in place a new, more coherent system for regulating the practice of manufacturing zinc fertilizers from hazardous secondary materials, and establishes conditions under which such materials can be recycled to produce fertilizers without the materials or the fertilizers being regulated as hazardous wastes. The rule, which was proposed on November 28, 2000 (65 FR 70954), is the Agency's response to concerns expressed by public interest groups, citizens, industry and state environmental agencies with regard to the RCRA regulations that have previously applied to this practice. We believe that these new regulations will create a

more consistent and comprehensive regulatory framework for such recycling activities, will make industry more accountable for those activities, will establish more appropriate limits on contaminants in zinc fertilizers made from hazardous secondary materials, and in general will promote safe, beneficial recycling in the zinc fertilizer industry.

EPA wishes to emphasize that today's regulatory action addresses only one aspect of the larger issue of contaminants in fertilizers. Fertilizers made from recycled hazardous wastes (which are the only types of fertilizers subject to regulation under EPA's RCRA authorities) represent a very small segment–less than one half of one percent--of the total fertilizer market. To our knowledge, virtually all of these are zinc micronutrient fertilizers. Currently, less than half of all zinc fertilizers on the market are made from such recycled materials. In any case, EPA's studies of contaminants in fertilizers have indicated that the great majority of fertilizers are safe when used properly. This general finding is consistent with similar studies done by states such as Washington and California.

Because fertilizers are generally safe, EPA sees no compelling reason to launch a broad new federal regulatory program to address fertilizer contaminants generally (such regulatory authority is potentially available under the Toxic Substances Control Act). This is not to say, however, that there is no need at all to regulate fertilizer contaminants. A wide range of fertilizers and soil amendments, including many products that are not made from recycled wastes, contain appreciable levels of heavy metal contaminants. In addition, EPA's fertilizer studies concluded that a few of these products may contain contaminants at levels approaching those which could pose unacceptable risks to human health and the environment. There is also the potential for tainted feedstocks to be introduced into the market unknowingly, particularly when such materials are imported into the country from unknown sources. A recent incident in the Pacific Northwest involving imported shipments of zinc sulfate material with extremely high cadmium levels is evidence that such problems can occur (see Washington Department of

Ecology fact sheet at http://www.ecy.wa..gov/pubs/004025.pdf).

Traditionally, state agriculture agencies have had responsibility for regulating the content of fertilizers, and in recent years several states (so far, Washington, Texas and California) have developed comprehensive programs to control contaminants in fertilizers and soil amendments. We believe that these state programs have been largely successful, and the Agency supports further state efforts in this area. Additional discussion of state fertilizer regulations and how they relate to this RCRA rulemaking is presented in section V. of this preamble.

B. Who will be affected by today's final rule?

We expect that the primary impact of this rule will be on manufacturers of zinc fertilizer products who have an interest in using hazardous secondary materials as feedstocks, and the generators who supply them. We expect that a number of manufacturers who have heretofore been avoiding the use of hazardous wastes will use the exclusion in today's rule to begin using materials such as zinc-rich dusts from brass foundries and fabricators as substitutes for other feedstocks. The generators of those materials are thus expected to benefit from this rule. The Agency is aware that the last manufacturer of K061 derived fertilizer (Frit Industries of Ozark, Alabama) has already begun the transition to use of alternative feedstock materials. Nucor Steel, the K061 generator that has been Frit Industries' supplier, is likewise switching to other recycling or disposal options. More detailed discussion of the impacts of this rule is presented in section VII.A of this preamble, and in the economic impact analysis document that has been prepared for this rulemaking.

C. How were public comments on the proposal considered by EPA?

EPA received more than 600 comments on the proposal during the formal comment period, which closed on February 26, 2001. The Agency also received a number of letters, cards and emails commenting on the proposal after the comment period, and these comments have been entered into the docket for this rulemaking. In addition, more than seventy individuals

made oral statements at the public hearing on the proposal, which was held in Seattle, WA on November 29, 2001. Those statements have been recorded in the transcript of that hearing, which is also in the docket. At the hearing a substantial number of written comments were also submitted to the Agency, and have been included in the docket as well. In total, nearly 1000 comments were received on the proposed rule.

EPA has reviewed each comment on the proposal that was submitted. The major substantive comments that were received, and the Agency's response to them, are discussed in following sections of today's preamble. Other comments (with EPA's responses) are set out in a separate Response to Comments document. Where many commenters expressed similar or identical views on certain issues, these have been consolidated in the document, and the Agency has prepared a collective response to them. The Response to Comments document has been placed in the docket for this rulemaking.

D. How does this final rule compare to the proposal?

In today's final rule EPA is promulgating the same basic regulatory approach that was outlined in the November 28, 2000 proposal. To summarize, today's rule:

- Removes the exemption from land disposal restrictions (LDR) treatment standards for zinc fertilizers made from electric arc furnace dust, or K061; and
- Establishes a conditional exclusion from the RCRA regulatory definition of solid waste for hazardous secondary materials that are legitimately recycled to make zinc micronutrient fertilizers; and
- Establishes conditions (chiefly concentration limits for certain heavy metals and dioxins) under which zinc fertilizers produced from hazardous secondary materials are not classified as solid wastes, and hence are not subject to RCRA subtitle C regulation.

Although EPA has finalized the same basic regulatory approach that was outlined in the November 28, 2000 proposed rule, several substantive revisions have been made in response to

comments received. The following is a summary of these changes, which are discussed in more detail in following sections of this preamble:

Applicability. The final rule clarifies how the new product specification contaminant limits will apply to zinc fertilizers made from regulated (i.e., non-excluded) hazardous wastes. In short, such fertilizers will need to comply with the existing, applicable land disposal restrictions (LDR) treatment standards for the hazardous wastes the fertilizers contain. Manufacturers of such fertilizers may, however, choose to meet the new, more stringent contaminant limits, if they wish.

Intermediate handlers. Under today's final rule, intermediate handlers (e.g., brokers) of excluded materials will be eligible for the same exclusion as generators, provided they choose to meet the same conditions for reporting, record keeping and storage of excluded materials that apply to generators of such materials. The proposed rule did not contain any provisions specifically addressing intermediate handlers.

Additional testing. Today's final rule provides for additional sampling and analysis of fertilizer products in cases where processes or feedstock materials are changed in ways that could significantly affect contaminant levels in the fertilizers.

One-time notice. Two changes have been made to the condition for one-time notices that generators will need to submit to EPA or to authorized state agencies. One change eliminates the need to provide certain potentially proprietary information in the notices (e.g., estimated quantities of material to be shipped to specific manufacturers). The other change will require that facilities identify in the one-time notice when they intend to begin managing materials under the terms of the conditional exclusion.

Certifications. The final rule eliminates the proposed condition that each shipment of excluded material to another state be accompanied by a certification that the receiving state is authorized to administer the conditional exclusion in this regulation.

Unit Closure. The final rule includes a provision clarifying that storage units which have previously stored hazardous wastes, and that subsequently will only store excluded materials according to these regulations, will not be subject to RCRA closure requirements.

Limits for nickel and arsenic. The proposed level for arsenic has been lowered in this final rule, and the proposed level for nickel has been eliminated.

Storage in supersacks. The proposed condition that would have prohibited outside storage of excluded secondary materials in non-rigid "supersack" containers has been revised to allow the use of these types of containers outdoors, provided they are managed within units (e.g., on concrete pads) that have containment systems to prevent releases from leaks, spills or precipitation events.

E. Why does EPA believe this is the best approach for regulating this recycling practice?

EPA's main objectives for this rulemaking are to:

- Establish a more consistent, more comprehensive, and more protective regulatory framework for this recycling practice; and
- Establish more appropriate limits on contaminants in recycled zinc fertilizers that effectively distinguish fertilizer products from wastes by adopting limits that are already found in commercial fertilizers, which can be achieved with well-demonstrated manufacturing techniques, and that are protective; and
- Encourage legitimate recycling by streamlining regulatory restrictions on the management of hazardous secondary materials used to make zinc fertilizers, while making industry more accountable for its recycling activities.

EPA believes that the regulatory approach in today's final rule is the best means of achieving these objectives, for several reasons. We expect it to be environmentally beneficial by removing regulatory anomalies and making zinc fertilizers cleaner--for example, by halting production of K061-derived zinc fertilizers with relatively high contaminant levels (see section

III.B. of this preamble). A further environmental benefit will be recovery of large volumes of valuable zinc, rather than landfilling this resource. The rule will also enhance the ability of regulatory agencies to effectively monitor this recycling practice, while removing unnecessary regulatory disincentives on legitimate recycling. We also believe that the new contaminant limits in this rule are reasonable and are consistent with the environmental objectives stated above, and can be (and are being) easily achieved by industry using relatively simple, economically viable, existing manufacturing practices. These levels thus reasonably demarcate products from wastes.

While EPA believes that this final rule provides an appropriate balance of conditions and incentives, a large proportion of the more than 1000 total comments we received expressed a clear preference for a more stringent regulatory approach. Most of these comments were received in the form of emails, post cards, form letters and oral statements made at the public hearing. In general, these commenters expressed support for a regulatory approach similar to the option in the preamble identified as "Maintain current UCD requirements, with additional reporting, record keeping and testing requirements for all hazardous waste derived fertilizers" (see 65 FR 70964-5, November 28, 2000). Under this type of approach, the current hazardous waste regulatory structure would be maintained and made more stringent by requiring lower limits on a wider range of potential fertilizer contaminants, greatly expanded testing requirements, labeling of hazardous waste derived fertilizer products, and much more in-depth reporting of environmental and manufacturing data. Many commenters suggested in addition that there should be a complete prohibition on the use of any dioxin-containing hazardous wastes to make fertilizers.

Such a regulatory approach would likely result in a complete elimination of hazardous secondary materials as a source of zinc to make fertilizers, since it would perpetuate existing regulatory disincentives (e.g., RCRA permit requirements, as explained further in this preamble)

and substantially increase compliance costs. To avoid these regulatory disincentives, manufacturers would almost certainly use alternative feedstock materials (which would likely contain the same or similar contaminants as are found in hazardous wastes) to make fertilizers. The resulting fertilizers would be largely unregulated, since they would not be subject to EPA's RCRA regulatory system, and only a few states presently regulate fertilizer contaminants under other legal authorities. Therefore, by eliminating the use of hazardous wastes in fertilizer manufacture, contaminant levels in some fertilizers could actually increase, which we do not believe is a desirable environmental result (not to mention the energy and other resources conserved by avoiding treatment and disposal of zinc-bearing secondary materials).

As explained in the preamble to the proposed rule, EPA has found that a wide variety of zinc-bearing materials–including hazardous wastes--can be safely and legitimately processed and recycled into high-quality zinc fertilizer products by using relatively simple, existing manufacturing techniques. In other words, the quality of the end fertilizer product depends almost entirely on the manufacturing process, rather than on the type of feedstock material that is used. EPA did not receive any comments on the proposal that presented technical or scientific information to challenge these findings, and we therefore have no reason to believe that high-purity zinc fertilizers made from recycled hazardous wastes are any different in composition or risk potential from those made from other types of materials. (See proposed rule at 65 FR at 70959 n. 2 discussing the similarity of hazardous constituent levels in zinc fertilizers made from hazardous wastes and from other materials). Given that high purity zinc fertilizers made from hazardous secondary materials are essentially identical to those made from other types of feedstock materials, we see no environmental reason for increasing regulatory restrictions over such products. We believe that today's rule provides the proper balance of protections and incentives for this recycling practice without the need for additional, more prescriptive regulatory controls. The Agency therefore chose not to adopt the more stringent regulatory

approach (described above) that was advocated by many commenters.

We also received a number of comments that simply decried the practice of using hazardous waste to make fertilizers, claiming that it creates serious threats to human health, the food supply, and the environment. None of these commenters, however, offered any specific evidence of such threats, or any concrete information indicating that hazardous wastes are being indiscriminately added to fertilizers as a way of disposing of them. It is important to note that any such acts would be considered "sham" recycling of hazardous waste, which is illegal.[1] Further, EPA's studies of contaminants in fertilizers have not found evidence to support such serious concerns. We do not wish to minimize the potential for adverse health effects from exposure generally to toxic chemicals such as heavy metals. We believe, however, that with regard to fertilizers, much of this concern is apparently misplaced, and may have resulted from unsubstantiated speculations and exaggerated claims of risk that have appeared in the media and elsewhere. We hope that this final rule, and the record of evidence that supports it, will help to allay unnecessary public fears with regard to fertilizers made from recycled hazardous wastes.

III. Detailed Description of Today's Final Rule

A. Applicability.

---

[1]Sham recycling is waste treatment or disposal occurring under the guise of recycling. United States v. Marine Shale Processors, 81 F. 3d 1361, 1365 (5th Cir. 1996). Sham recycling occurs, for example, "if extra materials are added to [the material to be recycled] that provide no benefit to the industrial process ....." American Petroleum Inst. v. EPA, 216 F. 3d 50, 58 (D.C. Cir. 2000). EPA has frequently noted factors that are likely to be relevant in determining whether sham recycling is occurring. See United States v. Marine Shale Processors, 81 F. 3d at 1365 nn. 3 and 4 (compiling Federal Register citations). These include: (a) whether the secondary material is ineffective or only marginally effective for the claimed use (i.e., does not contribute a significant element to the recycled product or to the recycling process); (b) whether the secondary material is used in excess of the amount needed; and (c) whether the secondary material is handled in a manner consistent with its use as a substitute for an industrial feedstock (i.e., to guard against loss).

Today's rule establishes a new regulatory framework for legitimate recycling of "hazardous secondary materials" in the manufacture of zinc micronutrient fertilizers. A secondary material is a sludge, by-product, or spent material. See 50 FR at 616 n. 4 (Jan. 4, 1985). A hazardous secondary material is a secondary material that would be a hazardous waste (i.e., is listed or exhibits a characteristic of hazardous waste) if it is first a solid waste. Hazardous secondary materials are presently classified as hazardous wastes when recycled to produce fertilizers. See 65 FR at 70958-59, explaining the "use constituting disposal" provisions in EPA's hazardous waste recycling rules. However, EPA is referring to these materials in this preamble as "secondary materials" or "hazardous secondary materials," rather than as "hazardous wastes," since today's rule excludes them from being defined as wastes provided that certain conditions are followed.

The rule will potentially apply to manufacturers of zinc fertilizers who use (or wish to use) hazardous secondary materials as ingredients in their production processes, and to the generators and any intermediate handlers who supply those materials to the manufacturers. The rule will not directly affect any zinc fertilizers that are made from non-hazardous materials ("secondary" or otherwise), nor will it change the current regulatory requirements for non-zinc fertilizers made from hazardous wastes. A full explanation of the regulatory requirements for hazardous waste fertilizer recycling that have been in effect prior to today's action is presented in the preamble to the proposed rule (see November 28, 2000, 65 FR at 70956).

It should be noted that today's final rule creates two separate conditional exclusions–an exclusion from regulation for the hazardous secondary materials used in zinc fertilizer manufacture, and an exclusion for the fertilizer products that are made from these materials. The exclusion for hazardous secondary materials will potentially be available to those parties who handle such materials prior to recycling (i.e., the secondary material generators, any intermediate handlers, and the fertilizer manufacturers). The exclusion provided for the finished zinc

fertilizer products will only apply to fertilizer manufacturers, since they are solely responsible for ensuring that their products meet the specifications in today's rule.

To reiterate, today's final rule will not apply to any fertilizers other than zinc fertilizers that are made from recycled hazardous secondary materials. Thus, if a manufacturer were to use hazardous waste as an ingredient in a non-zinc fertilizer, the manufacturer would not be eligible for the conditional exclusion in today's rule, and will need to comply with applicable hazardous waste management requirements [see existing §266.20(b)].

Effective Dates. Except for one provision, today's rule will become effective immediately upon publication in the Federal Register. The exception is the provision in the rule that amends §266.20(b), removing the exemption from treatment standards for fertilizers made from recycled K061. The effective date for that provision will be (insert six months from date of publication).

The RCRA statute establishes six months as the usual effective date for Subtitle C rules (see RCRA section 3010 (b)), though the Agency may provide for a shorter or immediate effective date in the case of regulations with which the regulated community does not need six months to come into compliance, as determined by the Admininstrator. Since today's final rule is essentially deregulatory in nature (with the exception noted above), we see no reason to delay its effective date. Thus, except for the provision that removes the exemption for K061 derived fertilizers, today's rule will be effective immediately upon publication in the Federal Register.

One commenter (Frit Industries) requested an extended (nine month) effective date for removing the exemption from treatment standards for K061 fertilizers. We note that there is no provision in the RCRA statute for such extended effective dates. In addition, the commenter has had ample notice of the Agency's intent to finalize this provision, and has been aware of the Agency's schedule for completing this regulatory action. Thus, we believe the commenter has had sufficient notice of this action.

Once this provision of the rule becomes effective, sales of K061 derived fertilizers by manufacturers to other parties will not be permitted, unless those fertilizers can meet the specifications for exclusion in today's rule. Assuming they cannot meet the exclusion specifications, remaining manufacturer inventories of K061 fertilizers after the effective date will need to be managed in accordance with applicable hazardous waste regulations. As a practical matter, however, inventories of K061 (or other) fertilizers that have already entered commerce (i.e., have been sold and shipped to other parties) before the effective date will not be affected. Thus, fertilizer dealers and others who may have unsold stocks of K061 fertilizers after this rule's effective date will not be affected, provided the fertilizers were sold and shipped by the manufacturer prior to the effective date. It is our intent to hold manufacturers of K061 fertilizers (and any other affected fertilizers) responsible for ensuring that non-compliant products do not enter commerce after the effective date of this rule.

B. Removal of Exemption for Fertilizers Made from Electric Arc Furnace Dust (K061).

Today's rule eliminates the provision in §266.20 that has exempted zinc fertilizers made specifically from electric arc furnace dust (K061) from having to meet applicable land disposal restrictions (LDR) treatment standards (i.e., the treatment standards for K061). This exemption was originally promulgated in the "First Third" LDR rulemaking (August 17, 1988, 52 FR 31138), based on a determination by EPA that fertilizers made from K061 had metal contaminant levels comparable to those of substitute zinc fertilizers (including those made from non-hazardous waste feedstocks), and that the use of K061 fertilizers did not appear to pose significant risks (see 53 FR 31164, August 17, 1998). However, in recent years zinc fertilizers of much higher purity (e.g., zinc sulfate monohydrate, or ZSM fertilizers) have become widely available, and K061 derived zinc fertilizers now have among the highest contaminant (i.e., hazardous constituent) levels of any zinc fertilizers. Thus, EPA believes that the original basis

for the K061 exemption is no longer valid, and sees no reason why these fertilizer products should not have to meet the same contaminant limits as other fertilizers made from recycled hazardous wastes (or be excluded from regulation in the same way as other such fertilizers).

Response to Comments. Numerous commenters expressed support for a complete ban on the use of K061 in fertilizer manufacture, often citing the relatively high levels of dioxins in K061 fertilizers compared to other fertilizer products. Others urged a ban on the use of all "dioxin laden wastes" to make fertilizer. A few commenters opposed removing the current LDR exemption for K061 derived fertilizers.

EPA chose not to ban the use of K061 to make zinc fertilizers, for several reasons. Most importantly, we believe that with the promulgation of today's rule the issue of dioxins in K061 derived fertilizers will effectively become moot, largely because the new rules will in all likelihood eliminate the use of K061 to make zinc oxysulfate fertilizers. Oxysulfate is a type of zinc fertilizer that is typically made by simply mixing zinc-bearing material (e.g., K061) with sulfuric acid. There is typically no processing step to remove contaminants–whatever impurities are in the feedstock material will usually remain in the finished product. Such products will be unable to meet the new exclusion levels in today's rule, or the applicable LDR standards. Thus, we do not expect this type of fertilizer to be produced after the effective date of today's regulations.

At the same time, it is possible to remove the contaminants in K061 to make a different type of fertilizer, such as high-purity ZSM fertilizer, which can satisfy the conditional exclusion levels. Most of the zinc in K061 is bound with iron in a zinc ferrite compound that is relatively insoluble and, at normal temperatures, cannot be effectively digested with acids to precipitate and filter out contaminants such as lead and other metals. However, it has been demonstrated that raw K061 can be first processed in high-temperature furnaces to form a zinc oxide material that can then easily be made into ZSM. Such thermal treatment, combined with subsequent

manufacturing processes, is likely to destroy most or nearly all dioxins present in K061. The agency thus sees no dioxin-related reason to prohibit this use of K061. Further discussion of dioxins in hazardous waste derived fertilizers is presented in section III.D.3 of this preamble.

A few comments were received that opposed removing the current exemption from LDR treatment standards for K061 derived zinc fertilizers. These commenters did not, however, challenge the Agency's logic for eliminating the exemption, but rather argued that EPA has no legal jurisdiction to regulate these fertilizers at all, based on recent court decisions. EPA rejects these arguments, for the reasons discussed later in this preamble.

C. Conditional exclusion for hazardous secondary materials used to make zinc fertilizers

In this final rule, EPA has created a "conditional exclusion" from the RCRA definition of solid waste for hazardous secondary materials (which would otherwise be classified as hazardous wastes, as explained above) that are used as ingredients to make zinc micronutrient fertilizers. As mentioned previously, this feature of the final rule is consistent with the proposal, though a few specific changes have been made, as explained below.

The conditional exclusion provided in today's rule is an exclusion only from the RCRA subtitle C regulations, and not from the emergency, remediation and information-gathering sections of the RCRA statute [sections 3004(u), 3007, 3013, and 7003]. This is consistent with the principle already codified for other excluded secondary materials–that the exclusion is only from RCRA regulatory provisions, and not from these statutory authorities. See §261.1(b). EPA is restating this principle here in the interests of clarity, not to reopen the issue. The legal basis for the distinction of the Agency's authority under these provisions is that they use the broader statutory definition of solid waste (and hazardous waste as well) and so need not (and should not) be read as being limited by the regulatory definition. See, for example, 50 FR at 627. See also Connecticut Coastal Fishermen's Assn. v. Remington Arms, 989 F. 2d 1305, 1313-15 (2d

Cir. 1993) (EPA may permissibly ascribe different definitions to the term "solid waste" for regulatory and statutory purposes).

Today's conditional exclusion is intended to remove many of the regulatory disincentives that to date have discouraged legitimate recycling in the zinc fertilizer industry. Previously, hazardous wastes that were recycled to make fertilizers were subject to the full suite of hazardous waste regulatory requirements, including the requirement to obtain a RCRA permit for storage of wastes prior to fertilizer production. This permitting requirement in particular has dissuaded a number of fertilizer manufacturers from using valuable secondary materials as feedstocks, since RCRA permits can be time and resource-intensive to obtain and maintain, and a number of alternative materials are readily available that are not subject to subtitle C regulation, either because they are not hazardous (i.e., are not listed and do not exhibit a characteristic), or are raw materials. By allowing companies to manage these hazardous secondary materials in accord with the conditions which are established in today's final rule, EPA expects that the rate of legitimate recovery of zinc values in these materials will increase considerably, which should be environmentally beneficial and result in lower costs to farmers for zinc fertilizers.

Once this rule becomes effective, those who wish to begin managing hazardous secondary materials according to the conditional exclusion will first need to notify EPA or the authorized state of their intent to do so. This will provide overseeing agencies information as to who will be operating under this alternative regulatory system, when they will start, and the type of materials involved. In EPA's view, for this particular recycling practice, this is the minimum information needed to ascertain that legitimate recycling of the zinc-bearing materials will occur, and by whom. The other conditions that must be met to use and maintain the conditional exclusion address the proper storage of materials prior to recycling, and documentation of all off-site shipments of excluded materials. In addition, fertilizer manufacturers will need to

submit an annual report to the overseeing agency that identifies the type, quantity and origin of all excluded materials that were used in the previous year. Again, EPA believes that for this recycling practice, these conditions are needed to assure that the materials will be recycled legitimately.

1. Applicability. Several changes have been made to the final rule with regard to its applicability. For one, the final rule has been modified with regard to how it applies to intermediate handlers who act as brokers or middlemen between generators and fertilizer manufacturers. The proposed regulatory language did not specify any requirements or conditions specifically for intermediate handlers, though EPA discussed the issue and solicited comments on it in the preamble (65 FR at 70962-3). Several commenters observed that the use of intermediate handlers in this industry is not uncommon, with one commenter suggesting that in the final rule an intermediate handler should have the same responsibilities as a manufacturer who uses the conditional exclusion.

The conditions in the final rule for excluding hazardous secondary materials are intended to reflect normal, responsible practices for management of valuable material commodities, rather than waste management. Since intermediate handlers may be an integral part of the management chain for these materials prior to recycling, we believe it is reasonable to also establish conditions for them. If intermediate handlers had no responsibilities for maintaining the excluded status of materials they receive, the materials could potentially be mixed or consolidated with other materials, or could in some other way lose their regulatory identity and escape the chain of custody that provides accountability to the government and the public to ensure that these materials are being handled in way that is consistent with the handling of a valuable commodity. They also could simply be stored haphazardly and create the types of damage associated with improper management of discarded materials, as has occurred in past damage incidents within the zinc fertilizer recycling industry (records of these damage cases are

in the docket for this rulemaking).

EPA sees no reason to prohibit excluded materials from being shipped through intermediate handlers, since they may provide a useful service to both generators and manufacturers in this industry. Moreover, use of such middle-men is relatively common in the industry, and so is consistent with the idea of an exclusion conditioned to conform to industry commercial practice. However, their use must not compromise the protections that have been built into this conditional exclusion.

We believe that intermediate handlers have incentives for managing conditionally excluded materials that are very similar to the generators', and thus should have similar responsibilities (i.e., any exclusion for intermediate handlers should be conditioned in the same manner as for generators). The final rule therefore specifies that intermediate handlers who wish to use the conditional exclusion must meet the same set of conditions that apply to the generators of the materials [see §261.4(a)(20)(ii)]. In effect, any intermediate handler who elects to receive conditionally excluded materials and wishes to maintain their excluded status under the terms of today's rule would need to provide prior notice to the appropriate regulatory agency, store the materials in accordance with the conditions in the rule, and meet all other conditions that would otherwise apply to the generator of the material. Alternatively, it is possible that an intermediate handler might choose not to use the conditional exclusion, in which case any excluded materials received by the handler would lose their excluded regulatory status.

2. *Conditions to the exclusion.* In general, the conditions established in today's final rule for storage and documentation of excluded material are designed to reflect normal fertilizer industry handling practices for zinc-bearing feedstock materials. They are the same basic conditions that were proposed for establishing and maintaining a regulatory exclusion for hazardous secondary materials used to make zinc fertilizers, with several relatively minor changes.

Under this rule, in order to begin managing hazardous secondary materials that will be used to make zinc fertilizers without being subject to the current hazardous waste regulatory system, the responsible party (i.e., the secondary material generator, the fertilizer manufacturer or an intermediate handler) must initially notify the appropriate regulatory agency that he or she intends to begin doing so, and must then meet the conditions set out in this regulation. These conditions address proper storage of the excluded secondary material, notification of regulatory agencies, and documenting and maintaining records of any off-site shipments of such material. Fertilizer manufacturers who wish to use the conditional exclusion will also need to submit an annual report to EPA or the authorized state agency on the types, origins and quantities of excluded materials used in the previous year.

The storage conditions in today's rule are based on normal industry practices for storing zinc-bearing feedstock materials used to make fertilizers, and thus are analogues to the hazardous constituent specification levels for the fertilizers, which likewise are drawn from existing industry practice. The conditions generally serve to prevent these materials from being discarded via wholesale release into the environment. The conditions also reflect the fact that zinc fertilizer feedstock materials are typically valued commodities, and are thus stored so as to prevent releases or other losses of the material. EPA's review of feedstock storage practices by zinc fertilizer manufacturers indicated, for example, that bulk feedstock materials are usually stored outdoors in hoppers or other types of tanks, while indoor storage is typically in supersack containers or in piles. We are not aware of any zinc fertilizer manufacturer currently storing feedstock materials in ways that readily allow dispersal via wind or precipitation runoff (e.g., open, outdoor piles). See the memorandum "Industry Storage Practices," in the docket for this rulemaking. Thus, we believe that the conditions in today's rule reflect this industry's feedstock storage practices, and thus reasonably serve to demarcate valuable feedstocks from wastes.

EPA has made several changes from the proposed rule to the specific conditions that

must be met in order to be eligible for the exclusion. These changes address outside storage of material in supersack containers, initial notifications to regulatory agencies, certifications for off-site shipments of excluded material, and enforcement of the conditions, as discussed in more detail below.

Outdoor storage in supersack containers. Supersacks are flexible, woven resin containers designed to hold approximately one ton of dry material, and are commonly used by generators, manufacturers and others to store various types of solid zinc fertilizer feedstock materials. Several commenters objected to the proposed condition that would have allowed only indoor storage of excluded materials in this type of container, asserting that such a restriction could be a hardship for smaller facilities that may not have sufficient indoor storage capacity, and that with a few simple safeguards supersacks can be safely and reliably used to store this type of material out of doors.

EPA agrees with the commenters' assertions that outdoor storage of excluded material in supersack containers can be safe and does not automatically indicate the material is being discarded, and therefore should be allowed under certain conditions. We are unaware of any environmental damage cases associated with storage of zinc fertilizer feedstock materials in supersack containers. The final rule therefore specifies that storage of excluded material in non-rigid containers (e.g., supersacks) will be allowed outdoors, as long as they are kept closed and are in sound condition, and are managed within storage units (e.g., on concrete pads) that can contain, drain and allow removal of leaks, spills, and accumulated precipitation, and can prevent run-on into the unit. These conditions are intended to assure management commensurate with the secondary material's classification as a valuable feedstock, rather than as a waste. Put another way, the conditions assure both that the material is being managed comparably to other material inputs used in fertilizer manufacture, and that the secondary materials will not be discarded via haphazard management that allows wholesale environmental release of the

material, so becoming "part of the waste disposal problem". American Mining Congress v. EPA, 824 F. 2d 1177, 1193 (D.C. Cir. 1987); Association of Battery Recyclers v. EPA, 298 F. 3d 1047, 1056 n. 6 (D.C. Cir. 2000).

One-time notice. Under the proposed rule, generators would have had to identify in their one-time notices to regulatory agencies the estimated annual quantities of excluded materials that they expected to ship to each fertilizer manufacturer. Some commenters objected to this condition on the grounds that such information would be speculative, commercially sensitive, and of questionable use to regulatory agencies. EPA agrees, largely for the reasons offered by the commenters, and has removed this element of the one-time notice condition from the final rule.

Certification. The proposed rule specified that generators using the conditional exclusion in today's rule would need to ensure that each shipment of excluded material off-site to another state was accompanied by a certification stating that the receiving state is authorized to administer the provisions of this rule. The implication of this proposed provision was that out-of-state shipments of excluded material would only have been allowed if the receiving state had adopted and obtained authorization from EPA to implement these rules. Several commenters objected to this provision, arguing that shipments to states not authorized for this rule should be allowed, provided the materials are managed as hazardous wastes once they enter the receiving state. EPA agrees with these commenters, and has removed this certification provision from the final rule language.

3. Other Provisions

Burden of Proof. The proposed rule contained a provision stating that in an enforcement action, the burden of proof in establishing conformance with the conditions in §261.4(a)(20) shall be on the generator, intermediate handler or manufacturer claiming the exclusion. One commenter correctly noted that this provision is redundant with the provision in §261.2(f), which

also addresses assigning burdens of proof (both the burden of going forward and the ultimate burden of persuasion, see 50 FR at 642) when conditional exclusions are involved. The proposed provision has therefore been deleted from the final rule.

Unit Closure. Today's final rule specifies that storage units (e.g., tanks and containers) used only to store zinc-bearing hazardous wastes before a conditional exclusion takes effect (i.e., before the facility owner/operator submits the one-time notice provided under §261.4(a)(20)(ii)(B)), and that will be used thereafter only to store secondary material excluded under today's rule, will not be subject to the closure requirements of 40 CFR Part 264 (for units at permitted facilities) or Part 265 (for units at interim status facilities). This provision is intended to address situations where units such as tanks that have been used to store hazardous wastes would be required under the existing regulations to go through RCRA closure before storage of the excluded material could commence. As explained in the preamble to the proposed rule, the existing regulations require closure of units within 90 days of receiving the final volume of hazardous waste (see §264.113(a) and §265.113(a)). In the case of facilities affected by today's rule, this would mean that for units such as tanks that have been storing zinc-bearing hazardous wastes, the owner/operator would need to remove all waste residues and other contamination from the unit, in order for the unit to then commence storing the identical material under the terms of the conditional exclusion. We believe that requiring closure under these circumstances would serve little, if any environmental purpose, and today's rule explicitly provides that in these situations storage units will not be subject to RCRA closure requirements.

Although these storage units will not be required to undergo closure according to the RCRA hazardous waste regulations, when the use of such a unit for this purpose is ultimately discontinued for some reason, the Agency expects that owner/operators will take common-sense steps to decontaminate and decomission the unit. We encourage owner/operators in these situations to consult with regulatory agencies as to the best way to ensure that such units and

their surroundings are cleaned up properly.

EPA wishes to emphasize that relieving storage units from closure requirements in these situations will not relieve facility owner/operators of their responsibility to respond to any releases from such units during their operational life. As explained elsewhere in this preamble, not responding to such releases could be considered an act of illegal disposal under RCRA, and could thus be subject to enforcement action under RCRA section 3008(a), which could impose penalties, as well as require any necessary cleanup actions. The conditional exclusion also will not affect a facility owner/operator's corrective action obligations under RCRA §3004(u) or §3008(h). If necessary, other federal or state remedial authorities may also be used to address such releases. We also note that the facilities operating under the terms of today's conditional exclusion will remain subject to regulatory oversight by authorized states and EPA, and as such we expect that environmental conditions at these facilities will continue to be scrutinized by regulatory personnel. Another consideration for not requiring RCRA closure in today's rule is that storage in land-based units (e.g., outdoor piles) will not be allowed under the conditional exclusion. Generally, land-based units are more likely to have releases and are often more difficult to remediate. We thus believe, for the reasons cited above, that eliminating the closure requirement for storage units at facilities affected by today's rule will not compromise environmental protections at these facilities.

4. Implementation and Enforcement.

Implementation. The preamble to the proposed rule discussed and requested comments on several issues relating to implementation of this rule once it takes effect (65 FR at 70966-70967). These issues addressed the potential regulatory consequences of the rule on permitted and interim status RCRA facilities, and how the rule would be enforced. EPA has not made any specific regulatory changes in the final rule to address these issues, since we believe they can be satisfactorily resolved by the following explanation.

One key issue has to do with the effects of the rule on facilities that currently have RCRA permits or interim status, and are managing hazardous wastes that will become conditionally excluded under this rule. Under one scenario, a facility that manages a variety of hazardous waste materials, including some that become excluded under this rule, would be affected only to the extent that certain units or procedures at the facility would no longer be subject to hazardous waste regulations. A somewhat different scenario could involve a facility whose hazardous wastes all become conditionally excluded from regulation when this rule takes effect (i.e., the facility no longer operates any hazardous waste management units).

One idea discussed in the proposal was to amend the current regulations to automatically terminate permit conditions, permits and/or interim status at facilities where hazardous waste management units or activities become de-regulated under today's rule. This could eliminate the need for regulatory agencies to process permit modifications or administratively terminate permits or interim status for those facilities. One state agency commenting on the proposal argued, however, for maintaining a government role in managing these facility transitions, asserting that automatically terminating permit conditions would not provide adequate oversight over facilities in these situations. Although cases like this are expected to be relatively few in number (perhaps only one facility in the nation will potentially be able to have its RCRA permit terminated because of this rule), we agree with the state agency commenter that making the transition to non-permitted status may not be entirely straightforward, especially when such facilities are undergoing cleanup actions under RCRA authorities. Thus, we concur that there should be some regulatory agency oversight in changing a facility's permit or interim status obligations under these regulations, and today's rule does not contain any regulatory provision for automatically terminating permits, permit conditions or interim status at facilities affected by this final rule. We believe that making these changes at affected facilities can be done efficiently under current authorized state administrative procedures for modifying or terminating a facility's

RCRA permit or interim status.

Another potential implementation issue that could arise has to do with ensuring cleanup of historic contamination problems at facilities that may no longer need permits or interim status once the conditional exclusion takes effect. An example might be a facility with a RCRA operating permit that is working to remediate ground water contamination under the conditions of the permit. While the facility's operating permit may no longer be needed (since it is no longer actively managing hazardous waste), the owner/operator's obligations to remediate the contamination problems at the facility would not be affected by a change in the facility's operating status. In these situations, the authorized states would have the flexibility to address the facility's cleanup obligations by either maintaining in effect the corrective action-related provisions of the permit, or by using alternative federal or state enforcement mechanisms that may be available.

Enforcement. The exclusion in today's rule for hazardous secondary materials [§261.4(a)(20)] will take effect once a generator, intermediate handler or manufacturer provides notice to the appropriate regulatory agency of his/her intent to begin using the exclusion. There is no requirement for the regulatory agency to formally approve or otherwise act on such notices, though some state agencies may wish to do so.

The party claiming the conditional exclusion will be responsible for maintaining the exclusion by ensuring that all of the conditions are met. In the event that a condition is not met, the facility owner/operator will need to remedy the situation as soon as possible in order not to jeopardize the exclusion. Should there be any questions as to whether the facility has properly maintained its exclusion, it will be the responsibility of the owner/operator to demonstrate that the conditions have been and are being met. See section 261.2(f), discussed earlier. If necessary, the overseeing regulatory agency may use RCRA inspection and information collection authorities to assist in establishing whether or not a facility is meeting the exclusion

conditions.

Facilities that claim the exclusion but fail to meet one or more of its conditions may be subject to enforcement action. For example, if a facility claiming the conditional exclusion failed to store secondary material in accordance with one or more of the conditions, the facility would in effect automatically lose its exclusion, and EPA or an authorized state agency could take enforcement action [under RCRA §3008(a)], since the facility would likely then be violating hazardous waste regulatory requirements. In these situations a range of specific enforcement actions might be taken. In less serious cases the facility might simply be required to promptly remedy the situation, though fines or other penalties could also be assessed if appropriate. In especially serious cases the facility could be ordered to obtain a RCRA permit and comply with all applicable hazardous waste regulations.

As a general matter, if a facility fails to meet a condition of the exclusion it will not necessarily affect the regulatory status of the secondary material at other facilities. For example, if a fertilizer manufacturer's facility were to lose its exclusion, the facility generating the secondary material would typically be allowed to retain its exclusion, provided that he or she continues to meet the applicable conditions. In such a case, the manufacturer would need to be in compliance with applicable hazardous waste regulations in order to accept any further shipments of excluded (or non-excluded) material from a generator.

With regard to enforcement, it should also be noted that the conditional exclusion in today's rule will not affect a facility owner/operator's obligation to promptly respond to and remediate any releases of excluded secondary material that may occur at the facility. An accident, for example, could rupture or otherwise damage a tank or container, causing spillage of material onto soils. If such released material were not cleaned up promptly, the owner/operator would be subject to enforcement action for illegal disposal of waste. See section 264.1(g)(8)(iii).

Today's conditional exclusion will not affect the rights of concerned citizens to bring to

regulators' attention any circumstance that might aid authorities in their monitoring and enforcement efforts. A concerned citizen also may file a suit under RCRA §7002 against a party for violations that may result from failure to meet any of the conditions in this rule. Moreover, imminent and substantial endangerment provisions under Section 7003 of RCRA will continue to apply to conditionally excluded secondary materials as a safeguard, since those materials remain a statutory solid waste. Thus, EPA or an authorized State can act in the unlikely event of circumstances which may endanger human health or environment.

5. Response to Comments. EPA received a number of comments addressing the general issue of whether or not a conditional exclusion from hazardous waste regulations is appropriate in the context of this rulemaking. One set of commenters presented arguments contending that EPA has no legal jurisdiction at all under RCRA to establish conditions or otherwise regulate hazardous secondary materials that are recycled to make zinc fertilizers. On the other hand, a substantial number of commenters expressed support for EPA continuing to regulate these materials as hazardous wastes, and called for adding a number of new, more stringent regulatory controls and restrictions over these waste materials.

With respect to comments challenging EPA's authority to classify hazardous secondary materials used as ingredients in fertilizer as solid wastes at all, EPA notes first that this issue has been long-settled, and was not reopened in this rule. EPA's rules classifying hazardous secondary materials used in a manner constituting disposal – which includes use as fertilizers, or as ingredients in fertilizers – were promulgated in 1985. 50 FR at 664, 666-67. These use constituting disposal rules were never challenged.[2] EPA did not reopen the issue of jurisdiction

---

[2]EPA promulgated the rules requiring products placed on the land which are produced from hazardous wastes to meet LDR requirements in 1988, which rules also contained the provision exempting K 061-derived zinc fertilizers from this requirement. 53 FR at 31212 (August 17, 1988). There were likewise no challenges to these rules raising the question of EPA's jurisdiction to adopt the provisions.

for comment in this proceeding. 65 FR at 70959 n. 2. Thus, EPA believes that these comments are untimely.

In the event that response is considered necessary, however, EPA believes that it has ample jurisdiction to classify hazardous secondary materials used to produce zinc fertilizers as solid wastes. We also note that the following discussion applies to authority over uses constituting disposal as defined in section 261.2(c)(1), and does not deal with, or apply to, any other type of recycling. First, the generator of the hazardous secondary material is an unrelated entity getting rid of its secondary materials to a different industry sector. Thus, when one entity takes a secondary material for which it has no continuing use and transfers it to an unrelated entity, the materials can be viewed as discarded by that first entity. See Owen Electric Steel Co., v. EPA, 37 F. 3d 146, 150 (4th Cir. 1994) (EPA properly classified secondary material as a solid waste "because the slag is sold to others for use in roadbed construction, it is not "destined for beneficial reuse or recycling in a continuous process by the generating industry itself", quoting AMC I, 824 F. 2d at 1186 (emphasis original)). See generally American Petroleum Institute v. EPA ("API II"), 216 F. 3d 50, 58 (D.C. Cir. 2000); Association of Battery Recyclers v. EPA, 208 F. 3d 1047, 1059-60 (D.C. Cir. 2000); American Petroleum Institute v. EPA, 906 F. 2d 729, 741 (D.C. Cir. 1990)[33]; Specialty Steel Mfrs. Assn v. EPA, 27 F. 3d 642, 646 (D.C. Cir. 1994).

[3]Commenters argued that API I was not on point because EPA there had compelled recovery of K 061 by establishing a treatment standard mandating metals recovery, and so had simply forced the recycling of material that would otherwise be disposed of, so that the material could be regarded as "discarded". Although it is correct that the opinion states that K061 was subject to a treatment standard of mandatory metal reclamation, 906 F. 2d at 741, it is incorrect that steel mills were otherwise disposing of their electric arc furnace dust, or that EPA had through its treatment standard converted a disposed-of waste into a recycled secondary material. Metals reclamation of K 061 was widespread at the time EPA adopted the treatment standard, and EPA based the standard on this well-established, existing practice. See 53 FR 11742, 11752 (April 8, 1988) (high temperature metal recovery currently in use by at least four domestic facilities to recover zinc from K061, and the proposed treatment standard is taken from measurements from one of those existing operations). It also should be noted that the recycling practice at issue in API I is arguably more continuous than the types of practices involved in this

Recycling via land application is a further indication of discarding. As EPA has stated years ago, "Use constituting disposal involves as a practical matter the disposal of wastes. The wastes are being gotten rid of by placing them directly on the land." 53 FR at 31198; see also 48 FR at 14484 (April 4, 1983) ("these practices are virtually the equivalent of unsupervised land disposal"). When placed on the land, hazardous secondary materials and the hazardous constituents they contain (few, if any, of which contribute to the recycling activity) could escape via all conceivable exposure pathways -- air, runoff, leaching, even (as here) foodchain uptake. Such activities can certainly be viewed as discarding that is "part of the waste disposal problem."

The statute supports this position. See RCRA section 3004 (l) (use of "waste or used oil or other material, which is contaminated with dioxin or any hazardous waste .... for dust suppression or road treatment is prohibited")[4]; H.R. Rep. No. 198, 98th Cong., 1st Sess. at 46, 67-68 (hazardous waste-derived products that are placed on the land are to be the special object of EPA scrutiny in implementing subtitle C); see also Association of Battery Recyclers v. EPA, 208 F. 3d 1047, 1059 - 60 (recycling via uses constituting disposal pose even greater potential risks

---

rulemaking. When electric arc furnace dust is smelted for zinc recovery, it is captured as a dust by steel mill baghouses, conveyed to a storage bin at the mill (usually by conveyor belt, but sometimes pneumatically), and then shipped directly by truck or rail to the purchasing smelter. Typical storage time at the generating steel mill is two days or less, due to limited storage bin capacity. In contrast, storage times at generators of secondary materials used eventually as a zinc source for fertilizer often is up to 90 days. These generators also often deal through intermediary brokers who find an end use for the secondary material.

[4]Since dioxin is a chemical contaminant, and is not itself a waste, section 3004 (l) thus states that use of contaminated used oil which is recycled via use as a dust suppressant – an example of a use constituting disposal – is prohibited. Congress, by placing this prohibition within section 3004 (which applies only to solid and hazardous wastes) could take this action only if it considered this form of recycling to involve a solid waste. It also bears mention that use of used oil contaminated with dioxin as a dust suppressant is not per se a type of sham recycling. Dioxins bind tenaciously with soils, and so contribute to the dust suppression use. The Congressional prohibition in section 3004 (l) thus applies to a form of recycling, not to illicit disposal. Note also that today's rule deals (in part) with the issue of dioxin contamination in the secondary materials used to produce zinc fertilizers.

than conventional land disposal, and thus justify stricter regulation). As the Agency concluded in 1988 (in another determination that was never challenged), "To say that Congress did not intend to control these use constituting disposal situations under RCRA is to say that Congress had no intention of controlling such damage incidents as the Times Beach dioxin spreading incident where a group of communities were rendered uninhabitable as a result of use of a distillation botto[m] mixed with used oil as a dust suppressant. No credible reading of the statute would authorize this type of conduct." 53 FR at 31198. Indeed, some of the fertilizers addressed by today's rule contain dioxin, which comes from the hazardous secondary materials used as a source of zinc. EPA does not consider it plausible that Congress prohibited the use of dioxin-containing secondary materials as dust suppressants, but denied EPA the authority to even consider the question of dioxin-containing hazardous secondary materials used as fertilizers – the more potentially harmful practice given the possibility of food chain contamination.

EPA notes, in addition, that many of the conditions in today's rule serve to demarcate legitimate recycling. The hazardous constitutent levels for fertilizers, for example, are drawn from typical levels in commercial zinc micronutrient fertilizers. To the extent that fertilizers contain non-nutritive hazardous constituents which come from hazardous secondary materials in concentrations significantly in excess of these levels, the recycling practice can be veiwed as simply discarding those materials and constituents. American Petroleum Inst. II, 216 F. 3d at 58.

This is not to say that EPA lacks discretion to classify some hazardous secondary materials, and products derived therefrom, which are used in a manner constituting disposal as not being solid wastes. The facts justifying such discretion here (stated broadly) are a) the usefulness of the materials as a source of zinc for fertilizer; b) the similarity of hazardous constituent levels in hazardous and non-hazardous feedstock materials, and the fact that zinc fertilizers made from hazardous secondary materials are indistinguishable from those made from non-hazardous materials, and are processed identically (see, e.g. 46 FR at 44971 (Aug. 8, 1981)

(EPA's first announcement of the principle that identity of waste-derived and non-waste derived products justifies cessation of RCRA regulation); and c) management practices commensurate with the idea that the secondary materials are being managed as a valuable commodity rather than as a waste. The conditions adopted in today's rule are designed to assure that this fact pattern actually occurs, and (as noted above) are further designed to assure that legitimate rather than sham recycling occurs.

As mentioned previously, a number of commenters did not support a regulatory exclusion of any kind for hazardous secondary materials used to make fertilizers, and instead favored maintaining and expanding the current hazardous waste regulatory controls over these materials. Among the suggestions for increased regulatory controls were greatly enhanced reporting by waste generators, middlemen and fertilizer manufacturers with regard to all shipments of hazardous wastes, including reporting on the composition of both the wastes that are used and of the fertilizers that are produced from those wastes. These additional reports would be required as part of the RCRA biennial reporting system (see §262.41). More thorough testing for a wider range of hazardous constituents was also suggested, as was labeling of fertilizer packaging to indicate that the fertilizer was made from hazardous waste.

As discussed earlier, we believe that maintaining RCRA regulatory controls over all hazardous secondary materials used to make zinc fertilizer is counter-productive, in that it discourages legitimate, safe recycling of these valuable materials, and can actually encourage production of fertilizers with higher contaminant levels . Adding further regulatory requirements would almost certainly ensure that this recyling practice would be eliminated completely, which we do not believe would be beneficial environmentally. With regard specifically to requiring additional testing of wastes and materials, the commenters did not supply any data to demonstrate why such additional testing is necessary, or any evidence indicating that fertilizers which meet today's exclusion levels are likely to contain meaningful levels of contaminants

other than those for which we have established limits. EPA thus sees no reason to impose such additional requirements without a clear rationale for doing so.

With regard to commenters who supported labeling of hazardous waste derived fertilizer products, we note that there is no legal authority under RCRA to impose such a labeling requirement on products that are made from legitimately recycled hazardous wastes or conditionally excluded secondary materials. We also question the appropriateness of requiring such labels, since they would likely unnecessarily stigmatize products that are identical in composition to fertilizers made from other types of materials.

D. Conditional exclusion for zinc fertilizers made from excluded hazardous secondary materials.

As mentioned previously, today's rule finalizes the same basic approach as was proposed with regard to setting conditional limits on contaminants in zinc fertilizers made from recycled hazardous secondary materials. This rule therefore establishes specific limits on heavy metals and dioxins that may be contained in these zinc fertilizers (the limits serving as the means for distinguishing wastes from fertilizer products under the conditional exclusion), and sets conditions for sampling, analysis and recordkeeping to verify compliance with these limits (i.e., to verify that excluded recycling is occurring). In effect, these conditions must all be met in order for zinc fertilizers made from hazardous secondary materials to be considered products, rather than wastes.

1. Hazardous constituent levels for excluded zinc fertilizers. Today's rule establishes a new set of product specification limits for contaminants in zinc fertilizers made from hazardous secondary materials. Zinc fertilizers that meet these specification limits will in effect be

considered products, rather than wastes.

The new exclusion limits in today's final rule address five metal contaminants – i.e., metals coming from zinc-containing hazardous secondary materials that are both non-nutritive and toxic (lead, cadmium, arsenic, mercury and chromium) – and dioxins (likewise non-contributing). In absolute terms, the exclusion limits for the five metals are numerically higher than the LDR treatment standards for those metals (i.e., the "universal treatment standards" specified at §268.48). However, direct comparisons between the two sets of limits are difficult to make. This is because the LDRs are measured according to a leachate extraction procedure (the toxicity characteristic leaching procedure, or TCLP - see §261.24), while the new exclusion levels are expressed as total concentrations. Since the leachability of metal constituents varies according to a number of factors, it is difficult to predict the relationship between TCLP-measured levels vs. total concentration levels with any degree of certainty. To illustrate, the new exclusion level for lead in a 20% zinc fertilizer formulation would be 56 ppm, while the universal treatment standard for lead is 0.75 ppm (milligrams per liter). If in this case the tested sample contained 56 ppm total lead, the TCLP result could be either higher than 0.75 ppm, or lower if the lead was in (for example) a relatively insoluble compound form.

The exclusion limit for dioxins in today's rule is more stringent than the LDR standards, since dioxins are typically not "underlying constituents" subject to treatment in the secondary materials that are likely to be excluded under today's rule (i.e., secondary materials that exhibit a hazardous characteristic –see §268.40(e)). Because of this, and in light of the uncertainties inherent in comparing LDR standards for metals with the new exclusion levels, EPA considers today's exclusion levels to be generally more stringent than the LDR standards.

The product specifications in today's rule must be met for any zinc fertilizer that is made from excluded secondary materials. In this sense the two exclusions are linked--a manufacturer who uses the exclusion for hazardous secondary materials must meet the new, more stringent exclusion levels for the zinc fertilizers he or she produces. The LDR standards will continue to apply to any non-zinc fertilizer that is made from recycled hazardous waste.

It is possible under some circumstances that a zinc fertilizer manufacturer might choose not to use the conditional exclusion for hazardous secondary materials, and instead use fully regulated hazardous wastes as feedstock materials. This might happen, for instance, if the manufacturer has already obtained a RCRA permit and made the necessary investments to comply with hazardous waste regulations. In such a case the LDR standards would apply to the hazardous waste derived fertilizers. Such a manufacturer would have the option, however, of meeting the generally more stringent product specifications in today's rule if there were some incentive (e.g., a marketing advantage) to do so.

To reiterate, today's conditional exclusions apply only to zinc fertilizers and the secondary materials used to produce them. Thus, if hazardous wastes are used to make non-zinc fertilizers, both the wastes and the fertilizers will be subject to applicable hazardous waste regulations [see §262.20(a)].

2. *Limits on metal contaminants.* Table 1 presents the final limits on five metal contaminants in zinc fertilizers that are made from hazardous secondary materials:

Table 1. Limits on Metal Contaminants

Metal Constituent	Maximum allowable total concentration in fertilizer, per unit (1%) of zinc content
Arsenic	0.3 ppm

Cadmium	1.4 ppm
Chromium	0.6 ppm
Lead	2.8 ppm
Mercury	0.3 ppm

As noted in the table, these limits are expressed as total concentrations of the metal in the fertilizer product. The alternative of establishing limits based on a different type of test procedure, such as the TCLP used in the RCRA program to identify hazardous wastes, was not supported by any of the commenters on the proposal (one obvious reason being that satisfying a leach test would normally mean that the material is unusable as a fertilizer, since the nutritive metal would be bound up along with the hazardous constitutents). It should also be noted that the limits are tied to the percentage of zinc in the fertilizer. This is primarily because the zinc content of fertilizers varies widely. If the limits were not tied to the percentage of zinc in the product, it is possible that manufacturers could comply with the limits simply by lowering the zinc content of the product, in effect diluting the contaminants with other ingredients. 55 FR at 70969.

These limits on metals are based on the levels of contaminants in commercial zinc fertilizers that have been well demonstrated as technically and economically practical, by using sound, relatively simple manufacturing techniques. They thus are reasonable levels for demarcating products from wastes. As explained in the preamble to the proposed rule, a widely-marketed zinc fertilizer formulation known as zinc sulfate monohydrate, or ZSM, was used as the basis for developing these limits. 55 FR at 70969.

EPA has made three substantive changes in finalizing the conditional limits for metal contaminants. One change was made in response to a commenter who suggested that additional sampling and testing for metal contaminants should be required whenever a change in manufacturing processes or ingredients is made that could significantly affect the amounts of contaminants in the fertilizer product. The Agency has added this condition to the final rule, since we believe it to be a reasonable precaution that prudent manufacturers would likely take in the normal course of production, even without such a regulatory provision. As such, we believe it a reasonable condition to demarcate products from wastes and to assure that legitimate recycling occurs.

Another substantive change that has been made to the proposed limits on metal contaminants is that the final rule does not include a limit for nickel. Several commenters expressed the view that the proposed limit on nickel (1.4 ppm per percent of zinc in the fertilizer) was unnecessary from an environmental perspective, in that nickel is generally less toxic than the five other metal contaminants, and EPA's background data did not reveal especially high levels of nickel in any of the fertilizer products that were studied [see "Background Document on Fertilizer Use, Contaminants and Regulation" (EPA 747-R-98-003, January, 1999)]. Some of these commenters also opined that setting a limit on nickel in the context of this EPA rulemaking could create an unnecessary and unwarranted perception that exposure to nickel generally poses serious human health and/or environmental risks.

EPA agrees that nickel is generally less toxic to humans than metals such as lead, cadmium, arsenic and others, and we acknowledge that our review of fertilizer contaminant data did not identify any fertilizer product with nickel at levels that could pose significant health or

ecological risks. Further, the processing and filtering steps that are required to manufacture high-purity zinc fertilizers (such as ZSM fertilizers) remove nickel along with other metal contaminants. It is therefore highly unlikely that fertilizers which meet the RCRA contaminant limits for other metals (lead, cadmium, arsenic, mercury and chromium) would contain elevated levels of nickel.

Given that excessive levels of nickel are unlikely in zinc fertilizers that meet the limits for the other five metals in today's rule, and given the relatively lower toxicity of nickel as compared with those metals, the Agency is persuaded that specifying a limit for nickel in today's final rule would serve no real environmental or regulatory purpose. We have therefore removed the limit for nickel in today's final rule.

The third change that has been made to the proposed limits for metals is that the final conditional limit for arsenic has been lowered, from 0.6 ppm per unit of zinc, to 0.3 ppm. This change was made in response to a commenter who questioned the validity of certain data that were used to derive the numerical limit for arsenic. Specifically, the commenter noted that the proposed limit appeared to be based on test results that represented analytical detection limits, rather than actual measured levels of arsenic in tested fertilizers. Our further review of the data confirmed this to be the case, and we have therefore established an arsenic limit that more accurately reflects what we believe to be the actual levels of arsenic in ZSM fertilizers.

Response to comments. EPA received comments reflecting a wide range of viewpoints (in addition to those described above) regarding the proposed limits on metals in recycled zinc fertilizers. One group of commenters questioned the Agency's legal authority to establish any limits at all on contaminants in these fertilizers, arguing that recent court decisions have

narrowed the scope of EPA's regulatory jurisdiction over this type of hazardous waste recycling (an issue addressed earlier in this preamble). Some of these commenters also argued that, legal issues aside, it is unnecessary to set any limits on fertilizer contaminants, since EPA's own studies have concluded that fertilizers are generally safe when used properly. Other commenters expressed the view that the technology-based limits (i.e. conditional levels reflecting demonstrated fertilizer production process capabilities) as proposed were unnecessarily stringent from a risk perspective, and that any such contaminant limits should be risk-based (i.e., set at levels that are "safe," based on an assessment of potential risks to humans and ecosystems). Some of these commenters further suggested that the risk-based guidelines for metal contaminants in fertilizers that were recently adopted by the Association of American Plant Food Control Officials (AAPFCO) (see http://aapfco.org/SUIP25Aug08.htm) could be used for this purpose. Other commenters expressed the view that the proposed limits for metals were not stringent enough, and should be set at the lowest levels that can be technically achieved. Some of these commenters further suggested that limits should be set for additional metals (e.g., selenium, vanadium, beryllium, antimony). One commenter further argued that the limit on chromium should apply only to the more toxic, hexavalent form of chromium, rather than to total chromium as proposed.

EPA chose not to use risk-based limits in this final rule, primarily because we continue to believe that technology-based limits are more appropriate in the context of this rulemaking. Our rationale for using technology-based limits for metals in fertilizers -- viz. as explained above, establishing a specification based on contaminant levels found in normal commercial fertilizers in order to reasonably distinguish products from wastes -- was explained in detail in the

preamble to the proposal, and many commenters supported the approach. Given that today's rule is an exclusion of these materials from being solid wastes, rather than an exclusion from being a hazardous waste (which would more naturally call for a risk-based justification), EPA continues to believe that this approach is reasonable. We did not receive any comments persuading us that the use of technology-based limits in the context of this rulemaking is inappropriate, technically difficult or unduly burdensome for industry.

Moreover, developing risk-based limits for zinc fertilizers would be a highly complex and resource intensive undertaking, and risk-based limits might actually allow contaminant levels in fertilizers to increase substantially, which we do not believe is an environmentally desirable result. To illustrate, Table 2 compares today's exclusion levels with AAPFCO's recommended standards (which were developed from risk assessment studies) for five metals in micronutrient fertilizers, assuming a 35.5% zinc content that is typical for zinc sulfate monohydrate fertilizers:

Table 2 - Comparison of RCRA Exclusion Levels with AAPFCO Recommended Guidelines

Metal	RCRA Exclusion Levels (ppm)	AAPFCO Guideline (ppm)
Arsenic	10.7	3,976
Cadmium	49.7	2,947
Chromium	21.3	No limit
Lead	99.4	16,437
Mercury	10.7	213

It should be noted that the AAPFCO recommended standards listed in Table 2 were based primarily on a risk assessment study commissioned by The Fertilizer Institute (an industry

trade organization). As with other similar risk assessments, including EPA's ("Estimating Risk from Contaminants Contained in Agricultural Fertilizers," September 1, 1999; website address www.epa.gov/epaoswer/hazwaste/recycle/fertiliz/risk/report.pdf), a number of simplifying assumptions and models were used to address data gaps and other uncertainties inherent in that analysis. EPA does not necessarily accept or dispute the validity of the AAPFCO recommended levels as accurate indicators of potential risks; any such technical judgment would of necessity have to be based on additional data and more rigorous analysis. We note, however, that the general findings of EPA's risk assessment did not differ dramatically from those of the TFI-sponsored study. In any case, we simply wish to underscore the point that any risk-based standards for fertilizer contaminants, including those adopted by AAPFCO, have a considerable uncertainty factor associated with them.

The comparison in Table 2 indicates that risk-based limits for zinc fertilizers are likely to be far higher than the levels of contaminants that are now found in many commonly marketed products. At best, therefore, risk-based standards would have very little effect in terms of actually limiting the amounts of toxic metals in fertilizer products. In fact, as noted already, such standards could allow contaminant levels in zinc fertilizers to increase substantially over current levels. From an environmental perspective, and in light of the public policy debate that has recently taken place over fertilizer contamination, we believe such a result to be inappropriate from an environmental and public policy perspective. In EPA's view, regulatory efforts to control contaminants in fertilizers should be focused mainly on ensuring that fertilizers remain relatively clean, rather than allowing fertilizers to become increasingly contaminated to the point where they may begin to pose unacceptable human health or ecological risks. More

importantly for the purposes of this rulemaking, risk-based levels are inappropriate as a measure of distinguishing zinc fertilizer products from wastes, since they bear no relation to the levels that are found in currently marketed zinc fertilizers, and therefore bear no relation to the question of whether the waste-derived fertilizers should be viewed as being or containing waste.

As for the comment suggesting that it is unnecessary to place any limits on contaminants in fertilizers because EPA's studies indicate fertilizers are generally safe, we disagree. In our view, it would be difficult, if not unconscionable, to assure the public and other stakeholders as to the safety and legitimacy of using hazardous secondary materials--i.e., what otherwise are hazardous wastes--to make fertilizers without having any means of limiting contaminants in the resulting fertilizer products. Moreover, opportunities for sham recycling obviously would become rife under such an approach.

Some commenters expressed support for EPA's proposal to use technology-based limits for metals in recycled zinc fertilizers, but suggested that lower limits can and should be achieved. One industry commenter agreed, noting that his company consistently produces pharmaceutical grade zinc sulfate monohydrate with lower contaminant levels than those proposed, and that other companies could meet similar levels.

EPA does not question the assertion that lower contaminant levels than those proposed are technically achievable through the use of more refined (and more expensive) manufacturing processes. However, it is not the Agency's intent to set these limits at the very lowest levels that can be technically achieved. Cf. 63 FR at 33784-33885 (June 19, 1998) (explaining a similar benchmark approach for establishing levels to distinguish products from waste fuels based on comtaminant levels found in normal fossil fuels, rather than the very 'cleanest' or 'dirtiest' fossil

fuels). The Agency's fertilizer risk assessment indicates that the proposed limits are considerably below levels that we estimate (albeit roughly) to be "safe" for humans and ecosystems. Thus, the actual environmental benefit to be gained from more stringent limits would likely be negligible. Further, we find highly questionable the notion that there would be any real public benefit in requiring zinc fertilizers to be suitable for pharmaceutical use, or that such exceptional purity (necessary for such a specialized use) is a reasonable means of demarcating fertilizer products from wastes. Finally, setting stricter limits in this rule would almost certainly force most manufacturers to either raise prices for finished zinc fertilizer products, or avoid regulatory requirements altogether by simply switching to alternative feedstock materials that are unregulated by RCRA. We see little if any benefit in either outcome. We have therefore not adjusted the final limits for metals in response to these comments.

Some commenters expressed the view that this rule should set limits for additional metals such as selenium, vanadium, beryllium, antimony and others, citing the possibility that potentially harmful levels of such metals could occur in zinc fertilizers. These commenters did not, however, provide any data to establish that elevated levels of such metals occur in ZSM products (or any other types of fertilizers), or that the purification techniques used in manufacturing ZSM would fail to remove these metals. We note, too, that the data we have reviewed to date on fertilizer contaminants did not indicate the presence of elevated levels of such additional contaminants in zinc fertilizers or any other fertilizer products. We are therefore not persuaded that there is any real need to set limits on additional metals in this rule, and the final rule addresses only the five metal constituents listed above.

A few commenters questioned the proposed limit on chromium (0.6 ppm per unit of zinc), contending that it would be unnecessarily stringent since it does not differentiate between the hexavalent and trivalent forms of chromium, and only the hexavalent form is a potential threat to human health. One commenter also stated that there is no basis or precedent in RCRA to establish controls on the less toxic forms of chromium. That commenter argued further that new fertilizer manufacturing techniques under development may be unable to meet the proposed limit if it applied to total chromium, but could presumably meet that level if it applied only to the hexavalent form.

EPA does not dispute that the potential adverse health effects from exposure to hexavalent chromium are considerably greater than for trivalent chromium, although we do not agree with the commenter's assertion that RCRA controls only apply to hexavalent chromium. As one example, the listing of chromium as a "hazardous constituent" in Appendix VIII of 40 CFR Part 261 does not distinguish between the hexavalent and trivalent forms. Similarly, the "land disposal restrictions" treatment standard for chromium [see §268.48] applies to total chromium. There are a number of other examples, as well. We acknowledge, however, that some regulatory provisions of RCRA do make risk distinctions between hexavalent and trivalent chromium. One example is the exemption from the definition of hazardous waste for certain wastes that, upon specific demonstration, are shown to contain only trivalent chromium [see §261.4(b)(6)].

The proposed limit for total chromium (0.6 ppm per unit of zinc) represents the level that has been demonstrated as readily achievable in ZSM fertilizers, including a small margin to account for variabilities in the manufacturing process. The commenter who proposed applying

the limit only to hexavalent chromium did not question EPA's assertion that this level can be easily achieved in ZSM products, but instead referred to an unspecified "advanced technology" for making zinc fertilizer that is not designed to remove these contaminants. We note that the commenter did not supply any description of this advanced process, or submit any data to substantiate the claim that this technology would be unable to meet the proposed limit for total chromium. In fact, it is unclear from the commenter's discussion that this unspecified technology has been actually used in full-scale manufacture of zinc fertilizers. We also note that there is little, if any, available ZSM analytical data that differentiates between the different forms of chromium, although the basic chemical properties of chromium suggest that the presence of hexavalent chromium in ZSM fertilizers is likely to be relatively rare. In any case, it is certainly not EPA's intent in this rule to stifle development of new technologies for legitimate recycling in the fertilizer industry. However, without additional data and/or considerably more substantiation of the commenter's claims it is difficult for the Agency to conclude that the proposed limit on chromium is inappropriate or will otherwise be a hardship for zinc fertilizer manufacturers. The final limit on (total) chromium is therefore unchanged from the proposal.

3. Limit on dioxins. Today's rule finalizes the proposed limit of eight (8) parts per trillion of dioxins in zinc fertilizers, as measured according to the "toxicity equivalence" or TEQ method [see "Estimating Exposures to Dioxin-like Compounds" (EPA publication #600/6-88/005 Ca)]. The eight part per trillion limit is based on EPA's estimate of average national background levels of dioxins in soils [see EPA report "Estimating Exposure to Dioxin-Like Compounds, Review Draft" (EPA/600/6-88/000Ca; June 1994)]. EPA has included dioxins in its list of priority "persistent, bioaccumulative and toxic" (PBT) chemicals that are of particular

concern environmentally and are the focus of new control strategies being developed by EPA. Further information on the Agency's overall strategy for addressing PBTs can be found on our website (see www.epa.gov/pbt.htm).

Significant levels of dioxins (in the hundreds of parts per trillion range) have been found in zinc oxysulfate fertilizers made from K061 hazardous wastes. EPA's fertilizer risk assessment concluded that exposure to dioxins in fertilizers at these levels is unlikely to pose unacceptable risks, based on currently available dioxin health effects information. However, available data on dioxin levels in fertilizers are admittedly very limited, so it is possible that dioxin levels in some fertilizer products could be higher than the current data suggest. It is also possible that, when finished, the Agency's ongoing reassessment of dioxin health effects could conclude that even more aggressive measures to control this class of PBT compounds are warranted. Because of these uncertainties, and because EPA is committed generally to a multifaceted national strategy aimed at reducing PBTs in the environment, we believe it is appropriate and prudent to limit dioxins in fertilizers in today's final rule. Moreover, given the presence of dioxins in at least some of the hazardous secondary materials used to produce zinc fertilizers, the extreme health risks associated with dioxins, and the fact that they contribute nothing to the efficacy of fertilizer products, some limit on dioxins is necessary for distinguishing product fertilizers from wastes, and to guard against sham recycling.

As explained in the preamble to the proposed rule, EPA chose to use a "background" approach to setting a limit for dioxins in zinc fertilizers primarily because we do not have sufficient data on dioxin levels in zinc fertilizers to establish a technology-based limit, which would be consistent with the approach used in this rulemaking to set limits for metals. The

limited data that are available on dioxin concentrations in zinc sulfate monohydrate (the zinc fertilizer formulation used to develop the technology-based limits for metals) indicate dioxin levels of approximately one part per trillion (TEQ) or less. We did not receive any additional data from commenters with regard to dioxin levels in ZSM products, nor did any commenters offer persuasive evidence that the 8 ppt limit would be technically or economically difficult for ZSM producers to achieve in their products. Thus, we believe that the 8 ppt limit can be (and is being) easily achieved by industry, should not impose any significant economic burden on zinc fertilizer manufacturers, and serves as a reasonable level for distinguishing fertilizer products from wastes.

Response to comments. Many of the commenters on the proposal cited the need to limit dioxins in fertilizers as one of their primary concerns with regard to this rulemaking. Most of these commenters argued for either a more stringent limit than was proposed (e.g., a technology-based limit), or a complete ban on the recycling of any dioxin-containing waste material to make fertilizers. Some commenters suggested that a limit based on average national soil background levels would be appropriate only if it were based on "pre-industrial" background levels (which would presumably be lower than eight parts per trillion). In contrast, a number of other commenters opposed setting any limit on dioxins in this rule, arguing that it would increase costs to industry and would have little or no net environmental benefit. Other commenters suggested that if a limit on dioxins in fertilizer is established it should be risk-based, rather than based on national background soil levels. One commenter suggested that a dioxin limit of 100 parts per trillion would be more reasonable and appropriate than the proposed limit, though the basis for that specific limit was not provided.

None of the commenters who argued for more stringent limits on dioxins in this rule offered any scientific evidence establishing an environmental need for such additional controls, or questioning EPA's basic risk findings with regard to dioxins in zinc fertilizers. In addition, it is likely that more stringent limits would raise costs for this rule considerably. We see no reason to impose such additional costs without a convincing environmental rationale for doing so; thus, we chose not to adopt more stringent controls for dioxins in this final rule.

We disagree with the commenters who questioned the need for any limit on dioxins in this rule. As explained above, we believe that a limit on dioxins is appropriate as part of the Agency's broader strategy to control PBT chemicals in the environment, and should moreover have minimal cost impacts on industry. We also believe that a limit on dioxins in this rule is useful in distinguishing products from wastes, and in guarding against sham recycling of dioxin-containing secondary materials (dioxin being a non-contributing hazardous constituent in fertilizers). We do not agree with the commenters who suggested using a risk-based approach to setting limits on dioxins in this rule, for reasons similar to those in the preceding discussion of risk-based levels for metal contaminants. A risk-based limit on dioxins would likely be much higher than the actual levels of dioxins in high-quality zinc fertilizer, or the national soil background level of eight parts per trillion. Thus, a risk-based limit on dioxins would likely allow dioxin levels in these fertilizer products to increase greatly, to the point where they could pose unacceptable risks. EPA does not believe this to be a desirable environmental result, particularly in light of the current scientific uncertainty over the health effects of dioxins.

We also chose not to adopt a limit of 100 parts per trillion, as was suggested by one commenter. That commenter did not offer any scientific, technical or economic basis for this

particular limit, nor did the commenter offer any evidence to refute our assumption that the eight ppt limit would be easily achievable by manufacturers of high-quality zinc fertilizers. We thus see no reason to adopt this higher, alternative limit for dioxins in this rule.

IV. Mining wastes used to make fertilizers.

In the preamble to the proposed rule, EPA discussed and requested comment as to the regulatory status of certain fertilizers that are made from mining wastes which exhibit a hazardous characteristic (e.g., are toxic when tested according to the TCLP, cited earlier). One particular iron fertilizer product, which is widely marketed to consumers through retail outlets under the name "Ironite," has been identified as being made from such material. This product is notable for containing approximately 4400 parts per million of arsenic–to our knowledge, the highest arsenic levels of any fertilizer, by several orders of magnitude. At issue is the fact that the hazardous mining wastes used to make Ironite are presently exempt from regulation as hazardous wastes, under the so-called Bevill exemption in the RCRA statute [section 3001(b)(3)(A)(ii)].

In the proposed rule we invited comment as to whether EPA should undertake a regulatory initiative to remove the current exemption for this type of fertilizer. Most of the commenters on the proposed rule supported the idea of regulating Ironite (and other similar fertilizers, though we are not aware of any) under the same set of regulations that apply to hazardous waste derived fertilizers. Several commenters, in fact, expressed strong concerns as to the potential adverse health effects of Ironite, particularly acute effects that could result from direct ingestion (e.g., by children) of Ironite products. Some of these commenters also

questioned the validity of the studies that have been cited by the Ironite Products Company as demonstrating the safety of their products. One commenter, however (the American Mining Association), disputed the idea that Ironite is unsafe, suggesting that EPA's actual motive in this regard is to "backdoor" its way into narrowing the scope of the Bevill exemption. These commenters also cited the argument made by others that EPA has no legal authority at all to regulate hazardous wastes that are recycled to make fertilizers, let alone mining wastes that are specifically exempt from hazardous waste regulations.

EPA continues to believe that concerns regarding exposure to arsenic in Ironite products are worthy of serious consideration, particularly since it is a widely marketed consumer product intended for use by home gardeners and others. As such, the potential for misuse and/or accidental exposure (especially to children) cannot be discounted. At the same time, however, we recognize that there are technical issues associated with estimating risks from exposure to contaminants in Ironite that merit further study before the Agency can reach any definitive conclusions as to the potential risks of the product. For example, there has been some controversy regarding the bio-availability of the arsenic and lead compounds in Ironite and Ironite-amended soils.

EPA's Office of Solid Waste is partnering with EPA's Office of Research and Development and EPA's Region 8 Office to further evaluate the potential human health and environmental risks that may occur from the use of Ironite fertilizer. We expect that these efforts will provide the Agency with a much clearer sense of the environmental implications of Ironite use, and whether or not there is a need to pursue regulatory action to impose RCRA controls. The Agency will be coordinating this effort with state environmental and public health agencies

and others who may have conducted similar studies or may have supporting analyses underway. Preliminary results of EPA's evaluation should be available in calendar year 2003. We hope to announce the Agency's follow-up regulatory strategy with regard to specific mining waste-derived fertilizers, such as Ironite, subsequently.

V. State Fertilizer Regulatory Programs

Virtually all States have regulatory programs for fertilizers, which are usually administered by state agricultural agencies. Traditionally, the primary focus of these regulatory programs has been to ensure that fertilizers are accurately classified and labeled, and meet manufacturers' plant nutrient claims. Until quite recently, state regulatory programs did not explicitly address the issue of controlling contaminants such as heavy metals in fertilizer products. In 1998 the State of Washington enacted legislation to create this country's first comprehensive system for regulating fertilizer contaminants. A key feature of Washington's program is a publicly accessible internet website containing data on all fertilizers registered in the State of Washington, including data on levels of non-nutrient metals in each registered product. This database can be accessed at http//www.wa.gov/agr/pmd/fertilizers.

The States of Texas and California have also recently established regulatory programs for fertilizer contaminants, and a number of other states are likewise considering regulatory initiatives in this area.

EPA supports state efforts to regulate contaminants in fertilizers. EPA regulates only a small fraction of the fertilizers currently on the market (one half of one percent or less) under its RCRA authorities. The potential certainly exists, however, for contaminant problems in other

types of fertilizers. For example, cadmium levels in certain phosphate fertilizers (which typically are not waste derived) have been the subject of some concern recently by researchers, state regulators and others. We believe that the State of Washington's fertilizer regulatory program has been highly successful in controlling, and in a number of cases reducing, contaminants in fertilizer products sold in that state, and we thus encourage other states to develop similar programs.

VI. State authority

A. Applicability of Federal RCRA Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified states to administer the RCRA hazardous waste program within the state. Following authorization, the state requirements authorized by EPA apply in lieu of equivalent federal requirements and become federally enforceable as requirements of RCRA. EPA maintains independent authority to bring enforcement actions under RCRA sections 3007, 3008, 3013, and 7003. Authorized states also have independent authority to bring enforcement actions under state law.

A state may receive authorization by following the approval process described in 40 CFR part 271. Part 271 of 40 CFR also describes the overall standards and requirements for authorization. After a state receives initial authorization, new Federal regulatory requirements promulgated under the authority in the RCRA statute which existed prior to the 1984 Hazardous and Solid Waste Amendments (HSWA) do not apply in that state until the state adopts and receives authorization for equivalent state requirements (this does not, however, preclude a state from adopting and implementing such new regulations under state law only, prior to being

authorized for them). The state must adopt such requirements to maintain authorization. In contrast, under RCRA section 3006(g), (42 U.S.C. 6926(g)), new Federal requirements and prohibitions imposed pursuant to HSWA provisions take effect in authorized states at the same time that they take effect in unauthorized States. Although authorized states are still required to update their hazardous waste programs to remain equivalent to the Federal program, EPA carries out HSWA requirements and prohibitions in authorized states, including the issuance of new permits implementing those requirements, until EPA authorizes the state to do so. Authorized states are required to modify their programs only when EPA promulgates Federal requirements that are more stringent or broader in scope than existing Federal requirements.

RCRA section 3009 allows the states to impose standards more stringent than those in the Federal program. See also 40 CFR 271.1(i). Therefore, authorized states are not required to adopt Federal regulations, either HSWA or non-HSWA, that are considered less stringent.

B. Authorization of States for Today's Proposal

Today's rule is promulgated pursuant in part to HSWA authority and in part to non-HSWA authority. The conditional exclusion from the definition of solid waste for hazardous secondary materials used in zinc fertilizers is promulgated pursuant to non-HSWA authority, and is also less stringent than the current Federal requirements. Therefore, States will not be required to adopt and seek authorization for the conditional exclusion. EPA will implement the exclusion only in those States which are not authorized for the RCRA program. EPA believes, however, that this final rulemaking has considerable merit, and we thus strongly encourage States to amend their programs and become federally authorized to implement these rules.

The elimination of the exemption from LDR treatment standards for K061 derived fertilizers is promulgated pursuant to RCRA section 3004(g), a HSWA provision.[5] Therefore, the Agency is adding this rule to Table 1 in 40 CFR 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA and take effect in all States, regardless of their authorization status. Table 2 in 40 CFR 271.1(j) is modified to indicate that these requirements are self-implementing. Until the States receive authorization for these more stringent HSWA provisions, EPA will implement them. Once authorized States adopt an equivalent rule and receive authorization for such rule from EPA, the authorized state rule will apply in that State as the RCRA Subtitle C requirement in lieu of the equivalent federal requirement.

VII. Administrative Assessments

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735), the Agency must determine whether this regulatory action is "significant" and therefore subject to formal review by the Office of Management and Budget (OMB) and to the requirements of the Executive Order, which include assessing the costs and benefits anticipated as a result of the proposed regulatory action. The Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment,

---

[5] In Aug 17, 1988, through a rule promulgated pursuant to HSWA, EPA imposed treatment standards prior to land application on all other commercial fertilizers containing recyclable waste, except for those derived from K061 (53 FR 31198, 31202). Today's rule simply extends the application of treatment standards to K061 derived fertilizers.

public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of Executive Order 12866, the Agency has determined that today's proposed rule is a significant regulatory action because this proposed rule contains novel policy issues. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the docket to today's proposal.

EPA's economic analysis suggests that this rule is not economically significant under Executive Order 12866.

Detailed discussions of the methodology used for estimating the costs, economic impacts and the benefits attributable to today's rule for regulatory modifications to the definition of solid waste for zinc-containing hazardous waste-derived fertilizers, followed by a presentation of the cost, economic impact and benefit results, may be found in the background document: "Economic Analysis for Regulatory Modifications to the Definition of Solid Waste For Zinc-Containing Hazardous Waste-Derived Fertilizers, Notice of Final Rulemaking," which is in the docket for today's final rule.

Methodology. To estimate the cost, economic impacts to potentially affected firms and benefits to society from this rulemaking, we analyzed data from zinc micronutrient producers, firm financial reports, trade associations and chemical production data. The Agency has used both model facilities and actual facilities in analyzing the effects of this proposed regulation.

To estimate the incremental cost or cost savings of this rule making, we reviewed baseline management practices and costs of potentially affected firms. The Agency has modeled the most likely post-regulatory scenario resulting from this action (e.g., shifts to non-hazardous fertilizer feedstocks, shifting from zinc oxysulfate to zinc sulfate monohydrate production) and the estimated the cost of complying with it. The difference between the baseline management cost and the post-regulatory cost is either the incremental cost or cost savings resulting from the rulemaking.

To estimate the economic impact of today's rule, we compared the incremental cost or cost savings of the rule with model firm sales. The Agency has also considered the ability of potentially affected firms to pass compliance costs on in the form of higher prices.

To characterize the benefits of today's rule, we evaluated available data and presented a qualitative assessment of benefits including ecological benefits and protection of natural resources such as groundwater.

Results.

Volume. Data reviewed by the Agency indicates that there are 3 to 4 zinc micronutrient producers, one zinc producer, one steel mill, and 23 brass fume dust generators (ingot makers, mills, and foundries) potentially affected by today's rule. Although the exact amount of hazardous waste used in zinc micronutrient fertilizer production an annual basis varies from year to year, in 1997, data indicate that approximately 46,000 tons of hazardous waste were used in the production of zinc micronutrient fertilizer. The principal hazardous waste feedstocks were tire ash, electric arc furnace dust (K061) and brass fume dust from ingot makers, mills and foundries.

Costs. For the part of today's rule pertaining to zinc micronutrient fertilizers, we estimate the total annual cost savings from today's proposal to be $ 2.14 million for all facilities. Costs savings for different groups are summarized in Table 1.

Table 1, Estimated Incremental Costs and Cost Savings By Facility Category

Potentially Affected Facility	Incremental Annual Costs (Cost Savings) (1999$)
Zinc Oxysulfate Producers	($ 0.49 million)
Zinc Sulfate Monohydrate Producers	($ 0.75 million)
Primary Zinc Producers	($ 1.0 million)
Steel Mill	$1.5 million
Brass Fume Dust Generators	($1.4 million)
Total	($2.14 million)

Costs and cost savings to zinc oxysulfate producers are estimated from either shifting production to zinc sulfate monohydrate or shifting to nonhazardous sources of oxysulfate feedstocks. Zinc sulfate monohydrate producers and primary zinc producers are estimated to realize cost savings from shifting brass fume dust currently used in animal feed production to fertilizer production. Under current zinc sulfate markets, fertilizers are sold at a higher price than animal feed. One steel mill that has generated baghouse dust used in fertilizer manufacturing is expected to incur additional costs from having to shift their dust from fertilizer production to land disposal. And brass fume dust generators (mills, ingot makers, foundries) are estimated to incur cost savings from shifting their dust from zinc reclamation and animal feed to fertilizer production.

Economic Impact Results. To estimate potential economic impacts resulting from today's

rule, we use a first order economic impacts measure: the estimated incremental costs or cost savings of today's rule as a percentage of affected firms sales. Because of data limitations, EPA was unable to obtain profit information for potentially affected firms. For two zinc oxysulfate producers the estimated impact of the rule is 1.42 percent in incremental costs for one firm and 0.64 percent in cost savings for the other. Two zinc sulfate monohydrate producers are estimated to realize cost savings of 0.1 and 15 percent of revenue. For the primary zinc producer, the rule is estimated to result in cost savings equal to 1 percent of firm sales. More detailed information on this estimate can be found in the economic analysis placed into today's docket.

Benefits Assessment

Because EPA did not use any risk assessments of current or projected metals and dioxin concentrations in zinc fertilizers in the development of this rulemaking, the Agency cannot make any quantitative conclusions about the risk reduction from today's final rule. To estimate the benefits resulting from today's rule, EPA looked at available literature and records regarding hazardous waste feedstocks used to make zinc micronutrient fertilizers. The data suggest that today's rule will reduce loading of toxic non-nutritive constituents to the soil. Two zinc oxysulfate samples produced from hazardous waste and analyzed by the State of Washington had dioxin concentrations between 17 and 42 times background level ("Final Report Screening Survey for Metals and Dioxins in Fertilizer Products and Soils in Washington State," Washington State Department of Ecology, April 1999, Figures 1-1 and 1-2). In addition, the zinc oxysulfate manufacturing process does not remove any of the lead or cadmium from the feedstock material. If promulgated, today's proposal would reduce annual loadings of these

metals to the soil.

In addition, today's proposal may reduce natural resource damage and contamination to groundwater. EPA is aware of at least two damage incidents caused by land placement of hazardous waste prior to fertilizer production that resulted in contamination of either groundwater or surrounding surface water bodies adjacent to the site. ("Report of RCRA Compliance Inspection at American Microtrace Corporation," US EPA Region VII, December 4, 1996, Editorial, The Atlanta Journal/Constitution, April 11, 1993). Today's proposal may increase non-use values for these environmental amenities as well.

The Agency also believes that this rule has the potential for reducing what may be considered low probability but high consequence adverse human health or environmental impact if contamination from hazardous secondary material used in fertilizer production should, because of geological conditions such as karst terrain, reach a major population drinking water source or sensitive environmental location. This rule should lessen the chances of this type of event even though the probabilities of such occurrences and the magnitude of any impacts are not known.

B. Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 USC 601 et. seq.

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

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) a small business that has fewer than 1000 or 100 employees per firm depending upon the SIC code the firm primarily is classified; (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, we have determined 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.

There is one small entity incurring incremental costs and offsetting increased revenues resulting from this rulemaking. This firm is Frit Inc, a zinc oxysulfate fertilizer producer. Frit has one facility co-located onsite with Nucor Steel's Norfolk, Nebraska facility. Frit has been producing zinc oxysulfate fertilizer from Nucor's baghouse dust (K061, a listed hazardous waste). As result of this rulemaking, Frit will no longer be able to make zinc oxysulfate from Nucor's dust. This is due to both the removal of the exemption of K061 derived fertilizer's

from LDR requirements and metal limits on zinc fertilizers made from hazardous secondary materials. EPA understands that Frit is ceasing operations at the Norfolk, Nebraska facility. In the economic analysis of the proposed rulemaking, EPA had modeled Frit switching from zinc oxysulfate to zinc sulfate monohydrate at Nucor's facility as the most cost-effective post-regulatory alternative. In public comment on the proposed rulemaking, The Fertilizer Institute, a trade association of which Frit is a member, commented that EPA's economic analysis had not accounted for costs of switching and operating from zinc oxysulfate to zinc sulfate monohydrate. Although EPA agrees with some of The Fertilizer Institute's comments and disagrees with others (for more information see the Response to Comments document to today's rulemaking), when EPA reevaluated two possible alternative regulatory responses for Frit to this rulemaking (1. switching from zinc oxysulfate to zinc sulfate monohydrate, and 2. switching from hazardous secondary sources to nonhazardous secondary sources), we determined that switching to nonhazardous sources of zinc-bearing secondary materials would be more cost-effective for Frit than switching its production to ZSM.. This is because although it costs more to purchase nonhazardous zinc-bearing secondaries, the fertilizers produced from the nonhazardous sources are sold at a higher price due to lower nonnutritive mineral content (i.e. lead and cadmium). Because Frit is ceasing operations at the Nucor site, EPA has modeled the firm consolidating its operations at another company facility to produce zinc oxysulfate from nonhazardous sources. EPA has estimated that Frit's costs for nonhazardous feedstocks will increase by $2.9 million. Also, Frit should realize increased revenues of $3.4 million that offset these costs and increase profit by $0.49 million. Thus, Frit should not be significantly impacted by this rule even though it will be required to incur additional costs when substituting to nonhazardous sources.

Moreover, EPA does not believe that one regulated entity constitutes a substantial number of small entities in the zinc micronutrient industry. There are several other firms producing zinc micronutrient fertilizers, some of them small businesses. As discussed below, this rule will benefit many of these firms.

It is also likely that even in the absence of this rulemaking that opportunities to market K061 derived fertilizers would become more limited in response to decreased consumer demand for fertilizers with high non-nutritive mineral content . EPA notes that there is currently a market trend away from zinc fertilizers with high heavy metal content (see www.chemexpo.com/news/newsframe.cfm?framebody=/news/profile.cfm as obtained April 12, 2002 for zinc sulfate). Therefore, it is likely that even in the absence of this rulemaking, the market for zinc fertilizers with relatively high heavy metal content, such as K061-derived zinc oxysulfate, is declining in favor of cleaner zinc fertilizers. And in the past 3 years, there has been a trend away from using K061 in fertilizer production. Two of the three firms that had used K061 in 1997 in zinc oxysulfate production had ceased using this hazardous feedstock prior to EPA's proposed fertilizer rulemaking.

EPA also notes that this rulemaking will assist many small businesses that either generate hazardous zinc-bearing secondary feedstocks or use those feedstocks in fertilizer production by opening up markets for these materials including brass dust, tire ash, and zinc oxides from steel waste. Brass foundries, brass mills, and brass ingot makers are examples of the types of small business generators likely to benefit from today's final rule. The Agency has received favorable public comments from trade associations representing small business generators of hazardous zinc-bearing secondaries. Other small business producers of zinc sulfate monohydrate such as

Big River Zinc, and Madison Industries will benefit from increased supplies of zinc-bearing secondaries. For more information, please refer to the background document entitled "Economic Analysis for Regulatory Modifications to the Definition of Solid Waste For Zinc-Containing Hazardous Waste-Derived Fertilizers, Notice of Final Rulemaking," which was placed in the docket for today's final rule.

For the reasons discussed above, I hereby certify that this rule will not have a significant adverse economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1189.XX). A copy of this ICR may be obtained from Sandy Farmer, OPIA Regulatory Information Division, U.S. Environmental Protection Agency (2137), 1200 Pennsylvania Avenue, NW., Washington DC 20460, or by calling (202) 260-2740 and a copy may be obtained from Sandy Farmer by mail at OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., S.W.; Washington, DC 20460, by email at farmer.sandy@epamail.epa.gov, or by calling (202) 260-2740. A copy may also be downloaded off the internet at http://www.epa.gov/icr.

EPA has finalized the following conditions for reporting and recordkeeping by generators and manufacturers: The rule requires generators to submit a one-time notice to the EPA Regional Administrator (or the state Director in an authorized state) and to maintain all records of all shipments of excluded hazardous secondary materials for a minimum of three years As a

condition of the exclusion, manufacturers will be required to submit a one-time notice, retain for a minimum of three years records of all shipments of excluded hazardous secondary materials that were received by the zinc fertilizer manufacturer during that period, and submit an annual report identifying the types, quantities and origins of all such excluded materials that were received by the manufacturer in the preceding year. The manufacturer will also be required to perform sampling and analysis of the fertilizer product to determine compliance with the contaminant limits for metals no less than every six months, and for dioxins no less than every twelve months. Additional testing will be required when changes to processes or feedstock materials are made that could significantly alter the composition of the fertilizer products. These conditions replace the current hazardous waste regulatory requirements for reporting and recordkeeping, and are designed to improve the accountability system, and government oversight capabilities, over the handling of secondary materials used to make zinc fertilizers.

EPA estimates that the total annual respondent burden for the new paperwork requirements in the rule is approximately 61 hours per year and the annual respondent cost for the new paperwork requirements in the rule is approximately $12,653. However, in addition to the new paperwork requirements in the rule, EPA also estimated the burden and cost savings that generators and manufacturers could expect as a result of no longer needing to comply with the existing RCRA hazardous waste information collection requirements for the excluded materials. This cost savings of $21,149 minus the $12,653 cost for the new paperwork requirements will result in an overall cost savings $8,496. The net cost to EPA of administering the rule was estimated at approximately $244 per year. 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 are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, 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 must prepare a written analysis, 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 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 § 205 do not apply when they are inconsistent with applicable law. Before EPA establishes any regulatory requirements that may significantly or

uniquely affect small governments, including tribal governments, it must have developed under § 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials to have meaningful and timely input in the development of regulatory proposals, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This rule does not include a Federal mandate that may result in expenditures of $100 million or more to State, local, or tribal governments in the aggregate, because this rule imposes no enforceable duty on any State, local, or tribal governments. EPA also has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs exceeding $100 million. Therefore, today's proposed rule is not subject to the requirements of Sections 202, 203, and 205 of UMRA.

E. Federalism – Applicability of Executive Order 13132

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."

Under Section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required

by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

Section 4 of the Executive Order contains additional requirements for rules that preempt State or local law, even if those rules do not have federalism implications (i.e., the rules 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). Those requirements include providing all affected State and local officials notice and an opportunity for appropriate participation in the development of the regulation. If the preemption is not based on express or implied statutory authority, EPA also must consult, to the extent practicable, with appropriate State and local officials regarding the conflict between State law and Federally protected interests within the agency's area of regulatory responsibility.

This 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 directly affects primarily zinc micronutrient producers and generators of hazardous wastes used in zinc fertilizer production. There are no State and local government bodies that incur direct compliance costs by this rulemaking. And State and local government implementation expenditures are expected to be less than $500,000 in any one year (for more information, please refer to the background document entitled "Federalism Analysis

(Executive Order 13132) for Zinc-Containing Hazardous Waste-Derived Fertilizers, Notice of Proposed Rulemaking: Substantial Direct Effects", August 2000). Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

This rule preempts State and local law that is less stringent for these zinc-bearing hazardous wastes. Under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 to 6992k, the relationship between the States and the national government with respect to hazardous waste management is established for authorized State hazardous waste programs, 42 U.S.C. 6926 (§3006), and retention of State authority, 42 U.S.C. 6929 (section 3009). Under section 3009 of RCRA, States and their political subdivisions may not impose requirements less stringent for hazardous waste management than the national government.

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 9, 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." This final rule does not have tribal implications, as specified in Executive Order 13175. Today's rule does *not* significantly or uniquely affect the communities of Indian tribal governments, nor would it impose substantial direct compliance costs on them. Thus, Executive Order 13175 does not apply to this rule.

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

The Executive Order 13045, entitled "Protection of Children from Environmental Health

Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that EPA determines (1) is "economically significant" as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has 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.

This final rule is not subject to the Executive Order because it is not economically significant as defined in E.O. 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this rule present a disproportionate risk to children. EPA's fertilizer risk assessment modeled a number of pathways by which farmers and their children could be exposed to metals and dioxins in fertilizer products applied at recommended rates and frequencies. Exposure was modeled through both direct and indirect pathways. The direct pathways considered were the inhalation pathway, including inhalation of windblown emissions, and from emissions during product application and tilling. Direct ingestion of soils amended with fertilizers was also modeled. The indirect exposure pathways considered were ingestion of plants (vegetables, fruits, and root vegetables) grown on soils amended with fertilizer products containing metals and dioxins, ingestion of beef and dairy products produced on land amended with these products, and ingestion of home-caught fish from a stream adjacent to the farmer's agricultural field.

EPA's fertilizer risk assessment used a probabilistic methodology to estimate incremental lifetime cancer and non-cancer risks to farmers and farm children. The general conclusion of the

risk assessment was that fertilizers generally do not pose harm to human health or the environment. Since today's final rule is expected to reduce the overall levels of contaminants in zinc fertilizers made from hazardous secondary materials, the Agency expects that the impacts of this rule on childrens' health will be positive, albiet relatively small.

H. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rule establishes a conditional exclusion for zinc fertilizers based on contaminant levels for metals and dioxins. After considering alternatives, EPA has determined that it would be impractical and inappropriate to use voluntary consensus standards in this rulemaking, for the reasons discussed in more detail in in Section III.D of this preamble.

I. Executive Order 12898

EPA is committed to addressing environmental justice concerns and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all populations in the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income bears disproportionately high and

adverse human health or environmental impacts as a result of EPA's policies, programs, and activities, and that all people live in safe and healthful environments. In response to Executive Order 12898 and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3-17).

Today's rule pertains to hazardous wastes used in zinc micronutrient production, and is intended to reduce risks of excluded hazardous secondary materials, and benefit all populations. As such, this rule is not expected to cause any disproportionately high and adverse impacts to minority or low-income communities versus non-minority or affluent communities.

Excluded hazardous secondary materials will be subject to protective conditions regardless of where they are generated and regardless of where they may be managed. Although the Agency understands that the exclusion may affect where these wastes are managed in the future, the Agency's decision to conditionally exclude these materials is independent of any decisions regarding the location of waste generators and the siting of waste management facilities. Today's rule will reduce loadings of toxic non-nutritive constituents to the soil, and will ensure proper management of secondary materials at affected facilities. EPA believes that these provisions of the rule will benefit all populations in the United States, including low-income and minority communities.

J. Executive Order 13211 (Energy Effects)

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. This rule applies to a discrete sector of the economy and potentially adversely affects fewer than 20 firms. This rule reduces regulatory burden and creates markets for hazardous zinc-bearing secondary materials. It thus does not adversely affect energy supply, distribution or use.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. §801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A Major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. §804(2). This rule will be effective on [insert date of publication], except for the amendment to 40 CFR 266.20(b), which eliminates the exemption from treatment standards for fertilizers made from recycled electric arc furnace dust. The effective date for that provision in today's final rule is [insert six months from publication].

List of Subjects

40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and record keeping

requirements.

40 CFR Part 266

Environmental protection, Energy, Hazardous waste, Recycling,

Reporting and record keeping requirements.

40 CFR Part 268

Environmental protection, Hazardous waste, Reporting and record keeping requirements.

Dated:

Christine Todd Whitman,

Administrator.

Accordingly, Title 40, Chapter I of the Code of Federal Regulations is amended as follows:

PART 261--IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y), and 6938.

Subpart A - General

2. Section 261.4 is amended by adding new paragraphs (a)(20) and (21) to read as follows:

§261.4 Exclusions.

(a) * * *

(20) Hazardous secondary materials used to make zinc fertilizers, provided that the conditions specified below are satisfied:

(i) Hazardous secondary materials used to make zinc micronutrient fertilizers must not be accumulated speculatively, as defined in §261.1 (c)(8).

(ii) Generators and intermediate handlers of zinc-bearing hazardous secondary materials that are to be incorporated into zinc fertilizers must:

(A) Submit a one-time notice to the Regional Administrator or State Director in whose jurisdiction the exclusion is being claimed, which contains the name, address and EPA ID number of the generator or intermediate handler facility, provides a brief description of the secondary material that will be subject to the exclusion, and identifies when the manufacturer intends to begin managing excluded, zinc-bearing hazardous secondary materials under the conditions specified in this paragraph (a)(20).

(B) Store the excluded secondary material in tanks, containers, or buildings that are constructed and maintained in a way that prevents releases of the secondary materials into the environment. At a minimum, any building used for this purpose must be an engineered structure made of non-earthen materials that provide structural support, and must have a floor, walls and a roof that prevent wind dispersal and contact with rainwater. Tanks used for this purpose must be structurally sound and, if outdoors, must have roofs or covers that prevent contact with wind and rain. Containers used for this purpose must be kept closed except

when it is necessary to add or remove material, and must be in sound condition. Containers that are stored outdoors must be managed within storage areas that:

(1) have containment structures or systems sufficiently impervious to contain leaks, spills and accumulated precipitation; and

(2) provide for effective drainage and removal of leaks, spills and accumulated precipitation; and

(3) prevent run-on into the containment system.

(C) With each off-site shipment of excluded hazardous secondary materials, provide written notice to the receiving facility that the material is subject to the conditions of this paragraph (a)(20).

(D) Maintain at the generator's or intermediate handlers's facility for no less than three years records of all shipments of excluded hazardous secondary materials. For each shipment these records must at a minimum contain the following information:

(1) Name of the transporter and date of the shipment;

(2) Name and address of the facility that received the excluded material, and documentation confirming receipt of the shipment; and

(3) Type and quantity of excluded secondary material in each shipment.

(iii) Manufacturers of zinc fertilizers or zinc fertilizer ingredients made from excluded hazardous secondary materials must:

(A) Store excluded hazardous secondary materials in accordance with the storage requirements for generators and intermediate handlers, as specified in paragraph

(a)(20)(ii)(B) of this section.

(B) Submit a one-time notification to the Regional Administrator or State Director that, at a minimum, specifies the name, address and EPA ID number of the manufacturing facility, and identifies when the manufacturer intends to begin managing excluded, zinc-bearing hazardous secondary materials under the conditions specified in this paragraph (a)(20).

(C) Maintain for a minimum of three years records of all shipments of excluded hazardous secondary materials received by the manufacturer, which must at a minimum identify for each shipment the name and address of the generating facility, name of transporter and date the materials were received, the quantity received, and a brief description of the industrial process that generated the material.

(D) Submit to the Regional Administrator or State Director an annual report that identifies the total quantities of all excluded hazardous secondary materials that were used to manufacture zinc fertilizers or zinc fertilizer ingredients in the previous year, the name and address of each generating facility, and the industrial process(s) from which they were generated.

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

(v) Interim status and permitted storage units that have been used to store only zinc-bearing hazardous wastes prior to the submission of the one-time notice described in

paragraph (a)(20)(ii)(A) of this section, and that afterward will be used only to store hazardous secondary materials excluded under this paragraph, are not subject to the closure requirements of 40 CFR Parts 264 and 265.

(21) Zinc fertilizers made from hazardous wastes, or hazardous secondary materials that are excluded under paragraph (a)(20) of this section, provided that:

(i) The fertilizers meet the following contaminant limits:

(A) For metal contaminants:

Constituent	Maximum Allowable Total Concentration in Fertilizer, per Unit (1%) of Zinc (ppm)
Arsenic	0.3
Cadmium	1.4
Chromium	0.6
Lead	2.8
Mercury	0.3

(B) For dioxin contaminants the fertilizer must contain no more than eight (8) parts per trillion of dioxin, measured as toxic equivalent (TEQ).

(ii) The manufacturer performs sampling and analysis of the fertilizer product to determine compliance with the contaminant limits for metals no less than every six months, and for dioxins no less than every twelve months. Testing must also be performed whenever changes occur to manufacturing processes or ingredients that could significantly affect the amounts of contaminants in the fertilizer product. The manufacturer may use any reliable analytical method to demonstrate that no constituent of concern is present in the product at concentrations above the applicable limits. It is the

responsibility of the manufacturer to ensure that the sampling and analysis are unbiased, precise, and representative of the product(s) introduced into commerce.

(iii) The manufacturer maintains for no less than three years records of all sampling and analyses performed for purposes of determining compliance with the requirements of (a)(21)(ii) of this section. Such records must at a minimum include:

(A) The dates and times product samples were taken, and the dates the samples were analyzed;

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

(C) A description of the methods and equipment used to take the samples;

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

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

(F) All laboratory analytical results used to determine compliance with the contaminant limits specified in this paragraph (a)(21).

* * * * *

PART 266 - [AMENDED]

3. The authority citation for Part 266 continues to read as follows:

Authority: 42 U.S.C. 1006, 2002(a), 3001-3009, 3014, 6905, 6906, 6912, 6921, 6922, 6924, 6927, 6934, and 6937.

Subpart C - Recyclable Materials Used in a Manner Constituting Disposal

4. Section 266.20 is amended by removing the last two sentences of paragraph (b), and adding a new paragraph (d) to read as follows:

§266.20 Applicability.

* * * * *

(d) Fertilizers that contain recyclable materials are not subject to regulation provided that:

(1) They are zinc fertilizers excluded from the definition of solid waste according to §261.4(a)(21) of this chapter; or

(2) They meet the applicable treatment standards in subpart D of Part 268 of this chapter for each hazardous waste that they contain.

PART 268 [AMENDED]

5. The authority citation for part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6924.

Subpart D - Treatment Standards

6. Section 268.40 is amended by removing and reserving paragraph (i).

PART 271--REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

1. The authority citation for Part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

12. In §271.1(j) tables 1 and 2 are amended by adding the following entries in chronological

order by date of publication to read as follows:

§271.1 Purpose and scope.

* * * * *

(j) * * *

Table 1.--Regulations Implementing the Hazardous and Solid Waste Amendments of 1984

Promulgation date	Title of regulation	Federal Register Reference	Effective date
* * * * * * *			
July 15, 2002	Elimination of LDR Treatment Standards Exemption for K061-Derived Fertlizers	[insert FR cite]	[insert six months from publication]
* * * * * * *			

Table 2.--Self Implementing Provisions of the Solid Waste Amendments of 1984

Effective date	Self-implementing Provision	RCRA citation	Federal Register reference
* * * * * * *			
[insert six months from publication]	Elimination of LDR Treatment Standards Exemption for K061 Derived Fertilizers	3004(g)(6)	[insert publication date and cite of FR final rule]
* * * * * * *			

* * * * *

Federal Register

Monday,
October 7, 2002

Part IV

Environmental Protection Agency

43 CFR Parts 268 and 271
Land Disposal Restrictions: National Treatment Variance To Designate New Treatment Subcategories for Radioactively Contaminated Cadmium–, Mercury– and Silver–Containing Batteries; Final Rule and Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 268 and 271

[FRL–7390–7; Docket Number: RCRA–2002–0027]

RIN 2050–AE99

Land Disposal Restrictions: National Treatment Variance To Designate New Treatment Subcategories for Radioactively Contaminated Cadmium-, Mercury-, and Silver-Containing Batteries

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to grant a national treatability variance from the Land Disposal Restrictions (LDR) treatment standards for radioactively contaminated cadmium-, mercury-, and silver-containing batteries by designating new treatment subcategories for these wastes in response to a rulemaking petition from the Department of Energy. The current treatment standards of thermal recovery for cadmium batteries and of roasting and retorting for mercury batteries are technically inappropriate, because any recovered metals would likely contain residual radioactive contamination and not be usable. The current numerical treatment standard for silver batteries is also inappropriate because of the potential increase in radiation exposure to workers associated with manually segregating silver-containing batteries for the purpose of treatment. Macroencapsulation in accordance with the provisions for treatment standards for hazardous debris is designated as the required treatment prior to land disposal for the new waste subcategories. This will allow safe disposal of these radioactively contaminated materials.

DATES: This rule is effective on November 21, 2002 without further notice, unless EPA receives adverse comment by November 6, 2002. If we receive such comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand/delivery/courier. You must send an original and two copies of the comments referencing Docket Number RCRA–2002–0027 to: EPA Docket Center (EPA/DC), B102, EPA West, 1301 Constitution Ave. NW, Washington, DC 20460–0002. Follow the detailed instructions as provided in the **SUPPLEMENTARY INFORMATION** section I. D. below.

FOR FURTHER INFORMATION CONTACT: For general information, call the RCRA Call Center at 1–800–424–9346 or TDD 1–800–553–7672 (hearing impaired). Callers within the Washington Metropolitan Area must dial 703–412–9810 or TDD 703–412–3323 (hearing impaired). The RCRA Call Center is open Monday-Friday, 9 a.m. to 4 p.m., Eastern Standard Time. For more information on specific aspects of this direct final rule, contact Mr. John Austin at 703–308–0436, *austin.john@epa.gov,* or write him at the Office of Solid Waste, 5302W, U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

The contents of the preamble to this final are listed in the following outline:

I. General Information

A. Regulated Entities

Entities potentially regulated by this action are those which generate, treat, and dispose radioactive batteries. Regulated categories and entities include:

Category	Radioactively contaminated cadmium-, mercury-, and silver- containing batteries.
Industry	Nuclear waste generators, and treatment and disposal facilities.
Examples of regulated entities.	Envirocare of Utah, Inc.; Nevada Test Site; and the Hanford Nuclear Reservation, Washington.
Federal Agencies	Department of Energy.

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. 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.

B. Direct Final Action

EPA is publishing this rule without a prior proposal because we view it as a noncontroversial action. We anticipate no adverse comment because of the limited nature of this action. Having said this, in the "Proposed Rules" section of today's **Federal Register** publication, we are publishing a separate document that will serve as the proposal to grant the designation of a new treatment subcategory if adverse comments are filed. This direct final rule will be effective on November 21, 2002 without further notice unless we receive adverse comment by November 6, 2002. If we receive significant adverse comment on this rulemaking, we will publish a timely withdrawal in the **Federal Register** indicating that this direct final rule action is being withdrawn due to adverse comment. We will then address all public comments, as appropriate. We will not institute a second comment period on this action. Any parties interested in commenting on this rulemaking must do so at this time.

C. How Can I Get Copies of This Document and Other Related Information?

1. Docket. EPA has established an official public docket for this action under Docket ID No. RCRA–2002–0027. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the EPA Docket Center (EPA/DC), B102, EPA West, 1301 Constitution Ave. NW, Washington, DC 20460–0002. The EPA/DC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. To review file materials, we recommend that you make an appointment by calling (202) 566–0270. You may copy a maximum of 100 pages from any file maintained at the RCRA Docket at no charge. Additional copies cost $0.15 per page.

2. Electronic Access. You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials at the EPA/DC.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

D. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. Electronically. If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

i. EPA Dockets. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select "Information Sources," "Dockets," and "EPA Dockets." Once in the system, select "search," and then key in Docket ID No. RCRA–2002–0027. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. E-mail. Comments may be sent by electronic mail (e-mail) to *rcra-docket@epa.gov*, Attention Docket ID No. RCRA–2002–0027. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. Disk or CD ROM. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in the following section. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. By Mail. You must send an original and two copies of the comments referencing Docket Number RCRA–2002–0027 to: EPA Docket Center (EPA/DC), B102, EPA West, 1301 Constitution Ave. NW, Washington, DC 20460–0002.

3. By Hand Delivery or Courier. Deliver your comments to: EPA Docket Center (EPA/DC), B102, EPA West, 1301 Constitution Ave. NW, Washington, DC 20460–0002, Attention Docket ID No. RCRA–2002–0027. Deliveries are only

accepted during the Docket's normal hours of operation 9 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

E. How Should I Submit CBI to the Agency?

Do not submit information electronically that you consider to be CBI through EPA's electronic public docket or by e-mail. Send or deliver information identified as CBI only to the following address: RCRA CBI Document Control Officer, Office of Solid Waste (5305W), U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460, Attention Docket ID No. RCRA–2002–0027. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

F. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at your estimate.

5. Provide specific examples to illustrate your concerns.

6. Offer alternatives.

7. Make sure to submit your comments by the comment period deadline identified.

8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

II. Background

What Is the Basis for LDR Treatment Variances?

Under section 3004(m) of the Resource Conservation and Recovery Act (RCRA), EPA is required to set "levels or methods of treatment, if any, which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized." EPA interprets this language to authorize treatment standards based on the performance of best demonstrated available technology (BDAT). This interpretation was upheld by the *D.C. Circuit in Hazardous Waste Treatment Council* vs. *EPA*, 886 F. 2d 355 (D.C. Cir. 1989).

The Agency recognizes that there may be wastes that cannot be treated to levels specified in the regulations (see 40 CFR 268.40) because an individual waste matrix or concentration can be substantially more difficult to treat than those wastes the Agency evaluated in establishing the treatment standard (51 FR 40576, November 7, 1986), or that it may be inappropriate to require the waste to be treated to the level specified or by the method specified, even though such treatment is technically possible. For such wastes, EPA has a process by which a generator or treater may seek a treatment variance (see 40 CFR 268.44). Treatment variances may be generic (under 40 CFR 268.44(a)) or site-specific (under 40 CFR 268.44(h)). A generic variance can result in the establishment of a new treatability group and a corresponding treatment standard that applies to all wastes that meet the criteria of the new waste treatability group (55 FR 22526, June 1, 1990). A site-specific variance applies only to a specific waste from a specific facility.

On June 13, 2002, the Department of Energy (DOE) petitioned EPA pursuant to 40 CFR 268.44 for a generic treatability variance for mercury-, cadmium-, and silver-containing batteries that are contaminated with radioactive materials. The petition is available in the docket for this rulemaking.

III. Why Are the Existing Standards Inappropriate?

A. What Are the Wastes That Require a Treatment Variance?

Batteries are used in a variety of ways across the DOE complex. For example, nickel-cadmium (NiCd) rechargeable batteries are commonly found in cellular and cordless telephones, 2-way radios, video cameras, portable power tools, laptop computers, and radiological monitoring equipment. Mercury-containing and silver-containing batteries have been widely used in watches, calculators, and cameras. When these batteries reach end of life, they are typically classified as radioactive waste if they were used in a radioactively contaminated area, unless through decontamination and/or radiological surveys they can be cleared for management as non-radiological waste. Sometimes because of cracks, fissures, holes or uneven surfaces in the battery casings, a reasonable confidence level that the batteries are free of radioactive contamination cannot be achieved. In other cases, radioactive contamination is found that cannot be easily removed. In either case, there will always be some batteries that are deemed to be radioactively contaminated.

Based on input from individual facilities, DOE estimates that 2,653 kg of radioactively contaminated waste cadmium-containing batteries, and 247 kg of radioactively contaminated waste mercury-containing batteries are in storage across the complex. No estimate is available for silver-containing batteries. Projected generation rates are 23 kg/yr for radioactively contaminated waste cadmium batteries and 4 kg/yr for radioactively contaminated waste mercury batteries.

The cadmium-containing waste batteries are almost all NiCd batteries, although other types of cadmium-containing waste batteries such as mercury-cadmium and silver-cadmium may be present as well. At a minimum, all of the cadmium-containing waste batteries exhibit the toxicity characteristic for cadmium and carry a D006 hazardous waste code.

Detail on the specific types of mercury-containing waste batteries present is limited, but it is assumed that this waste stream includes both mercury-zinc and mercury-cadmium batteries. At a minimum, these batteries exhibit the toxicity characteristic for mercury and carry a D009 hazardous waste code. Detail on specific types of silver-containing waste batteries is also limited. They may be silver-cadmium or of other composition. At a minimum,

these batteries exhibit the toxicity characteristic for silver and carry a D011 hazardous waste code.

While not representing a large volume of waste, radioactively contaminated cadmium-, mercury-, and silver-containing batteries, which must be managed as mixed waste (*i.e.*, RCRA hazardous and radioactive), present an ongoing waste disposal problem for several sites in the DOE complex. This situation has developed because the existing applicable LDR treatment standards are inappropriate, as explained below. Moreover, neither EPA nor DOE is aware of any commercial metals recovery facility that currently accepts radioactively contaminated cadmium-, or mercury-containing waste batteries for treatment.

B. What Are the New Treatment Standards?

Under existing land disposal restriction (LDR) treatment standards, cadmium-containing waste batteries are classified as D006 Cadmium Containing Batteries Subcategory waste. As such, they are subject to the specified technology of RTHRM (thermal recovery of metals). Most mercury-containing waste batteries are classified as D009 High Mercury-Inorganic Subcategory waste because they are inorganic, exhibit the toxicity characteristic for mercury (under 40 CFR 261.24(b)), and contain greater than 260 ppm total mercury. As such, they are subject to the specified technology of RMERC (roasting/retorting with recovery of mercury). In both cases, the objective of the specified technology is to volatilize the metals in a high temperature treatment unit and subsequently condense and collect them for reuse, while significantly reducing the concentration of metals in the waste residual. This approach is technically inappropriate for radioactively contaminated cadmium- and mercury-containing batteries, because the recovered metals would likely contain residual radioactive contamination. As a consequence, the recovered metals would have an extremely low probability for reuse.

For silver-containing batteries that are D011, the existing LDR treatment standards require treatment to meet numerical constituent concentration levels for silver and any underlying hazardous constituents. Meeting these standards could involve manually segregating the silver-containing batteries from commingled waste batteries before treatment, which could entail increased worker exposure to radiation and result in the generation of larger volumes of radioactively contaminated waste for disposal.

As a result, we intend to grant a national treatment variance by designation of new treatment subcategories for these materials. We believe that the appropriate treatment standard is macroencapsulation in accordance with the design and operating standards of 40 CFR 268.45. Macroencapsulation of debris is defined at 40 CFR 268.45 Table 1 as:

Application of surface coating materials such as polymeric organics (*e.g.*, resins and plastics) or use of a jacket of inert inorganic materials to substantially reduce surface exposure to potential leaching media.

The design and operating standard requires that the encapsulating material must completely encapsulate the waste and be resistant to degradation by the debris and its contaminants and materials into which it may come into contact after placement (*e.g.*, leachate, other waste, or microbes).

Encapsulation technologies are applicable primarily to wastes containing hazardous metal constituents. Macroencapsulation is the required treatment for D008 radioactive lead solids subcategory wastes and K175 mercury-bearing wastes. Macroencapsulation is also an alternative treatment standard for hazardous debris. We believe that macroencapsulation is appropriate for these radioactively contaminated batteries, because it would require minimal worker handling and reduce the potential for leaching media to contact the batteries following disposal. Thus, macroencapsulation would minimize worker exposure to radioactivity and the potential for release, which we wish to encourage.

IV. State Authority

A. Applicability of 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. A State may receive authorization by following the approval process described under 40 CFR 271.21. See 40 CFR part 271 for the overall standards and requirements for authorization. EPA continues to have independent authority to bring enforcement actions under RCRA sections 3007, 3008, 3013, and 7003. An authorized State also continues to have independent authority to bring enforcement actions under State law.

After a State receives initial authorization, new Federal requirements promulgated under RCRA authority existing prior to the 1984 Hazardous and Solid Waste Amendments (HSWA) do not apply in that State until the State adopts and receives authorization for equivalent State requirements. In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), new Federal requirements and prohibitions promulgated pursuant to HSWA provisions take effect in authorized States at the same time that they take effect in unauthorized States. As such, EPA carries out HSWA requirements and prohibitions in authorized States, including the issuance of new permits implementing those requirements, until EPA authorizes the State to do so.

Authorized States are required to modify their programs when EPA promulgates Federal requirements that are more stringent or broader in scope than existing Federal requirements. RCRA section 3009 allows the States to impose standards more stringent than those in the Federal program. See also § 271.1(i). Therefore, authorized States are not required to adopt Federal regulations, both HSWA and non-HSWA, that are considered less stringent than existing Federal requirements.

B. Effect on State Authorization

The requirements of today's rule, in EPA's view, are neither more nor less stringent than current regulatory requirements.[1] Therefore, when promulgated, the Agency will add the rule to Table 1 in 40 CFR 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA. Although States are only required to adopt requirements that are more stringent than the existing provisions, EPA strongly encourages States to adopt the provisions of today's rule.

V. Regulatory Requirements

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant

[1] Although today's rule is granted through the 40 CFR 268.44 variance process, the Agency has determined that the new standards are neither more nor less stringent than the current standards. This is because today's rule offers a different technical approach (macoencapsulation) over the current technical approaches of recovery and stabilization.

regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

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. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et. seq.

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

For purposes of assessing the impacts of today's rule on small entities, a small entity is defined as: (1) A small business that has fewer than 1000 or 100 employees per firm depending upon the SIC code the firm primarily is classified; (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.

This rule is not expected to result in a net cost to any affected entity. Thus, adverse impacts are not anticipated. Costs could increase for entities that are not complying with current requirements, but even these costs, which are not properly attributable to the current rulemaking, would not be expected to result in significant impacts on a substantial number of small entities.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

This rule does not change in any way the paperwork requirements already applicable to radioactive cadmium-, mercury-, or silver-containing batteries. Therefore, it does not affect requirements under the Paperwork Reduction Act.

D. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, 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 the proposed and final rules with "federal mandates" that may result in expenditures by state, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

Before promulgating a 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, enable 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.

The Agency's analysis of compliance with the Unfunded Mandates Reform Act (UMRA) of 1995 found that today's rule imposes no enforceable duty on any state, local or tribal government or the private sector. This rule contains no federal mandates (under the regulatory provisions of Title II of the UMRA) for state, local, or tribal governments or the private sector. In addition, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Because we consider today's rule to be neither more nor less stringent than the current regulations, state governments are not required to adopt the proposed changes. The UMRA generally excludes from the definition of "Federal intergovernmental mandate" duties that arise from participation in a voluntary federal program. The UMRA also excludes from the definition of "Federal private sector mandate" duties that arise from participation in a voluntary federal program. Therefore, we have determined that today's rule is not subject to the requirements of sections 202 and 205 of 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, because states are not required to adopt the provisions of this rule. Thus, Executive Order 13132 does not apply to this rule.

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 9, 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." This final rule does not have tribal implications, as specified in

Executive Order 13175, because it does not preempt tribal law. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Children's Health

"Protection of Children From Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that EPA determines (1) "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 potential effective and reasonably feasible alternatives considered by the Agency. This final rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by 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. When the subject wastes are treated and disposed in accordance with this regulation, the Agency believes that future risks to the human health and the environment will be minimized.

H. Executive Order 13211: Energy Effects

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Effect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, though OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rule does not establish new technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Environmental Justice

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (February 11, 1994) is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. In response to Executive Order 12898, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17). Facilities that would be affected by today's rule include any facility generating hazardous radioactive cadmium, radioactive mercury, or radioactive silver batteries for treatment or disposal. The Agency does not believe that today's rule will result in any disproportionately negative impacts on minority or low-income communities relative to affluent or non-minority communities, because today's rule will facilitate the removal of the subject hazardous wastes from current generation sites for treatment and controlled disposal to ensure protection of human health and the environment.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective 45 days following the publication.

List of Subjects

40 CFR Part 268

Environmental protection, Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous material transportation, Hazardous waste, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Dated: September 30, 2002.

Christine Todd Whitman,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 268—LAND DISPOSAL RESTRICTIONS

1. The authority citation for part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6924.

2. In § 268.40, the Table, "Treatment Standards for Hazardous Wastes" is amended by adding entries to the end of entries D006, D009, and D011 to read as follows. The footnotes are republished without change.

§ 268.40 Applicability of treatment standards.

* * * * *

TREATMENT STANDARDS FOR HAZARDOUS WASTES

Waste code	Waste description and treatment/Regulatory subcategory[1]	Regulated hazardous constituent		Wastewaters: Concentration in mg/L,[3] or technology code[4]	Nonwastewaters: Concentration in mg/kg[5] unless noted as "mg/L TCLP", or technology code.[4]
		Common name	CAS[2] No.		
*	* * *	*	*	*	*
D006[9]	* * * * * Radioactively contaminated cadmium containing batteries. **(Note:** This subcategory consists of nonwastewaters only)	Cadmium	7440–43–9	NA	Macroencapsulation in accordance with 40 CFR 268.45.
*	* * *	*	*	*	*
D009[9]	* * * * * Radioactively contaminated mercury containing batteries. **(Note:** This subcategory consists of nonwastewaters only)	Mercury	7439–97–6	NA	Macroencapsulation in accordance with 40 CFR 268.45.
*	* * *	*	*	*	*
D011[9]	* * * * * Radioactively contaminated silver containing batteries. **(Note:** This subcategory consists of nonwastewaters only)	Silver	7440–22–4	NA	Macroencapsulation in accordance with 40 CFR 268.45.
*	* * *	*	*	*	*

Footnotes to Treatment Standard Table 268.40

[1] The waste descriptions provided in this table do not replace waste descriptions in 40 CFR part 261. Descriptions of Treatment/Regulatory Subcategories are provided, as needed, to distinguish between applicability of different standards.

[2] CAS means Chemical Abstract Services. When the waste code and/or regulated constituents are described as a combination of a chemical with its salts and/or esters, the CAS number is given for the parent compound only.

[3] Concentration standards for wastewaters are expressed in mg/L and are based on analysis of composite samples.

[4] All treatment standards expressed as a Technology Code or combination of Technology Codes are explained in detail in 40 CFR 268.42 Table 1—Technology Codes and Descriptions of Technology-Based Standards.

[5] Except for Metals (EP or TCLP) and Cyanides (Total and Amenable) the nonwastewater treatment standards expressed as a concentration were established, in part, based upon incineration in units opeated in accordance with the technical requirements of 40 CFR Part 264, Subpart O, or Part 265, Subpart O, or based upon combustion in fuel substitution units operating in accordance with applicable technical requirements. A facility may comply with these treatment standards according to provisions in 40 CFR 268.40(d). All concentration standards for nonwastewaters are based on analysis of grab samples.

* * * * * * *

[9] These wastes, when rendered nonhazardous and then subsequently injected in a Class I SDWA well, are not subject to treatment standards. (See § 148.1(d)).

* * * * * * *

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

3. The authority citation for part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

4. Section 271.1(j) is amended by adding the following entries to Table 1 in chronological order by date of publication to read as follows.

§ 271.1 Purpose and scope.

* * * * *

(j) * * *

TABLE 1.—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Promulgation date	Title of regulation	**Federal Register** reference	Effective date
*	* * *	*	*
Sept. 30, 2002	Land Disposal Restrictions: National Treatment Variance to Designate New Treatment Subcategories for Radioactively Contaminated Cadmium-, Mercury-, and Silver-Containing Batteries.	[Insert **Federal Register** citation page numbers].	November 21, 2002
*	* * *	*	*

* * * * *

[FR Doc. 02–25414 Filed 10–4–02; 8:45 am]
BILLING CODE 6560–50–P

[FR Doc. 03–19285 Filed 7–29–03; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 261 and 279

[RCRA–1998–0015; FRL–7537–4]

RIN 2050–AF07

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Recycled Used Oil Management Standards

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Today's final rule eliminates drafting errors and ambiguities in the used oil management standards. Specifically, this rule clarifies when used oil contaminated with polychlorinated biphenyls (PCBs) is regulated under the RCRA used oil management standards and when it is not; that mixtures of conditionally exempt small quantity generator (CESQG) waste and used oil are subject to the RCRA used oil management standards irrespective of how that mixture is to be recycled; and that the initial marketer of used oil that meets the used oil fuel specification need only keep a record of a shipment of used oil to the facility to which the initial marketer delivers the used oil.

DATES: This final rule will become effective on September 29, 2003.

ADDRESSES: Public comments and supporting materials are available for viewing in the EPA Docket Center, located at 1301 Constitution Avenue, NW, Washington, DC. The Docket ID Number is RCRA–1998–0015. The index and some supporting materials are available electronically. See the **SUPPLEMENTARY INFORMATION** section for information on accessing them.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Call Center at (800) 424–9346 or TDD (800) 553–7672 (hearing impaired). In the Washington, DC metropolitan area, call (703) 412–9810 or TDD (703) 412–3323.

For more detailed information on specific aspects of this rulemaking, contact Mike Svizzero by mail at Office of Solid Waste (5303W), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460, by phone at (703) 308–0046, or by Internet e-mail at *svizzero.michael@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

EPA has established an official public docket for this action under Docket ID No. RCRA–1998–0015. The official public docket is the collection of materials that is available for public viewing at the OSWER Docket in the EPA Docket Center (EPA/DC), EPA West Building, Room B102, 1301 Constitution Ave NW., Washington, DC. The EPA Docket Center 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 OSWER Docket is (202) 566–0270.

You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified above. Once in the system, select "search" and then key in the appropriate docket identification number.

Outline of Today's Document

I. Authority

These regulations are issued under the authority of sections 1004, 1006, 2002(a), 3001 through 3007, 3010, 3013, 3014, 3016 through 3018, and 7004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, and as amended by the Used Oil Recycling Act, as amended, 42 U.S.C. 6901, 6905, 6912(a), 6921 through 6927, 6930, 6934, 6935, 6937 through 6939 and 6974.

II. Background and Regulatory Amendments

Today's final rule reinstates, with some modifications, three amendments to the RCRA used oil management standards of 40 CFR Part 279. These amendments were issued on May 6, 1998 as a direct final rule, but were retracted on July 14, 1998 because of adverse public comment to the amendments (see 63 FR 24963 and 63 FR 25006). One of the withdrawn amendments, applicability of the used oil management standards to PCB contaminated used oil, was a clarification of the applicability of the RCRA used oil management standards to PCB contaminated used oil. This clarification was undertaken as part of a settlement agreement to resolve a lawsuit challenging a final rule promulgated on May 3, 1993, (58 FR 26420) regarding EPA's used oil regulations. *Edison Electric Institute* v. *U.S. EPA* (D.C. Circuit No. 93–1474). Specifically, the May 1993 rule corrected technical errors and provided clarifying amendments to the used oil management standards promulgated on September 10, 1992 (57 FR 41566). The other amendments reinstated today clarify (1) that mixtures of conditionally exempt small quantity generator (CESQG) waste and used oil are subject to the used oil management standards irrespective of how that mixture is to be recycled and (2) that the initial marketer of used oil that meets the used oil fuel specification need only keep a record of a shipment of used oil to the facility to which the initial marketer delivers the used oil.

A. Applicability of the Used Oil Management Standards to PCB Contaminated Used Oil

Today's rule amends 40 CFR 279.10(i) to clarify the applicability of the RCRA used oil management standards to used oil containing PCBs. The amendment clarifies that used oil that contains less than 50 ppm of PCBs is generally subject to regulation under the RCRA used oil management standards. However, the amendment notes that the

Toxic Substances Control Act (TSCA) prohibition against the dilution of PCB concentrations below regulatory thresholds (40 CFR 761.1(b)(5)) applies to the dilution of PCB-containing used oil. Used oil, therefore, that contains, or contained prior to dilution, 50 ppm or greater of PCBs is not subject to regulation under the RCRA used oil management standards, because the TSCA regulations at 40 CFR Part 761 provide comprehensive management of such used oil.

For used oil that contains PCB concentrations of 2 ppm or greater, but less than 50 ppm (other than those diluted to below 50 ppm), TSCA regulates the burning of used oil for energy recovery at 40 CFR 761.20(e). Such used oil is also regulated under the RCRA used oil management standards at 40 CFR Part 279. Table 1 shows the applicability of the RCRA and TSCA regulations as they pertain to used oil containing PCBs that is to be burned for energy recovery. Please note, under the TSCA regulations at 40 CFR 761.20(e)(2), used oil that is to be burned for energy recovery is presumed to contain 2 ppm or greater of PCBs unless shown otherwise by testing or other information. Used oil that is to be burned for energy recovery and has been shown to contain less than 2 ppm PCBs (if it has not been diluted) is subject to record keeping and retention requirements under TSCA (40 CFR 761.20(e)(2), (e)(4)) and is regulated under the RCRA used oil management standards. TSCA regulations prohibit the burning for energy recovery of used oil that contains (or contained prior to dilution) PCB concentrations of 50 ppm or greater (40 CFR 761.20(a)).

TABLE 1.—REGULATION OF USED OIL CONTAINING PCBS THAT IS TO BE BURNED FOR ENERGY RECOVERY UNDER 40 CFR PART 279 (RCRA REGULATIONS) AND 40 CFR PART 761 (TSCA REGULATIONS).

Range of PCB contamination levels in used oil (ppm)	Does RCRA regulate this used oil if it is to be burned for energy recovery? [b]	Does TSCA regulate this used oil if it is to be burned for energy recovery? [b]
Demonstrated to contain less than 2	Yes (part 279)	Yes (761.20(e)(2), (e)(4)).[a]
2 to less than 50	Yes (part 279)	Yes (761.20(e)).
50 and greater	No (part 279)	Yes (prohibited) (761.60).

[a] Used oil that is to be burned for energy recovery is presumed to contain 2 ppm or greater of PCBs unless shown otherwise by testing or other information. TSCA imposes record keeping and retention requirements.

[b] Assumes no dilution. No person may avoid any provision under TSCA specifying a PCB concentration by diluting the PCBs, unless otherwise provided. See 40 CFR 761.1(b)(5).

Used oil containing less than 50 ppm PCBs that is recycled in a manner other than being burned for energy recovery is generally excluded from TSCA requirements except where: (1) Used oil was diluted to below 50 ppm PCBs, or (2) the PCB containing used oil or source of the PCB-containing used oil to be recycled was not legally manufactured, processed, distributed in commerce or used under TSCA. See 40 CFR 761.3 (definition of "excluded PCB products"); 761.20(a)(1); and 761.20(c). However, 40 CFR 761.20(d) of the TSCA regulations prohibits the use of used oil that contains any detectable concentration of PCBs as a sealant, coating, or dust control agent. This prohibition specifically includes road oiling and general dust control. Use of used oil as a dust suppressant is also prohibited under RCRA except in a state that has received authorization from EPA to allow use of used oil as a dust suppressant. Currently no states have received such authorization. In the event that a state were authorized to use used oil as a dust suppressant pursuant to 40 CFR 279.82, the prohibition in 40 CFR 761.20(d) would still apply, however.

Dilution of PCB-Containing Used Oil

The Agency received comment on the May 6, 1998 proposal (63 FR 24963) related to the applicability of the dilution prohibition of 40 CFR 761.1(b)(5) to used oil that contains PCBs. One commenter raised a concern that the May 6, 1998 proposal was unclear as to how PCB-contaminated used oils that have been diluted (below either the 50 ppm or 2 ppm TSCA PCB regulatory thresholds) are regulated.

Used oil that contains PCBs may not be diluted under TSCA to avoid a particular regulatory requirement unless otherwise specifically provided by the TSCA regulations. The TSCA PCB regulations at 40 CFR 761.1(b)(5) prohibit the dilution of PCBs to avoid regulatory requirements. This prohibition is repeated in the definition of "excluded PCB products" in 40 CFR 761.3. Accordingly, used oil that contained PCB concentrations greater than or equal to 50 ppm and that was subsequently diluted to a concentration of less than 50 ppm PCBs, is still regulated under TSCA as used oil that contains a PCB concentration of 50 ppm or greater. This diluted used oil is subject to comprehensive management under TSCA and, therefore, is not regulated under the RCRA used oil management standards. Likewise, used oil that contained a maximum PCB concentration of 2 ppm or greater, but less than 50 ppm, which is subsequently diluted to a concentration of less than 2 ppm, is still regulated under TSCA as used oil that contains a concentration greater than 2 ppm PCBs. (Note, however, that used oils of unknown concentration can be mixed with other such used oils in a common container and subsequently tested to determine if it is less than 2 ppm PCB. See 40 CFR 761.20(e)(2) and 761.60(g)(2)).

The TSCA regulations do allow, however, for the decontamination of used oil at PCB concentrations of 50 ppm or greater to a concentration below 2 ppm if specified decontamination methods (*e.g.*, filtering) are used. Such decontaminated used oil is exempt from most TSCA management standards (other than 40 CFR 761.20(e)(2), (e)(4) and 761.79(f)) and is regulated under the RCRA used oil management standards. See 40 CFR 761.79(a)(3) and 761.79(b).

Applicability of the Used Oil Fuel Specification to PCB-Containing Used Oil

There has been confusion in the regulated community that the presence of PCBs in used oil is one of the criteria for determining whether a used oil fuel subject to the RCRA used oil management standards meets the fuel specification standard such that it may be burned for energy recovery without further regulation under RCRA. In fact, one of the comments received in response to the May 6, 1998 proposal implied that used oil that contains PCB concentrations of 2 ppm or greater, but less than 50 ppm is off-specification used oil due to its PCB content. This is incorrect. As described above, the concentration of PCBs in used oil is relevant to determining whether a used

oil is subject to the RCRA used oil management standards. However, for those used oils subject to the RCRA used oil management standards, the presence of PCBs is not one of the criteria for determining whether a used oil fuel meets the used oil fuel specification.

However, used oil that contains PCB concentrations of 2 ppm or greater, but less than 50 ppm, and is burned for energy recovery is also subject to requirements under the TSCA PCB regulations, specifically 40 CFR 761.20(e). These TSCA requirements incorporate by reference certain RCRA Part 279 "off-specification" used oil requirements. (See the discussion below for an explanation of the regulation of PCB-containing used oil that is burned for energy recovery.)

RCRA Requirements

The RCRA used oil specification criteria are set forth at 40 CFR 279.11. The specification criteria establish which used oil fuels may be burned in nonindustrial burners without regulation under RCRA. The used oil fuel specification sets maximum allowable limits for arsenic, cadmium, chromium, lead, and total halogens, as well as a minimum flash point. Although the PCB regulations promulgated pursuant to TSCA are referenced in a note to Table 1 in § 279.11, the presence of PCBs in used oil is not one of the criteria for determining whether used oil that is to be burned for energy recovery meets the fuel specification for purposes of RCRA regulation.

Used oil that is to be burned for energy recovery and that meets the RCRA fuel specifications of § 279.11 ("on-specification" used oil) is not regulated under the authority of Part 279 provided that: (1) Certain conditions for used oil fuel marketers are met, and (2) the used oil is not mixed or contaminated with hazardous waste. (Applicable on-specification used oil fuel marketer requirements can be found at §§ 279.72, 279.73, and 279.74(b).) This is the case, notwithstanding that a used oil fuel may contain PCBs. Although the RCRA regulations do not identify the presence of PCBs in used oil as relevant to the determination of whether the used oil is on- or off-specification, the presence of PCBs in used oil is relevant for determining the applicability of the TSCA regulations for the burning of used oil.

TSCA Requirements

The TSCA rules (specifically, 40 CFR 761.20(e)(2)) establish a presumption that detectable quantities of PCBs are present in used oils to be burned for energy recovery. The presumption can be overcome if a marketer determines through testing or other specified procedures that the used oil fuel does not contain quantifiable levels (2 ppm) of PCBs. TSCA rules found at 40 CFR 761.20(a) also prohibit burning for energy recovery of used oil that contains (or contained prior to dilution) PCBs at concentrations of 50 ppm and greater. In addition, §§ 761.1(b)(5) prohibits dilution to attain PCB concentrations either below 50 ppm or below 2 ppm. (However, see decontamination provisions at 40 CFR 761.79(a)(3) and 761.79(b).)

The TSCA regulations establish requirements for the marketing and burning for energy recovery of used oils containing detectable quantities of PCBs at concentrations of 2 ppm or greater, but less than 50 ppm (40 CFR 761.20(e)). Some of these requirements are incorporations by reference of Part 279 requirements for the marketing and burning for energy recovery of off-specification used oil. Therefore, by operation of the TSCA rules, used oil that is on-specification under the RCRA rules may nevertheless be subject to certain requirements specified in the RCRA rules for off-specification used oil.

Specifically, for used oil burners, the TSCA rules reference some of the RCRA off-specification burner requirements of Part 279 Subpart G, including restrictions on burning, notification requirements, tracking requirements, certification requirements and record keeping requirements. (See 40 CFR 761.20(e)(3)–(4)). For used oil marketers, the TSCA rules, with limited exceptions, restrict marketing to qualified incinerators, to marketers who market off-specification used oils, and to off-specification burners as defined in the RCRA Part 279 regulations (See 40 CFR 761.20(e)(1)). The TSCA rules also reference the RCRA regulatory provisions for marketers in Part 279 Subpart H, including record retention, notification, tracking, and certification. The fact that the TSCA rules incorporate by reference these RCRA standards does not by itself mean that PCB-containing used oil is regulated under RCRA authority or that such used oil is off-specification as defined by Part 279.

B. Mixtures of CESQG Waste and Used Oil

Today's rule harmonizes the applicability of 40 CFR Part 261 and Part 279 to mixtures of conditionally exempt small quantity generator (CESQG) waste and used oil that are to be recycled. Specifically, the rule makes clear that mixtures of CESQG waste and used oil that are to be recycled are regulated as used oil under the used oil management standards. Notwithstanding EPA's regulatory intent, the CESQG provision, 40 CFR 261.5(j), that references the applicability of the used oil management standards to mixtures of CESQG waste and used oil that are to be recycled, appears to limit the applicability of the used oil management standards to mixtures that are to be recycled by burning for energy recovery. Section 261.5(j), therefore, incorrectly suggests that mixtures of CESQG wastes and used oil that are to be recycled in a manner other than by burning for energy recovery, such as by re-refining, would not be subject to the used oil management standards. Indeed, because CESQG wastes are not regulated as hazardous wastes, § 261.5(j) would suggest that such mixtures that are re-refined would not be subject to regulation under RCRA Subtitle C or the used oil management standards.

The used oil management standards, however, apply to used oil to be recycled irrespective of what form of recycling is to be employed. By its terms, the presumption in 40 CFR 279.10(a) that used oil is to be recycled (such that used oil is presumptively subject to the used oil management standards, unless it is disposed or sent for disposal), encompasses any type of recycling. The recycling presumption does not, for instance, condition the applicability of the used oil management standards on whether used oil is recycled by burning for energy recovery or by re-refining. Since Part 279 applies to used oil that is to be recycled without regard to how the used oil is to be recycled, Part 279 also applies to mixtures of used oil and CESQG wastes that are to be recycledirrespective of how that mixture is to be recycled.

The apparent limitation contained in § 261.5(j), which would limit the applicability of the used oil management standards to mixtures to be burned for energy recovery, is an artifact of the pre-1992 used oil regulations at 40 CFR Part 266, which only regulated the burning of used oil. When the expanded used oil management standards were promulgated on September 10, 1992, the Agency inadvertently failed to amend § 261.5(j) to reflect the broader scope of the new Part 279. Indeed, the corresponding provision in Part 279 that addresses mixtures of CESQG wastes and used oil to be recycled, § 279.10(b)(3), does not contain the apparent limitation found in § 261.5(j) that would limit the

applicability of the used oil management standards to mixtures to be burned for energy recovery. Therefore, today's rule amends § 261.5(j) as it should have been amended in 1992 to reflect the greater scope of Part 279 and to eliminate any potential ambiguity over the applicability of the used oil management standards to mixtures of CESQG wastes and used oil to be recycled. This amendment does not impose additional regulatory requirements on this category of CESQG waste. These wastes have been and continue to be regulated under 40 CFR 279.10(b)(3).

The Agency received one comment opposing this amendment from a state in response to the May 6, 1998 proposal. The comment stated that mixtures of conditionally exempt small quantity generator (CESQG) waste and used oil should only be regulated as used oil if it is to be recycled by burning for energy recovery. This comment opens up the merits of the original rule (§ 279.10(b)(3)) and that is not the intent of today's final rule. Today's final rule intends only to make certain conforming changes to § 261.5(j) to correctly reflect EPA's original intent in the September 10, 1992 Part 279 used oil management standards rule. EPA addressed the merits of the original rule in that previous rulemaking and EPA is not reopening that issue in this final rule. Even if EPA were to reopen this issue in today's rulemaking and to address the merits of this issue, EPA would come to the same conclusion as it did in the previous rulemaking. EPA is not aware of any reason for distinguishing used oil being burned for energy recovery from used oil being recycled in other ways, and the commenter did not provide any. Notwithstanding this clarification of the federal regulations, the state may regulate mixtures of CESQG waste and used oil more stringently than the federal used oil management program.

C. Clarification of the Recordkeeping Requirements for Marketers of On-Specification Used Oil

Today's rule amends 40 CFR 279.74(b) to clarify that the marketer who first claims that used oil that is to be burned for energy recovery meets the fuel specification (on-specification used oil) must only keep a record of a shipment of used oil to the facility to which the initial marketer delivers the used oil. The preamble to the November 29, 1985 rule (50 FR 49164 at 49189) clearly describes the agency's intent to only track on-specification used oil that is to be burned for energy recovery one step beyond the initial marketer. When these recordkeeping requirements were recodified at 40 CFR 279.74(b) (57 FR 41566, September 10, 1992), the regulations required that a marketer must keep a record of each shipment of used oil to an on-specification used oil burner. However, the marketer who first claims that used oil that is to be burned for energy recovery meets the fuel specification might choose not to market the used oil directly to an on-specification used oil burner (*i.e.* a non-industrial oil burner). Instead, the on-specification used oil might be marketed to a fuel oil distributor for subsequent sale as fuel oil. In this situation, § 279.74(b) could be interpreted to require the initial marketer of the on-specification used oil to keep a record of all subsequent shipments of that used oil until the on-specification used oil reaches a used oil burner. Today's rule clarifies that the initial marketer of on-specification used oil must only keep a record of a shipment of used oil to the facility to which the initial marketer delivers the used oil. The initial marketer need not keep a record of any subsequent transfers of this used oil. For example, the initial marketer would need to keep a record of a shipment of on-specification used oil to a fuel oil distributor, but the initial marketer would not need to keep records of shipments of this used oil from the fuel oil distributor to fuel oil burners or other fuel oil distributors.

The Agency received one comment opposing this amendment from a state in response to the May 6, 1998 proposal. The commenter was concerned that the proposed amendment does not require tracking of used oil that meets the used oil fuel specification to the point to which it is burned for energy recovery, and thus does not provide adequate protection. The Agency disagrees with this comment. This comment opens up the merits of the original November 29, 1985 rule and that is not the intent of today's rule. As with the issue above discussing mixtures of CESQG waste and used oil, the Agency is not reopening the merits of this issue, because the Agency addressed the merits of this issue in the preamble to the November 29, 1985 rule (50 FR 49164 at 49189). Today's amendment does not represent a change in the requirements, but only clarifies the Agency's intent that only the initial marketer of on-specification used oil must keep a record of each shipment of used oil to the facility to which it delivers the used oil. In the September 23, 1991 supplemental notice of proposed rulemaking (56 FR 48000), EPA did not propose to change the tracking requirements or the management requirements, originally promulgated in 1985 for used oil that meets the used oil fuel specification. In drafting the 1992 rule, EPA only intended to recodify the tracking requirements from the now superseded Part 266. It has always been the Agency's position that used oil that is to be burned for energy recovery that meets the used oil fuel specification is a commodity that will be properly handled like any other fuel. The Agency has always intended that used oil that is to be burned for energy recovery only be regulated under the Used Oil Management Standards until it has been determined to meet the used oil fuel specification. Once it has been determined to meet the fuel specification and the marketer complies with 40 CFR 279.72, 279.73, and 279.74(b), the used oil is no longer regulated by the Used Oil Management Standards. If the used oil is not burned for energy recovery and is recycled by other means or disposed, it is regulated as used oil under the Used Oil Management Standards. Even if the Agency were to address the merits of this issue, we would continue to take the position as we are taking in today's amendment, because, for the reasons discussed above, the Agency believes that the tracking requirements would provide adequate protection. The commenter has provided no new information or arguments that would lead us to change this long-standing position. Notwithstanding this clarification of the federal regulations, a state may regulate used oil more stringently than the federal used oil management program.

III. State Authority

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. Following authorization, the state requirements authorized by EPA apply in lieu of equivalent Federal requirements and become Federally-enforceable as requirements of RCRA. EPA maintains independent authority to bring enforcement actions under RCRA sections 3007, 3008, 3013, and 7003. Authorized states also have independent authority to bring enforcement actions under state law.

A state may receive authorization by following the approval process described in 40 CFR part 271. Part 271 of 40 CFR also describes the overall standards and requirements for authorization. After a state receives initial authorization, new Federal

regulatory requirements promulgated under the authority in the RCRA statute which existed prior to the 1984 Hazardous and Solid Waste Amendments (HSWA) do not apply in that state until the state adopts and receives authorization for equivalent state requirements. The state must adopt such requirements to maintain authorization. In contrast, under RCRA section 3006(g), (42 U.S.C. 6926(g)), new Federal requirements and prohibitions imposed pursuant to HSWA provisions take effect in authorized states at the same time that they take effect in unauthorized States. Although authorized states still are required to update their hazardous waste programs to remain equivalent to the Federal program, EPA carries out HSWA requirements and prohibitions in authorized states, including the issuance of new permits implementing those requirements, until EPA authorizes the state to do so. Authorized states are required to modify their programs only when EPA promulgates Federal requirements that are more stringent or broader in scope than existing Federal requirements.

RCRA section 3009 allows the states to impose standards more stringent than those in the Federal program. See also 40 CFR 271.1(i). Therefore, authorized states are not required to adopt Federal regulations, either HSWA or non-HSWA, that are considered less stringent.

Today's rule corrects and clarifies the scope of certain regulatory requirements and is, therefore, considered to be no more stringent than the existing federal standards. Authorized States are only required to modify their programs when EPA promulgates federal regulations that are more stringent or broader in scope than the existing federal regulations. Therefore, States that are authorized for the used oil management standards are not required to modify their programs to adopt today's rule. However, EPA strongly urges States to do so.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether this regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant" regulatory action as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

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 since it does not represent any change in requirements, but only clarifies the Agency's intent with respect to certain provisions in the Used Oil Management Standards. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR Part 279) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0124 (EPA ICR No. 1286.06).

Copies of the ICR document(s) may be obtained from Susan Auby, by mail at the Office of Environmental Information, Collection Strategies Division; U.S. Environmental Protection Agency (2822); 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, by email at *auby.susan@epa.gov*, or by calling (202) 260–4901. A copy may also be downloaded off the internet at *http://www.epa.gov/icr*. Include the ICR and/or OMB number in any correspondence.

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 are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.* generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

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

After considering the economic impacts of today's final rule on small entities, I certify that today's rule will not have a significant economic impact on a substantial number of small entities. Today's rule will not impact any small entity because it does not impose regulatory requirements or otherwise substantively change existing requirements. The rule eliminates drafting errors and ambiguities in the used oil management standards so as to clarify the Agency's intended result. Even if the rule were viewed as a change, the rule would result in lesser regulatory impact than under existing requirements.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, 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, giving them meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising them on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector because it does not impose regulatory requirements or otherwise substantively change existing requirements. Today's rule eliminates drafting errors and ambiguities in the used oil management standards so as to clarify the Agency's intended result. Even if the rule were viewed as a change, the rule would result in lesser regulatory impact than under existing requirements. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. Similarly, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

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." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to the Office of Management and Budget (OMB), in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the agency's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

This final rule 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, because it does not impose regulatory requirements or otherwise substantively change existing requirements. Today's rule eliminates drafting errors and ambiguities in the used oil management standards so as to clarify the Agency's intended result. Even if today's rule were viewed as a change, it would result in lesser regulatory impact than under existing requirements. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

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 9, 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." Today's rule does not have tribal implications, as specified in Executive Order 13175. Specifically, today's rule does not significantly or uniquely affect the communities of Indian tribal governments because it does not impose regulatory requirements or otherwise substantively change existing requirements. Today's rule eliminates drafting errors and ambiguities in the used oil management standards so as to clarify the Agency's intended result. Even if today's rule were viewed as a change, it would result in lesser regulatory impact than current requirements. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Children's Health

"Protection of Children from Environmental Health Risks and 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 rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions based on environmental health or safety risks.

H. Executive Order 13211: Energy Effects

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995

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

This proposed rulemaking does not involve technical standards. Therefore, 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 rule will be effective September 29, 2003.

V. Effective Date

Because the regulated community does not need 6 months to come into compliance with this rule, EPA finds, pursuant to RCRA section 3010(b)(1), that this rule can be made effective in less than six months.

List of Subjects

40 CFR Part 261

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

40 CFR Part 279

Conditionally exempt small quantity generator (CESQG), Environmental protection, Hazardous waste, Polychlorinated biphenyls (PCBs), Solid waste, Recycling, Response to releases, Used oil, Used oil specification.

Dated: July 23, 2003.

Marianne L. Horinko,

Acting Administrator.

■ For the reasons set out in the preamble, chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y) and 6938.

§ 261.5 [Amended]

■ 2. Section 261.5(j) is amended by removing both phrases, "if it is destined to be burned for energy recovery."

PART 279—STANDARDS FOR THE MANAGEMENT OF USED OIL

■ 1. The authority citation for part 279 continues to read as follows:

Authority: Sections 1006, 2002(a), 3001 through 3007, 3010, 3014, and 7004 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6905, 6912(a), 6921 through 6927, 6930, 6934, and 6974); and Sections 101(37) and 114(c) of CERCLA (42 U.S.C. 9601(37) and 9614(c)).

■ 2. Section 279.10 is amended by revising paragraph (i) to read as follows:

§ 279.10 Applicability.

* * * * *

(i) *Used oil containing PCBs.* Used oil containing PCBs (as defined at 40 CFR 761.3) at any concentration less than 50 ppm is subject to the requirements of this Part unless, because of dilution, it is regulated under 40 CFR Part 761 as a used oil containing PCBs at 50 ppm or greater. PCB-containing used oil subject to the requirements of this Part may also be subject to the prohibitions and requirements found at 40 CFR Part 761, including § 761.20(d) and (e). Used oil containing PCBs at concentrations of 50 ppm or greater is not subject to the requirements of this Part, but is subject to regulation under 40 CFR Part 761. No person may avoid these provisions by diluting used oil containing PCBs, unless otherwise specifically provided for in this Part or Part 761 of this chapter.

■ 3. Section 279.74 is amended by revising paragraph (b) to read as follows:

§ 279.74 Tracking.

* * * * *

(b) *On-specification used oil delivery.* A generator, transporter, processor/re-refiner, or burner who first claims that used oil that is to be burned for energy recovery meets the fuel specifications under § 279.11 must keep a record of each shipment of used oil to the facility to which it delivers the used oil. Records for each shipment must include the following information:

(1) The name and address of the facility receiving the shipment;

(2) The quantity of used oil fuel delivered;

(3) The date of shipment or delivery; and

(4) A cross-reference to the record of used oil analysis or other information used to make the determination that the oil meets the specification as required under § 279.72(a).

* * * * *

[FR Doc. 03–19275 Filed 7–29–03; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 021122286–3036–02; I.D. 072303B]

Fisheries of the Exclusive Economic Zone Off Alaska; Sablefish by Vessels Using Trawl Gear in the Central Regulatory Area of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), NationalOceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure.

SUMMARY: NMFS is prohibiting retention of sablefish by vessels using trawl gear in the Central Regulatory Area of the Gulf of Alaska (GOA). NMFS is requiring that catch of sablefish by vessels using trawl gear in this area be treated in the same manner as prohibited species and discarded at sea with a minimum of injury. This action is necessary because the allocation of the sablefish 2003 total allowable catch (TAC) assigned to trawl gear in this area has been reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 26, 2003, until 2400 hrs, A.l.t., December 31, 2003.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for the Groundfish Fishery of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the

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 Llebre 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.