WEST VIRGINIA
SECRETARY OF STATE
Betty Ireland
ADMINISTRATIVE LAW DIVISION

Form #1

Do Not Mark In This Box

2008 JUL -8 PM 1:

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: WV Department of Environmental Protection, DWWM TITLE NUMBER: 33

RULE TYPE: Legislative CITE AUTHORITY: WV Code §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: Hazardous Waste Management System

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

DATE OF PUBLIC HEARING: August 12, 2008 TIME: 7:00 pm

LOCATION OF PUBLIC HEARING: WV Department of Environmental Protection
Coopers Rock Training Room
601 57th Street, SE
Charleston, WV 25304

COMMENTS LIMITED TO: ORAL [ ] WRITTEN [ ] BOTH [X]

DATE WRITTEN COMMENT PERIOD ENDS: August 12, 2008 TIME: At close of hearing

WRITTEN COMMENTS MAY BE MAILED TO:
Kathy Cosco, Public Information Office
WV Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Authorized Signature

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: "Hazardous Waste Management System" 33CSR20

A. AUTHORITY: WV Code §22-18-6

B. SUMMARY OF RULE: This rule regulates the generation, treatment, storage and disposal of hazardous waste. The rule proposed for 2009 adopts and incorporates by reference the federal regulations set forth in 40 CFR Parts 260 through 279 that are in effect as of June 1, 2008, and proposes to amend rule to allow hazardous waste recyclers to stage recyclable materials for 3 days prior to recycling.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE: This rule is proposed to adopt three changes to federal regulations 40 CFR Parts 260 through 279 into the State Hazardous Waste Management System, enabling the State hazardous waste program to maintain consistency with the federal program. The changes to 40 CFR regulations are a technical correction to the standards for universal waste management, expanding the exclusion for oil-bearing hazardous secondary materials, and clarifications and corrections to the National Emissions Standards for Hazardous Air Pollutants. The other amendment proposed to this rule promotes the recycling of hazardous waste by allowing recyclers to stage hazardous waste for three days prior to recycling under certain conditions.

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

The proposed revisions are consistent with the federal counterpart regulation and therefore no determination of stringency is required.

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:

At its meeting on June 24, 2009, the Environmental Protection Advisory Council discussed this rule. (See attached minutes for Council's discussion.)

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES
Tuesday, June 24, 2008
601 57th Street, SE, Charleston, WV
West Virginia Room – 3rd Floor

IN ATTENDANCE:

Members of the Council:

Jackie Hallinan
Karen Price
Bill Raney
Rick Roberts

DEP:

Randy Huffman	Cabinet Secretary
Lisa McClung	Deputy Cabinet Secretary and Director, Division of Water and Waste Management
Raymond Franks II	General Counsel
Karen Watson	Associate General Counsel
Kathy Cosco	Communications Director
Pam Nixon	Environmental Advocate
Ken Politan	Mining & Reclamation
Lewis Halstead	Mining & Reclamation
Charlie Sturey	Mining & Reclamation
Carroll Cather	Water & Waste Management
Don Martin	Land Restoration
Brian Long	Water & Waste Management
Dan Arnold	Water & Waste Management
Mike Zeto	Environmental Enforcement
Terrie Sangid	Water & Waste Management
Jim Mason	Air Quality
Mike Johnson	Water & Waste Management
Kathy Emery	Water & Waste Management
Scott Mandirola	Water & Waste Management

Visitors:

Tom Boggs	Chamber of Commerce
Don Garvin	WV Environmental Council
Ruth Lemmon	WV Auto/Truck Dealers Association

OLD BUSINESS:

Secretary Huffman called the meeting to order at 1:35 p.m., and he announced that Members Lisa Dooley and Larry Harris would not be attending. On motion made by Mr. Raney and seconded by Ms. Hallinan, the Council approved the minutes from the March 18, 2008 meeting. Secretary Huffman then ceded the floor to Mr. Franks.

NEW BUSINESS:

Mr. Franks noted that for the 2009 regular legislative session, DEP was proposing changes to 20 rules, grouped by Division for presentation to the Council. Depending on who had shepherded the rule through its initial drafting, either Mr. Franks or Ms. Watson would lead the discussion, with program administrators available to assist in answering the Council's questions.

Ms. Watson presented 60 CSR 3, the "Brownfields" Rule. Ms. Watson explained that the Rule was currently pending before the Secretary of State for authorization as an emergency rule, and that the proposed changes included adjustments to the "de minimis" table and enhancing DEP's flexibility in obtaining risk assessments.

Ms. Price referred to a letter recently sent to DEP seeking clarification of the Rule's provisions concerning land use covenants and long-term maintenance agreements. Secretary Huffman stated that the letter would be retrieved and the issue noted for further consideration by the agency.

Mr. Raney inquired whether the Council could recommend changes to the rules as presented. Ms. Watson responded in the affirmative. Mr. Raney then asked whether written comments, such as those submitted by Mr. Harris prior to the meeting, would be appended to the minutes. Mr. Franks responded in the negative, and Ms. Watson expounded that Mr. Harris's comments would be summarized and addressed orally during the discussion of the particular rules involved.

Mr. Franks then presented 38 CSR 2, the Surface Mining Reclamation Rule. Mr. Franks explained that the proposed changes would expand the Secretary's oversight of "approved persons" authorized to render technical certifications contained within mining permit applications, and would clarify certain collateral activities as being within the scope of requests for incidental boundary revisions to existing permits. Mr. Franks also noted that the proposed Rule would set forth more relevant and exacting criteria for the Secretary to consider in evaluating applications for revisions.

Mr. Raney inquired generally about the provisions with respect to approved persons. Secretary Huffman replied that the increased oversight is necessary to improve the initial quality of the permit applications, such that the delays occasioned by subsequent corrections would be reduced or eliminated. Mr. Raney asked whether approved persons could include anyone other than engineers, and Mr. Halstead responded that the definition extended to surveyors and geologists. Mr. Raney noted the need to establish a procedure for suspension or revocation to limit the agency's unfettered discretion, to which Secretary Huffman and Mr. Franks replied that the Rule provided for notice and hearing prior to curtailing the privileges of anyone on the approved-person list.

Ms. Watson presented 47 CSR 30, establishing NPDES requirements for coal mining facilities. Ms. Watson explained that the proposed changes were relatively minor, designed to enhance consistency with the non-coal rule, to allow for digital signatures, and to permit correction of clerical errors.

The Council then considered the Air Quality rules. Mr. Franks presented 45 CSR 1 and 45 CSR 26, relating to control and reduction of nitrogen oxides from, respectively, non-electric and electric generating units, the latter by means of a budget trading program. The rules are to be repealed in their entireties, and Mr. Mason explained that both are being subsumed within the Clean Air Interstate Rule program.

Mr. Franks then presented 45 CSR 8, the Ambient Air Quality Rule. Mr. Franks explained that the 1-hour primary and secondary ozone standards were being replaced with 8-hour standards, with the maximum tolerance being reduced slightly. Mr. Raney inquired as to the practical effect of the proposed change, particularly with regard to whether non-compliance areas within the State might be expanded. Mr. Mason replied that an expansion might occur, but that it was difficult to predict at this early stage. Mr. Mason added that the time-period increase would inevitably lead to more accurate measurements.

Ms. Watson presented 45 CSR 13, governing permits for constructing and modifying non-major stationary sources of air pollutants. Ms. Watson explained that the Rule was being amended to reflect the recent statutory changes reducing the lag time for issuing permits and authorizing certain pre-permit construction. It was noted that Mr. Harris had submitted in writing his concern that courts would be loath to enforce agency cease-and-desist orders based on defects discovered during the permitting process after construction had already begun. Ms. Watson pointed out that the statute had been carefully crafted to avoid facile invocation of detrimental reliance, with Mr. Franks observing that the Rule strove to conform to the statute. Ms. Price wondered whether one or more of the timeframe provisions included within the existing Rule had been inadvertently omitted from the proposed version. Ms. Watson responded that the Rule had been carefully checked for completeness, but that she would once again verify the language to assure its accuracy.

Mr. Franks presented 45 CSR 14, governing permits for constructing and significantly modifying major stationary sources of air pollutants. Mr. Franks explained that references to pollution control projects and clean units were deleted in accordance with a federal appellate court decision vacating those provisions.

Mr. Franks went on to present 45 CSR 16, 45 CSR 25, and 45 CSR 34, relating respectively to performance standards for new stationary sources, pollution from hazardous waste treatment, storage, and disposal facilities, and emission standards for hazardous air pollutants. Mr. Mason noted that the changes incorporate revisions to the Rules' federal counterparts, except that some of the new standards were not incorporated within 45 CSR 34, because they constituted unfunded mandates. Mr. Garvin was recognized, and he asked whether the failure to incorporate equated to a lack of regulation. Mr. Mason responded in the negative, explaining that the monitoring and regulation would be performed by the federal government. Mr. Garvin inquired as to the affected industries, and Mr. Mason referred to a list including smaller gas facilities and paint-stripping shops.

Ms. Watson presented 45 CSR 37, detailing the budget trading program to reduce mercury emissions. Ms. Watson explained that the rule is being repealed as inconsistent with a federal appellate court decision, pending alternative action by the EPA. Mr. Garvin inquired whether the Rule repealed two years ago would be reinstated upon revocation of the current version, to which Ms. Watson and Mr. Franks replied that it would not, if there had indeed been a previous rule in place, which was somewhat in question. Mr. Mason explained that mercury emissions would be monitored and regulated as usual, except that budget trading would not be available as a method of reduction. He also stated that there have been discussions on a national level as to whether to reinstate the federal mercury monitoring requirements.

The Council then turned its attention to the Water and Waste Management Rules. Ms. Watson presented 33 CSR 20, governing hazardous waste management systems. Ms. Watson explained that the Rule incorporated by reference its federal counterpart, the most salient change to which is its attempt to reduce disposal by permitting facilities to stage hazardous waste for three days pending recycling. Mr. Raney asked whether three days was sufficient time, and Mr. Cather responded in the affirmative.

Mr. Franks presented 33 CSR 24, the Hazardous Waste Management Fee Rule. Mr. Franks explained that increases to the fee assessments are necessary to sustain the underlying Fund by ensuring sufficient matching revenue for federal grants. Ms. Price indicated her belief that, as part of the legislative compromise extending the fee's duration, no increases would be forthcoming until completion and review of the Fund's legislative audit. Secretary Huffman responded that the preliminary audit findings in no way indicate any misallocation within the Fund or contravene the agency's determination that fee increases are necessary. Ms. Lemmon was recognized, and she commented that the proposed increase was unfair to automobile and truck dealers, as well as other small generators. Ms. Lemmon suggested that a study be done to identify the industries causing DEP to incur program costs, with fee assessments to be made proportionately.

Ms. Watson presented 33 CSR 22 and 47 CSR 56, governing the assessment of civil administrative penalties for, respectively, hazardous and solid waste violations and violations relating to groundwater. Ms. Watson explained that the Rules were being modified for the first time since their initial promulgation, with the purpose of clarifying their application by listing additional factors to be considered in calculating penalties, providing ratings examples, and expanding facility categories.

Ms. Watson then presented 47 CSR 31, addressing the State Water Pollution Control Revolving Fund. Ms. Watson explained that the proposed changes include the creation of a state review process for sewer projects in lieu of a wholesale adoption of the federal requirements. Mr. Roberts observed that many of the eligibility criteria would be deleted, but Ms. Emery assured the Council that inasmuch as the criteria were not being uniformly met, the deletion would have no practical effect on the Fund's administration. Ms. Watson advised Mr. Roberts that if he continued to have concerns upon further review, he should submit written suggestions for changes during the formal comment period.

Mr. Franks presented 47 CSR 32, governing the certification of laboratories conducting analyses of waste and wastewater. Mr. Franks explained that the proposed changes are designed to modernize outdated procedures and protocols that have remained constant since 1995, and to increase program funding through increased certification fees and a new application fee. Mr. Raney asked whether the new fees would render the program self-sustaining, and Mr. Arnold replied that it would for the time-being. In response to further inquiry, Mr. Arnold stated that DEP conducts annual, on-site audits of commercial and industrial labs, with municipal labs typically audited every two years, depending on the experience of the support personnel.

Ms. Watson presented 47 CSR 34, the Dam Safety Rule. Ms. Watson explained that the Rule is being extensively augmented to govern disbursement and use of a new Revolving Fund to finance repair and rehabilitation of deficient dams. Secretary Huffman commented that it appeared imminent that the Legislature would approve a transfer of $350,000 from excess general revenue as seed money for the Fund.

Lastly, Ms. Watson presented 47 CSR 2, the Water Quality Standards Rule. Ms. Watson explained that the proposed revisions are designed to clarify the definition of Category A use, while providing specific standards to be applied in the permitting process to determine in a more streamlined fashion whether the use is unsuitable in cases of insufficient flow and hydrologic modification. Mr. Raney commented that the Category A determination process has always been a significant problem for the coal industry. Ms. Price also agreed for her members. Mr. Garvin noted that the environmental community had expressed some initial concern regarding the proposed streamlining mechanisms, but that there was some general support for taking the matter out of the legislative arena. Mr. Huffman affirmed that the revisions are designed solely for the benefit of the regulated public and that the revisions must include the clarification that Category A applies statewide.

Ms. Watson reported that the rules will proceed to be filed with the Secretary of State, some perhaps as early as the week following the Council meeting, and that some will have an extended 45-day comment period.

Mr. Franks requested closing comments from Council members and from the public. Following the cessation of discussion, Mr. Franks reminded the Council that the next meeting is scheduled for 1:30 p.m. on September 9, 2008.

Secretary Huffman declared the meeting adjourned at 3:25 p.m.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 33CSR20 - "Hazardous Waste Management System"

Type of Rule: ___X__ Legislative _____Interpretive _____Procedural

Agency: Division of Water and Waste Management

Address: 601 57th Street SE

Charleston, WV 25304

Phone Number: 926-0499 Ext. 1317 Email: ccather@wvdep.org

Fiscal Note Summary

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

The proposed revisions to this rule should cause no additional impact on costs and revenues of state government.

Fiscal Note Detail

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

FISCAL YEAR			
Effect of Proposal	2009 Increase/Decrease (use "-")	2010 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	$ 0	$ 0	$ 0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs & Alterations	0	0	0
Assets	0	0	0
Equipment	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

Rule Title: 33CSR20 - "Hazardous Waste Management System"

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

The proposed revisions to this rule will have a minimal effect on the costs to the Division of Water and Waste Management because the revisions impose no additional requirements beyond current federal requirements. Costs are covered under previous cost estimates.

MEMORANDUM

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

Date:

Signature of Agency Head or Authorized Representative

_____

, Director

TITLE 33
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
~~DIVISION OF~~ WASTE MANAGEMENT

SERIES 20
HAZARDOUS WASTE MANAGEMENT SYSTEM

§33-20-1. General.

1.1. Scope. -- This rule establishes and adopts a program of regulation for 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 24, 2008~~.

1.4. Effective Date. -- ~~June 1, 2008~~.

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 June 1, ~~2007~~ 2008 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. "West Virginia Department of Environmental Protection" will be substituted for "Environmental Protection Agency."

1.5.a.2. "Secretary of the 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. 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.

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, Office of Air Quality rule, 45 CSR 25, "Control of Air Pollution from Hazardous Waste Treatment, Storage and 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 Secretary, 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 the West Virginia Department of Environmental Protection, Office of Air Quality rule, 45 CSR 25, "Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities" that is in effect on the date that this rule becomes effective.

§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.

2.1.a.2. "Stage" or "staging" means the temporary placement of off-site generated recyclable materials within a recycling facility for a period of time no longer than three (3) days. Placement of recyclable materials for longer than three (3) days is considered "storage."

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 Secretary 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 shall accompany all petitions submitted under this rule. The petitioner shall execute an agreement with the Secretary 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 shall 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, shall submit a certified letter to the Secretary 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 Secretary shall 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 shall petition the Secretary 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 Secretary to evaluate the petition.

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

2.5.c. The Secretary shall 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 Secretary to include a waste as a universal

waste as follows:

2.5.d.1. Submit a petition to the Secretary 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 shall 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 Secretary shall 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 Secretary will be in writing and state the reasons to either grant or deny the petition. Any petitioner aggrieved by the decision of the Secretary 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 shall comply with the following:

3.1.a.1. Provide a certification in writing to the Secretary that groundwater monitoring complying with either 40 CFR part 265, subpart F or which is approved by the Secretary, 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 shall 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) shall notify the Secretary of the receipt of the wastes on a form prescribed by the Secretary.

3.1.a.3. Annually submit to the Secretary 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 shall notify the Secretary of their hazardous waste activity in accordance with section 4.

§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 shall notify the Secretary 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 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.

4.1.b. The purpose of section 4 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 or all who initiated hazardous waste activities subsequent to the requirements of EPA as referenced above in subdivision 4.1.a to notify the Secretary of their hazardous waste activities.

4.2. Notification. Any person that notified EPA of hazardous waste activities as referenced above in subsection 4.1 shall provide a copy of that notification to the Secretary.

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, but is subject to those requirements shall notify the Secretary 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, RCRA Subtitle C Site Identification Form, 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, shall notify the Secretary 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 shall 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 shall comply with the EPA identification number requirements and shall 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 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 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 shall file with the Secretary 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 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 shall file with the Secretary 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, Office of Air Quality, -- The standards in section 7 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, "Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities", 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, 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 Secretary shall 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 Secretary shall specify in the facility permit the frequencies for collecting samples required under 40 CFR §264.99(g). This frequency shall not be less than once annually.

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 Office of Air Quality regarding emissions from incinerators. The 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 Secretary retains authority to enforce 40 CFR §§264.347(b)(c)(d).

7.6.a. Consult the Office of Air Quality, 45 CSR 25, "Control of Air Pollution from Hazardous Waste Treatment, Storage and 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 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 Secretary shall 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 Office of Air Quality regarding emissions from incinerators. The 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 Secretary retains 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 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 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.

9.1 40 CFR Part 266. -- The provisions of 40 CFR part 266 are hereby adopted and incorporated by reference. Consult the rules of the 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 §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 and Standardized Permit.

11.1. 40 CFR Part 270. -- The provisions of the 40 CFR part 270 and 40 CFR part 267 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 and 40 CFR part 267 to 40 CFR part 124 will be deemed to be references to the applicable provisions of subsections 11.4 through 11.17. To the extent of any inconsistency with 40 CFR part 270 and 40 CFR part 267, 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, shall 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. 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 shall hold at least one meeting with the public in order to solicit questions from the community and inform the community of proposed hazardous waste management activities. The applicant shall post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.

11.4.c. The applicant shall 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 shall provide public notice of the pre-application meeting at least thirty (30) days prior to the meeting. The applicant shall maintain, and provide to the permitting agency upon request, documentation of the notice.

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

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

11.4.d.1.B. A visible and accessible sign. The applicant shall post a notice on a clearly marked sign at or near the facility, fulfilling the requirements in paragraph 11.5.d.2. If the applicant places the sign on the facility property, then the sign shall 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 shall 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 Secretary.

11.4.d.1.D. A notice to the permitting agency. The applicant shall send a copy of the newspaper notice to the permitting agency and the Secretary shall forward copies to the appropriate units of State and local government having jurisdiction over the area

where the facility is, or is proposed to be, located; and to each state agency having any authority under state law with respect to the construction or operation of the facility.

11.4.d.2. The notices required under paragraph 11.4.d.1.shall 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 Secretary shall provide public notice as required in subsection 11.5 when a Part B permit application has been submitted. The Secretary shall 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; 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 Secretary and is available for review.

11.5.b.4. Any person otherwise entitled to receive notice under subdivision 11.5.b 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 Secretary. The notice shall 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 shall 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 Secretary shall 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 Secretary shall assess the need, on a case-by-case basis, for an information repository. When assessing the need for an information repository, the Secretary shall consider a variety of factors, including: the level of public interest; the type of facility; the presence of an existing repository; and the proximity to the nearest copy of the administrative record. If the Secretary determines, at any time after submittal of a permit application, that there is a need for a repository, then the Secretary shall notify the facility that it must establish and maintain an information repository.

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

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

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

11.6.f. The facility owner/operator shall be responsible for maintaining and updating the repository with appropriate information throughout a time period specified by the Secretary. The Secretary shall close the repository at his or her discretion, based on the factors in subdivision 11.6.b.

11.7. Application for a Permit.

11.7.a. Any person who requires a permit under this rule shall complete, sign, and submit to the Secretary 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 Secretary shall not begin the processing of a permit until the applicant has fully complied with the application requirements for that permit. Permit applications shall comply with the signature and certification requirements of 40 CFR §270.11.

11.7.b. The Secretary shall review for completeness every application. Each application submitted by a new hazardous waste management facility, shall be reviewed for completeness by the Secretary within 30 days of its receipt. Each application submitted by an existing hazardous waste management facility (both Part A and Part B of the application), shall be reviewed for completeness within 60 days of receipt. Upon completing the review, the Secretary shall notify the applicant in writing whether the application is complete. If the application is incomplete, the Secretary shall list the information necessary to make the application complete. When the application is for an existing hazardous waste management facility, the Secretary shall specify in the notice of

deficiency a date for submitting the necessary information. The Secretary shall notify the applicant that the application is complete upon receiving this information. After the application is completed, the Secretary shall request additional information from the applicant but only when necessary to clarify, modify or supplement previously submitted material. Request for additional information shall not render an application incomplete.

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

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

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

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

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

11.8.b. If the Secretary decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice, comment, or hearings. Denials by the Secretary may be appealed to the Environmental Quality Board in accordance with section ~~15~~16.

11.8.b.1. If the Secretary initially decides to modify or revoke and reissue a permit under 40 CFR §§270.41 or 270.42 (c), he or she shall prepare a draft permit under section 11.9 incorporating the proposed changes. The Secretary may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of a revoked and reissued permit, the Secretary shall require the submission of a new application.

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 shall 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 Secretary decides to terminate a permit under 40 CFR §270.43, he or she shall issue a Notice of Intent to

Terminate. A Notice of Intent to Terminate is a type of draft permit which follows the same procedures as any draft permit prepared under subsection 11.9.

11.9. Draft Permits.

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

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

11.9.c. If the Secretary decides to issue a draft permit, he or she shall 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 Secretary under this section shall be accompanied by a fact sheet and shall be based on the administrative record, publicly noticed and made available for public comment.

11.10. Fact Sheet

11.10.a. A fact sheet shall be prepared for every draft permit for a hazardous waste management facility, which the Secretary 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 Secretary shall send the fact sheet to the applicant and to anyone who requests it.

11.10.b. The fact sheet shall 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 Secretary shall 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. Written notice of that denial shall 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 will allow at least forty-five (45) days for public comment. Public notice of a public hearing shall be given at least thirty (30) days before the hearing. (Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.)

11.11.d. Public notice of activities described in subdivision 11.11.a shall 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 Secretary 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 Secretary shall update the mailing lists from time to time by requesting written indications of continued interest from those listed. The Secretary shall 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 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, 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, all persons identified in subparagraphs 11.11.d.1.A, 11.11.d.1.B, and 11.11.d.1.C shall 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.

11.12.a. During the public comment period provided under subsection 11.11, 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 shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in subsection 11.16.

11.13. Public Hearings.

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

11.13.b. The Secretary shall 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 Secretary shall hold a public hearing whenever he or she receives written notice of opposition to a draft permit and a request for a hearing within forty-five (45) days of public notice under subdivision 11.11.c; whenever possible the Secretary shall 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.

11.13.e. Whenever a public hearing will be held the Secretary shall 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 shall 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 shall 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 shall 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 Secretary shall take one or more of the following actions:

11.14.a.1. Prepare a new draft permit, appropriately modified, under subsection 11.9.

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

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

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

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

11.15. Issuance and Effective Date of Permit.

11.15.a. After the close of the public comment period on a draft permit, the Secretary shall issue a final permit decision. The Secretary shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. The notice shall include reference to the procedures for appealing a decision on the permit. 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 Secretary shall 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 shall be available to the public.

11.17. Administrative Record.

11.17.a. The provisions of a draft permit prepared under subsection 11.9 shall 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 Secretary shall 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 (including any extension or reopening under subsection 11.14);

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

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

11.17.b.5. The response to comments required by subsection 11.16 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 shall 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, 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 Secretary's possession shall be available to the public for inspection and copying; provided, however, that upon a satisfactory showing to the Secretary 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 Secretary shall consider, treat, and protect

those records as confidential.

11.18.b. It shall 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 Secretary which contains information for which claim of confidentiality is made must be submitted in a sealed envelope marked "CONFIDENTIAL" and addressed to the Secretary. The document shall be submitted in two (2) separate parts. The first part shall contain all information which is not deemed by the person preparing the report as confidential and shall 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 shall be protected as confidential information by the Secretary unless it is submitted in accordance with the provisions of subdivision 11.18.c and no information which is submitted in accordance with the provision of subdivision 11.18.c shall be afforded protection as confidential information unless the Secretary finds that the protection is necessary to protect trade secrets. The person who submits information claimed to be confidential shall receive written notice from the Secretary 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 shall be marked with the term "ACCEPTED" and shall be protected as confidential information. If the person fails to satisfactorily demonstrate to the Secretary that information in the form presented meets the criteria of subdivision 11.18.d, the Secretary shall mark the information "REJECTED" and promptly return it to the person who submitted the information. The Secretary shall retain a copy of the information for reference.

11.18.f. Nothing contained herein shall be construed to restrict the release of relevant confidential information during situations declared to be emergencies by the Secretary.

11.18.g. Nothing in subsection 11.18 shall 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 shall 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.

11.20. 40 CFR §270.24. The provisions of 40 CFR §270.24 are excepted from incorporation by reference. Consult the rules of the 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 Secretary's decision to approve or deny the RAP application to the Environmental Quality Board under subsections 11.4 through 11.17. 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. The Secretary shall 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.

§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 shall 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 shall notify the Secretary in writing of the transfer.

12.3. Other Requirements. -- Nothing contained in this section 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 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 shall file with the Secretary 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 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 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. Standards for Hazardous Waste Recycling.

15.1 The provisions of 40 CFR §261.6 are hereby adopted and incorporated by reference with the modifications contained in this section.

15.2 Standards Applicable To All Hazardous Waste Recycling Activities.

15.2.a Any residual material resulting from a recycling process shall be evaluated in accordance with section 3 to determine whether it is subject to regulation as a hazardous waste.

15.2.b Any facility that treats hazardous waste without recycling it, or that treats hazardous waste prior to recycling it is subject to regulation under section 11. Generators that treat hazardous waste in containers or tanks in compliance with 40 CFR§262.34 are exempt from regulation under section 11 for that treatment activity.

15.2.c Owners or operators of facilities with hazardous waste management units that recycle hazardous wastes are subject to section 7.

15.3 Hazardous Waste Recycling At Off-Site Facilities.

15.3.a. Owners or operators of facilities that receive recyclable materials, stage recyclable materials, and recycle them without storing them before they are recycled are subject to:

15.3.a.1. The requirements of subsection 15.3;

15.3.a.2. The generator requirements of section 5; and

15.3.a.3. Financial Requirements -- Prior to staging any material, owners or operators shall demonstrate financial assurance for closure of the facility by:

15.3.a.3.A. Maintaining a closure cost estimate that meets the requirements of 40 CFR § 265.142, and that has been approved by the Secretary; and

15.3.a.3.B. Establishing financial assurance in accordance with 40 CFR§ 265.143.

15.3.b. Owners and operators of facilities that store recyclable materials before they are recycled are subject to section 11 and to all applicable provisions of sections 1, 3, and 5.

~~§33-20-15~~ §33-20-16. Appeal Rights.

Any person aggrieved or adversely affected by the failure or refusal of the Secretary 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 Secretary 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

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. This action simply reflects already existing Federal requirement for state air pollution control agencies and existing LMWC units that are subject to the provisions of 40 CFR part 60, subpart Cb and related subpart Eb. However, in the "Proposed Rules" section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the section 111(d)/129 plan revision should relevant adverse or critical comments be filed. This rule will be effective June 9, 2008 without further notice unless EPA receives adverse comments by May 8, 2008. If EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule did not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a 111(d)/129 plan submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing 111(d)/129 plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the 111(d)/129 plan is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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 action 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).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *June 9, 2008.* Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements, Sulfur oxides, Waste treatment and disposal.

Dated: March 31, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR part 62 is amended as follows:

PART 62—[AMENDED]

■ 1. The authority citation for Part 62 continues to read as follows:

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

Subpart V—Maryland

■ 2. Section 62.5110 is amended by redesignating the existing paragraph as paragraph (a) and adding paragraph (b) to read as follows:

§ 62.5110 Identification of plan.

* * * * *

■ (b) On October 24, 2007, Maryland submitted a revised State plan (Phase II) and related COMAR 26.11.08.01, .02, and .08 amendments as required by 40 CFR part 60, subpart Cb, amended May 10, 2006.

■ 3. Section 62.5112 is amended by redesignating the existing paragraph as paragraph (a) and adding paragraph (b) to read as follows:

§ 62.5112 Effective date.

* * * * *

■ (b) The plan revision (Phase II) is effective June 9, 2008.

[FR Doc. E8–7347 Filed 4–7–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 63, 264 and 266

[EPA–HQ–OAR–2004–0022; FRL–8549–4]

RIN 2050–AG35

NESHAP: National Emission Standards for Hazardous Air Pollutants: Standards for Hazardous Waste Combustors; Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing amendments to the national emission standards for hazardous air pollutants (NESHAP) for hazardous waste combustors, which

EPA promulgated on October 12, 2005. The amendments to the October 2005 final rule clarify several compliance and monitoring provisions, and also correct several omissions and typographical errors in the final rule. We are finalizing the amendments to facilitate compliance and improve understanding of the final rule requirements. This rule does not address issues for which petitioners sought reconsideration. Nor does it address issues raised in EPA's comment solicitation of September 27, 2007.

DATES: The final rule is effective on April 8, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2004–0022. All documents in the docket are listed on *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information the disclosure of which 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 through *http://www.regulations.gov* or in hard copy at the HQ EPA Docket Center, Docket ID No. EPA–HQ–OAR–2004–0022, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The HQ EPA Docket Center telephone number is (202) 566–1742. 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. A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: For more information on this rulemaking, contact Frank Behan at (703) 308–8476, or *behan.frank@epa.gov*, Office of Solid Waste (MC: 5302P), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

Entities Potentially Affected by This Rule. Categories and entities potentially affected by this rule include:

Category	NAICS code[a]	Potentially affected entities
Petroleum and coal products manufacturing	324	Any entity that combusts hazardous waste as defined in the final rule.
Chemical manufacturing	325	
Cement and concrete product manufacturing	3273	
Other nonmetallic mineral product manufacturing	3279	
Waste treatment and disposal	5622	
Remediation and other waste management services	5629	

[a] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be impacted by this rule. This table lists examples of the types of entities EPA is now aware could potentially be regulated by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, etc., is affected by this rule, you should examine the applicability criteria in 40 CFR 63.1200. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

How Do I Obtain a Copy of This Document and Other Related Information? In addition to being available in the docket, an electronic copy of today's rule will also be available on the on the World Wide Web. Following the Administrator's signature, a copy of this document may be posted at *http://www.epa.gov/hwcmact*. This Web site also provides other information related to the NESHAP for hazardous waste combustors including the NESHAP issued on October 12, 2005 (70 FR 59402).

Judicial Review. Under section 307(b)(1) of the Clean Air Act, judicial review of the final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by June 9, 2008. Section 307(d)(7)(B) of the CAA provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review." This section also provides a mechanism for us to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Moreover, under section 307(b)(2) of the CAA, the requirements established by the final action may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

Organization of This Document. The information presented in this preamble is organized as follows:

I. Background

A. What Is the Source of Authority for the Development of NESHAP?

Section 112(c) of the Clean Air Act requires EPA to list categories and subcategories of major sources and area sources of hazardous air pollutants (HAP) and to establish NESHAP for the listed source categories and subcategories. Hazardous waste combustors include incinerators, cement kilns, lightweight aggregate kilns, boilers, and hydrochloric acid production furnaces that burn hazardous waste. EPA's initial list of categories of major and area sources of HAP was published on July 16, 1992 (57 FR 31576). Hazardous waste incinerators, Portland cement manufacturing, clay products manufacturing (including lightweight aggregate kilns), industrial/commercial/institutional boilers and process heaters, and hydrochloric acid production furnaces were among the listed categories of sources. Major sources of HAP are those sources that have the potential to emit at least 10 tons per year of any one HAP or 25 tons per year of any combination of HAP.

B. How Did the Public Participate in Developing the Amendments to the Final Rule?

The final rule was published on October 12, 2005 (70 FR 59402) and codified in 40 CFR part 63, subpart EEE. Following publication of the final rule, two industry trade associations identified a number of typographical errors and suggested several potential compliance and monitoring amendments and clarifications to the rule.[1] On September 6, 2006, we published proposed amendments (71 FR at 52639) to address these issues and sought public comment on the proposed amendments.[2] EPA received comments from five entities. Today's action presents EPA's responses to those comments and promulgates amendments to Subpart EEE of 40 CFR part 63.

II. Summary of the Final Amendments

In today's notice, we are announcing our final action on several amendments to Subpart EEE of 40 CFR part 63. The amendments revise several compliance and monitoring provisions in response to questions and issues raised by entities affected by the rule. The revised provisions are effective immediately, and today's final rule does not change the October 14, 2008 compliance date established by the October 12, 2005 final rule. See also Section III (Time Lines for compliance activities) in today's action. Sources can readily comply with the revised provisions promulgated today within the compliance time frames established by the October 12, 2005 final rule. See § 63.1206(a).

A. Proposed Amendments for Which No Adverse Comments Were Received

In the September 6, 2006 proposal, we proposed several corrections and clarifications to the NESHAP for hazardous waste combustors. 71 FR at 52639–642, 52645–646. We received no adverse comments on the majority of the corrections and clarifications (see Table 1 below). Therefore, we are promulgating those provisions, as proposed, without further discussion.[3] The reader is referred to the September 2006 proposed rule for background on these changes.

TABLE 1.—SUMMARY OF AMENDMENTS FOR WHICH NO ADVERSE COMMENTS WERE RECEIVED

Preamble section in September 2006 proposed rule	Subject of proposed amendment	Code of Federal Register (CFR) section(s) amended
V.A	Sunset Provision for the Interim Standards	63.1203(e), 63.1204(i), 63.1205(e).
V.B	Operating Parameter Limits for Sources with Fabric Filters	63.1206(c)(9).
V.C	Confirmatory Performance Testing Not Required for Sources That Are Not Subject to a Numerical Dioxin/Furan Emission Standard.	63.1207(b)(3)(vi).
V.D	Periodic Performance Test for Phase I Sources	63.1207(d).
V.E	Performance Test Waiver for Sources Subject to Hazardous Waste Thermal Concentration Limits.	63.1207(m).
V.F	Averaging Method When Calculating 12-Hour Rolling Average Thermal Concentration Limits.	63.1209(n)(2)(iii).
V.I	Timing of the Periodic Review of Eligibility for the Health-Based Compliance Alternatives for Total Chlorine.	63.1215(h)(2)(i).
V.K	Mercury Standards for Cement Kilns	63.1220(a)(2) and (b)(2), 63.1209(l)(1)(iii).
V.L	Facilities Operating Under RCRA Interim Status	None. Interpretation of existing regulations (see 71 FR at 52642).
VII.A	Miscellaneous Typographical Errors	63.1206(a)(2) heading, 63.1206(a)(2)(ii)(A), 63.1206(b)(16), 63.1210(b), 63.1215(a)(2), 63.1215(b)(2), 63.1215(b)(3), 63.1215(b)(6)(ii)(C), 63.1215(f)(5)(ii)(A), 63.1217(a)(6)(ii), 63.1217(b)(6)(ii).

[1] See docket items EPA–HQ–OAR–2004–0022–0551 and 0552.

[2] In addition to soliciting comment on the rule amendments discussed in this action, EPA also requested comment on other issues in the September 6, 2006 proposed rule. The other issues related to our response to four petitions for reconsideration that were submitted to the Administrator pursuant to section 307(d)(7)(B) of the Clean Air Act. EPA's final response to the petitions for reconsideration is not included in today's action. See Sections II, III, and IV of the September 2006 notice for additional information on the reconsideration proceedings. Nor does this final rule address any of the issues raised by EPA's solicitation of comment published on September 27, 2007 (72 FR 54875).

[3] Please note, however, that we have revised proposed § 63.1207(d)(2), which prescribes the schedule for confirmatory performance testing, to conform with existing § 63.1207(b)(3) to clarify further that confirmatory performance testing is not required for sources that are not subject to a numerical D/F emission standard: solid fuel boilers and hydrochloric acid production furnaces; lightweight aggregate kilns that are not subject to a numerical dioxin/furan emission standard under § 63.1221; and liquid fuel boilers that are not subject to a numerical dioxin/furan emission standard under § 63.1217.

TABLE 1.—SUMMARY OF AMENDMENTS FOR WHICH NO ADVERSE COMMENTS WERE RECEIVED—Continued

Preamble section in September 2006 proposed rule	Subject of proposed amendment	Code of Federal Register (CFR) section(s) amended
VII.B	Citation Corrections	63.1206(b)(14)(iv), 63.1207(g)(2)(i) and (ii), 63.1209(n)(2)(vii), 63.1215(a)(1)(i), 264.340(b), 266.100(b)(3).
VII.C	Corrections to the NIC Provisions for New Units	63.1212(b)(1) and (b)(3).
VII.D	Clarification of the Applicability of Title V Permit Requirements to Phase 2 Area Sources.	None. Interpretation of existing regulations (see 71 FR at 52646).

We also received no adverse comment on the proposed amendments described in Section V.G (Calculating Rolling Averages for Averaging Periods in Excess of 12 Hours) of the September 6, 2006 preamble citation. That discussion described our intent to simplify the monitoring requirements for sources that select mercury or semivolatile metal feedrate limits averaged over periods greater than 12 hours. As described in the preamble, this would require identical changes to four paragraphs of the regulation: §§ 63.1209(n)(2)(v)(A)(*2*)(*iv*), 63.1209(n)(2)(v)(A)(*3*)(*v*), 63.1209(l)(1)(ii)(B)(*5*), and 63.1209(l)(1)(ii)(C)(*5*). However, corresponding regulatory changes to the latter three paragraphs were inadvertently omitted from the September 2006 proposed rule. In today's rule, we are correcting this oversight by promulgating the language proposed for § 63.1209(n)(2)(v)(A)(*2*)(*iv*) in all four paragraphs.

B. Proposed Amendments for Which Comments Were Received

1. Calculating Rolling Averages

a. *Summary of the Final Action.* We are revising §§ 63.1209(n)(2)(v)(B)(*1*), 63.1209(n)(2)(v)(B)(*2*), and 63.1209(o)(1)(ii)(A)(*3*) as proposed on September 6, 2006. 71 FR at 52640. These changes are intended to clarify that data for demonstrating compliance with feed rate limits of up to a 12-hour rolling average must be updated each minute. In addition, § 63.1209(n)(2)(v)(B)(*1*)(*i*) is modified to confirm that the chromium feed rate limit for boilers burning liquid hazardous waste with a heating value of 10,000 Btu/lb or greater is a 12-hour rolling average limit.

b. *What Are the Responses to Major Comments?*

Comment: We received two comments on this topic. One supported the changes as proposed. The other commenter objected to updating the 12-hour average every minute rather than every hour, arguing that this complicates data management and could require increased data storage.

Response: We believe that complications to data management or increases in data storage requirements, if any, are negligible. Phase I sources—incinerators, cement kilns, and lightweight aggregate kilns—have been complying with 12-hour averages updated each minute for several years without significant problems. Furthermore, data storage is not measurably affected. These continuous monitors are required to record a data point at least once each minute, regardless of the whether the rolling average value for determining compliance is updated each minute or each hour. Consequently, the amount of recorded data is not significantly affected under either approach to calculating the rolling average.

Phase I sources have been required to update their 12-hour rolling average feed rate data each minute ever since the hazardous waste combustor MACT rule was first promulgated in 1999. A "rolling average" was defined in that rule as "the average of all one-minute averages over the averaging period." That definition has remained the same through the interim standards (for Phase I sources) and the replacement standards. We have consistently interpreted the definition to require that a new rolling average be calculated each minute. See, for example, the preamble discussion in the September 30, 1999 rule which says, while discussing how to calculate rolling averages upon initial startup, "Given that the one-hour, and 12-hour rolling averages for limits on various parameters must be updated each minute * * *" 64 FR at 52924.

In the 2004 replacement standards proposed rule, we first introduced the concept of hourly updates to rolling averages, but only in the context of monitoring compliance with annual rolling average feed rate limits. See 69 FR at 21312. At no time did we discuss or propose any change to the long-standing requirement that rolling averages of 12 hours or less be updated each minute. In fact, we reiterated the requirement for one-minute updates in discussing how compliance with the 12-hour thermal feed rate limits would be monitored. In that discussion we said that "For compliance, you would continuously monitor the feed rate of hazardous waste on a 12-hour rolling average updated each minute or, for standards based on normal emissions, on an annual rolling average updated each hour." *Id.* at 21312.

Given that we have consistently required rolling averages of 12 hours or less to be updated each minute and we have never discussed or proposed any changes to that approach, we find ample evidence that the addition of hourly updates for these parameters in the final replacement standards were, as we asserted in the proposed rule, inadvertent. Furthermore, we find no support for the commenter's claim that data management or data storage requirements are significantly affected under either approach. Therefore, we have removed the references to hourly updates, as proposed.

2. Expressing Particulate Matter Standards Using the International System of Units

a. *Summary of the Final Action.* We proposed to revise the particulate matter standards expressed in English units (gr/dscf) in §§ 63.1216 through 63.1221 by converting and expressing the standards using the International System of Units (SI). 71 FR at 52641. However, after considering the comments received in response to the proposed rule, we are not revising the standards as proposed. Thus, we are retaining the format of the particulate matter standards as promulgated in the October 12, 2005 final rule.

b. *What Are the Responses to Major Comments?*

Comment: We received three comments on this topic. One supported revising the particulate matter standards by expressing all particulate matter standards in SI units as proposed. Two other commenters opposed the proposed revisions because converting a standard from gr/dscf to mg/dscm and rounding to two significant figures can

increase (and apparently does for at least one affected source) the stringency of the standard.

Response: Given that the proposed conversion to SI units can increase the stringency of the promulgated standard in some instances, we are not revising the particulate matter standards as proposed. We do not believe the proposed revisions are appropriate because a source currently complying with the standard expressed in English units could find itself suddenly out of compliance if the standard were converted to SI units, after rounding the result to two significant figures. We believe this would be an inappropriate outcome for this "housekeeping" amendment.

3. Corrections to the Notice of Intent To Comply (NIC) Provisions for New Units

a. *Summary of the Final Action.* We proposed several corrections to the NIC regulatory provisions for new units to accurately reflect the time frames for holding the informal public meeting and submitting a final NIC. See 71 FR at 52645–646. Specifically, we made corrections to the time line (Figure 2; 71 FR at 52644), and proposed to revise § 63.1210(b)(3) and (c)(1), which are the core requirements for the informal public meeting and final NIC. We explained that it was our intent to clarify that existing units' NIC deadlines were based upon the effective date of the rule (e.g., "* * * no later than one year following the effective date * * *"), whereas new units" NIC deadlines were based upon a set number of days between NIC compliance activities (e.g., "* * * or 60 days following the informal public meeting"). This was necessary because the final rule effective date has no bearing on new units. We further explained that since the public meetings for the NIC and the RCRA pre-application are to occur simultaneously for new units, we anticipate new units will plan accordingly and work with their permitting authorities to determine the most suitable time to begin the NIC compliance process.

Today we are amending § 63.1210(b)(3) and (c)(1) to accurately reflect the time frames for holding the informal public meeting and submitting a final NIC for new units. However, the amendments are not finalized as proposed, but rather were revised to reflect a comment we received (see below). We are now further subdividing the paragraphs to explicitly differentiate between "existing units" and "new units." Also, to further clarify that new units are subject to the same NIC requirements, we have added a new paragraph (b)(5) to § 63.1212 with respect to the final NIC. While it essentially mirrors § 63.1210(b)(3), we believe it is important to clearly indicate all applicable NIC provisions for new units in § 63.1212.

b. *What Are the Responses to Major Comments?*

Comment: One comment was received in response to the proposed amendments. The commenter noted that the proposed § 63.1210(c)(1) language retains the 10 month deadline, but also requires that the meeting must be held no later than 30 days following the notice. The 30 day advance notice language of § 63.1210(c)(3) was retained. This puts the facility in a position of having to issue the public notice precisely 30 days before the public meeting (i.e., facilities have two 30 day deadlines, one working backward from the meeting date and one working forward from the notice date). The commenter suggested that the requirements for new units and existing units be presented as two separate paragraphs to better represent the timelines for each.

Response: We agree with the commenter. The few words added to § 63.1210(c)(1) do not clearly differentiate between existing and new units' NIC deadlines. The reference in § 63.1210(c)(1) to the "* * * no later than 10 months after the effective date * * *" was intended only for existing units and the proposed reference to "* * * or 30 days following notice * * *" was intended only for new units. The way the paragraph reads gives the appearance that both references may be applicable to all units. Therefore, if one reads the 30 day reference in § 63.1210(c)(1) to also apply to existing units, along with the 30 day reference which was retained in § 63.1210(c)(3), it creates the situation which the commenter correctly identifies.

We have subdivided § 63.1210(c)(1) (as well as § 63.1210(b)(3)) to clearly designate applicability for existing and new units as the commenter suggests. Section 63.1210(c)(1) is revised to require the informal public meeting for new units to be held *no earlier than* 30 days following notice of the informal meeting, as opposed to *no later than* 30 days following the notice. Also, we have revised § 63.1212(b)(4) to state that the informal public meeting must be held *no earlier than* 30 days following notice of the meeting, so that it is consistent with § 63.1210(c)(1). Finally, as noted above, a new paragraph (b)(5) is added to § 63.1212 regarding submission of the final NIC.

C. Corrections to the Startup, Shutdown, and Malfunction Plan Provisions

This action also corrects a ministerial error by EPA that lead to inadvertent revision of § 63.1206(c)(2)(v). In a 2006 final rule amending the Part 63 general provisions, EPA made conforming changes to many individual MACT standards that merely incorporate the startup, shutdown and malfunction (SSM) requirements of the general provisions. 71 FR 20446 (April 20, 2006). In doing so, EPA inadvertently revised the SSM provisions tailored specifically for HWC facilities. Today, we are correcting that inadvertent error. Accordingly, we are revising § 63.1206(c)(2)(v)(A)(*2*) and (c)(2)(v)(B)(*4*) so that they read as they did before the April 20, 2006 revisions.

D. Time Lines

In the September 2006 proposed rule, we noted several errors in the time lines published in the October 12, 2005 final rule. See 70 FR 59524–525 and 71 FR at 52642–644. Consequently, we revised the time lines, Figures 1 and 2, to reflect the correct dates and time frames associated with compliance activities for Phase 1 (i.e., incinerators, cement kilns, and lightweight aggregate kilns) and Phase 2 sources (i.e., liquid and solid fuel boilers and hydrochloric acid production furnaces). In addition, we discussed the time line revisions and why the changes were necessary, as well as providing some clarifying remarks.

We did not receive any public comments on the revised time lines that were published in the proposed rule. For the reader's convenience, we are publishing the time lines again in today's final rule. Please refer to the proposal for the accompanying discussion of the time lines. 71 FR at 52642–643.

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Figure 1. Time Line for Phase 1 Replacement Standards and Phase 2 Standards – Existing Sources

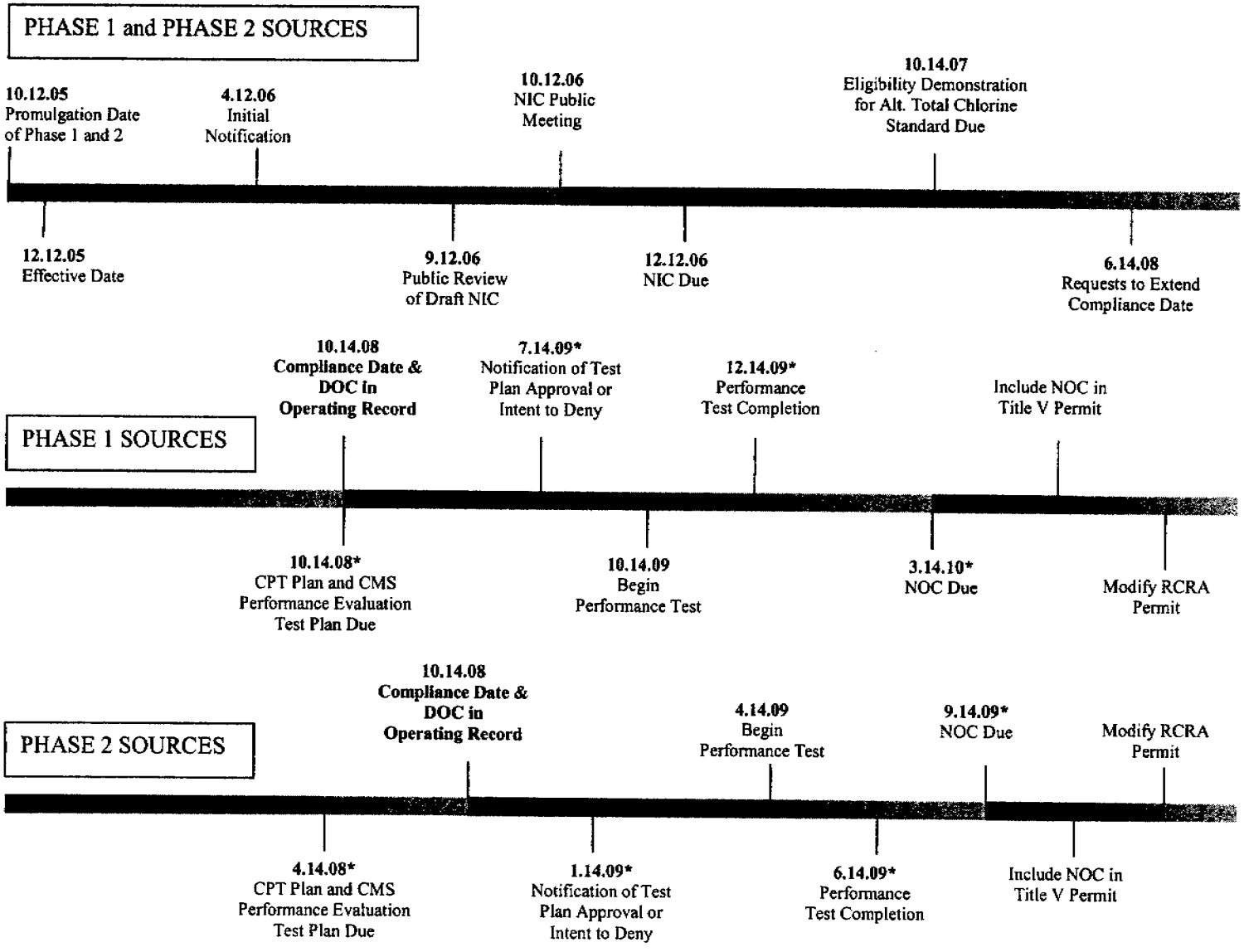
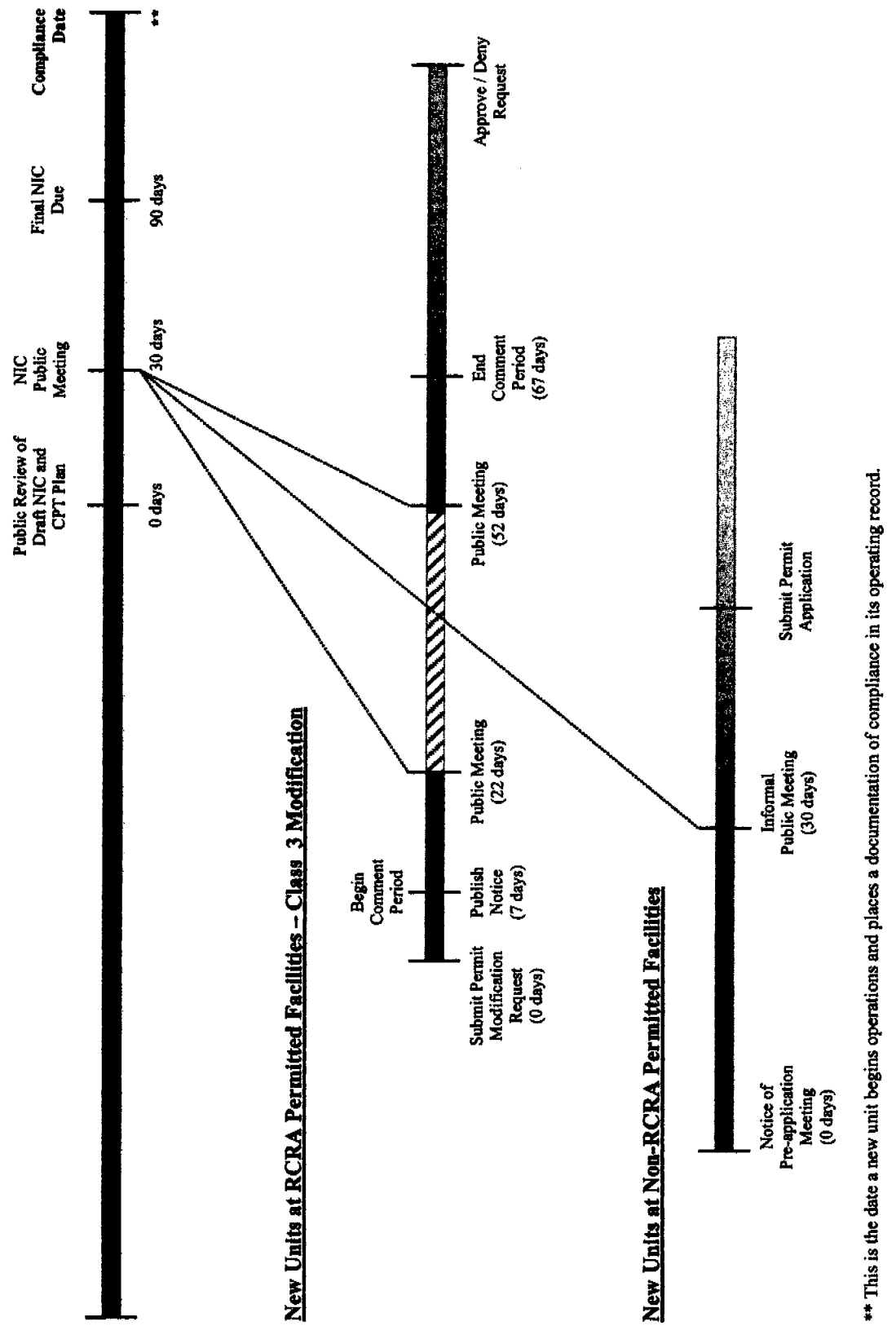


Figure 2. NIC and CPT Plan Time Line - New Units



** This is the date a new unit begins operations and places a documentation of compliance in its operating record.

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III. Impacts of the Final Rule

A. What facilities are affected by the final amendments?

A description of the affected source categories is discussed in the April 20, 2004 proposed rule. 69 FR at 21207–09. In the October 12, 2005 final rule, we estimated that there are a total of 267 sources subject to the rule requirements, including 116 boilers (104 liquid fuel boilers and 12 solid fuel boilers), 92 on-site incinerators, 25 cement kilns, 15 commercial incinerators, 9 lightweight aggregate kilns, and 10 hydrochloric acid production furnaces. 70 FR at 59530. While we are aware of several changes to the universe of operating hazardous waste combustors, these estimates remain a reasonable representation of existing operating sources.[4]

B. What are the impacts of the final rule?

The rule amendments do not change any of the impacts presented in the preamble to the October 12, 2005 final rule. See 70 FR at 59529–35.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to OMB review.

B. Paperwork Reduction Act

This action does not impose any new information collection burden because there is no additional burden on affected sources as a result of the final rule. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (see 40 CFR part 9) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0171, EPA ICR number 1773.08. A copy of the OMB approved Information Collection Request (ICR) may be obtained by writing to: Director, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1700.

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

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

C. Regulatory Flexibility Act

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

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

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. As discussed in the October 12, 2005 final rule (which today's final rule amends), we determined that hazardous waste combustion facilities are not owned by small governmental jurisdictions or nonprofit organizations. 70 FR at 59538. Therefore, in that rule only small businesses were analyzed for small entity impacts (a small entity was defined either by the number of employees or by the dollar amount of sales). We found that few—a total of eight out of 145 facilities—of the sources affected by the October 2005 rule were owned by small businesses. Finally, our analysis indicated that none of these facilities are likely to incur annualized compliance costs greater than one percent of gross annual corporate revenues. Cost impacts were found to range from less than 0.01 percent to 0.46 percent of annual gross corporate revenues. 70 FR at 59538.

Although this final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. We note that today's final rule does not alter the number or type of small businesses that were discussed in the October 12, 2005 final rule. Additionally today's rule does not have any significant new regulatory requirements as compared to the requirements discussed in the October 12, 2005 final rule.

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

[4] Given the small size of the lightweight aggregate kiln category, it is worth mentioning that the Solite Cascade plant in Virginia has ceased operations. Prior to closure, this plant operated four kiln sources. See also 70 FR at 59426.

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. This is because today's final rule does not add new requirements that would increase the costs of the original NESHAP for hazardous waste combustors. The NESHAP was published on September 30, 1999, and October 12, 2005, and had aggregated annualized social costs between $50 to $63 million (64 FR at 53022) and $22.6 million (70 FR at 59538), respectively. Thus, today's final rule is not subject to the requirements of sections 202 and 205 of the UMRA. In addition, EPA has determined that this final rule does not significantly or uniquely affect small governments because it contains no requirements that apply to such governments or impose obligations upon them. Therefore, this final rule is not subject to section 203 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have federalism implications. The final rule does 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 State and local governments do not own or operate any sources that would be subject to the requirements of the final rule and as such would not bear substantial costs of effects. 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 tribal governments do not own or operate any sources subject to today's action. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under EO 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.

EPA interprets Executive Order 13045 as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This final rule is not subject to Executive Order 13045 because it is based solely on technology performance and not on health or safety risks. Furthermore, this final rule is not considered "economically significant" as defined under EO 12866.

H. Executive Order 13211: Actions Concerning Regulations 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, we have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

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

This action involves technical standards. During the development of the final rule, EPA searched for voluntary consensus standards that might be applicable. EPA adopted the following standards as practical alternatives to specified EPA test methods in the final rule: (1) American Society for Testing and Materials (ASTM) D6735–01, "Standard Test Method for Measurement of Gaseous Chlorides and Fluorides from Mineral Calcining Exhaust Sources—Impinger Method," and (2) American Society of Mechanical Engineers (ASME) standard QHO–1–2004, "Standard for the Qualification and Certification of Hazardous Waste Incinerator Operators."

Section 63.1208 lists the test methods to determine compliance with the emission standards in the final rule. Under § 63.7(f) of the general provisions, a source may apply to EPA for permission to use alternative test methods in place of any required testing method, performance specification, or procedure.

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

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

populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because the provisions contained within do not affect the level of protection to human health of the environment. The final amendments to the hazardous waste combustor NESHAP (40 CFR part 63 subpart EEE) are comprised of clarifications and revisions to current compliance and monitoring provisions that do not affect the current level of control at facilities subject to these rules.

K. Congressional Review

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 action 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 will be effective on April 8, 2008.

List of Subjects

40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

40 CFR Part 264

Environmental protection, Air pollution control, Hazardous waste, Insurance, Packaging and containers, Reporting and recordkeeping requirements, Security measures, Surety bonds.

40 CFR Part 266

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

Dated: March 26, 2008.

Stephen L. Johnson,

Administrator.

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

PART 63—NATIONAL EMISSIONS STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

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

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

■ 2. Section 63.1203 is amended by adding paragraph (e) to read as follows:

§ 63.1203 What are the standards for hazardous waste incinerators that are effective until compliance with the standards under § 63.1219?

* * * * *

(e) The provisions of this section no longer apply after any of the following dates, whichever occurs first:

(1) The date that your source begins to comply with § 63.1219 by placing a Documentation of Compliance in the operating record pursuant to § 63.1211(c);

(2) The date that your source begins to comply with § 63.1219 by submitting a Notification of Compliance pursuant to § 63.1210(b); or

(3) The date for your source to comply with § 63.1219 pursuant to § 63.1206 and any extensions granted there under.

■ 3. Section 63.1204 is amended by adding paragraph (i) to read as follows:

§ 63.1204 What are the standards for hazardous waste burning cement kilns that are effective until compliance with the standards under § 63.1220?

* * * * *

(i) The provisions of this section no longer apply after any of the following dates, whichever occurs first:

(1) The date that your source begins to comply with § 63.1220 by placing a Documentation of Compliance in the operating record pursuant to § 63.1211(c);

(2) The date that your source begins to comply with § 63.1220 by submitting a Notification of Compliance pursuant to § 63.1210(b); or

(3) The date for your source to comply with § 63.1220 pursuant to § 63.1206 and any extensions granted there under.

■ 4. Section 63.1205 is amended by adding paragraph (e) to read as follows:

§ 63.1205 What are the standards for hazardous waste burning lightweight aggregate kilns that are effective until compliance with the standards under § 63.1221?

* * * * *

(e) The provisions of this section no longer apply after any of the following dates, whichever occurs first:

(1) The date that your source begins to comply with § 63.1221 by placing a Documentation of Compliance in the operating record pursuant to § 63.1211(c);

(2) The date that your source begins to comply with § 63.1221 by submitting a Notification of Compliance pursuant to § 63.1210(b); or

(3) The date for your source to comply with § 63.1221 pursuant to § 63.1206 and any extensions granted there under.

■ 5. Section 63.1206 is amended as follows:

■ a. By revising paragraph (a)(2) heading and the first sentence of paragraph (a)(2)(ii)(A).

■ b. By revising paragraphs (b)(14)(iv) and (b)(16) introductory text.

■ c. By revising paragraphs (c)(2)(v)(A)(*2*), (c)(2)(v)(B)(*4*), and (c)(9) introductory text.

§ 63.1206 When and how must you comply with the standards and operating requirements?

(a) * * *

(2) *Compliance date for solid fuel boilers, liquid fuel boilers, and hydrochloric acid production furnaces that burn hazardous waste for standards under §§ 63.1216, 63.1217, and 63.1218.*

* * * * *

(ii) * * * (A) If you commenced construction or reconstruction of your hazardous waste combustor after April 20, 2004, you must comply with the new source emission standards of this subpart by the later of October 12, 2005, or the date the source starts operations, except as provided by paragraph (a)(2)(ii)(B) of this section. * * *

* * * * *

(b) * * *

(14) * * *

(iv) *Operating limits.* Semivolatile and low volatile metal operating parameter limits must be established to ensure compliance with the alternative emission limitations described in paragraphs (b)(14)(ii) and (iii) of this section pursuant to § 63.1209(n), except that semivolatile metal feedrate limits apply to lead, cadmium, and selenium, combined, and low volatile metal feedrate limits apply to arsenic, beryllium, chromium, antimony, cobalt, manganese, and nickel, combined.

* * * * *

(16) Compliance with subcategory standards for liquid fuel boilers. You must comply with the mercury, semivolatile metals, low volatile metals, and hydrogen chloride and chlorine standards for liquid fuel boilers under § 63.1217 as follows:

* * * * *

(c) * * *

(2) * * *

(v) * * *

(A) * * *

(2) Although the automatic waste feed cutoff requirements continue to apply during a malfunction, an exceedance of an emission standard monitored by a CEMS or COMS or operating limit specified under § 63.1209 is not a violation of this subpart if you take the corrective measures prescribed in the startup, shutdown, and malfunction plan.

* * * * *

(B) * * *

(4) Although the automatic waste feed cutoff requirements of this paragraph apply during startup and shutdown, an exceedance of an emission standard or operating limit is not a violation of this subpart if you comply with the operating procedures prescribed in the startup, shutdown, and malfunction plan.

* * * * *

(9) *Particulate matter detection system requirements.* If you combustor is equipped with an electrostatic precipitator or ionizing wet scrubber and you elect not to establish under § 63.1209(m)(1)(iv) site-specific control device operating parameter limits that are linked to the automatic waste feed cutoff system under paragraph (c)(3) of this section, or your combustor is equipped with a fabric filter and you elect to use a particulate matter detection system pursuant to paragraph (c)(8)(i)(B) of this section, you must continuously operate a particulate matter detection system that meets the specifications and requirements of paragraphs (c)(9)(i) through (iii) of this section and you must comply with the corrective measures and notification requirements of paragraphs (c)(9)(iv) through (v) of this section.

* * * * *

■ 6. Section 63.1207 is amended as follows:

■ a. By adding paragraph (b)(3)(vi).

■ b. By revising paragraphs (d)(1), (d)(2), and (d)(4).

■ c. By revising the first sentence of paragraphs (g)(2)(i) and (g)(2)(ii).

■ d. By revising paragraph (m).

§ 63.1207 What are the performance testing requirements?

* * * * *

(b) * * *

(3) * * *

(vi) Sources that are required to perform the one-time dioxin/furan test pursuant to paragraph (b)(3) of this section are not required to perform confirmatory performance tests.

* * * * *

(d) * * *

(1) *Comprehensive performance testing.* Except as otherwise specified in paragraph (d)(4) of this section, you must commence testing no later than 61 months after the date of commencing the previous comprehensive performance test used to show compliance with §§ 63.1216, 63.1217, 63.1218, 63.1219, 63.1220, or 63.1221. If you submit data in lieu of the initial performance test, you must commence the subsequent comprehensive performance test within 61 months of commencing the test used to provide the data in lieu of the initial performance test.

(2) *Confirmatory performance testing.* Except as otherwise specified in paragraph (d)(4) of this section, you must commence confirmatory performance testing no later than 31 months after the date of commencing the previous comprehensive performance test used to show compliance with §§ 63.1217, 63.1219, 63.1220, or 63.1221. If you submit data in lieu of the initial performance test, you must commence the initial confirmatory performance test within 31 months of the date six months after the compliance date. To ensure that the confirmatory test is conducted approximately midway between comprehensive performance tests, the Administrator will not approve a test plan that schedules testing within 18 months of commencing the previous comprehensive performance test.

* * * * *

(4) *Applicable testing requirements under the interim standards.* (i) *Waiver of periodic comprehensive performance tests.* Except as provided by paragraph (c)(2) of this section, you must conduct only an initial comprehensive performance test under the interim standards (*§§ 63.1203 through 63.1205*); all subsequent comprehensive performance testing requirements are waived under the interim standards. The provisions in the introductory text to paragraph (d) and in paragraph (d)(1) of this section apply only to tests used to demonstrate compliance with the replacement standards promulgated on or after October 12, 2005.

(ii) *Waiver of confirmatory performance tests.* You are not required to conduct a confirmatory test under the interim standards (*§§ 63.1203 through 63.1205*). The confirmatory testing requirements in the introductory text to paragraph (d) and in paragraph (d)(2) of this section apply only after you have demonstrated compliance with the replacement standards promulgated on or after October 12, 2005.

* * * * *

(g) * * *

(2) * * *

(i) Carbon monoxide (or hydrocarbon) CEMS emissions levels must be within the range of the average value to the maximum value allowed, except as provided by paragraph (g)(2)(v) of this section. * * *

(ii) Each operating limit (specified in § 63.1209) established to maintain compliance with the dioxin/furan emission standard must be held within the range of the average value over the previous 12 months and the maximum or minimum, as appropriate, that is allowed, except as provided by paragraph (g)(2)(v) of this section. * * *

* * * * *

(m) *Waiver of performance test.* You are not required to conduct performance tests to document compliance with the mercury, semivolatile metals, low volatile metals, or hydrogen chloride/chlorine gas emission standards under the conditions specified in paragraphs (m)(1) or (m)(2) of this section. The waiver provisions of this paragraph apply in addition to the provisions of § 63.7(h).

(1) *Emission standards based on exhaust gas flow rate.* (i) You are deemed to be in compliance with an emission standard based on the volumetric flow rate of exhaust gas (i.e. µg/dscm or ppmv) if the twelve-hour rolling average maximum theoretical emission concentration (MTEC) determined as specified below does not exceed the emission standard:

(A) Determine the feedrate of mercury, semivolatile metals, low volatile metals, or total chlorine and chloride from all feedstreams;

(B) Determine the stack gas flowrate; and

(C) Calculate a MTEC for each standard assuming all mercury, semivolatile metals, low volatile metals, or total chlorine (organic and inorganic) from all feedstreams is emitted;

(ii) To document compliance with this provision, you must:

(A) Monitor and record the feedrate of mercury, semivolatile metals, low volatile metals, and total chlorine and chloride from all feedstreams according to § 63.1209(c);

(B) Monitor with a CMS and record in the operating record the gas flowrate (either directly or by monitoring a surrogate parameter that you have correlated to gas flowrate);

(C) Continuously calculate and record in the operating record the MTEC under the procedures of paragraph (m)(1)(i) of this section; and

(D) Interlock the MTEC calculated in paragraph (m)(1)(i)(C) of this section to the AWFCO system to stop hazardous waste burning when the MTEC exceeds the emission standard.

(iii) in lieu of the requirement in paragraphs (m)(1)(ii)(C) and (D) of this section, you may:

(A) Identify in the Notification of Compliance a minimum gas flowrate limit and a maximum feedrate limit of mercury, semivolatile metals, low volatile metals, and/or total chlorine and chloride from all feedstreams that ensures the MTEC as calculated in paragraph (m)(1)(i)(C) of this section is below the applicable emission standard; and

(B) Interlock the minimum gas flowrate limit and maximum feedrate limit of paragraph (m)(1)(iii)(A) of this section to the AWFCO system to stop hazardous waste burning when the gas flowrate or mercury, semivolatile metals, low volatile metals, and/or total chlorine and chloride feedrate exceeds the limits of paragraph (m)(1)(iii)(A) of this section.

(2) *Emission standards based on hazardous waste thermal concentration.* (i) You are deemed to be in compliance with an emission standard specified on a hazardous waste thermal concentration basis (i.e., pounds emitted per million Btu of heat input) if the HAP thermal concentration in the waste feed does not exceed the allowable HAP thermal concentration emission rate.

(ii) To document compliance with this provision, you must:

(A) Monitor and record the feedrate of mercury, semivolatile metals, low volatile metals, and total chlorine and chloride from all hazardous waste feedstreams in accordance with § 63.1209(c);

(B) Determine and record the higher heating value of each hazardous waste feed;

(C) Continuously calculate and record the thermal feed rate of all hazardous waste feedstreams by summing the products of each hazardous waste feed rate multiplied by the higher heating value of that hazardous waste;

(D) Continuously calculate and record the total HAP thermal feed concentration for each constituent by dividing the HAP feedrate determined in paragraph (m)(2)(ii)(A) of this section by the thermal feed rate determined in paragraph (m)(2)(ii)(C) of this section for all hazardous waste feedstreams;

(E) Interlock the HAP thermal feed concentration for each constituent with the AWFCO to stop hazardous waste feed when the thermal feed concentration exceeds the applicable thermal emission standard.

(3) When you determine the feedrate of mercury, semivolatile metals, low volatile metals, or total chlorine and chloride for purposes of this provision, except as provided by paragraph (m)(4) of this section, you must assume that the analyte is present at the full detection limit when the feedstream analysis determines that the analyte in not detected in the feedstream.

(4) Owners and operators of hazardous waste burning cement kilns and lightweight aggregate kilns may assume that mercury is present in raw material at half the detection limit when the raw material feedstream analysis determines that mercury is not detected.

(5) You must state in the site-specific test plan that you submit for review and approval under paragraph (e) of this section that you intend to comply with the provisions of this paragraph. You must include in the test plan documentation that any surrogate that is proposed for gas flowrate adequately correlates with the gas flowrate.

■ 7. Section 63.1209 is amended as follows:

■ a. By revising paragraphs (l)(1)(ii)(B)(*5*) and (l)(1)(ii)(C)(*5*).

■ b. By revising paragraphs (l)(1)(iii)(B) and (l)(1)(iii)(C) introductory text.

■ c. By revising paragraphs (l)(1)(iii)(D)(*1*), and (l)(1)(iii)(D)(*2*).

■ d. By revising paragraph (n)(2)(iii)(A).

■ e. By revising paragraphs (n)(2)(v)(A)(*2*)(*iv*) and (n)(2)(v)(A)(*3*)(*v*)

■ f. By revising paragraphs (n)(2)(v)(B)(*1*)(*i*), (n)(2)(v)(B)(*1*)(*ii*), and (n)(2)(v)(B)(*2*).

■ g. By revising the first sentence of paragraph (n)(2)(vii) introductory text.

■ h. By revising paragraph (o)(1)(ii)(A)(*3*).

§ 63.1209 What are the monitoring requirements?

* * * * *

(l) * * *

(1) * * *

(ii) * * *

(B) * * *

(*5*) If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section. Thereafter, you must calculate rolling averages using either one-minute or one-hour updates. Hourly updates shall be calculated using the average of the one-minute average data for the preceding hour. For the period beginning with initial operation under this standard until the source has operated for the full averaging period that you select, the average feedrate shall be based only on actual operation under this standard.

(C) * * *

(*5*) If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section. Thereafter, you must calculate rolling averages using either one-minute or one-hour updates. Hourly updates shall be calculated using the average of the one-minute average data for the preceding hour. For the period beginning with initial operation under this standard until the source has operated for the full averaging period that you select, the average feedrate shall be based only on actual operation under this standard.

(iii) * * *

(B) When complying with the emission standards under §§ 63.1204 and 63.1220(a)(2)(ii)(A) and (b)(2)(ii)(A), you must establish a 12-hour rolling average limit for the feedrate of mercury in all feedstreams as the average of the test run averages;

(C) Except as provided by paragraph (l)(1)(iii)(D) of this section, when complying with the hazardous waste maximum theoretical emission concentration (MTEC) under § 63.1220(a)(2)(ii)(B) and (b)(2)(ii)(B), you must:

* * * * *

(D) * * *

(*1*) Identify in the Notification of Compliance a minimum gas flowrate limit and a maximum feedrate limit of mercury from all hazardous waste feedstreams that ensures the MTEC calculated in paragraph (l)(1)(iii)(C)(*4*) of this section is below the operating requirement under paragraphs §§ 63.1220(a)(2)(ii)(B) and (b)(2)(ii)(B); and

(*2*) Initiate an automatic waste feed cutoff that immediately and automatically cuts off the hazardous waste feed when either the gas flowrate or mercury feedrate exceeds the limits identified in paragraph (l)(1)(iii)(D)(*1*) of this section.

* * * * *

(n) * * *

(2) * * *

(iii) * * * (A) When complying with the emission standards under § 63.1220(a)(3)(i), (a)(4)(i), (b)(3)(i), and (b)(4)(i), you must establish 12-hour rolling average feedrate limits for semivolatile and low volatile metals as the thermal concentration of semivolatile metals or low volatile metals in all hazardous waste feedstreams. You must calculate hazardous waste thermal concentrations for semivolatile metals and low volatile metals for each run as the total mass feedrate of semivolatile metals or low volatile metals for all hazardous waste feedstreams divided by the total heat

input rate for all hazardous waste feedstreams. The 12-hour rolling average feedrate limits for semivolatile metals and low volatile metals are the average of the test run averages, calculated on a thermal concentration basis, for all hazardous waste feeds.

* * * * *

(v) * * *

(A) * * *

(*2*) * * *

(*iv*) If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section. Thereafter, you must calculate rolling averages using either one-minute or one-hour updates. Hourly updates shall be calculated using the average of the one-minute average data for the preceding hour. For the period beginning with initial operation under this standard until the source has operated for the full averaging period that you select, the average feedrate shall be based only on actual operation under this standard.

* * * * *

(*3*) * * *

(*v*) If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section. Thereafter, you must calculate rolling averages using either one-minute or one-hour updates. Hourly updates shall be calculated using the average of the one-minute average data for the preceding hour. For the period beginning with initial operation under this standard until the source has operated for the full averaging period that you select, the average feedrate shall be based only on actual operation under this standard.

(B) * * *

(*1*) * * * (*i*) The 12-hour rolling average feedrate limit is a hazardous waste thermal concentration limit expressed as pounds of chromium in all hazardous waste feedstreams per million Btu of hazardous waste fed to the boiler. You must establish the 12-hour rolling average feedrate limit as the average of the test run averages.

(*ii*) You must comply with the hazardous waste chromium thermal concentration limit by determining the feedrate of chromium in all hazardous waste feedstreams (lb/hr) and the hazardous waste thermal feedrate (MMBtu/hr) at least once each minute as [hazardous waste chromium feedrate (lb/hr)/hazardous waste thermal feedrate (MMBtu/hr)].

(*2*) *Boilers that feed hazardous waste with a heating value less than 10,000 Btu/lb.* You must establish a 12-hour rolling average limit for the total feedrate (lb/hr) of chromium in all feedstreams as the average of the test run averages.

* * * * *

(vii) *Extrapolation of feedrate levels.* In lieu of establishing feedrate limits as specified in paragraphs (n)(2)(ii) through (vi) of this section, you may request as part of the performance test plan under §§ 63.7(b) and (c) and §§ 63.1207(e) and (f) to use the semivolatile metal and low volatile metal feedrates and associated emission rates during the comprehensive performance test to extrapolate to higher allowable feedrate limits and emission rates. * * *

* * * * *

(o) * * *

(1) * * *

(ii) * * *

(A) * * *

(*3*) You must comply with the feedrate limit by determining the mass feedrate of hazardous waste feedstreams (lb/hr) at least once a minute and by knowing the chlorine content (organic and inorganic, lb of chlorine/lb of hazardous waste) and heating value (Btu/lb) of hazardous waste feedstreams at all times to calculate a 1-minute average feedrate measurement as [hazardous waste chlorine content (lb of chlorine/lb of hazardous waste feed)/hazardous waste heating value (Btu/lb of hazardous waste)]. You must update the rolling average feedrate each hour with this 60-minute average feedrate measurement.

* * * * *

■ 8. Section 63.1210 is amended by revising paragraphs (b) introductory text, (b)(3), and (c)(1) to read as follows:

§ 63.1210 What are the notification requirements?

* * * * *

(b) *Notification of intent to comply (NIC).* These procedures apply to sources that have not previously complied with the requirements of paragraphs (b) and (c) of this section, and to sources that previously complied with the NIC requirements of §§ 63.1210 and 63.1212(a), which were in effect prior to October 11, 2000, that must make a technology change requiring a Class 1 permit modification to meet the standards of §§ 63.1219, 63.1220, and 63.1221.

* * * * *

(3) You must submit the final NIC to the Administrator:

(i) *Existing units.* No later than one year following the effective date of the emission standards of this subpart; or

(ii) *New units.* No later than 60 days following the informal public meeting.

(c) * * * (1) Prior to the submission of the NIC to the permitting agency and:

(i) *Existing units.* No later than 10 months after the effective date of the emission standards of this subpart, you must hold at least one informal meeting with the public to discuss the anticipated activities described in the draft NIC for achieving compliance with the emission standards of this subpart. You must post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.

(ii) *New units.* No earlier than thirty (30) days following notice of the informal public meeting, you must hold at least one informal meeting with the public to discuss the anticipated activities described in the draft NIC for achieving compliance with the emission standards of this subpart. You must post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.

* * * * *

■ 9. Section 63.1212 is amended by revising paragraphs (b)(1), (b)(3), and (b)(4) and adding paragraph (b)(5) to read as follows:

§ 63.1212 What are the other requirements pertaining to the NIC?

* * * * *

(b) * * *

(1) Prepare a draft NIC pursuant to § 63.1210(b) and make it available to the public upon issuance of the notice of public meeting pursuant to § 63.1210(c)(3);

* * * * *

(3) Provide notice to the public of a pre-application meeting pursuant to § 124.31 of this chapter or notice to the public of a permit modification request pursuant to § 270.42 of this chapter;

(4) Hold an informal public meeting [pursuant to § 63.1210(c)(1) and (c)(2)] no earlier than 30 days following notice of the NIC public meeting and notice of the pre-application meeting or notice of the permit modification request to discuss anticipated activities described in the draft NIC and pre-application or permit modification request for achieving compliance with the emission standards of this subpart; and

(5) Submit a final NIC pursuant to § 63.1210(b)(3).

* * * * *

■ 10. Section 63.1215 is amended as follows:

■ a. By revising paragraph (a)(1)(i).

■ b. By revising the definitions of "1-Hour Average HCl-Equivalent Emission Rate" and "1-Hour Average HCl-Equivalent Emission Rate Limit" in paragraph (a)(2).
■ c. By revising paragraphs (b)(2), (b)(3), and (b)(6)(ii)(C).
■ d. By revising paragraph (f)(5)(ii)(A).
■ e. By revising paragraph (h)(2)(i).

§ 63.1215 What are health-based compliance alternatives for total chlorine?

* * * * *

(a) * * *

(1) * * *

(i) Identify a total chlorine emission concentration (ppmv) expressed as chloride (Cl(−)) equivalent for each on site hazardous waste combustor. You may select total chlorine emission concentrations as you choose to demonstrate eligibility for the risk-based limits under this section, except as provided by paragraph (b)(7) of this section;

* * * * *

(2) * * *

1–Hour Average HCl-Equivalent Emission Rate means the HCl-equivalent emission rate (lb/hr) determined by equating the toxicity of chlorine to HCl using aRELs as the health risk metric for acute exposure.

1–Hour Average HCl-Equivalent Emission Rate Limit means the HCl-equivalent emission rate (lb/hr) determined by equating the toxicity of chlorine to HCl using aRELs as the health risk metric for acute exposure and which ensures that maximum 1-hour average ambient concentrations of HCl-equivalents do not exceed a Hazard Index of 1.0, rounded to the nearest tenths decimal place (0.1), at an off-site receptor location.

* * * * *

(b) * * *

(2) *Annual average rates.* You must calculate annual average toxicity-weighted HCl-equivalent emission rates for each combustor as follows:

$$ER_{LTtw} = ER_{HCl} + ER_{Cl_2} \times (RfC_{HCl}/RfC_{Cl_2})$$

Where:

ER_{LTtw} is the annual average HCl toxicity-weighted emission rate (HCl-equivalent emission rate) considering long-term exposures, lb/hr

ER_{HCl} is the emission rate of HCl in lbs/hr

ER_{Cl_2} is the emission rate of chlorine in lbs/hr

RfC_{HCl} is the reference concentration of HCl

RfC_{Cl_2} is the reference concentration of chlorine

(3) *1-hour average rates.* You must calculate 1-hour average toxicity-weighted HCl-equivalent emission rates for each combustor as follows:

$$ER_{STtw} = ER_{HCl} + ER_{Cl_2} \times (aREL_{HCl}/aREL_{Cl_2})$$

Where:

ER_{STtw} is the 1-hour average HCl-toxicity-weighted emission rate (HCl-equivalent emission rate) considering 1-hour (short-term) exposures, lb/hr

ER_{HCl} is the emission rate of HCl in lbs/hr

ER_{Cl_2} is the emission rate of chlorine in lbs/hr

$aREL_{HCl}$ is the aREL for HCl

$aREL_{Cl_2}$ is the aREL for chlorine

* * * * *

(6) * * *

(ii) * * *

(C) You must calculate the 1-hour average HCl-equivalent emission rate using these HCl and Cl_2 emission rates and the equation in paragraph (b)(3) of this section.

* * * * *

(f) * * *

(5) * * *

(ii) * * *

(A) You must determine your chlorine emissions to be the higher of the value measured by Method 26/26A as provided in appendix A–8, part 60 of this chapter, or an equivalent method, or the value calculated by the difference between the combined hydrogen chloride and chlorine levels measured by Method 26/26A as provided in appendix A–8, part 60 of this chapter, or an equivalent method, and the hydrogen chloride measurement from EPA Method 320/321 as provided in appendix A, part 63 of this chapter, or ASTM D 6735–01 as described under § 63.1208(b)(5)(i)(C), or an equivalent method.

* * * * *

(h) * * *

(2) * * *

(i) *Proactive review.* You must submit for review and approval with each comprehensive performance test plan either a certification that the information used in your eligibility demonstration has not changed in a manner that would decrease the annual average or 1-hour average HCl-equivalent emission rate limit, or a revised eligibility demonstration.

* * * * *

■ 11. Section 63.1217 is amended by revising paragraphs (a)(6)(ii) and (b)(6)(ii) to read as follows:

§ 63.1217 What are the standards for liquid fuel boilers that burn hazardous waste?

(a) * * *

(6) * * *

(ii) When you burn hazardous waste with an as-fired heating value of 10,000 Btu/lb or greater, emissions in excess of 5.1×10^{-2} lbs combined emissions of hydrogen chloride and chlorine gas attributable to the hazardous waste per million Btu heat input from the hazardous waste;

* * * * *

(b) * * *

(6) * * *

(ii) When you burn hazardous waste with an as-fired heating value of 10,000 Btu/lb or greater, emissions in excess of $5.1 \times^{-2}$ lbs combined emissions of hydrogen chloride and chlorine gas attributable to the hazardous waste per million Btu heat input from the hazardous waste;

* * * * *

■ 12. Section 63.1220 is amended by revising paragraphs (a)(2)(ii) and (b)(2)(ii) to read as follows:

§ 63.1220 What are the replacement standards for hazardous waste burning cement kilns?

(a) * * *

(2) * * *

(ii) Either:

(A) Emissions in excess of 120 µg/dscm, corrected to 7 percent oxygen, or

(B) A hazardous waste feed maximum theoretical emission concentration (MTEC) in excess of 120 µg/dscm;

* * * * *

(b) * * *

(2) * * *

(ii) Either:

(A) Emissions in excess of 120 µg/dscm, corrected to 7 percent oxygen, or

(B) A hazardous waste feed maximum theoretical emission concentration (MTEC) in excess of 120 µg/dscm;

* * * * *

PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

■ 13. The authority citation for part 264 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924 and 6925.

■ 14. Section 264.340 is amended as follows:
■ a. By revising the first sentence of paragraph (b)(1) and paragraph (b)(3).
■ b. By removing paragraph (b)(5).

§ 264.340 Applicability.

* * * * *

(b) * * *

(1) Except as provided by paragraphs (b)(2) through (b)(4) of this section, the standards of this part do not apply to a new hazardous waste incineration unit that becomes subject to RCRA permit requirements after October 12, 2005; or no longer apply when an owner or operator of an existing hazardous waste incineration unit demonstrates

compliance with the maximum achievable control technology (MACT) requirements of part 63, subpart EEE, of this chapter by conducting a comprehensive performance test and submitting to the Administrator a Notification of Compliance under §§ 63.1207(j) and 63.1210(d) of this chapter documenting compliance with the requirements of part 63, subpart EEE, of this chapter. * * *

* * * * *

(3) The particulate matter standard of § 264.343(c) remains in effect for incinerators that elect to comply with the alternative to the particulate matter standard under §§ 63.1206(b)(14) and 63.1219(e) of this chapter.

* * * * *

PART 266—STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES

■ 15. 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.

§ 266.100 [Amended]

■ 16. Section 266.100 is amended by redesignating the second paragraph (b)(3)(ii) as (b)(3)(iii).

[FR Doc. E8–6667 Filed 4–7–08; 8:45 am]
BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 071030628–8482–02]

RIN 0648–AV84

Endangered and Threatened Wildlife; Sea Turtle Conservation

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to clarify the existing sea turtle conservation requirements for sea scallop dredge vessels entering waters south of 41°9.0′ N. latitude from May 1 through November 30 each year and to add a transiting provision to the requirements. Any vessel with a sea scallop dredge and required to have a Federal Atlantic sea scallop fishery permit, regardless of dredge size or vessel permit category, that enters waters south of 41°9.0′ N. latitude, from the shoreline to the outer boundary of the Exclusive Economic Zone (EEZ) must have a chain mat on each dredge, unless the terms of the transiting provision are met. The chain-mat modified dredge is necessary to help reduce mortality and injury to endangered and threatened sea turtles in scallop dredge gear and to conserve sea turtles listed under the Endangered Species Act (ESA). This current action addresses a procedural error in the original rulemaking to require chain mats on scallop dredge gear, clarifies the existing requirements, and adds a transiting provision to the regulations. Any incidental take of threatened sea turtles in sea scallop dredge gear in compliance with this gear modification requirement and all other applicable requirements will be exempted from the ESA's take prohibition.

DATES: Effective May 8, 2008.

ADDRESSES: Copies of the Environmental Assessment (EA) and Regulatory Impact Review/Final Regulatory Flexibility Analysis (RIR/FRFA) prepared for this final rule may be obtained by writing to Ellen Keane, NMFS, Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Ellen Keane (ph. 978–281–9300 x6526, fax 978–281–9394, e-mail *ellen.keane@noaa.gov*) or Barbara Schroeder (ph. 301–713–2322, fax 301–427–2522, e-mail *barbara.schroeder@noaa.gov*).

SUPPLEMENTARY INFORMATION:

Background

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) sea turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico that are listed as endangered. Due to the inability to distinguish between these populations of green turtles away from the nesting beach, NMFS considers green sea turtles endangered wherever they occur in U.S. waters. Kemp's ridley, hawksbill, loggerhead, and green sea turtles are hard-shelled sea turtles. The incidental take, both lethal and non-lethal, of loggerhead, Kemp's ridley, and unidentified hard-shelled sea turtles has been documented in the sea scallop dredge fishery, as well as a non-lethal take of a green sea turtle (NEFSC FSB, Observer Database). In addition, an unconfirmed take of a leatherback sea turtle was reported during the experimental fishery to test the chain-mat modified dredge gear (DuPaul *et al.*, 2004).

This action is being taken under the ESA provisions authorizing the issuance of regulations to conserve threatened species and for enforcement purposes (sections 4(d) and 11(f), respectively). The requirement to use chain-mat modified dredge gear is necessary to provide for the conservation of threatened loggerhead sea turtles, and will have ancillary benefits for other sea turtle species that have been taken in the sea scallop dredge fishery, albeit to a lesser extent than loggerheads. Under the ESA and its implementing regulations, taking endangered sea turtles—even incidentally—is prohibited. The incidental take of endangered species may only legally be exempted by an incidental take statement (ITS) or an incidental take permit issued pursuant to section 7 or 10 the ESA, respectively. Existing sea turtle conservation regulations at 50 CFR 223.206(d) exempt fishing activities and scientific research from the prohibition on takes of threatened species under certain conditions. Any incidental take of threatened loggerhead sea turtles in sea scallop dredge gear in compliance with this gear modification requirement and other applicable requirements is exempted from the prohibition against takes.

The chain-mat modified dredge is expected to benefit sea turtles following an interaction in the water column. Based on the available information, NMFS has determined that the use of a chain-mat modified dredge will prevent most captures of sea turtles in the dredge bag as well as any ensuing injuries as a result of such capture (e.g., crushing in the dredge bag, crushing on deck, etc.). However, NMFS has made the conservative assumption that a turtle in a bottom interaction sustains significant injuries on the bottom, so, under this conservative assumption, there would not be a benefit from the chain mat for bottom interactions. This assumption, however, may be too conservative in that it is possible (although not likely) that turtles in a bottom interaction only receive minor injuries. In the unlikely scenario of a turtle receiving only minor injuries following a bottom interaction, the chain mat modification would prevent significant injuries that result from capture in the dredge bag (i.e, injuries

Standards for Universal Waste Management

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ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 273

Standards for Universal Waste Management

CFR Correction

In Title 40 of the Code of Federal Regulations, Parts 266 to 299, revised as of July 1, 2006, in Sec. 273.9, on page 463, in alphabetical order, reinstate the definition of ``On-site'' to read as follows:

Sec. 273.9 Definitions.

* * * * *

On-site means the same or geographically contiguous property which may be divided by public or private right-of-way, provided that the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along the right of way. Non-contiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, are also considered on-site property.

* * * * *

[FR Doc. 07-55505 Filed 6-28-07; 8:45 am]
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Regulation of Oil-Bearing Hazardous Secondary Materials From the Petroleum Refining Industry Processed in a Gasification System To Produce Synthesis Gas

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ENVIRONMENTAL PROTECTION AGENCY
40 CFR Parts 260 and 261
[EPA-HQ-RCRA-2002-0002: FRL-8511-5]
RIN 2050-AE78

Regulation of Oil-Bearing Hazardous Secondary Materials From the Petroleum Refining Industry Processed in a Gasification System To Produce Synthesis Gas

AGENCY: Environmental Protection Agency.
ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is revising its hazardous waste management regulations under the Resource Conservation and Recovery Act (RCRA) to further promote the environmentally sound recycling of oil-bearing hazardous secondary materials generated by the petroleum refining industry. Specifically, EPA is amending an existing exclusion from the definition of solid waste for oil-bearing hazardous secondary materials when they are processed in a gasification system at a petroleum refinery for the production of synthesis gas. We are finalizing this exclusion so that the gasification of these materials will have the same regulatory status (they are all excluded from the definition of solid waste under RCRA) as oil-bearing hazardous secondary materials that are reinserted into the petroleum refining process. This action serves what we believe is a national interest by capturing as much energy from a barrel of oil as possible to maximize production efficiencies at petroleum refineries in an energy constrained world.

DATES: This final rule is effective on February 1, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID

No. EPA-HQ-RCRA-2002-0002. All documents in the docket are listed on the http://www.regulations.gov web site. Although listed in the index, some information is not publicly available, because, for example, it may be Confidential Business Information (CBI) or other information, the disclosure of which is restricted by statute. Certain 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 through http://www.regulations.gov or in hard copy at the RCRA Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the RCRA docket is (202) 566-0270.

FOR FURTHER INFORMATION CONTACT: Elaine Eby, Waste Minimization Branch, Hazardous Waste Minimization and Management Division, Office of Solid Waste (5302P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308-8449, fax number: (703) 308-8433, e-mail address: eby.elaine@epa.gov.

SUPPLEMENTARY INFORMATION:

A. Does This Action Apply to Me?

This rule may apply to entities regulated under RCRA, in the petroleum refining industry, identified as Standard Industrial Classification (SIC) 2911. To determine whether your facility, company, or business is affected by this action, you should carefully examine 40 CFR Parts 260 through 271. 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. Table of Contents

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I. Statutory Authority

The U.S. Environmental Protection Agency (EPA or the Agency) regulates the generation and management of hazardous waste under 40 CFR Parts 260 through 273 using the authority of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6901 et seq.

II. Summary of This Action

EPA is amending an existing exclusion from the definition of solid waste that applies to oil-bearing hazardous secondary materials generated at a petroleum refinery when these materials are recycled by inserting them back into the petroleum refining process. This exclusion is found at 40 CFR 261.4(a)(12)(i) and applies to oil-bearing hazardous secondary materials that are hazardous because they are listed in 40 CFR Part 261, Subpart D (e.g., K048-K052, K169-K170, and F037-F038), or because they exhibit a hazardous characteristic under Part 261, Subpart C.

With today's final rule, the exclusion will be revised to add ``gasification'' to the list of already recognized petroleum refinery processes (e.g., distillation, catalytic cracking, fractionation, and thermal cracking units) into which oil-bearing hazardous secondary materials can be legitimately recycled. The Agency is also promulgating a definition for the term ``gasification,'' at 40 CFR 260.10, which applies only to this specific exclusion. The exclusion is conditioned on there being no land placement and no speculative accumulation of the oil-bearing hazardous secondary material prior to re-insertion into the petroleum refining process. The exclusion allows these materials to be inserted into the same petroleum refinery where they are generated, or sent directly to another petroleum refinery, and still be excluded under this provision.

Provided the conditions of the exclusion are met, oil-bearing hazardous secondary materials will be excluded from the definition of solid waste at the point of generation. Similarly, the fuels and by-

products manufactured from these excluded materials will also be excluded.\1\ Residuals from the gasification process, like residuals generated from other recognized petroleum refining processes (e.g., fines from coking operations) will be classified as newly generated waste and would only be considered hazardous if they exhibit one or more of the hazardous waste characteristics. However, as discussed in the preamble for the Federal Register notice promulgating this exclusion at 63 FR 42128 (August 6, 1998), the exclusion extends only to materials actually reinserted into the petroleum refinery process, and any residuals generated from the processing of oil-bearing hazardous secondary materials prior to insertion into the petroleum refining process are designated as F037 waste.

\1\ The existing exclusion found at 40 CFR 261.4(a)(12)(i) also requires that the oil-bearing hazardous secondary material inserted into the petroleum refinery process does not result in the coke product exhibiting one or more of the hazardous waste characteristics.

Subsequent to the promulgation of the exclusion in August 1998 (63 FR 42110), we proposed regulatory language that would create a new, separate exclusion to address the gasification of oil-bearing hazardous secondary materials. (See 67 FR 13684, March 25, 2002.) However, in the course of finalizing this rule, we have concluded that a new exclusion is unnecessary. Instead, we are following the original proposal suggested in the July 15, 1998 Notice of Data Availability (NODA) (See 63 FR 38139) to add to 40 CFR 261.4(a)(12)(i) gasification, as one of the recognized petroleum refining processes to which oil-bearing hazardous secondary materials can be inserted and not be considered a solid waste under the Subtitle C hazardous waste regulations. The definition of gasification, however, is generally based on the March 2002 proposal, and comments and information developed as a result of both the NODA and that proposal.

Today's final rule is based on information presented in the July 1998 NODA, the final rule for oil-bearing hazardous secondary materials for petroleum refining operations published in August 1998, and the March 25, 2002 proposed rule. The rulemaking record for this rule incorporates the rulemaking records for all of these notices.

III. Background

The exclusion at 40 CFR 261.4(a)(12)(i) provides operators of petroleum refineries with the ability to recycle materials generated by the refining of crude oil to manufacture additional fuels. In that rule, we specifically address certain reinsertion scenarios that involved common practices within the industry (e.g., coking and quench coking operations). Prior to finalizing these provisions, however, we issued a Notice of Data Availability (NODA) specifically requesting comment on extending the exclusion to gasification--a process that also provides operators of petroleum refineries the ability to extract additional hydrocarbons from these materials by converting them into a synthesis gas. (See 63 FR 38139, July 15, 1998.)

We stated in the NODA that gasification of oil-bearing hazardous secondary materials from the petroleum refining industry may be an activity warranting an exclusion from the definition of solid waste, because gasification also provides a means of recovering hydrocarbons from these materials and could be viewed as an additional process in

crude oil refining. We also noted that a gasification system might compete with other petroleum refining operations (i.e., coking) for these same materials, which suggested to us that gasification is an alternative fuel production process--just one that was not being used extensively in the petroleum refining industry.

The Agency did not add gasification in the 1998 rule, choosing to explicitly include only those petroleum refining processes discussed in the original proposal. In 2002 however, the Agency proposed a different, more ambitious exclusion for hazardous waste processed in a gasification system for the production of synthesis gas. In that

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proposal, we solicited comment on two conditional exclusions. The first was for oil-bearing hazardous secondary materials recycled in a gasification system operating at a petroleum refinery or at a different facility operating outside the petroleum refining industry. This proposal was different from what was proposed in the 1998 NODA, where gasification operations were specifically identified as part of the petroleum refining operation. A second, much broader exclusion, addressed all hazardous secondary material when processed in a gasification system for the production of synthesis gas. This broader exclusion is not being addressed as part of this rulemaking and is still under consideration by the Agency.\2\

\2\ However, it is likely that if we chose to move forward with the broader exclusion, the Agency would issue a supplemental proposal before it makes any final decision.

Because the proposed exclusion was addressing recycling scenarios for oil-bearing hazardous secondary materials outside petroleum refining operations, we proposed an expanded set of conditions. The conditions proposed included the conditions already included in 40 CFR 261.4(a)(12)(i) (e.g., no speculative accumulation and no land placement of the material prior to reuse), as well as conditions, that we believed, would ensure the legitimacy of the process as a production operation, rather than a waste treatment process.

The first condition specified was a definition of the types of gasification systems capable of processing these oil-bearing hazardous secondary materials into synthesis gas. At the time, we were aware of a number of devices operating in the United States (U.S.) that could claim to be a type of gasification system, but did not gasify materials in the same manner, or to the same extent, as the gasification systems we considered for the proposal. We were concerned that these devices may be more similar to waste treatment processes than to production operations.

Additionally, we proposed that the synthesis gas product from the gasification system meet the fuel specification promulgated for hazardous waste derived synthesis gas in the ``Synthesis Gas Rule.'' \3\ The synthesis gas specification (or syngas spec) establishes specific physical parameters and concentration levels for contaminants and serves as a regulatory benchmark for classifying synthesis gas produced from hazardous waste as a fuel that can be readily marketed, rather than as a hazardous waste fuel (see 40 CFR 261.38(b)).\4\

\3\ For purposes of this preamble discussion, we are using the

term, ``Synthesis Gas Rule'' to refer to the regulation found at 40 CFR 261.38(b). This regulation was developed as part of the RCRA Comparable Fuels Exclusion that provides a conditional exclusion from RCRA Subtitle C for fuels which are produced from a hazardous waste, but which are comparable to some currently used fossil fuels. The entire preamble and rule can be found in 63 FR 33782, June 19, 1998. Hazardous Waste Combustors; Revised Standard; Final Rule--Part I: RCRA Comparable Fuel Exclusion; Permit Modification for Hazardous Waste Combustion Units; Notification of Intent to Comply; Waste Minimization and Pollution Prevention Criteria for Compliance Extensions.

\4\ We also solicited comment on a number of approaches to revise the synthesis gas specifications found at 40 CFR 261.38(b). (See 67 FR at 13694, March 25, 2002.) In particular we were interested in revised standards for the highly volatile metals and some organic constituents.

Finally, we proposed that any co-product or residue generated by the gasification system be subject to the Universal Treatment Standards (UTS) (found at 40 CFR 268.48) for six RCRA metals (i.e., antimony, arsenic, chromium, lead, nickel, and vanadium), if such co-product or residue was placed on the land. This condition was proposed to ensure legitimacy by applying the same land disposal provisions to any co-product and residual that would have existed had the oil-bearing hazardous secondary materials not been excluded from the definition of solid waste. We reasoned that this would eliminate any incentive to claim to be performing ``gasification'' for the real purpose of avoiding treatment of metals in residues that ultimately are placed on the land.

In response to the proposal, a number of commenters generally supported the idea of promoting the reuse of oil-bearing hazardous secondary materials from petroleum refineries to produce additional fuels, although they also expressed concern with one or more of the proposed conditions. A number of other commenters, however, disagreed with our approach. Specifically, these commenters believed that full RCRA Subtitle C regulation for both the oil-bearing hazardous secondary materials and the gasification process was mandated by RCRA. These commenters stated that RCRA Subtitle C oversight is necessary because gasification is merely a poor combustion process, promoting the generation and release of toxic products of incomplete combustion (PIC), including dioxin-containing compounds. Conversely, other commenters questioned, as they had for the coking and quench coking operations in the original exclusion, whether we had any regulatory authority at all in this situation. (See discussion at 63 FR 42121-42129, August 6, 1998.) These commenters suggested that the gasification of oil-bearing hazardous secondary materials generated elsewhere in the refining process is merely the final step in extracting fuels from the crude oil feed to the refinery and is, therefore, part of an ongoing production process. We also received comments on the specific conditions we proposed as part of the exclusion.

With regard to the specific technical issues for which we solicited comment, we received little response. That is, commenters did not provide data on the composition of gasification system residues or the composition of synthesis gas. In addition, limited data were received regarding the economics of operating a gasification system at a petroleum refinery or elsewhere.\5\ While we solicited this information for both the proposed petroleum refinery exclusion and the broader exclusion applicable to all hazardous waste (see 67 FR at 13695, March 25, 2002), the lack of information submitted weighed heavily on our

decision to limit today's rulemaking specifically to the petroleum refinery industry.

\5\ One commenter described the composition of their residue streams for their specific gasification system; however, no constituent concentration data was provided. In this case, the commenter described inorganic residues that vitrify into a leach resistant glass, solid particulates of baghouse dust and a dissolved salt scrubber solution.

A few comments were received on the economics of the gasification process. Several commenters disagreed with our assessment of the economics of running a gasification system. One commenter disagreed with our statements that the cost of building and operating a gasification system is sufficient to guarantee high quality products. Other commenters stated that the changes we were proposing would not lower the regulatory barriers to using gasification as part of the production process.

Major comments on today's rule are discussed elsewhere in this preamble.

IV. Development of This Final Rule

Through study of existing technical reports and papers published by the Department of Energy (DOE) and others, the Agency was aware that gasification could be a part of the petroleum refining process. We solicited data to confirm this in our proposal; however, commenters did not provide a significant amount of new information, thus requiring EPA to once again check existing information and data to confirm our understanding of the gasification process and its use in petroleum refinery operations. In addition, we sought to confirm, through site visits, how gasification was integrated into the production process at some petroleum refineries.

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A. How Many Gasification Systems Are Currently Operating at Petroleum Refineries?

Petroleum refineries use gasification for the conversion of low-value fuels and/or secondary material, such as petroleum coke, visbreaker tar and deasphalter pitch into synthesis gas. Synthesis gas can then be converted to usable products, such as hydrogen, ammonia and other chemicals, and/or used as a fuel to produce steam and electricity. Oil-bearing hazardous secondary materials generated at the petroleum refinery can also be co-gasified with these other materials to manufacture synthesis gas. In petroleum refining operations, electric power generation is a preferred use for the synthesis gas. For this purpose, the integrated gasification combined cycle (IGCC) technology can be integrated into the petroleum refinery process. Except for the gasifier and the feedstock preparation units, many of the components in an IGCC system already exist at a petroleum refinery. Downstream of a gasifier, petroleum refineries, as part of their ongoing production processes, typically have the other components of an IGCC plant, including gas clean-up systems, Claus plants, heat recovery systems, and steam and gas turbines. Power generation for use within a petroleum refinery is not a new activity and based on our research, is

widely practiced. Seldom, however, is enough power produced to allow it to be sold for external consumption. With the utilization of an IGCC plant, a refinery's internal power needs can be readily addressed with surplus power sold as a commodity to outside consumers.

Presently, EPA has identified four gasification systems operating at petroleum refineries in the U.S.\6\; one of these is an IGCC unit. \7,8,9\ The second uses the synthesis gas to produce chemicals. The Agency is also aware of two petroleum refineries that operate units combining fluid coking with coke gasification, a process known as flexicoking.TM\10\

\6\ Data pertaining to operational gasification systems processing secondary materials from petroleum refineries was developed from a review of the Gasification Technology Council's database. Based on information obtained from this database, there are 16 gasification systems operating at petroleum refineries outside the U.S. See email correspondence from Mr. James Childress, Executive Director, Gasification Technology Council to Ms. Elaine Eby, USEPA. Re: Operational Gasification Systems Processing Petroleum Refining Residues at Petroleum Refineries. July 2007.

\7\ Experience With Low Value Feed Gasification at the El Dorado, Kansas Refinery by Gary DelGrego. Texaco Power and Gasification. Presented at the 1999 Gasification Technology Conference. Recently, the Agency learned that the IGCC unit operating at the El Dorado, Kansas refinery was shut down in 2006.

\8\ IGCCs combine the gasification reactor with a combined cycle power turbine designed to use the synthesis gas. In IGCC systems, the synthesis gas is injected into the combustion turbine and ignited. The resulting high energy exhaust from the combustion of synthesis gas in the turbine is used to turn a generator. Steam and additional electric power is recovered in a follow-up heat recovery steam generator from the turbine's high temperature exhaust.

\9\ One of the largest markets for IGCC systems is the petroleum refining industry using petroleum residual feedstock, such as vacuum residual oil, deasphalter bottoms and petroleum coke. Petroleum refineries typically feature multi-train designs for high reliability and the co-production of power, steam and hydrogen for the refinery, with extra power being sold to third parties. Major Environmental Aspects of Gasification-based Power Generation Technologies--Final Report. U.S. Department of Energy. Office of Fossil Energy. National Energy Technology Laboratory. December 2002.

\10\ Sapre, Ajit, Kamienski, Paul, Phillips, Glenn, Wright, Marie, Resid Upgrading Technology Options and Role of Flexicoking Technology. ERTC Coking and Gasification Conference, Paris France. April 18, 2007.

While petroleum refinery-based gasification units are currently in limited use in the U.S., interest in developing these systems is on the rise.\11,12,13\ Many factors may be contributing to this interest, but we believe it is most likely related to the increasing cost of natural gas, an increasing interest in maximizing efficiencies in the petroleum refining process, manufacturing cleaner fuels, and reducing the generation of waste. Although limited in number, petroleum refinery-based gasification systems have demonstrated positive economic returns, while providing more flexible operations to address increases in raw material costs.\14\ These facilities have shown that gasification

systems can process lower value fuels or material commodities (e.g., petroleum coke and other petroleum secondary materials) into higher value fuels or chemical commodities. These systems have also demonstrated how well gasification fits into petroleum refinery operations and the advantages of doing so.

\11\ Gray, D. and Tomlinson. Potential of Gasification in the U.S. Refining Industry. United States Department of Energy, National Energy Technology Laboratory. June 2000.

\12\ Murano, John J. Refinery Technology Profiles. Gasification and Supporting Technologies. U.S. Department of Energy. National Energy Technology Laboratory. Energy Information Administration. June 2003.

\13\ Clayton, Stewart J., Steigel, Gary J., and Wimer, John G., Gasification Technologies Product Team, U.S. Department of Energy. U.S. DOE's Perspective on Long-Term Market Trends and R&D Needs in Gasification. Presented at the 5th European Gasification Conference. Gasification--The Clean Choice. Noordwijk, The Netherlands. April 8-10, 2002.

\14\ The addition of a gasification plant at an El Dorado, Kansas petroleum refinery resulted in significant economic benefits. Previously, the refinery was spending $12 to $14 million per year on power purchases from the local utility. With the implementation of the gasification system, the refinery reported paying only a few million dollars a year for stand-by services. In addition, the refinery saved about $1 million annually in both waste shipment and disposal costs and nitrogen costs. Steam production costs were reduced by more than half. Other benefits resulted from oxygen enrichment of the sulfur plant that enabled the refinery to process a wider range of high sulfur crudes. Furimsky, E. Gasification in Petroleum Refinery of 21st Century. Oil and Gas Science and Technology--Rev. IFP, Vol.54 (1999), No. 5, pp. 597-618.

B. What Conclusions Have We Drawn About Gasification Systems Operating at Petroleum Refineries?

This Unit IV.B. explains the overall rationale for the Agency's decision that oil-bearing hazardous secondary materials inserted into a gasifier are excluded from the definition of solid waste. Analyses supporting this decision are found elsewhere in this preamble and in the rulemaking record, including the Response to Comment document for this rulemaking. In each configuration reviewed, where petroleum refineries used petroleum coke alone or in combination with other petroleum feedstock (including oil-bearing hazardous secondary materials), we found that the systems are operated as part of the petroleum refining process and produce synthesis gas as a legitimate product to further enhance the petroleum refining operation. We believe that a gasification system, when operated at a petroleum refinery, will function as a component of the overall petroleum refinery process to produce synthesis gas as its main product.\15\ In turn, synthesis gas can be used to manufacture usable products, such as hydrogen, ammonia and other chemicals, and/or used as a fuel to produce steam and electricity. Oil-bearing hazardous secondary materials generated by petroleum refineries, as well as other low-value fuels, are appropriate feed materials to

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gasification systems because these materials contain hydrocarbons that can be further processed into fuels or chemicals. The use of a gasifier to recover these hydrocarbons is ideal because the system not only operates to recover the hydrocarbon value for the production of a legitimate product, but can also process the non-fuel components to yield inorganic co-products (e.g., liquid or solid sulfur, ammonia). In manufacturing settings, gasification systems have historically been used to produce commodities and have not been operated to get rid of unwanted material.\16\ At petroleum refineries, a gasification system complements the activities already being performed at the petroleum refinery, i.e., the manufacture of fuels from crude oil.

\15\ ``Gasification-based systems operated at a petroleum refinery are typically highly integrated processes. The complex consists of a number of distinct processing steps/plants. These are: feed preparation, gasifier, air separation unit (ASU), syngas clean-up, sulfur recovery unit (SRU), and downstream process options, such as cogeneration, hydrogen production, Fischer-Tropsch synthesis or methanol synthesis. Any given installation may or may not contain all of these processes depending on the feedstock used, products desired, and the availability of spare capacity in pre-existing plants at the petroleum refinery. For example, if the petroleum refinery has spare sulfur plant capacity or can revamp its existing sulfur plant to gain capacity, the sulfur plant would be considered outside the battery limits of the gasification complex.'' Marano, John J., Refinery Technology Profiles: Gasification and Supporting Technologies. U.S. Department of Energy. National Energy Technology Laboratory. Energy Information Administration. June 2003.)

\16\ See review of Coal Conversion Technologies in Perry's Chemical Engineer's Handbook, Seventh Edition. Pages 27-13 through 27-25. McGraw-Hill. 1997.

While some commenters have argued that gasification of oil-bearing hazardous secondary materials is more a waste management process involving incineration than a petroleum refining process, we refer to the conclusions drawn in a DOE report contrasting incineration and gasification. DOE concluded, and we agree, that gasification and incineration are distinct processes that can be distinguished by a number of factors. As discussed in the report, the factors distinguishing the two processes are: (1) Incinerators are designed to maximize the conversion of feedstock to carbon dioxide and water; gasifiers are designed to maximize the conversion of feedstock to carbon monoxide and hydrogen; (2) incinerators utilize large quantities of excess air; gasifiers utilize small quantities of oxygen; (3) incinerators operate in a highly oxidizing environment; gasifiers operate in a reducing environment; (4) incinerators discharge their flue gas to the environment as a waste; gasifiers utilize their synthesis gas for ongoing chemical, fuel production or power production as a product gas.\17 \

\17\ A Comparison of Gasification and Incineration of Hazardous Waste--Final Report. United States Department of Energy, National Energy Technology Laboratory (NETL). 3610 Collins Ferry Road.

Morgantown, West Virginia 26505. DCN 99.803931.02. March 30, 2000.

The Agency has concluded that gasification operations fall within the scope of normal operations at petroleum refineries--even when applied to material that has historically been managed as waste. The Agency believes that recognizing gasification as a petroleum refining process, capable of recycling oil-bearing hazardous secondary materials, achieves the resource recovery goals of RCRA without jeopardizing human health and the environment. Gasification is a desirable component of fuel manufacturing operations at a petroleum refinery because it ensures more efficient processing of crude oil and provides the petroleum refinery with the added flexibility to maximize its fuel production outputs. Therefore, we disagree with the view that the activity serves essentially as a waste management process.

In today's final rule, we find that oil-bearing hazardous secondary materials generated as part of the petroleum refinery process and inserted into a gasification system located at a petroleum refinery, will serve as legitimate feedstock materials and that the gasification process, is a type of petroleum refining process warranting these materials an exclusion from the definition of solid waste. We have concluded that the operation of gasification systems at petroleum refineries is consistent with other processes that occur at petroleum refineries (e.g., fractionation, coking, quench coking) because: (1) The activity takes place at a petroleum refinery; (2) the system uses feedstock only from refinery operations; (3) the system generates a synthesis gas that, is converted to multiple products, such as steam, electricity, hydrogen, as well as other chemicals; (4) the products generated are consistent with the many types of products normally generated at petroleum refineries; and (5) the system processes the raw material by manipulating the same variables, e.g., hydrocarbons, as other refining processes that are universally accepted to be part of a petroleum refinery.\18\

\18\ Energy and Environmental Profile of the U.S. Petroleum Refining Industry. United States Department of Energy. December 1998.

V. This Final Rule

Gasification systems, like other petroleum refining operations, are capable of recovering fuel value or chemicals from the recycling of oil-bearing hazardous secondary materials. As such, we believe it is appropriate to treat these materials in a manner consistent with the other processes used at petroleum refineries that recover fuel value or chemicals from crude oil--the basic raw material used in petroleum refining. Today, we are amending the exclusion found at 40 CFR 261.4(a)(12)(i), by adding gasification to the list of recognized petroleum refining processes. We are finalizing this change to: (1) Prevent unnecessary confusion regarding the status of oil-bearing hazardous secondary materials from the petroleum industry recycled in a gasification system; (2) promote the use of a technologically advanced method of extracting hydrocarbons from these materials; and (3) remove regulatory restrictions that may limit the petroleum refining industry's ability to maximize the production of fuels and other commodities from crude oil, while minimizing the production of waste from the fuel production process.

The Agency has decided to limit the scope of this exclusion to oil-bearing hazardous secondary materials that are gasified as part of the petroleum refining process for the production of synthesis gas. As such, we are retaining only the conditions applied to oil-bearing hazardous secondary materials in the existing exclusion at 40 CFR 261.4(a)(12)(i). We are, however, adding one additional condition, a definition for gasification, which is based on information presented in the 1998 NODA, as well as the March 2002 proposal and comments and information received in response to these notices.

We have decided not to finalize the other conditions proposed in 2002. In large part, we have decided to eliminate these conditions because we are not extending this exclusion to oil-bearing hazardous secondary materials recycled at gasification systems operating outside the petroleum refining industry. The condition requiring the synthesis gas meet the specification we developed in the regulations at 40 CFR 261.38(b) has been removed because we now believe, based on the compelling arguments made by commenters and a review of our rationale for including it as a condition, that it was unnecessary and an inappropriate application of RCRA to a petroleum fuel product. Our decision is strongly influenced by the operational purpose of petroleum refineries--the production of fuels. Petroleum refineries create fuels for commercial markets, and we are convinced that these gasification systems operate within the reasonable scope of these operations. We have also removed the condition requiring that materials generated by the gasification system (i.e., co-products and residuals) not be placed on the land if they exceed the nonwastewater Universal Treatment Standards (UTS) for antimony, arsenic, chromium, lead, nickel, and vanadium (found at 40 CFR 268.48). After further review, the Agency has determined that this condition is inconsistent with the current exclusion we are amending, and conflicts with how RCRA manages residues from excluded materials (i.e.,

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wastes are excluded at the point of generation, provided the conditions of the exclusion are met). Further, these constituents are not expected to leach at levels above the UTS in the residuals from gasification at petroleum refineries. These changes are discussed below.

A. Does the Conditional Exclusion Include a Definition for a Gasification System Used at a Petroleum Refinery?

Yes. In today's final rule, we are promulgating a regulatory definition for gasification systems that are used at petroleum refineries. For this rule, gasification is defined as a process, conducted in any enclosed device or system, designed and operated to process petroleum feedstock, including oil-bearing hazardous secondary materials, through a series of highly controlled steps utilizing thermal decomposition, limited oxidation, and gas cleaning to yield a synthesis gas composed primarily of hydrogen and carbon monoxide gas.

This final definition differs from the definition proposed in 2002 in a number of ways. We have: (1) Deleted the reference to incinerators or industrial furnaces; (2) removed the requirement for the gasifier to slag its inorganic feed at temperatures above 2000 degrees Fahrenheit; and (3) removed the requirement that the unit be equipped with monitoring devices that ensure the quality of the synthesis gas. This revised definition reflects current information on gasification systems at petroleum refineries and addresses the significant concerns

commenters raised regarding the proposed definition. More importantly, however, the definition reflects the primary purpose for using gasification at petroleum refineries, the production of synthesis gas. As such, we believe that we have retained the most important requirements of a gasification system operating at a petroleum refinery: (1) That it is considered a process; and (2) it utilizes petroleum feedstock to yield a synthesis gas.

In the 2002 proposal (see 67 FR at 13690), we defined a gasification system as an enclosed thermal device and associated gas cleaning system (or systems) that does not meet the definition of an incinerator or industrial furnace (found at 40 CFR 260.10), and that: (1) Limits oxygen concentrations in the enclosed thermal device to prevent the full oxidization of thermally disassociated gaseous compounds; (2) utilizes a gas cleanup system or systems designed to remove contaminants from the partially oxidized gas that do not contribute to its fuel value; (3) slags inorganic feed materials at temperatures above 2000 degrees Fahrenheit; (4) produces a synthesis gas; and (5) is equipped with monitoring devices that ensure the quality of the synthesis gas produced by the gasification system.

We received numerous comments criticizing various aspects of our proposed definition. Some commenters argued the definition, as written, prohibited the potential use of a large number of gasification system designs that are in use around the world. More specifically, commenters stated that the definition eliminated one of the gasification designs currently processing petroleum residues in the U.S. because it did not operate at the specified temperature or slag the residual.\19\ Generally, however, commenters urged the Agency to revise the definition to include all petroleum refinery-based units currently processing petroleum refining residues, or provide some type of site-specific variance to allow such units the opportunity to demonstrate that they can safely process refinery residues in their gasification system. While the development of a variance procedure would be a possible mechanism to evaluate those gasifiers not meeting the definition, the Agency believes that the definition of gasification being promulgated today addresses the concerns raised by the commenters and provides sufficient flexibility to allow for any number of gasification designs or configurations to be used within a petroleum refinery. As such, we have not included a variance provision as part of today's rule.

\19\ The Agency would also note that this gasification system operates outside a petroleum refinery and as such, would not be eligible for today's final rule.

As previously mentioned, EPA has conducted a number of site visits to gasifiers located both on-site of a petroleum refinery and off-site and has continued to research the use of gasification at petroleum refineries. As a result of these efforts, we have concluded that gasification design and operation can vary substantially within the petroleum refining industry. We have also concluded and agree with commenters that a variety of different gasifier designs are capable of legitimately processing petroleum feedstock to produce a synthesis gas.\20\ This has given us reason to reassess the need for specifically defining certain operating characteristics of a gasification system. Our revised definition of ``gasification'' allows additional flexibility in the design and configuration of gasification systems to

process petroleum feedstock, including oil-bearing hazardous secondary materials, provided the gasification system produces a synthesis gas.

\20\ The reader is referred to the following DOE reports assessing the various types of gasification systems that can be used at petroleum refineries. Marano, John J., Refinery Technology Profiles: Gasification and Supporting Technologies. U.S. Department of Energy. National Energy Technology Laboratory. Energy Information Administration. June 2003.) and Gray, D. and Tomlinson. Potential of Gasification in the U.S. Refining Industry. United States Department of Energy, National Energy Technology Laboratory. June 2000.

Several commenters questioned whether our definition should differentiate gasification from incinerators and industrial furnaces regulated under Subtitle C of RCRA. One commenter was particularly concerned that the proposed definition would require an affirmative determination by regulators that the gasification system did not meet the definition of incinerator or industrial furnace defined at 40 CFR 260.10. Additionally, the commenter questioned whether gasification systems also designed to recover hydrogen chloride (HCl) (which gasification systems can be configured to recover), could also be defined as a type of industrial furnace, (i.e., halogen acid furnace) and thus not be able to use the exclusion.

After weighing the value added to the definition by including the references to industrial furnaces and incinerators (defined at 40 CFR 260.10), we are persuaded that including the reference to hazardous waste burning incinerators and industrial furnaces in the definition is unnecessary and could lead to confusion between the public, the regulated community, and regulators on how to regulate these units. Accordingly, we have removed the references to incinerators and industrial furnaces from the final definition. We expect, however, that even with this change to the definition, that certain gasification systems could be confused with, or identified as, a type of industrial furnace. In these situations, where the design and operational characteristics appear to be shared between the two types of systems, we believe it is appropriate for regulators to review the predominant products and process design of the system in question. For example, if the system recovers only small amounts of synthesis gas fuel, but significant amounts of hydrogen chloride, and the design of the system does not differ substantially from industrial furnaces designed to recover hydrogen chloride (i.e., a substantial fraction of emissions are released to the atmosphere), such a system would more appropriately be classified as a type of industrial furnace, rather than a gasification system.

The Agency received few comments on four of the operational requirements

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proposed as part of the definition of gasification system: (1) Limits on oxygen concentrations in the enclosed thermal device to prevent the full oxidization of thermally disassociated gaseous compounds (2) production of a synthesis gas; (3) requirements for a gas cleanup system or systems designed to remove contaminants from the partially oxidized gas that do not contribute to its fuel value; and (4) requirements for monitoring devices that ensure the quality of the synthesis gas produced by the gasification system. In general,

commenters did not have specific technical issues with the provisions, but thought that the provisions were unclear and would benefit from additional clarification. For example, commenters stated that the requirement relating to monitoring devices would benefit from EPA identifying the type of monitoring equipment required. In the case of the requirement for monitoring devices, consideration of this condition is no longer germane based on our determination that petroleum gasification is a part of the petroleum refining operation. In today's rule, we have retained, with slight modifications, three of the operational requirements. Changes have been made to the definition to eliminate redundancy and provide a more clear and concise regulatory definition. The revised definition retains the key operational requirements of a gasification system operating at petroleum refinery--thermal decomposition, limited oxidation, gas cleanup, and production of a synthesis gas. This ensures that the exclusion applies only to gasification systems designed and operated in a manner that promotes the conversion of hydrocarbons found in the oil-bearing hazardous secondary materials into a synthesis gas fuel.

The operational requirement that received the most comment was for a gasification system to ``slag inorganic feed materials at temperatures above 2000 degrees Fahrenheit.'' Commenters were divided on the need for such a requirement. Some believed that the slagging criteria generally would result in a non-leachable residue, a ``preferred residual matrix.'' Others stated that the temperature requirement was arbitrary and not technically supportable. Additional commenters questioned the usefulness of the term slagging and the Agency's rationale for deciding to prohibit non-slagging gasifiers from the exclusion. These commenters pointed to the fact that the residues would be under RCRA Subtitle C jurisdiction if they exhibited a hazardous waste characteristic based on the content and leachability of the toxic metals.

We had proposed this requirement to address two issues: (1) To ensure that gasification systems processing excluded materials operate at a temperature sufficient to slag inorganic components found in the materials, so metals would not leach from the residue; and (2) to reduce the occurrence of unreacted carbon-containing compounds in the residue formed by the gasification system. After review of all the comments, and a re-examination of our site visit reports and available technical reports, we have determined that this requirement is not needed and would inappropriately restrict those gasification systems and configurations that could be effectively used at petroleum refineries for the production of synthesis gas fuels. We have found that classifying a gasifier as slagging or non-slagging has no relationship to a gasification system's overall ability to effectively process hydrocarbons for the production of synthesis gas fuel. Similarly, if a gasifier generates a residual that exhibits one or more of the hazardous waste characteristics, it will be subject to the RCRA Subtitle C hazardous waste regulations. We believe that this should provide adequate incentive for petroleum refineries to consider the potential benefit of slagging gasifiers verses non-slagging units.\21\ Any further requirement by EPA would only interfere with the refineries' ability to most effectively achieve the same environmental endpoint.

\21\ Although EPA did not rely on this information in its decision-making, data analyzed by the Agency suggests that it is highly unlikely that leachable metal concentrations in residuals from gasification of secondary material from petroleum refining

operations will be significant. See the memorandum to the record from Ms. Elaine Eby, USEPA. Re: Characterization of Petroleum Refining Waste and Possible Gasification Scenarios. August 2007.

In the proposed rule, we further stated that gasifiers generally do not have direct emissions to the atmosphere. Several commenters disagreed with this conclusion and suggested that potential releases of toxic and hazardous air pollutants (HAP) can occur during other steps in the gasification process. These steps include, feedstock preparation, gas cleanup, product recovery, and slag quenching, as well as during start-up, shutdown or operational emergencies of the gasification system. These commenters further stated that the current Clean Air Act (CAA) regulations may fail to properly address potential risk to human health and the environment posed by these releases. As a result, these commenters urged EPA to make a regulatory determination that gasifiers should be identified as an industrial furnace and subject to all RCRA/CAA hazardous waste combustion regulations.

In the proposal, (See 67 FR at 13688), we recognized that gasification systems are designed with release vents or flares that operate during emergencies or malfunctioning operations. Flares and release vents are necessary to prevent damage or catastrophic failure of the gasification system in the event of a major malfunction. These types of relief systems are common at facilities that manufacture products using thermal processes. Furthermore, the operation of flares and release vents is regulated by each facility's Title V CAA permit. Our decision to exclude, from the definition of solid waste, oil-bearing hazardous secondary materials generated at a petroleum refinery and inserted back into the petroleum refining process has been guided by a determination that gasification is a legitimate petroleum refining process that results in the manufacture of a synthesis gas product. (See discussion in Section IV of this preamble.) This decision allows the beneficial use of petroleum refining oil-bearing hazardous secondary materials for the manufacturing of a synthesis gas fuel that can be used for the production of steam, and/or power. Therefore, we do not agree with the commenter's suggestion that gasification systems operating at petroleum refineries processing these materials are waste management units (e.g., incinerators) and that any potential air emissions should be subject to all RCRA/CAA hazardous waste combustion regulations. Emissions at a petroleum refinery operating a gasification system will be evaluated. However, these emissions will be evaluated for compliance with regulations for petroleum refining operations under the authority of the CAA.\22\

\22\ See 72 FR 14734 (March 29, 2007), Risk and Technology Review, Phase II, Group 2.

B. Does the Conditional Exclusion Include a Synthesis Gas Specification?

No. In today's final rule, there is no condition requiring the synthesis gas to meet certain physical and/or constituent specifications. In the 2002 proposal, the Agency included a condition that required the synthesis gas to meet the specification for hazardous waste derived synthesis gas found at 40 CFR 261.38(b). We proposed to apply the synthesis gas specification because we believed it would ensure that the synthesis gas produced was a legitimate fuel product,

and was an appropriate

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condition considering we were proposing to allow oil-bearing hazardous secondary materials to be gasified at facilities outside a petroleum refinery. In addition, because the Agency was taking comment on whether to expand the exclusion to address all hazardous secondary materials generated in other industries, we considered such a provision to be important. In the development of the final rule, however, we have concluded, based on analysis of the comments and further review of petroleum refinery-based gasification systems that such a condition is unnecessary and an inappropriate use of RCRA to regulate a fuel product manufactured at petroleum refineries.

The majority of the comments received did not specifically address the need for a synthesis gas specification, but rather addressed the overall inadequacy of the synthesis gas specification finalized in the ``Synthesis Gas Rule.'' Commenters suggested that the specification was too lenient and not drawn from appropriate data.\23\ Several commenters also reminded the Agency of possible pending litigation.\24\

\23\ In the proposed rule, we requested comment on a number of approaches to revise the synthesis gas specification found at 40 CFR 261.38(b). In particular, we were interested in soliciting comment on the specifications for highly volatile metals and certain organics.

\24\ Commenters took issue with the inadequacy of the synthesis gas specification found at 40 CFR 261.38(b). Commenters believed that the allowable concentration limits for highly volatile metals and certain organics were excessively high, the BTU value was too low, and the specification was not based on actual synthesis gas from a gasification unit. Commenters noted the Agency was challenged on the synthesis gas specification in the Comparable Fuels Rule by the Sierra Club, Natural Resources Defense Council, and the Environmental Technology Council in Chemical Manufacturers Association v. EPA, No. 98-1375 (DC Cir. Filed August 17, 1998). The case is currently being held in abeyance by the DC Circuit Court. Because the Agency has decided not to require the synthesis gas fuel meet the specifications found at 40 CFR 261.38(b), specific comments on the appropriate specification requirements are not being addressed in this rulemaking.

Irrespective of the concerns with the details of a synthesis gas specification, only a few commenters supported establishing a synthesis gas specification. These commenters generally agreed with the Agency's proposed premise of applying the synthesis gas specification to ensure legitimacy of the gasification process and the quality of the synthesis gas. However, other commenters suggested that applying the synthesis gas specification was without basis and inappropriate. Commenters reasoned that the purpose of 40 CFR 261.38 was to provide an exclusion from the definition of solid waste for synthesis gas generated by the gasification of hazardous waste. Under the 2002 proposal, they believed EPA was establishing that oil-bearing hazardous secondary materials generated at a petroleum refinery and re-inserted into a gasifier were excluded from the definition of solid waste because gasification was part of the production process. Given that, commenters questioned the Agency's rationale for including a hazardous waste specification to a

manufactured fuel product, i.e., a product generated from a fossil fuel. Commenters reasoned that operators of gasification systems did not need a specification for synthesis gas any more than they needed a RCRA specification for gasoline, propane, petroleum coke, or any other legitimate product from a petroleum refining operation. Additionally, some commenters suggested that any questions regarding the quality of the synthesis gas were answered by the use of the synthesis gas as a fuel in power, steam, or hydrogen production on-site (subject to CAA regulations) and should serve to ensure that the synthesis gas was, in fact, a legitimate fuel.

The Agency agrees with the commenters. In this rule, we have determined that gasification is a part of the petroleum refining process and that oil-bearing hazardous secondary materials generated at a petroleum refinery and reinserted back into a gasification system located at a petroleum refinery are excluded from the definition of solid waste, provided the conditions of the exclusion are met. Hence, the Agency concludes that gasification is a legitimate fuel process that does not require a synthesis gas specification as a condition to ensure its legitimacy. Gasification systems when operated at a petroleum refinery take petroleum feedstocks and convert them into a synthesis gas comprised primarily of hydrogen, carbon monoxide, carbon dioxide and methane. Petroleum feedstocks to these systems can include petroleum coke, visbreaker tars, deasphalter pitch, as well as oil-bearing hazardous secondary materials. Available information suggests that the synthesis gas composition remains consistent regardless of the petroleum input feed. Furthermore, when used as a fuel for power generation, information available to the Agency shows that turbine specifications and other equipment specifications drive the fuel specification requirements of the synthesis gas fuel. As such, the Agency has also concluded that applying the synthesis gas specifications at 40 CFR 261.38 as presented in the 2002 proposal does not provide an additional assurance that legitimate fuel operations are occurring at gasifiers located at petroleum refineries. Therefore, in today's final rule, we are not including a condition that requires the synthesis gas generated by the gasification system to meet the specification of 40 CFR 261.38(b). The Agency has determined that the application of a hazardous waste derived synthesis gas specification is an inappropriate use of the synthesis gas specification for gasification operations at a petroleum refining.

However, we note that today's exclusion from the definition of solid waste does not exempt the device from regulation under the applicable CAA standard for the gasification device, co-product recovery units, or any related infrastructure designed to use the synthesis gas fuel to produce electricity.

C. Does the Conditional Exclusion Prohibit Oil-Bearing Hazardous Secondary Materials From Being Placed on the Land Prior to Insertion in the Gasification System?

Yes, the conditional exclusion we are amending (40 CFR 261.4(a)(12)(i)) prohibits oil-bearing hazardous secondary materials from being placed on the land prior to insertion into the petroleum refining process. This prohibition will not change with the addition of gasification as a listed petroleum refining process.

In the proposed rule, we explained our view that this condition (i.e., no placement on the land prior to re-insertion into the petroleum refining process) further defines gasification of excluded oil-bearing hazardous secondary materials as a legitimate refining

operation for processing these materials because it requires that the excluded materials be handled as a valuable feed to the gasification system. We stated that we knew of no gasification system (or for that matter, any petroleum refinery) which stored these materials on the land, and that to do so would indicate that such oil-bearing hazardous secondary materials are being handled more like waste, and not as a feedstock (since because of the physical characteristics of these oil-bearing materials, the potential for them not to be released could no longer be assured, and there could be large-scale losses of the secondary material due to land placement). Thus, we reasoned that oil-bearing hazardous secondary materials from the petroleum refinery process should preclude storing the material in anything other than a tank, container, or some other device that would contain the material because as

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far as we knew, the oil-bearing hazardous secondary materials were generally comprised of tar-like, oily substances not amenable to land storage or placement.

Most of the commenters agreed with our position that some type of restriction was appropriate to prevent the oil-bearing hazardous secondary materials from being placed or stored on the land. However, some commenters did not completely agree with our characterization of these materials (i.e., tar-like oily substances) and suggested that the prohibition take into account the physical characteristics of the oil-bearing hazardous secondary materials before a total prohibition on land placement was implemented. For example, some commenters believed that the prohibition should only apply to those hazardous secondary materials that are tar-like oily substances, while other commenters suggested that we modify the wording of the prohibition to allow for land placement of hazardous secondary materials if it would not endanger the environment. One commenter stated that the hazardous secondary materials they received from a petroleum refinery could be described as chunky, angular, blocky or coarse particulates and could be safely managed on the land. However, these commenters did not provide EPA with any characterization data that would support their claims.

Given that these hazardous secondary materials would be hazardous waste if discarded instead of being gasified, and given that land placement of these types of oil-bearing hazardous secondary materials is not typical before they are reinserted back into the petroleum refinery, we see no reason to relieve them from the existing prohibition against land placement for all oil-bearing hazardous secondary materials prior to re-insertion into the petroleum refining process (i.e., gasified). This approach maintains full regulatory consistency with the exclusion found at 40 CFR 261.4(a)(12)(i) which is being amended today to include gasification as an identified petroleum refining process.

D. Does the Conditional Exclusion Prohibit Oil-Bearing Hazardous Secondary Materials From Being Speculatively Accumulated Prior to Insertion in the Gasification System?

Yes. In today's rule, the conditional exclusion we are amending (40 CFR 261.4(a)(12)(i)) includes the requirement that the oil-bearing hazardous secondary materials not be speculatively accumulated prior to insertion into the petroleum refining process. This provision will not change with the addition of gasification as a listed petroleum refining

process.

In the proposed rule, we stated that the speculative accumulation provision ensures that legitimate quantities of oil-bearing hazardous secondary materials are being recycled and re-inserted into the petroleum refining process rather than being stored to avoid regulation. We reasoned that this condition was necessary to assure that recycling actually occurs, and that such materials are not discarded by being stored for extended periods of time. Furthermore, we stated that this condition is consistent with the no speculative accumulation condition we adopted for excluded oil-bearing hazardous secondary materials returned to the petroleum refinery process (40 CFR 261.4(a)(12)(i)).

As such, we are promulgating, as proposed, the speculative accumulation provision for oil-bearing hazardous secondary materials prior to their insertion into the petroleum refinery process. This requirement should ensure that such materials are not ``over accumulated,'' an indication of discard, but are being legitimately recycled, which maintains regulatory consistency with the existing exclusion we are amending at 40 CFR 261.4(a)(12)(i).

E. Does the Conditional Exclusion Regulate Certain Metals in Residuals Generated from the Gasification Process?

No. In today's final rule, we are removing the proposed condition that materials (both co-products and residues) generated by the gasification system not exceed the nonwastewater Universal Treatment Standards (UTS) (40 CFR 268.48) for antimony, arsenic, chromium, lead, nickel, and vanadium when placed on the land.\25\ Under today's rule, and consistent with both the proposal and the existing exclusion found at 40 CR 261.4(a)(12)(i), we are classifying residues generated after the gasification process as newly generated. The determination as to whether the gasification residues (i.e., waste) or any other residue generated after reinsertion into the petroleum refining process are hazardous will be based on whether the residues exhibit a hazardous waste characteristic(s) when generated (i.e., after the oil-bearing hazardous secondary material is gasified). Should a residue exhibit a characteristic, such as leaching toxic metals at levels above the prescribed standards, it will be required to be managed in compliance with all applicable RCRA hazardous waste regulations, including the Land Disposal Restrictions (see 40 CFR 268.48).\26\ As for co-products, they are fully excluded as products and are outside RCRA jurisdiction unless discarded and/or disposed.

\25\ Universal Treatment Standards (UTS) are concentration-based treatment levels that must be met before a RCRA hazardous waste can be land disposed. These treatment standards can be found in 40 CFR 268.40.

\26\ If the Agency receives evidence to suggest that these gasification residues routinely have the potential to adversely affect human health and the environment, the Agency could list them as hazardous under RCRA.

In our proposed rule, we requested comment on a condition to the exclusion establishing leachate limits for six toxic metals in the gasification co-products and residuals prior to any placement on the land. We considered this condition to ensure that co-products and residues generated by the gasification process and that were to be

placed on the land did not contain toxic metals with a potential for leaching greater than allowed by the requirements of the Land Disposal Restrictions (LDR) program. (See 67 FR at 13691, March 25, 2002.) In developing this possible condition, we were influenced by the condition established for hazardous waste-derived products that are used in a manner constituting disposal (see 40 CFR 266.20). These materials are required to meet the appropriate LDR treatment standards prior to use as products applied to the land (e.g., fertilizers). We reasoned that requiring this same condition for co-products and residuals would ensure legitimate fuel manufacturing by applying the same land disposal provisions to the co-products and residuals that would have existed had the material (i.e., the listed waste) not been excluded from the definition of solid waste. Further, it was reasoned that this proposed condition would be needed to assure that the gasification system is operated for the purpose claimed--conversion of organic matter in the hazardous secondary materials into fuels (or intermediates), while removing metals from raw synthesis gas and trapping those metals in an inert matrix. The levels in the proposed condition would provide a means of quantifying this premise.

We received comments that both supported and opposed this condition. Commenters opposed to the condition stated that there was no need to impose the UTS requirements, beyond what the regulations (e.g., 40 CFR 261.4(a)(12)(i)) already required for residues generated from the petroleum refining process (i.e., the characteristic test), and that EPA had provided no rationale for imposing the additional UTS

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requirements. As proposed, the condition would apply to any residual regardless of its characteristic determination. Other commenters, however, believed that EPA had not gone far enough, and that the residuals generated during the gasification process should be certified to meet all the nonwastewater UTS (both organic and inorganic constituents). Without such limits on hazardous organics, the commenters argued that substantial releases to the environment might occur because these residuals would be allowed in landfills not subject to subtitle C regulations.

The Agency rejects the suggestion of the commenters that gasification residuals should be tested for all UTS constituents. As a result of studies and analyses conducted by EPA in support of the listing determinations for petroleum refinery wastes, as well as development of the LDR treatment standards for these wastes, the characterization of these materials is well documented, and does not represent all the UTS constituents. The suggestion that it is necessary to require these residuals meet all the nonwastewater UTS for all organic and inorganic constituents is therefore without technical justification.

In response to the commenters arguing against imposing the UTS requirements for the six metals, the Agency set about establishing further justification for this condition. This began with a more detailed analysis of the characterization data for petroleum refining waste collected as part of the LDR program. We reviewed available data presented in various Treatment Technology Background Documents to get a better understanding of the total concentration levels of these six metals in the listed waste. As a result of this effort, we were able to collect concentration data for nine listed petroleum refining wastes. Next, based on information collected as part of the proposed rule, as well as information presented in two recent DOE studies, we developed gasification scenarios using a combination of petroleum coke and oil-

bearing hazardous secondary materials as feedstock to gasifiers with different feed rates.\27\ As a result of this analysis, we concluded, based on two scenarios we believe are most representative of possible gasification activities at petroleum refineries, that gasification residues would achieve the UTS levels for all metals, except for vanadium in one scenario and chromium in the other. With regard to chromium, the concentration level was below the characteristic level, but above the UTS level. As for vanadium, it was determined that petroleum coke (a product) contributed most of the vanadium to the gasifier, and that vanadium concentrations in the gasification residuals would not be affected when feeding petroleum coke alone or in combination with oil-bearing hazardous secondary materials.

\27\ See the memorandum to the record from Ms. Elaine Eby, USEPA. Re: Characterization of Petroleum Refining Waste and Possible Gasification Scenarios. August 2007.

Although this analysis showed chromium levels above the UTS in one scenario, the Agency is convinced that chromium concentrations in oil-bearing hazardous secondary materials have decreased from the levels found in our characterization studies, which were conducted in 1988, 1992, and 1998 and therefore will be lower than what we used in our analysis (i.e., the gasification residuals will have concentration levels below the UTS). This is based on information in the preamble for the August 1998 listing rule promulgating the exclusion at 261.4(a)(12)(i) that indicates that chromium levels in these hazardous secondary materials will decrease due to a prohibition on chromium-based water treatment chemicals in industrial cooling towers, as a result of Clean Air Act requirements (see 40 CFR part 63, subpart Q.) \28\ Furthermore, EPA believes that not only for chromium, but lead concentrations (which are below the UTS levels in the analysis we conducted) in the secondary materials will decline with time. This is due to the overall reduction in the use of these metals throughout the refinery (e.g., leaded gasoline is no longer produced). In conclusion, as a result of the additional analysis conducted in response to commenters concerns regarding the imposition of the UTS requirements, as well as our decision to amend 40 CFR 261.4(a)(12)(i) because we have determined that gasifiers are a part of the petroleum refinery process, the Agency has eliminated the condition requiring material generated by the gasification system to meet the UTS standards for antimony, arsenic, chromium, lead, nickel, and vanadium prior to their placement on the land. As such, oil-bearing hazardous secondary materials inserted to the gasification system, like other petroleum refining processes, are excluded from the definition of solid waste, at the point of generation, provided the conditions of the exclusion are met. Residuals generated after the gasification process are, therefore, considered a new point of generation. If a gasifier residual is determined to be characteristically hazardous, it must be managed as a hazardous waste (if discarded), including being treated to the UTS. These standards would require treatment for the characteristic, as well as any underlying hazardous constituents reasonably expected to be present. Underlying hazardous constituents include both organic and inorganic constituents. This is consistent with the current petroleum refinery exclusion found at 40 CFR 261.4(a)(12)(i), and addresses our greatest concern--assuring that gasification residues do not create potential risks when disposed.

\28\ On September 8, 1994 (59 FR 46339), EPA issued a final MACT rule that eliminated the use of chromium-based water treatment chemicals and subsequently chromium compound emissions from industrial process cooling towers.

As a final note, the Agency distinguishes between residuals generated from the gasifier and those residuals generated from the processing of oil-bearing hazardous secondary materials before they are reinserted into the petroleum process. EPA discussed in the final rule for the petroleum refinery exclusion (63 FR 42110, August 6, 1998), that some oil-bearing hazardous secondary materials cannot be directly inserted into a particular petroleum refining process, and therefore may require some type of processing or preparation beforehand (e.g., centrifugation, desorption, settling, etc.). See 63 FR at 42113-42114, 42128. These activities are generally viewed as part of normal petroleum refining operations.

During the 1998 rulemaking, however, we were particularly concerned with the management of any residuals generated from the processing or recycling of oil-bearing hazardous secondary materials prior to or before insertion back to the petroleum refining process, and thus developed an approach to ensure that if such residuals are discarded, that they continue to be managed appropriately. In the 1998 final rule, we clarified that the exclusion for oil-bearing hazardous secondary materials returned to the petroleum refining process only extends to the materials actually inserted into the petroleum refinery process, and any residuals generated from recycling or processing oil-bearing hazardous secondary materials prior to insertion into the refining process that: (1) Would have otherwise met a listing description when originally generated; and (2) are disposed of or intended for disposal, are designated as F037 waste and must be managed in accordance with all the applicable Subtitle C RCRA hazardous waste requirements. The language was

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intended to clarify that residuals that are not ultimately inserted are not excluded, and that these discarded residuals are classified as F037 waste.

The Agency did not include in the F037 listing residuals generated after reinsertion into the petroleum refining process, e.g., coke fines from coking operations. These types of residues generated after insertion into the petroleum refining process, are considered newly generated waste subject to the characteristic test, and not F037 waste. This is the exact reasoning we are applying to today's rule, i.e., if residuals are generated as a result of the processing of oil-bearing hazardous secondary materials prior to gasification, and if these residuals are intended for discard and the original oil-bearing hazardous secondary materials was a listed waste, these residuals are classified as F037 waste. Similarly, if the original waste exhibited one or more hazardous waste characteristics, and the processing, prior to gasification, resulted in a residual destined for disposal, that residue would be characterized as a newly generated waste, subject to the characteristic test.

F. Does the Conditional Exclusion Require Additional Recordkeeping and

Reporting Requirements?

No. Under today's rule, no additional recordkeeping or reporting requirements will be required. Under the exclusion at 40 CFR 261.4(a)(12)(i), oil-bearing hazardous secondary materials are not solid wastes, for purposes of Subtitle C regulation, and therefore are not (by definition) hazardous wastes from the point of generation. Therefore, requirements that normally apply to the management of hazardous wastes, such as notification or the use of a hazardous waste manifest, do not apply to these materials, provided the conditions of the exclusion are satisfied.\29\

\29\ It should be noted, however, that under 40 CFR 261.2(f) documentation is necessary to demonstrate that the conditions of an exclusion have been met. 40 CFR 261.2(f) does not contain specific record keeping requirements, but it does require the respondent to bear the burden of showing, through appropriate documentation, that the excluded material is being processed in a manner that meets the conditions in the claimed exclusion.

In the approach used for the proposed rule, oil-bearing hazardous secondary materials could be processed in a gasification system either on-site or off-site of a petroleum refinery (i.e., materials could be sent to gasifiers at facilities that are not located within petroleum refineries (SIC 2911)). We noted that allowing these materials to go to facilities outside the petroleum refining industry was somewhat different and more expansive than what was permitted for the other processes previously included in 40 CFR 261.4(a)(12)(i). Because of this expansion, we asked for comment on whether additional records and/or reporting requirements might be necessary. We proposed this alternative strategy (i.e., gasification facilities could be located either on-site or off-site of a petroleum refinery) because we believed that excluding oil-bearing hazardous secondary materials processed in gasification systems operating physically outside of a petroleum refinery could still be an extension of the petroleum refining process. It is not unusual for the refining of oil into fuels to occur at multiple locations.

Many commenters generally were supportive of allowing off-site facilities as part of the exclusion. However, there were some commenters that strongly believed that gasification should only occur at a petroleum refinery. Commenters supporting off-site gasification agreed with the Agency's assessment that any gasification process operated off-site would be technically indistinguishable from the types of gasifiers operated at a petroleum refinery. One commenter believed that generators would be better served by transporting the oil-bearing hazardous secondary materials to a centralized processing facility for conversion to synthesis gas, and if the exclusion is not extended to ``off-site'' gasification, the exclusion would be meaningless and have limited, if any, practical use.

The Agency recognizes and agrees, in part, with the potential flexibility afforded to petroleum refineries that have an option of using off-site gasification facilities (i.e., gasification systems not located at a petroleum refinery). However, we have decided not to promulgate this aspect of the rule. The Agency has concluded that a gasification operation located off-site of a petroleum refinery is inconsistent with our basic premise for promulgating this exclusion--

gasification is a part of the petroleum refining process. As such, EPA is electing to simplify its approach today by allowing this exemption only for facilities that clearly meet the definition of petroleum refineries.\30\ It should be noted, however, that under the provisions of the exclusion, oil-bearing hazardous secondary materials may be inserted into the same petroleum refinery where they are generated, or sent directly to another petroleum refinery, and still be excluded under this provision.\31\

\30\ It should be noted that petroleum refineries that ship oil-bearing hazardous secondary materials to an off-site gasification system not located at a petroleum refinery (SIC 2911) would not meet the conditions of this exclusion and would be subject to the appropriate Subtitle C regulations. See, for example, the Synthesis Gas Rule at 40 CFR 261.38(b). Furthermore, a gasification facility that accepts oil-bearing hazardous secondary materials from a petroleum refinery can not claim to be part of the petroleum refining process and utilize this exclusion, even if the synthesis gas is sent back to the petroleum refinery for use. However, we do recognize that there will be situations where petroleum gasification facilities are built in close proximity (e.g., adjoining land) and are part of the petroleum refining facility. In general, such facilities would be within the scope of the exemption being promulgated today.

\31\ See the February 8, 2002 letter from Mr. Robert Springer, Director of the Office of Solid Waste to Mr. Rob Short, Managing Director Tetra Process Services, L.C. In this letter, Mr. Short posed twelve detailed questions concerning the regulatory status of oil-bearing hazardous secondary materials under the RCRA. Specifically, clarification was requested on numerous aspects of the exclusion at 40 CFR 261.4(a)(12)(i).

VI. What Will the Effect of the Final Rule Be on Recycling and Energy Recovery?

Predicting the impacts of any rule is a difficult task. In most cases, the marketplace determines the adoption of new technologies and/or practices. In the case of gasification, it is doubly difficult as both the waste management market and the fuels market will impact adoption of the technology more than any regulatory provision. Today's conditional exclusion provides operators of petroleum refineries an option to consider. This does not mean that every petroleum refinery will adopt this technology as part of their operations, but it may mean that some will adopt the technology to provide for power or steam production less expensively, or for the generation of hydrogen used elsewhere in the petroleum refining process, or sold as a fuel or feedstock. What the rule does do is provide operational flexibility to allow petroleum refiners to adopt a technology that generates valuable products as a result of processing oil-bearing hazardous secondary materials that can and have historically been managed as solid and hazardous waste. With this rulemaking, petroleum refiners can decide whether to invest in the development of gasification with the knowledge that it will also allow them to increase their production efficiency and reduce their costs through the conversion of these materials.

VII. How Will These Regulatory Changes Be Administered and Enforced in

the States?

Under section 3006 of RCRA, EPA may authorize qualified states to administer their own hazardous waste

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programs in lieu of the federal program within the state. Following authorization, EPA retains enforcement authority under sections 3008, 3013, and 7003 of RCRA, although authorized states have primary enforcement responsibility. The standards and requirements for state authorization are found at 40 CFR Part 271.

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

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was amended by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized states at the same time that they take effect in unauthorized states. EPA is directed by the statute to implement these requirements and prohibitions in authorized states, including the issuance of permits, until the state is granted authorization to do so. While states must still adopt HSWA related provisions as state law to retain final authorization, EPA implements the HSWA provisions in authorized states until the states do so.

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

Today's exclusion is finalized pursuant to non-HSWA authority and is considered to be less stringent than the current federal requirements. Therefore, states will not be required to adopt and seek authorization for the finalized changes. EPA will implement the changes to the exemptions only in those states which are not authorized for the RCRA program. Nevertheless, EPA believes that this rulemaking has considerable merit, and we thus strongly encourage states to amend their programs and become federally-authorized to implement this rule.

VIII. What Are the Costs and Benefits of the Final Rule?

The costs and benefits of any regulatory action are traditionally measured by the net change in social welfare that it generates. The Agency's economic assessment conducted in support of today's final rule evaluates costs, cost savings (benefits), waste quantities affected, and other impacts, such as environmental justice, children's health, unfunded mandates, regulatory takings, and small entity impacts. To conduct this analysis, we prepared a baseline characterization for waste management and gasification at petroleum refineries, developed

and implemented a methodology for examining impacts, and followed appropriate guidelines and procedures for examining equity considerations, children's health, and other impacts. Because EPA's data are limited, the estimated findings from these analyses should be viewed as national, not site-specific impacts.

Proper baseline specification is vital in the assessment of incremental costs, benefits, and other economic impacts associated with a rule that would expand the exclusion for oil-bearing hazardous secondary materials that are utilized to generate fuels and other chemicals. The baseline essentially describes the world absent any expanded exclusion. The incremental impacts of today's final rule are evaluated by predicting post-rule responses with respect to baseline conditions and actions. The baseline, as applied in this analysis, is assumed to be the point at which the final rule is published. A full discussion of baseline specifications is presented in the economic assessment document completed for this rule.\32\

\32\ Assessment of the Potential Costs, Benefits, and Other Impacts of the Exclusion for Gasification of Petroleum Oil-Bearing Secondary Materials--Final Rule, August 2007.

As outlined above, the final rule creates an exclusion for oil-bearing hazardous secondary materials generated at a petroleum refinery if this material is used at a petroleum refinery as an input for the production of synthesis gas. Because not all petroleum refineries will elect to include a gasification system as part of their petroleum refinery, the impacts of the final rule will depend significantly on the number of petroleum refineries that decide to adopt the technology and use the exclusion and the baseline waste management practices of these petroleum refineries. To account for these factors in this analysis, a bottom-up analytic approach was developed for estimating impacts based on the decisions of individual petroleum refineries to exclude or not exclude their oil-bearing hazardous secondary materials under the final rule. The analysis of each affected petroleum refinery begins by estimating the likely costs and benefits associated with its potential use of the exclusion. A key assumption of the analysis is that a petroleum refinery will divert its oil-bearing hazardous secondary materials to gasification if the following two conditions apply: (1) The benefits realized by the petroleum refinery if it uses the exclusion exceed the related costs, and (2) the benefits realized by the gasification system receiving the petroleum refinery's oil-bearing hazardous secondary materials exceed the costs associated with accepting this material.

After determining whether a petroleum refinery is likely to divert its oil-bearing hazardous secondary materials to gasification, we estimate the total impacts associated with its decision to use or not use the exclusion. If the petroleum refinery is unlikely to use the exclusion, we assume zero impacts. If the analysis suggests that the petroleum refinery will use the exclusion, we estimate impacts as the sum of three items: (1) The savings that the petroleum refinery will experience by diverting its oil-bearing hazardous secondary materials to gasification, (2) savings for the petroleum refinery that receives this material and uses it as a feedstock in its gasification system, and (3) indirect third-party costs. Indirect third-party costs include increased virgin fuel and material costs for facilities that receive and manage the petroleum refinery's oil-bearing hazardous secondary

materials in the baseline (i.e., prior to the promulgation of the final rule) and either burn it for energy recovery or recycle it to recover metals or other valuable materials.

To complete our analysis and estimate the total impacts of the final rule, we summed the impacts associated with oil-bearing hazardous secondary materials diverted to gasification under the exclusion. In addition, we assessed the impacts of the rule under two scenarios to account for uncertainty in the operational status of gasification systems that are planned, but have not yet gone online: a low-capacity scenario reflecting existing gasification capacity

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and a high-capacity scenario reflecting existing and planned capacity.

This rule is projected to result in a benefit to society in the form of net cost savings to the private sector, on a nationwide basis, thereby allowing for the more efficient use of limited resources elsewhere in the market. For more detail regarding the data sources, key assumptions, and any limitations associated with the analyses of the economic impacts, the reader is referred to the economic assessment document completed for this rule, which can be found in the docket to this rulemaking.

As described in the methodology overview in EPA's economic assessment document, we estimated the impacts of the final rule under two gasification capacity scenarios: (1) A low-capacity scenario that reflects the capacity of the three petroleum refinery gasification systems that are known to be operating; and (2) a high-capacity scenario that reflects the capacity of these three systems plus two additional units that were planned as of 2003, but have not yet gone online. Results for both of these scenarios are presented as a range of the potential net social benefits of the rule, in order to help account for the uncertainty regarding the future operational status of planned units not yet in operation.\33\

\33\ The IGCC unit located at the El Dorado, Kansas Refinery was used as part of this analysis. However, as of 2006, this unit is no longer in operation.

The central conclusion of our analysis states that approximately 324,300 tons of oil-bearing hazardous secondary materials generated by 152 refineries would qualify for the exclusion each year. Of this quantity, petroleum refineries currently send approximately 205,500 tons offsite for disposal or recycling; the remaining 118,800 tons are processed onsite. Of the 324,300 tons of oil-bearing hazardous secondary materials qualifying for the exclusion, between 123,300 and 177,000 tons are likely to be excluded by petroleum refineries each year. This represents approximately 38 percent to 55 percent of the material eligible for the exclusion.

We estimate that the rule will yield between $46.4 million and $48.7 million in net social benefits per year. Avoided waste management costs make up the most significant share of the benefits of the rule, followed by feedstock savings for gasification systems. Commercial waste management facilities that manage oil-bearing hazardous secondary materials in the baseline may experience annual revenue losses of $10.8 million to $15.1 million under the final rule. Based on the limited data available on the revenues of these facilities, this loss

represents a small fraction of their revenues. The impact of the final rule depends significantly on the cost of incineration. The impacts reflect the average cost of incinerating bulk sludge, as reported by the Environmental Technology Council (ETC). If we use the low end of ETC's cost range, the net social benefits of the rule decline to $5.2 million to $25.5 million per year.\34\

\34\ ETC, Incinerator and Landfill Cost Data, http://www.etc.org/costsurvey8.cfm, EXIT Disclaimer accessed September 8, 2006.

IX. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ``significant regulatory action.'' It has been determined that this rule is a ``significant regulatory action'' because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, EPA submitted this rule to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. As indicated above, the annual cost savings of the rule are estimated to be $46.4 million to $48.7 million. This analysis is contained in the document ``Assessment of the Potential Costs, Benefits, and Other Impacts of the Exclusion for Gasification of Petroleum Oil-Bearing Secondary Materials--Final Rule.'' A copy of the analysis is available in the docket for this regulation.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. EPA is amending an existing exclusion from the definition of solid waste that applies to hazardous secondary materials generated at a petroleum refinery when these materials are inserted back into the petroleum refining process (see current exclusion found at 40 CFR 261.4(a)(12)(i)). With today's final rule, the conditional exclusion will be revised to add ``gasification'' to the list of identified petroleum refinery processes into which hazardous secondary materials can be legitimately recycled. Materials excluded under 40 CFR 261.4(a)(12)(i) are not solid wastes for purposes of Subtitle C regulation, and therefore are not (by definition) hazardous wastes from the point of generation. Therefore, requirements that normally apply to the management of hazardous wastes, such as notification or the use of a hazardous waste manifest, do not apply to these materials, provided the conditions of the exclusion are satisfied.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and

verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (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. This analysis must be completed unless the agency is able to certify that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

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

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owned and operated and is not dominant in its field.

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. 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 rule on small entities.'' 5 U.S.C. 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.

The final rule is projected to result in benefits/cost savings for those petroleum refineries that use the exclusion. In addition, those petroleum refineries that choose not to take advantage of the subject exclusion would experience no direct impact from this final rule. Consequently, the rule is not expected to adversely affect small entities that generate oil-bearing hazardous secondary materials eligible for the exclusion. Nevertheless, we developed facility-specific impact estimates for petroleum refineries that may be classified as small entities to show how they would likely benefit from the final rule. The SBA considers a petroleum refinery to be a small business if it has ``no more than 1,500 employees or more than 125,000

barrels per calendar day total Operable Atmospheric Crude Oil Distillation capacity.'' Based on the available data, it is not feasible to measure the distillation capacities of each refinery affected by the rule; therefore, we relied on facility employment data to determine which petroleum refineries are small entities. Our analysis of employment data suggests that 37 of the 152 refineries affected by the rule are small entities.

The benefits (cost savings) of the final rule on each small business are expected to range from $0 to $2.0 million per year. It is further estimated that the aggregate small entity impacts total $2.1 million to $2.5 million per year in cost savings, which represents 4.3 to 5.4 percent of the annual impact of the final rule. Similarly, the quantity of material eligible for the exclusion that is generated by small businesses, 16,895 tons, accounts for 5.2 percent of the total oil-bearing hazardous secondary materials tonnage eligible for the exclusion. We have therefore concluded that today's final rule will relieve regulatory burden for affected small entities.

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, 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.

Based on these criteria set forth by the UMRA, the final rule does not contain a significant unfunded mandate. As reported in the analytic results presented above, the rule is not likely to result in annualized costs of $100 million or more, either for the private sector or for state, local, and tribal governments.

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, as the rule imposes no enforceable duty on any State, local or tribal governments or the private sector. Furthermore, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus 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 it will not impose any requirements on states or any other level of government. 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'' (59 FR 22951, 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. No Tribal governments are known to own or operate petroleum refineries that generate oil-bearing hazardous secondary materials subject to the final rule. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045, ``Protection of Children From Environmental Health

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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.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This final rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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. On the contrary, this rule is expected to result in energy savings, as described below.

EPA estimates that of the 324,300 tons of oil-bearing hazardous secondary material qualifying for the exclusion, approximately 36,735 tons are currently managed through energy recovery in the baseline. Based on the results of our analysis, we estimate that between 3,700 to 18,700 tons of the 36,735 tons currently being reported as being recovered (e.g., managed) for energy recovery will be diverted to gasification at petroleum refineries as a result of the final rule. This represents an energy loss of 19,800 to 101,300 MMBtu for facilities that manage this material for energy recovery in the baseline. This is the equivalent of 3,400 to 17,500 barrels of crude oil per year.\35\ The petroleum refineries that gasify this oil-bearing hazardous secondary material under the final rule, however, would use the resulting synthesis gas as a fuel for the production of power or other petroleum products, which would (at least partially) offset the 19,800 to 101,300 MMBtu energy loss mentioned above. Moreover, gasification of the 119,600 to 158,300 tons of excluded material not burned for energy recovery in the baseline would yield additional energy savings. Assuming that all of the energy content of this material is retained in the resulting synthesis gas, the gasification of this material represents energy savings of 648,300 to 858,000 MMBtu per year. Therefore, accounting for the estimated energy loss of 19,800 to 101,300 MMBtu associated with oil-bearing hazardous secondary materials burned for energy recovery in the baseline, this rule could yield a net energy savings ranging from 628,500 to 756,700 MMBtu per year.

\35\ According to the U.S. Energy Information Administration (EIA) Annual Energy Outlook 2006, Table A2, one barrel of crude oil produced has a heat content of 5.8 million Btu.

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, 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.

The final rule does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

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

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment.

Under the final rule, EPA estimates that 123,000 to 177,000 tons of oil-bearing hazardous secondary materials will be diverted to gasification processes from their baseline disposition at hazardous waste treatment, storage, and disposal facilities (TSDFs). As such, the final rule will concentrate the processing of excluded material at the limited number of petroleum refineries that could potentially use this material as a feedstock under the final rule. However, EPA does not believe that gasification of this material represents a greater risk to the public than baseline management practices. Rather than managing the excluded material as hazardous waste and transporting it to more widely dispersed TSDFs, as is currently the case (e.g., under the baseline), the final rule would help limit distribution of these materials such that they are instead managed at their source of generation (e.g., petroleum refineries).

EPA also assessed the demographic characteristics of populations living within a one-mile radius of petroleum refineries with gasification systems using geo-coded data from the U.S. Census Bureau. This analysis shows that the areas surrounding gasification systems affected by the rule have disproportionately high minority and low-income populations when compared to the national average. However, based on a number of published studies, areas in close proximity to TSDFs and combustion facilities also have disproportionately high minority and low-income populations that are similar to or greater than those of petroleum refineries with gasification systems. For instance, among the individuals living within one mile of the existing and planned gasification systems included in our analysis, 15.8 percent are low-income individuals, compared to 15.7 percent and 22.3 percent near TSDFs and hazardous waste combustion facilities, respectively. Similarly, 28.1 percent of the individuals living near existing and planned gasification systems are minorities, compared to 27.2 percent living near TSDFs and 38.3 percent living near hazardous waste combustion facilities. These findings show that the percentages of low-income and minority populations near TSDFs are similar to or greater than those of populations living near petroleum refineries with gasification systems.

The implication of our analyses is that low-income and minority populations

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will not bear a disproportionate share of any human health or environmental effects associated with shifting the processing of excluded oil-bearing hazardous secondary materials to gasification systems. Furthermore, as less oil-bearing hazardous secondary materials will be received by TSDFs and hazardous waste combustion facilities, low-income and minority populations living near these facilities would

likely experience a potential reduction in risk under the final rule.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as amended 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 February 1, 2008.

List of Subjects

40 CFR Part 260

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 261

Excluded hazardous waste, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Dated: December 20, 2007.
Stephen L. Johnson,
Administrator.

• For the reasons set out in the preamble, 40 CFR chapter I is amended as follows:

PART 260--HAZARDOUS WASTE MANAGEMENT SYSTEM; GENERAL

• 1. The authority citation for part 260 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921-6927, 6930, 6934, 6935, 6937, 6938, 6939, and 6974.

Subpart B--Definitions

• 2. Section 260.10 is amended by adding in alphabetical order the definition of ``Gasification'' to read as follows:

Sec. 260.10 Definitions.

* * * * *

Gasification. For the purpose of complying with 40 CFR 261.4(a)(12)(i), gasification is a process, conducted in an enclosed device or system, designed and operated to process petroleum feedstock, including oil-bearing hazardous secondary materials through a series of highly controlled steps utilizing thermal decomposition, limited oxidation, and gas cleaning to yield a synthesis gas composed primarily

of hydrogen and carbon monoxide gas.
* * * * *

PART 261--IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

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

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

• 4. Section 261.4 is amended by revising paragraph (a)(12)(i) to read as follows:

Sec. 261.4 Exclusions.

(a) * * *

(12)(i) Oil-bearing hazardous secondary materials (i.e., sludges, byproducts, or spent materials) that are generated at a petroleum refinery (SIC code 2911) and are inserted into the petroleum refining process (SIC code 2911--including, but not limited to, distillation, catalytic cracking, fractionation, gasification (as defined in 40 CFR 260.10) or thermal cracking units (i.e., cokers)) unless the material is placed on the land, or speculatively accumulated before being so recycled. Materials inserted into thermal cracking units are excluded under this paragraph, provided that the coke product also does not exhibit a characteristic of hazardous waste. Oil-bearing hazardous secondary materials may be inserted into the same petroleum refinery where they are generated, or sent directly to another petroleum refinery and still be excluded under this provision. Except as provided in paragraph (a)(12)(ii) of this section, oil-bearing hazardous secondary materials generated elsewhere in the petroleum industry (i.e., from sources other than petroleum refineries) are not excluded under this section. Residuals generated from processing or recycling materials excluded under this paragraph (a)(12)(i), where such materials as generated would have otherwise met a listing under subpart D of this part, are designated as F037 listed wastes when disposed of or intended for disposal.
* * * * *

[FR Doc. E7-25240 Filed 12-31-07; 8:45 am]
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Notices For 2008 2007 2006 2005 2004 2003 2002 2001 2000 1999 1998 1997 1996 1995 1994

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 33CSR20 - "Hazardous Waste Management System"

Type of Rule: ___X__ Legislative _____Interpretive _____Procedural

Agency: Division of Water and Waste Management

Address: 601 57th Street SE
Charleston, WV 25304

FILED IN THE OFFICE OF
THE SECRETARY OF STATE

THIS DATE _____
ADMINISTRATIVE LAW DIVISION

Phone Number: 926-0499 Ext. 1317 Email: ccather@wvdep.org

Fiscal Note Summary

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

The proposed revisions to this rule should cause no additional impact on costs and revenues of state government.

Fiscal Note Detail

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

FISCAL YEAR

Effect of Proposal	2009 Increase/Decrease (use "-")	2010 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	$ 0	$ 0	$ 0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs & Alterations	0	0	0
Assets	0	0	0
Equipment	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

Rule Title: 33CSR20 - "Hazardous Waste Management System"

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

The proposed revisions to this rule will have a minimal effect on the costs to the Division of Water and Waste Management because the revisions impose no additional requirements beyond current federal requirements. Costs are covered under previous cost estimates.

MEMORANDUM

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

Date: 7/11/08

Signature of Agency Head or Authorized Representative

, Director