

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #3

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2005 JUL 29 P 1:38

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: West Virginia Department of Environmental Protection TITLE NUMBER: 60

CITE AUTHORITY: §22-25-4.

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 8

TITLE OF RULE BEING PROPOSED: Environmental Excellence Program Rule

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

Stephen P. Timmesmeier
Authorized Signature

SCANNED

QUESTIONNAIRE

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

DATE: July 29, 2005

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

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

West Virginia Department of Environmental Protection
601 57th Street, South East

Charleston, WV 25304
(304) 926-0499 Extension 1332

LEGISLATIVE RULE TITLE: _____

60CSR8, Environmental Excellence Program Rule

1. Authorizing statute(s) citation _____

§22-25-4.

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

June 15, 2005.

(Filed with the Secretary Of State Office and the Legislative Rule Making Committee on June 15, 2005.)

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

Classified Legal Advertisement in Charleston Daily Mail and Charleston Gazette, Agency Web Site, and Agency Calendar Of Events.

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

July 19, 2005.

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

Attached X

No comments received

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

July 29, 2005.

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

G. E. "Greg" Adolfson

Deputy Administrator

601 57th Street, South East

Charleston, WV 25304

Office: (304) 926-0499 Extension 1332

Facsimile: (304) 926-0484

E-Mail: gadolfson@wvdep.org

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

Same as Item 'f'.

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

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

Not Applicable.

b. Date of hearing or comment period:

Not Applicable.

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

Not Applicable.

d. Attach findings and determinations and reasons:

Attached Not Applicable.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: 60CSR8, Environmental Excellence Program Rule

A. AUTHORITY: W.Va. Code §22-25-4.

B. SUMMARY OF RULE:

60CSR8 authorizes the West Virginia Department of Environmental Protection to establish the eligibility, procedures, standards, and legal documents required for developing and implementing a voluntary environmental excellence program (E²P) as specified under West Virginia Code §22-25-4.

The purpose of the E²P Rule is to establish and administer an environmental excellence program that encourages, promotes, recognizes, and rewards businesses and organizations for superior environmental performance and enhanced public involvement throughout West Virginia.

The E²P establishes a system to encourage voluntary environmental performance that exceeds existing regulatory standards for health and the environment that results in continual improvement in the state's environment, economy, and overall quality of life.

The E²P is compatible with other federal programs that create incentives for achieving environmental performance beyond regulatory requirements, such as the United States Environmental Protection Agency's National Environmental Performance Track Program.

The E²P will accomplish the following:

- Encourage assessment environmental impacts;
- Encourage innovation and success through setting measurable and verifiable goals;
- Increase public participation and encourage stakeholder consensus;
- Focus resources on achieving positive environmental goals important to the state;
- Report environmental information and data to the public;
- Provide for measurement of performance in terms of goals and objectives;
- Provide flexibility to implement pollution prevention, source reduction, or other pollution reduction strategies, while complying with pollution limits;
- Encourage superior environmental performance and continual improvement toward sustainable levels of resource usage and minimization of pollution discharges, emissions, and releases;
- Promote transfer of technological and practical environmental innovations that improve environmental performance in an efficient, effective, and safe manner; and,
- Strive to lower transaction costs.

60CSR8, Environmental Excellence Program Rule
Briefing Document
Page 2

The E²P Rule institutionalizes the framework for the establishment and implementation of the necessary program elements for E²P participation. E²P elements include: eligibility criteria for participation; environmental performance record; environmental management system; environmental performance goals; public participation; incentives; procedures for application; notice; action on application; environmental performance agreement; annual performance report; annual facility visitations; procedures for retention, renewal, or termination of E²P designation; impact on incentives from termination of E²P designation; and, application fees and annual renewal fees.

Eligible businesses and organizations may participate at one of three levels: Bronze Leaf, Silver Leaf, or Gold Leaf. Level of participation and incentives granted are based on the businesses' and organizations' conformance to the requirements of this rule.

Eligibility Requirements:

- Environmental performance record;
- Environmental management system;
- Environmental performance goals;
- Public participation plan;
- Annual performance report; and,
- Annual facility visitations.

Potential Incentives:

- Recognition: numbered certificate of recognition and level of E²P membership; identification of E²P member on Internet website directory and highlights; notice of participation of E²P member to the various media; and, use of the E²P logo.
- Low priority for routine inspection;
- Regulatory and administrative relief:
 - General: low priority for routine inspections; single point of contact with WVDEP for all permitting actions; network established to promote the program and the E²P member; and, letter in good standing for the E²P member;
 - Air: flexible permits; reduced recordkeeping/reporting frequencies, and simplified reporting requirements subject to the Maximum Achievable Control Technology requirements/incentives rule; and, waiver of permit modification fees;
 - Water: waiver of permit modification fees; and, reduced frequency for filing discharge monitoring reports; and,
 - Waste: Reduced permitting requirements for generators of hazardous waste.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

As specified under West Virginia Code §22-25-4 within one year after the effective date of this section, the secretary, after consultation with representatives from the regulated community, local governments, environmental advocacy groups and other interested citizens, shall develop and implement a voluntary environmental excellence program in accordance with this article.

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

Although based upon and generally consistent with the federal National Environmental Performance Track Program administered by the United States Environmental Protection Agency, 60CSR8 does not directly incorporate federal regulations by reference. Therefore no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

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

**F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION
ADVISORY COUNCIL:**

At its June 8, 2005 meeting, the Environmental Advisory Council (EAC) reviewed and discussed this proposed rule. The EAC's comments are contained in the attached minutes.

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Wednesday - June 8, 2005

601 57th Street, SE, Charleston, WV

Dolly Sods Conference Room – 1st Floor

ATTENDEES:

Advisory Council Members:

Larry Harris

Jackie Hallinan

Rick Roberts

Lisa Dooley

Bill Raney

Karen Price

DEP:

Stephanie R. Timmermeyer, Cabinet Secretary

Karen G. Watson, Assistant General Counsel

Ken Ellison, Director - Division of Land Restoration

Lisa McClung, Director – Division of Water and Waste Management

John Benedict, Director – Division of Air Quality

Mike Zeto, WVDEP

Charlie Sturey, WVDEP

Jessica Greathouse, Chief Communication Officer – WVDEP – Public Information Office

James Martin, Chief, WVDEP - Office of Oil & Gas

Brett Loflin, WV Oil and Gas Conservation Commission

Dave Bassage- WVDEP

Greg Adolpson – WVDEP

Jim Mason – WVDEP

Fred Durham – WVDEP

Jim Mason – WVDEP

Mike Johnson – WVDEP

VISITORS:

Linda Tennant, Spilman, Thomas, Battle

Don Garvin – WVEC

Bob Asplund - Dominion

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

Proposed rules for the 2006 legislative session are as follows:

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

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

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

Comments:

How will this relate to the new rule 40?

Rule 40 will repeal Rule 1 in 2009.

Are these kinds of trading effective in lowering NO_x emission?

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

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

Have CEMS on stacks so we can analyze data.

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

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

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

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

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

No Comments

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

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

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

No Comments

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

This rule establishes and adopts national standards of performance for new stationary sources and other regulatory requirements promulgated by the United States Environmental Protection Agency (USEPA) pursuant to the Resource Conservation and Recovery Act, as amended (RCRA). This rule codifies general procedures and criteria to implement emission standards set forth in the Code of Federal Regulations as listed in Table 25-A of the rule. The rule also adopts associated appendices, reference methods, performance specifications and other test methods, which are appended to these standards. Any person, who constructs, reconstructs, modifies or operates any hazardous waste treatment, storage, or disposal facility must comply with the West Virginia Hazardous Waste management Program, the codified federal emission standards, and this rule.

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

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

Comments:

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

Look at the definition of “hazardous waste” and prevention language is meant to set forth overall purpose of the rule.

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

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

- **45CSR33 – “Acid Rain Provisions and Permits”**

This rule establishes and adopts the general provisions and operating permit program requirements for affected sources under the Acid Rain Program promulgated by the United States Environmental Protection Agency (USEPA) under title IV of the Clean Air Act, as amended (CAA). The rule also adopts associated appendices, reference methods, performance specifications and other test methods which are appended to these provisions. Under the Acid Rain Program and 45CSR33, no person may construct, modify, or operate or cause to be constructed, modified, or operated, an Acid Rain Source in violation of 40CFR Parts 72 through 77.

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

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

No Comments

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

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

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

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

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

No Comments

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

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

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

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

Comments:

How will this affect Industrial boilers?

The rule does not cover these sources.

What kind of monitoring is required?

Have to install CEMS.

What happens when there is litigation?

If court remands, we would withdraw the rule.

Does the rule apply to natural gas-fired units?

No, only coal-fired.

Does the rule establish new fees?

No.

John Benedict informed the Council of the following reductions:

Nationally

2010 – 22%

2018 – 69%

WV:

2010 – 43%

2018 – 77%

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

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

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

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

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

Comments:

How will this affect industrial boilers?

It will not. It only affects electric utilities.

Is there a set-aside provision?

Yes.

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

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

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

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

allowances from or to other program participants. Reducing upwind ozone season NO_x emissions will assist downwind 8-hour ozone nonattainment areas in achieving the National Ambient Air Quality Standards (NAAQS).

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

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

No Comments.

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

This rule establishes general provisions and the designated representative, permitting, allowance, monitoring, and opt-in provisions for the state CAIR SO₂ Trading Program pursuant to the federal Clean Air Interstate Rule (CAIR) under Section 110 of the Clean Air Act (CAA), 40 CFR Part 96, Subparts AAA through III, and 40 CFR §51.124 for state implementation plans as a means of mitigating interstate transport of fine particulates and sulfur dioxide (SO₂).

This rule partially fulfills the State’s obligations in response to the United States Environmental Protection Agency’s (U.S. EPA) final rule, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call* (12 May 2005, at FR 25162). The federal rule requires that large emitters of SO₂ reduce annual emissions based upon the implementation of retirement ratios for SO₂ allowances allocated under the Acid Rain Program. U.S. EPA is specifying that annual SO₂ emission reductions be implemented in two phases. The first phase of SO₂ reductions starts in 2010 and requires retiring SO₂ allowances at a 2:1 ratio; the second phase starts in 2015 and requires retiring SO₂ allowances at a 2.86:1 ratio, and continues thereafter. The SO₂ emissions reductions requirements are based on controls that are known to be highly cost effective for electric generating units. Flexibility is built in through market-based “cap and trade” provisions which allow sources to buy or sell SO₂ emission allowances from or to other program participants. Reducing upwind SO₂ emissions will assist downwind PM_{2.5} and 8-hour ozone nonattainment areas in achieving the National Ambient Air Quality Standards (NAAQS).

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

How was the fiscal note derived?

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

When will these rules be filed with EPA?

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

- **33CSR1 – “Solid Waste Management Rule”**

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

Comments:

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

Yes.

- **33-CSR20 – “Hazardous Waste Management”**

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

No Comments.

- **35CSR3 – “Coalbed Methane Wells Rule”**

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

Comments:

Are operators required to sample both water quality and quantity?

Just quality.

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

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

- **39CSR1 – “Rules of the Commission”**

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

No comments.

- **60CSR8 “Environmental Excellence Program Rule”**

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

Comments:

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

Yes, they will be posted on the internet.

Will people pay the \$1000 fee?

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

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

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

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

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

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

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

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

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

Comments:

The Council discussed the funding mechanisms under the new law.

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

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

4. SB 406. Uniform Environmental Covenant Act.

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

Comments:

A question was raised as to local governments.

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

5. HB 2723. Environmental Rules Bundle.

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

6. HB 3236. Thin Seam Coal Tax Applicability.

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

7. HB 2333. Environmental Good Samaritan Act.

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

8. HB 3033. Continuation of Special Reclamation Tax.

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

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

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

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

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

11. SB 748. Credit for Mitigation.

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

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

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

Comments:

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

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

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

14. SB 455. Financing of Environmental Control Activities.

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

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

Karen Watson adjourned the meeting.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Environmental Excellence Program Rule, 60CSR8

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: West Virginia Department of Environmental Protection

Address: 601 57th Street, South East
Charleston, West Virginia 25304

Phone Number: 304.926.0499 Extension 1332 Email: gadolfson@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.

To recover costs to the department in reviewing applications; developing, negotiating, and publicizing an environmental performance agreement; reviewing annual performance reports; coordinating annual facility visitations; etc.; the secretary has established a reasonable application fee and triennial renewal fee. An "Environmental Excellence Program Administrative Fund" was created in the state treasury for deposit of fees dedicated and appropriated to the department for program administration. An application fee of one thousand dollars (\$1,000.00 and \$300.00 for small businesses) must be paid by the applicant to cover the first three years of membership and a triennial renewal fee of five hundred dollars (\$500.00 and \$150.00 for small businesses) must be paid by the member at each three year anniversary date. Provided that the application/triennial renewal fee shall be waived for all public entities seeking membership in the environmental excellence program.

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	2005 Increase/Decrease (use "-")	2006 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	10,900.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Equipment	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	10,900.00

Rule Title:

Environmental Excellence Program Rule, 60CSR8

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

Fiscal Years 2005, 2006, and 2007 "Estimated Total Costs" are estimates based on program participation (Revenues) and are appropriated to the department to administer the program (Costs).

Fiscal Years 2005 and 2006 "Estimated Total Revenues" are \$0.00 (zero dollars) since the program will not begin until Fiscal Year 2007 (July 1, 2006 through June 30, 2007).

Fiscal Year 2007 "Estimated Total Revenues" are estimates based on program participation (Revenues) and are based on 10 (ten) application fees of one thousand dollars (\$1,000.00) and 3 (three) application fees of three hundred dollars (\$300.00).

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.

If there is no program participation, there will be no Revenues or Costs.

Date: 07-29-2005

Signature of Agency Head or Authorized Representative

**TITLE 60
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
SECRETARY'S OFFICE**

FILED

2005 JUL 29 P 1:39

**SERIES 8
ENVIRONMENTAL EXCELLENCE PROGRAM RULE**

OFFICE WEST VIRGINIA
SECRETARY OF STATE**§60-8-1. General.**

1.1. Scope. -- This legislative rule establishes the eligibility, procedures, standards and legal documents required for establishing a voluntary environmental excellence program.

1.2. Authority. -- W. Va. Code §22-25-4.

1.3. Filing Date. -- _____ 2005.

1.4. Effective Date. -- _____ 2005.

§60-8-2. Definitions.

Unless the context in which used clearly requires a different meaning, the definitions contained in W. Va. Code §22-25-3 will apply to the terms in this rule in addition to the definitions expressly set forth in this rule.

2.1. "Applicant" means an individual or entity who has fulfilled the department's requirements to be considered for admission (including payment of the application fee, if any) and who has been notified of one of the following actions: admission, non-admission, or application withdrawn (by applicant or department).

2.2. "Capital Improvement Project" means a project that helps maintain and/or improve an asset to be included in the capital budget, designed to reduce discharges and/or emissions from the facility below the environmental performance baseline for the specified discharges and/or emissions, and/or promotes sustainability, that is:

2.2.a. New construction, expansion, renovation, and/or a replacement project for an

existing facility or facilities and must have a total cost of at least \$10,000.00, in cash and/or in-kind contributions that are realized in goods, commodities, and/or services, etc., over the life of the project, and may include the cost of land, engineering, architectural planning, and contract services needed to complete the project; and/or,

2.2.b. Purchase of major equipment (assets) costing \$50,000.00 or more, in cash and/or in-kind contributions that are realized in goods, commodities, and/or services, etc., with a useful life of at least 10 years; and/or,

2.2.c. Major maintenance or rehabilitation project for existing facilities with a cost of \$10,000.00 or more, in cash and/or in-kind contributions that are realized in goods, commodities, and/or services, etc., and an economic life of at least 10 years; and/or,

2.2.d. Sustainability project costing \$10,000.00 or more, in cash and/or in-kind contributions that are realized in goods, commodities, and/or services, etc., with a useful life of at least 10 years, that integrates economic, environmental, social, and community elements, and essentially is about living, working, and ordering society and communities in ways that are environmentally sustainable, encouraging reduction of pollution, re-use of resources, promoting biodiversity, etc., whereas:

2.2.d.1. Sustainability is a concept and strategy by which facilities seek economic development approaches that benefit the local environment, society, communities, and overall quality of life, and:

2.2.d.1.A. Sustainable development provides a framework under which facilities can use resources efficiently, create efficient infrastructures, protect and enhance the quality of life, preserve the ability of an ecosystem to maintain a defined and desired state of ecological integrity over time, and create new businesses to strengthen their economies and communities; and

2.2.d.1.B. Sustainable communities are achieved by facilities that establish short-term and long-term methodologies for developing integrated approaches to develop and achieve a healthy community by addressing economic, environmental, social, and community issues, while fostering a strong sense of community and building partnerships and consensus among key stakeholders are also important elements.

2.3. "Community Advisory Panel" means a committee, task force, or board comprised of citizens affected by facilities that provides a public forum for community members to present and discuss their needs and concerns about the decision-making process at facilities affecting them.

2.4. "Environmental Management Program" means an activity for achieving a facility's environmental objectives and environmental targets that includes designation of responsibility for achieving environmental objectives and environmental targets at relevant functions and levels within the facility, and the means and time-frame by which they are to be achieved.

2.5. "Facility" means places, buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person, or by any person who controls, is controlled by, or is under common control with, such person that provides a particular service or is used for a particular industry; and also means the piece of land, with or without facilities, that is within the jurisdiction of federal, state, and/or municipal government.

2.6. "Person" means any and all persons,

natural or artificial, including the State of West Virginia or any other State, the United States of America, any municipal, statutory, public, or private corporation, organized or existing under the laws of this or any other state or country, and any firm, partnership, or association of whatever nature.

2.7. "Pollution Prevention" means any practice that reduces the use of any hazardous substance or amount of a pollutant or contaminant prior to reuse, recycling, treatment, or disposal, and reduces the hazards to public health and the environment associated with the use and release of hazardous substances, pollutants or contaminants; pollution prevention does not include cross-media pollution transfers that do not result in a net decrease of discharge, emission or impact to the environment, as specified under W. Va. Code §22-25-3; and includes:

2.7.a. "Pollution Prevention", for the purpose of this rule, also means "Source Reduction" as specified under the Pollution Prevention Act (42 U.S.C. §§13101-13109), as follows:

2.7.a.1. "Source Reduction" means any practice that:

2.7.a.1.A. Reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal;

2.7.a.1.B. Reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants;

2.7.a.1.C. Includes equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, or inventory control; and

2.7.a.1.D. Does not alter the physical, chemical, or biological characteristics or the volume of a hazardous substance, pollutant, or contaminant through a process or activity that itself is not integral to and necessary for the production of a product or the providing of a service.

2.7.a.2. "Source at a United States Environmental Protection Agency National Environmental Performance Track Member Facility" means a major or area source located at a facility that has been accepted by the United States Environmental Protection Agency for membership in the National Environmental Performance Track and is still a member of the National Environmental Performance Track as specified under the Pollution Prevention Act (42 U.S.C. §§13101-13109).

2.7.a.3. "Source at an Environmental Excellence Program Member Facility" means a major or area source located at a facility that has been accepted by the department for membership in the environmental excellence program and is still a member of the environmental excellence program.

2.8. "Public Entity" means a political subdivision of the state, including a municipality and its subdivisions, a school district, a regional educational attendance area, an organization composed of political subdivisions of the state; and any department, agency, special purpose district, or other instrumentality of the state or local government.

2.9. "Responsible Official" means one of the following:

2.9.a. For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

2.9.a.1. The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding \$25 million (in second quarter 1980 dollars); or,

2.9.a.2. The secretary approves the delegation of authority to such representative in advance.

2.9.b. For a partnership or sole proprietorship: a general partner or the proprietor, respectively; or,

2.9.c. For a municipality, State, Federal, or other public agency: either a principal executive officer or ranking elected official. For the purposes of this rule, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of the United States Environmental Protection Agency).

2.10. "Small Business" means a for-profit or non-profit enterprise that has either gross annual receipts not exceeding \$5 million or total payroll not exceeding \$1.5 million and/or any facility with fewer than fifty full-time employees. A United States business that is independently owned and operated, is not dominant in its field of operation and can qualify under criteria concerning number of employees, average annual receipts or other criteria as outlined by the United States Small Business Administration (CFR Title 13, Part 121, as amended).

2.11. "Supplemental Environmental Project (SEP)" means an environmentally beneficial project which a facility agrees to undertake in settlement of an enforcement action, but which the facility is not otherwise legally required to perform.

2.11.a. "Environmentally Beneficial" means a SEP must improve, protect, or reduce risks to public health, or the environment at large, and, while in some cases a SEP may provide the alleged violator with certain benefits, there must be no

doubt that the project primarily benefits the public health or the environment.

2.11.b. "In Settlement of an Enforcement Action" means the United States Environmental Protection Agency and/or the department has the opportunity to help shape the scope of the project before it is implemented and the project is not commenced until after the United States Environmental Protection Agency and/or the department has identified a violation (e.g., issued a notice of violation, administrative order, or complaint).

2.11.c. "Not Otherwise Legally Required to Perform" means the project or activity is not required by any federal, state or local law or regulation, and further, SEPs cannot include actions which the facility is likely to be required to perform as injunctive relief as part of an existing settlement or order in another legal action; or, by a state or local requirement.

2.12. "National Environmental Performance Track" means a United States Environmental Protection Agency program that is a public/private partnership recognizing top environmental performance among participating United States facilities of all types, sizes, and complexity, public and private.

§60-8-3. Purpose and Goals.

3.1. The purpose of this rule is to establish an environmental excellence program that promotes, rewards, and encourages superior environmental performance and enhanced public involvement.

3.2. Eligible facilities may participate at one of three levels: Bronze Leaf, Silver Leaf, and Gold Leaf. The level of participation and the incentives granted are based on the facility's environmental management system, environmental performance goals, and public involvement.

3.3. Nothing in this rule authorizes any violation of federal and/or state law, rule, regulation, and/or legislation.

§60-8-4. Eligibility Criteria for Participation.

4.1. Bronze Leaf environmental excellence program applicants must:

4.1.a. Have documentation of a proven environmental performance record;

4.1.b. Develop and implement an environmental management system within one year of acceptance into the program;

4.1.c. Develop and implement one environmental performance goal within one year of acceptance into the program and two additional environmental performance goals within three years of acceptance into the program;

4.1.d. Develop and implement a plan for public participation within one year of acceptance into the program;

4.1.e. Prepare and submit an annual performance report; and

4.1.f. Authorize the department to conduct annual facility visitations.

4.2. Silver Leaf environmental excellence program applicants must:

4.2.a. Have documentation of a proven environmental performance record;

4.2.b. Already have developed and implemented an environmental management system;

4.2.c. Already have developed and implemented two environmental performance goals and commit to develop and implement four additional environmental performance goals, and, a small business has the option to already have developed and implemented one environmental performance goal and commit to develop and implement two additional environmental performance goals;

4.2.d. Already have developed and implemented a plan for public participation;

4.2.e. Already have prepared and published an annual performance report; and

4.2.f. Authorize the department to conduct annual facility visitations.

4.3. Gold Leaf environmental excellence program applicants must:

4.3.a. Have documentation of a proven environmental performance record;

4.3.b. Already have developed and implemented an environmental management system;

4.3.c. Already have developed and implemented two environmental performance goals and commit to develop and implement four additional environmental performance goals, and, a small business has the option to already have developed and implemented one environmental performance goal and commit to develop and implement two additional environmental performance goals, and one additional environmental performance goal that must be a capital improvement project;

4.3.d. Already have developed and implemented a plan for public participation;

4.3.e. Already have prepared and published an annual performance report; and

4.3.f. Authorize the department to conduct annual facility visitations.

4.4. Participation in, and recognition of, federal programs. If the applicant's facility is registered and/or a member of an environmental excellence program implemented by the United States Environmental Protection Agency, such as the National Environmental Performance Track, the applicant automatically qualifies to participate in

the environmental excellence program at the Silver Leaf level unless the secretary determines that the applicant has not met all of the environmental excellence program eligibility criteria for participation at the Silver Leaf level as specified under subsection 4.2.

§60-8-5. Environmental Performance Record.

5.1. All persons, who operate a facility in West Virginia, are eligible to seek entry into the environmental excellence program and/or retain environmental excellence program designation, and are required to demonstrate compliance with all environmental laws by having documentation of a proven environmental performance record. A facility has a proven record of compliance with environmental laws if none of the following criminal, civil, or administrative actions apply to the facility or its employees:

5.1.a. Criminal actions.

5.1.a.1. Corporate criminal conviction or plea for felony violations of environmental laws involving the corporation and/or corporate officer within the past five (5) years preceding the filing of the initial environmental excellence program application;

5.1.a.2. Corporate criminal conviction or plea for misdemeanor violations of environmental laws involving the corporation and/or corporate officer within the past three (3) years preceding the filing of the initial environmental excellence program application;

5.1.a.3. Criminal conviction or plea of employee at the same facility for violations of environmental laws within the past five (5) years preceding the filing of the initial environmental excellence program application;

5.1.a.4. Ongoing criminal investigation and/or prosecution of corporation, corporate officer, and/or employee at the same facility for violations of environmental laws; and

5.1.a.5. Responsibility of a corporation, corporate officer, and/or employee, as determined by a court of appropriate jurisdiction, for an illegal action that caused substantial endangerment to the public health, safety, and/or welfare and/or to the environment.

5.1.b. Civil actions.

5.1.b.1. Assessment by an environmental appeals board or court of appropriate jurisdiction of any civil fine, penalty, and/or supplemental environmental project (SEP) where the total amounts exceeds \$10,000.00 for violations of any environmental law within a three-year period before filing the initial environmental excellence program application; and

5.1.b.2. Responsibility of a corporation, corporate officer, and/or employee, as determined by a court of appropriate jurisdiction, for an illegal action that caused substantial endangerment to the public health, safety, and/or welfare and/or to the environment.

5.1.c. Administrative actions.

5.1.c.1. Administrative settlement, entered into with the department within a three-year period before filing the initial environmental excellence program application, where the total amount of the administrative assessments, fines, penalties, and/or SEP's exceeds \$25,000.00; and

5.1.c.2. Planned, but not yet filed, administrative action at the facility.

5.2. In the case of a change of ownership, the secretary will consider the environmental performance record of the new owner or operators in determining whether the environmental excellence program applicant and/or current member meet the requirements of this rule.

5.3. In the case of a new facility, the secretary will consider the environmental performance record of other facilities owned and/or operated by the same entity, and in such a case, an entity's overall

environmental performance record will be considered in determining the facility's ability to achieve superior environmental performance.

§60-8-6. Environmental Management System.

6.1. Environmental excellence program applicants and environmental excellence program members must demonstrate conformance to environmental management system requirements through:

6.1.a. Registration or certification to an environmental standard, such as ISO 14001 or equivalent, as approved by the secretary; or,

6.1.b. Bronze Leaf environmental excellence program designation that includes a commitment to the development, implementation, and management of an environmental management system, by a date provided by the applicant and approved by the secretary, that must operate in accordance with a one-year environmental management system cycle as evidenced by an environmental management system audit; and, after one year in the environmental excellence program, already have developed, implemented, and managed an environmental management system; or,

6.1.c. Silver Leaf environmental excellence program designation that includes already developed, implemented, and managed environmental management systems, that operate in accordance with a one-year environmental management system cycle as evidenced by an environmental management system audit; or,

6.1.d. Gold Leaf environmental excellence program designation that includes already developed, implemented, and managed environmental management systems, that operate in accordance with a one-year environmental management system cycle as evidenced by an environmental management system audit.

6.2. Environmental excellence program applicants and environmental excellence program members must provide documentation of an

environmental management system, appropriate to the nature, scale, and potential environmental impacts of the facility, that:

6.2.a. Adopts an environmental policy, approved by the responsible official or operate under an adopted corporate environmental policy, that must demonstrate a high level of commitment to environmental management through the establishment of guiding principles, that:

6.2.a.1. Articulates the environmental excellence program member's mission, vision, and core values;

6.2.a.2. Emphasizes continual environmental improvement; and

6.2.a.3. Promotes multi-media pollution prevention through the development, implementation, and management of an effective multi-media pollution prevention program that:

6.2.a.3.A. Adopts an environmental policy that documents the environmental excellence program member's philosophy of multi-media pollution prevention that promotes:

6.2.a.3.A.1. Eliminates or reduces wastes at the source of generation;

6.2.a.3.A.2. Reuses wastes, including purchases of recycled material; and

6.2.a.3.A.3. Promotes environmentally sound, on-site and off-site, recycling.

6.2.a.3.B. Establishes and maintains a facility-specific multi-media pollution prevention program that:

6.2.a.3.B.1. Adopts and posts a multi-media pollution prevention policy, as specified under subparagraph 6.2.a.3.A that is signed by a responsible official;

6.2.a.3.B.2. Conducts periodic

multi-media pollution prevention program assessments that identify opportunities for eliminating wastes at the source, and promotes reuse and recycling;

6.2.a.3.B.3. Establishes multi-media pollution prevention program goals that specify the environmental media and types of pollution to be prevented or reduced, implementation activities, and projected time frames; and

6.2.a.3.B.4. Records and maintains reports to demonstrate progress on pollution prevention technologies.

6.2.a.3.C. Participates, formally, in the environmental excellence program by being a member in good standing in a recognized multi-media pollution prevention program.

6.2.a.4. Acknowledges the importance of and provide for communication with the public as specified under subdivision 6.2.j and section 8;

6.2.a.5. Emphasizes environmental compliance, with relevant environmental laws, legislation, and regulations, that:

6.2.a.5.A. Demonstrates compliance with all applicable environmental laws, legislation, regulations and other environmental requirements that:

6.2.a.5.A.1. Provides to the department, as part of the environmental excellence program application, a statement signed by a responsible official that he or she has reviewed the environmental excellence program compliance record and that, to the best of his or her knowledge, the environmental excellence program member is in compliance with all applicable environmental requirements and has no outstanding unresolved past or current violation that has not been corrected or, in the case of renewal, resolved by the environmental excellence program member's adherence to a binding compliance schedule to abate the violation;

6.2.a.5.A.2. Addresses any violation cited in a notice of violation by resolving the violation, making a showing to the secretary that the violation did not occur, or in the case of a renewal, being in compliance with a binding schedule, agreed to by the secretary, to correct any violation specified in a notice of violation issued by the secretary; and

6.2.a.5.A.3. Provides documentation that the facility has not been found by the secretary to be in violation of environmental requirements established by a local unit of government as specified under section 5.

6.2.a.5.B. Provides a binding and significant or measurable reduction in wastes below what would otherwise be required by applicable environmental requirements or include a significant or measurable reduction of pollutants if the environmental excellence program member does not meet the requirements as specified under subparagraph 6.2.a.5.A, then the secretary will consider an application for membership into the environmental excellence program; and

6.2.a.5.C. Provides documentation of a proven environmental performance record in the case of a change of ownership and control whereas the secretary will consider the environmental performance record of the new owner or owners in determining whether the requirements of this rule have been met and whether the secretary has approved membership into the environmental excellence program.

6.2.a.6. Recognizes that every individual at the facility can contribute to continual environmental performance and continual environmental improvement.

6.2.b. Establishes and maintains environmental management programs and procedures that:

6.2.b.1. Identifies the environmental aspects and environmental impacts of the

environmental excellence program member's activities, products, and services over which the environmental excellence program member can be expected to have an influence to determine the activities, products, or services that have or can have significant impacts on the environment, and ensure that the impacts and opportunities for continual environmental improvement are considered in setting the environmental excellence program member's environmental objectives and environmental targets; and

6.2.b.2. Develops and implements environmental objectives, environmental targets, and environmental management programs within each organizational level of the environmental excellence program member's organizational hierarchy.

6.2.c. Establishes a procedure to provide for a regular environmental management system audit that assures that there is an effective mechanism in place to promptly and adequately respond to and address any noncompliance with applicable environmental laws and any nonconformance with environmental management system requirements that are found;

6.2.d. Identifies specific organizational operations and activities, products, and services that have significant environmental impact or the potential for significant environmental impact, and have procedures in place that:

6.2.d.1. Monitors and measures the operations and activities, products, and services;

6.2.d.2. Assures that the operations and activities, products, and services remain within acceptable parameters;

6.2.d.3. Includes provisions to implement prompt correction if a deviation occurs; and

6.2.d.4. Provides for systematic review of records and reports on environmentally related actions relative to the operations and activities,

products, and services.

6.2.e. Establishes necessary reporting and record keeping that documents the environmental status of all operations and activities, products, and services;

6.2.f. Establishes and maintains procedures to identify and track the environmental training needs of all personnel who have responsibility or authority over activities, products, and services that have significant environmental impact or the potential for significant environmental impact;

6.2.g. Establishes and maintains procedures to respond to and report, as appropriate, accidents, malfunctions, spills, upsets, and other emergency situations and to mitigate any associated environmental impacts, and provides for a review of the procedures after the occurrence of an accident or emergency;

6.2.h. Defines the authority, responsibility, and methodology for an environmental management system audit for correcting and preventing nonconformance with the procedures set forth in the environmental management system;

6.2.i. Develops and maintains procedures for internal communication of the environmental management system and environmental issues between personnel across all functional and organizational levels; and

6.2.j. Establishes and maintains an effective public communication process and procedures for communicating information on environmental issues, significant environmental impacts, and the environmental management system with the public, including the local community and environmental interest groups that facilitate and encourage public understanding and dialogue on environmental issues.

§60-8-7. Environmental Performance Goals.

7.1. The applicant must propose environmental performance goals that it intends to implement and

achieve for the achievement of superior environmental performance. Environmental performance goals may be achieved through the implementation of environmental management programs, capital improvement projects, or other discernable programs.

7.2. The applicant must describe the program or project that it intends to implement to achieve superior environmental performance.

7.3. The applicant must quantify the environmental performance goals that the proposed program or project must achieve in terms of numerical standards or percent reductions.

7.4. The proposal must include objective standards by which the environmental performance goal must be monitored, measured, and evaluated with respect to the environmental performance baseline;

§60-8-8. Public Participation.

8.1. Environmental excellence program applicants and environmental excellence program members must demonstrate public participation through the development, implementation, and management of a public participation plan to ensure that the environmental performance goals are understood and supported.

8.2. Environmental excellence program applicants and environmental excellence program members must develop a public participation plan that:

8.2.a. Identifies and assesses issues and concerns of the public that are affected by an environmental management program, capital improvement project, other discernable program, issue, or long-term plan;

8.2.b. Defines objectives of environmental excellence program member involvement effort that broadly addresses public concerns as well as planning and environmental management program, capital improvement project, or other discernable

program development goals, where the objectives must guide the outreach activities and can be established as part of the initial phase of public participation activities and usually do not change over the course of the effort;

8.2.c. Identifies pertinent public participation activities; including development, implementation, and management of a community advisory panel; that considers the target audience, intended message, and any environmental excellence program member budget constraints;

8.2.d. Evaluates environmental excellence program member efforts based on achievement of environmental excellence program member objectives with well designed milestones during the public participation process, and understands that issues and concerns change over time and that the environmental excellence program member public participation plan should reflect those changes; and

8.2.e. Distributes annual performance report to the public on an annual basis as specified under section 14.6.e.

§60-8-9. Incentives

9.1. The department will grant recognition and regulatory incentives that are commensurate with the quantity and quality of environmental performance goals selected by the member. Bronze Leaf members must only be entitled to recognition incentives. Silver and Gold Leaf members are entitled to recognition and regulatory incentives.

9.2. Recognition Incentives.

9.2.a. The department will issue a numbered certificate of recognition to each participant in the program that specifies the level of achievement, i.e. Bronze, Silver, or Gold Leaf, and a unique facility identification number;

9.2.b. The department will identify each member on an internet site maintained by the department;

9.2.c. The department will annually provide notice of the participation of each member in the program to newspapers in the area in which each member operates; and

9.2.d. Members may use an environmental excellence program logo selected by the department on written materials produced by the member.

9.3. Regulatory and Administrative Incentives.

9.3.a. Silver and Gold Leaf members must be entitled to regulatory and administrative incentives that are commensurate with the degree of superior environmental performance achieved by the participating member.

9.3.a.1. General Incentives.

9.3.a.1.A. Low priority for routine inspections. The department will conduct any inspections of the member's facility at the lowest frequency permitted under law, except that the department may conduct an inspection whenever it has reason to believe that a participant is out of compliance with the environmental performance agreement or any environmental law;

9.3.a.1.B. Single point of contact with department for all permitting actions. The department will assign an employee to be the primary interface with the member to provide technical support and guidance on permitting actions and permitting activities;

9.3.a.1.C. Credit, dollar-for-dollar, for environmental excellence program triennial renewal fee toward permit fees;

9.3.a.1.D. A network established to promote the environmental excellence program and its members to recognize the accomplishments of environmental excellence program members and to provide networking opportunities with department officials and other members; and

9.3.a.1.E. Letter in good standing provided by the department to environmental

excellence program member in order to obtain financial support from a financial investor that provides incentives to firms that promote environmental and social performance.

9.3.a.2. Air Incentives.

9.3.a.2.A. Flexible permits. The department will work with members to design flexible permits that are designed to reduce permitting costs and uncertainty and allow for planned process changes for operating flexibility; and

9.3.a.2.B. Reduced reporting frequency and simplified reporting requirements for facilities governed by Maximum Available Control Technology (MACT). Facilities subject to MACT reporting requirements may be entitled to the reduced and simplified reporting provisions for National Environmental Performance Track members promulgated by the United States Environmental Protection Agency, 40 CFR §63.10 and §63.16.

9.3.a.3. Water Incentives.

9.3.a.3.A. Waiver of permit modification fees as specified under W. Va. Code of State Rules §47-26-6; and

9.3.a.3.B. Reduced frequency for filing discharge monitoring reports (DMR) with the department. Participants may be entitled to file DMRs on a quarterly basis. Other required documents are to be kept on file at the facility and made available upon request.

9.3.a.4. Waste Incentives.

9.3.a.4.A. Reduced permitting requirements for generators of hazardous wastes. Facilities that generate hazardous wastes may accumulate hazardous wastes up to 180 days, and in certain cases 270 days, without a Resource Conservation and Recovery Act (RCRA) permit or interim status provided the facility follows the Performance Track facility extended time

requirements promulgated by the United States Environmental Protection Agency, 40 CFR §262.34.

§60-8-10. Procedures for Application

10.1. To participate in the environmental excellence program, the facility must submit an environmental excellence program application on a form provided by the department that includes information pertaining to the facility that demonstrates compliance with and conformance to the eligibility requirements as specified under section 4, that includes:

10.1.a. Identification and contact information regarding the applicant facility; parent company; point-of-contact; street address; mailing address (if different from facility address); physical location and geographic boundary of the facility; city; state; zip code; phone number; facsimile number; electronic mail address; website address; environmental excellence program level applying for, whether Bronze Leaf, Silver Leaf, or Gold Leaf; and desired incentives;

10.1.b. Background and an identification of the environmental requirements that demonstrate the major federal, state, tribal, and/or local environmental laws that are applicable;

10.1.c. Environmental performance record that demonstrates compliance with all environmental laws as evidenced by a signature by a responsible official and conformance to section 5;

10.1.d. Environmental management system that demonstrates conformance with the environmental excellence program and environmental management system audit requirements as specified under section 6;

10.1.e. A description of the environmental performance goals and past achievements and future commitments that demonstrate superior environmental performance as specified under section 7;

10.1.f. Public participation to ensure that the environmental excellence program is broadly supported, its environmental implications are fully understood, and provides for ongoing engagement of the public as specified under section 8;

10.1.g. A Summary of public comments received by the applicant and the department during the public review period and the applicant's response to the comments received; and

10.1.h. Environmental excellence program application certification, signed by a responsible official, that demonstrates compliance with and conformance to the terms and conditions for eligibility criteria for participation, procedures for application, and incentives in the environmental excellence program as specified under this section and sections 4 and 9.

10.2. The department will distribute environmental excellence program requests for applications to potential environmental excellence program members and the public on November 1 and May 1 of each year.

10.3. Due dates for submission of environmental excellence program applications to the department are February 1 through April 30 and August 1 through October 31 of each year.

§60-8-11. Notice.

11.1. Before submitting an application to the department, the applicant must provide for a public review of the application and related documentation for a period of not less than 30 days. The applicant must notify the department of its intention to submit an application for environmental excellence program designation not less than 30 days before the end of the public review period. Public review will, at a minimum, include posting a notice in a local newspaper of the applicant's intent to file the environmental excellence program application and of the availability of the application and related documentation for review. The application and related documentation must be made available at a local public library or other public building for not

less than 30 days. The public notice must allow for comments to be made to the applicant or the department.

§60-8-12. Action on Application.

12.1. The department will complete its initial review of the environmental excellence program application within 14 days of receipt of the application that must include a cursory review of the application inventorying the contents and issuing a letter to the applicant detailing any shortcomings or acknowledging its completeness.

12.2. The department will publish, in the department calendar, a notice of receipt of the application and related documentation and of the availability of the application and related documentation for public review and comment not less than 30 days before the department makes a decision on the application.

12.3. Within 60 days of receipt of a complete application, unless an extension of time is requested by the applicant, the department will consider public comments, determine whether the criteria of these rules have been met, and notify the applicant, in writing, whether the applicant is eligible to participate in the environmental excellence program.

12.4. The department will provide public notice of its decision regarding the eligibility of the applicant to participate in the environmental excellence program within 30 days after rendering its decision concerning eligibility.

12.5. In cases where the department determines that the applicant is eligible to participate in the program, the department may hold an informational meeting on the applicant's proposal.

12.6. Within 30 days after the public notice specified under subsection 12.4, interested persons may request that the department grant them authorization to participate under the negotiations as specified under section 13. The secretary will determine whether a person who makes a request

under this section must participate in the negotiations based on whether the person has demonstrated sufficient interest in the issues raised by the application for eligibility to warrant that participation.

12.7. Any person adversely affected by the secretary's eligibility determination may appeal to the environmental quality board, pursuant to the provisions of article one [§22B-1-1 et seq.], chapter twenty-two-b of the West Virginia Code.

12.8. The department will determine whether the environmental excellence program applicant meets the requirements of this rule and will inform the environmental excellence program applicant of acceptance into the environmental excellence program at the Bronze Leaf or Silver Leaf or Gold Leaf designation by January 1 of each year.

§60-8-13. Environmental Performance Agreement.

13.1. Upon the secretary's determination that the applicant is eligible to participate in the environmental excellence program, the department will begin negotiations concerning an environmental performance agreement with the environmental excellence program applicant and any person or persons to whom the department granted permission as specified under subsection 12.6.

13.2. The environmental performance agreement will include information pertaining to environmental performance record, environmental management system, environmental performance goals, public participation, incentives, annual performance report, annual facility visitations, and application fees and triennial renewal fees as specified under section 18.

13.3. The department will conclude negotiations within 12 months of beginning negotiations unless the applicant and the department agree to an extension.

13.4. If negotiations as specified under

subsection 13.1 result in a draft environmental performance agreement, the department will provide public notice about the draft environmental performance agreement in the geographic area where the facility is located.

13.5. After providing public notice of a draft environmental performance agreement, the department will hold a public meeting in the geographic area in which the subject facility or activity, product, and service is located or performed to further discuss the draft environmental performance agreement.

13.6. The term of the environmental performance agreement will be three years.

§60-8-14. Annual Performance Report.

14.1. Each member facility must complete and submit an annual performance report that demonstrates to the department and the public the eligibility criteria for participation, environmental performance record, environmental management system, environmental performance goals, public participation, incentives, annual facility visitations, and maintenance of the environmental performance agreement. For environmental excellence program Silver Leaf members that already participate in the United States Environmental Protection Agency National Environmental Performance Track, submission of the National Environmental Performance Track annual performance report may be accepted in lieu of this requirement as determined by the secretary.

14.2. Annual performance reports include:

14.2.a. Self-certification of the facility's environmental excellence program that demonstrates compliance with and conformance to environmental excellence program membership eligibility criteria for participation as specified under section 4;

14.2.b. Summary of the facility's environmental performance record as specified under section 5;

14.2.c. Summary of the facility's environmental management system assessment activities and progress towards meeting environmental management system requirements including environmental objectives, environmental targets, and environmental management programs, including brief descriptions of audits conducted and improvements made, as specified under section 6;

14.2.d. Information on progress made in meeting the facility's environmental performance goals as specified under section 7;

14.2.e. Summary of the facility's public participation plan and associated activities as specified under section 8;

14.2.f. Summary of the facility's incentives as specified under section 9; and

14.2.g. Summary of the facility's annual facility visitation as specified under section 15.

14.3. Due date for the annual performance report is April 1 of each year, beginning with April 1st following the year in which an environmental excellence program applicant is accepted into the program, and annually thereafter, and therefore the annual performance report will be based on a calendar year.

14.4. Confidential business information should not be included in the annual performance report as the department will make the report available to the public.

14.5. Review of the annual performance report is performed by the department to identify significant problems, and if found, the annual performance report will be revised and reviewed by the department, and if accepted, will make the report available to the public.

14.6. Distribution of the annual performance report to the public is required by the environmental excellence program member on an annual basis and the department expects each facility to select and

document a means consistent with situations and the public participation plan as specified under section 8.

14.7. Supporting documentation must be maintained on-site to enable the environmental excellence program member to prepare the annual performance report and to make the report readily accessible to the department upon request.

§60-8-15. Annual Facility Visitations.

15.1. The department will conduct annual facility visitations with environmental excellence program members to evaluate the effectiveness of the environmental excellence program and compliance with the environmental performance agreement.

§60-8-16. Procedures for Retention, Renewal, or Termination of Environmental Excellence Program Designation.

16.1. Retention of environmental excellence program designation requires that an environmental excellence program member, at least 30 days before the anniversary date of the current environmental excellence program designation, submit a renewal request, supporting information, and a certification that the environmental excellence program member meets the requirements as specified under sections 4, 5, 6, 7, 8, 9, 14, and 15.

16.2. The supporting information as specified under section 14 includes an annual performance report that specifically describes the status of the activities, products, and services and details the actions undertaken to maintain and implement the environmental management system as specified under section 6.

16.3. A renewal request must include a statement by the responsible official that demonstrates that the environmental excellence program member is in compliance with and conforms to all applicable environmental requirements and has no outstanding unresolved violations, or is in compliance with and conforms to

a binding schedule to correct and prevent any outstanding violations.

16.4. The secretary will terminate the environmental excellence program designation if, after the effective date of the current environmental excellence program designation, the secretary determines that the environmental excellence program member:

16.4.a. Failed to meet the requirements of the environmental performance record as specified under section 5 or:

16.4.a.1. Failed to promptly and adequately correct and prevent a violation of environmental requirements as specified under section 5.

16.4.b. Failed to meet the requirements of the environmental management system as specified under section 6;

16.4.c. Failed to meet the requirements of the environmental performance goals as specified under section 7;

16.4.d. Failed to meet the requirements of public participation as specified under section 8;

16.4.e. Failed to meet the requirements of the incentives as specified under section 9;

16.4.f. Significantly or repeatedly abused its designation as an environmental excellence program member, by claiming or implying environmental excellence program designation for facilities and/or persons other than those identified in the application as specified under section 10;

16.4.g. Failed to meet the requirements of the environmental performance agreement as specified under section 13;

16.4.h. Failed to meet the requirements of the annual performance report as specified under section 14; and

16.4.i. Failed to meet the requirements of annual facility visitations as specified under section 15.

16.5. The secretary will advise a facility of his or her intent to terminate the environmental excellence program designation not less than 30-days before terminating the environmental excellence program membership.

16.6. There is no appeal of the secretary's environmental excellence program membership termination decision.

16.7. A person operating a facility in West Virginia, that was a former environmental excellence program member, may reapply for environmental excellence program designation at any time as long as the environmental excellence program applicant meets the requirements of this rule.

§60-8-17. Impact on Incentives from Termination of Environmental Excellence Program Designation.

17.1. Upon the secretary's termination of an environmental excellence program designation, all incentives, provided to the former environmental excellence program member and as specified under section 9, will be terminated and/or restricted as provided in this section and as determined by the secretary.

§60-8-18. Application Fees and Triennial Renewal Fees.

18.1. An application fee of one thousand dollars (\$1,000.00) must be paid by the environmental excellence program applicant and is to be submitted at the time the application is filed in the form of a check payable to the Department of Environmental Protection for deposit in the Environmental Excellence Program Administrative Fund for environmental excellence program administration, provided that an applicant which qualifies as a "small business" must pay an application fee of three hundred dollars (\$300.00), and provided

further that the application fee will be waived for all public entities seeking membership in the environmental excellence program.

18.2. A triennial renewal fee of five hundred dollars (\$500.00) must be paid by the environmental excellence program member and is to be submitted at the time the renewal is filed in the form of a check payable to the West Virginia Department of Environmental Protection for deposit in the Environmental Excellence Program Administrative Fund for environmental excellence program administration, provided that an environmental excellence program member which qualifies as a "small business" must pay a triennial renewal fee of one hundred and fifty dollars (\$150.00), and provided further that the triennial renewal fee will be waived for all members that are public entities.

PART 52—[AMENDED]

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

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

Subpart F—California

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

§ 52.220 Identification of plan.

* * * * *

(c) * * *

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

(i) Incorporation by reference.

(A) Kern County Air Pollution Control District.

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

contingency measures (Table 6-1); and Appendix B—"Emission Inventories."

PART 81—[AMENDED]

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

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

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

§ 81.305 California.

* * * * *

CALIFORNIA—OZONE

[1-Hour Standard]

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

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

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[FR Doc. 04-9036 Filed 4-21-04; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 63 and 262**

[OA-2004-0001; FRL-7650-6]

RIN 2090-AA13

National Environmental Performance Track Program

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final rule.

SUMMARY: EPA is issuing regulations applicable only to members of EPA's National Environmental Performance Track Program (Performance Track, or the Program). Today's action includes a revision to the Resource Conservation and Recovery Act (RCRA) regulations to allow hazardous waste generators who are members of Performance Track up to 180 days, and in certain cases 270 days, to accumulate their hazardous waste without a RCRA permit or interim status; and simplified reporting requirements for facilities that are members of Performance Track and governed by Maximum Available

Control Technology (MACT) provisions of the Clean Air Act (CAA). Today's final rule reflects EPA's response to comments filed by the public, interested stakeholders and associations, the Performance Track Participants Association, and Performance Track members. These provisions are intended to serve as incentives for facility membership in the National Environmental Performance Track Program while ensuring the current level of environmental protection provided by the relevant RCRA and MACT provisions.

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

ADDRESSES: EPA has established a docket for this action under Docket ID No. OA-2004-0001. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Office of Environmental Information Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Office of Environmental Information Docket is (202) 566-1752. In addition to being available in the docket, an electronic copy of this final rule will also be available on the Worldwide Web through the National Environmental Performance Track (Performance Track)

Web site at <http://www.epa.gov/performance-track>.

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Categories and entities potentially regulated by this action include all

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

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

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

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

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

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

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

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

I. General Information

A. Does this action apply to me?

II. Overview

A. What is the history of this action?

B. How have stakeholders been involved?

C. What incentives for members are envisioned?

D. What is EPA's rationale for this rule?

1. What environmental benefits will the Performance Track Program bring to society?

2. How will these incentives maximize the benefits of the Performance Track Program?

3. Will these incentives undercut existing environmental protections?

4. How does the Performance Track Program design limit membership to a uniquely appropriate set of facilities?

III. Final Rulemaking Changes

A. Maximum Achievable Control Technology (MACT)

1. Definition of Pollution Prevention

2. Reduced frequency of required MACT reporting for all eligible Performance Track facilities

3. Reporting reductions for Performance Track facilities that achieve MACT or better emission levels through pollution prevention methods such as process changes

B. 180-Day accumulation time for Performance Track hazardous waste generators

1. Background

2. What are the current requirements for large quantity generator accumulation?

3. What is in today's final rule?

4. How will today's final rule affect applicability of RCRA rules in authorized States?

IV. Summary of Environmental, Energy and Economic Impacts

A. What are the cost and economic impacts?

B. What are the health, environmental, and energy impacts?

V. Effective Date for Today's Requirements

VI. Administrative Requirements

A. Executive Order 12866, Regulatory Planning and Review

B. Paperwork Reduction Act

C. Regulatory Flexibility Act

D. Unfunded Mandates Reform Act

E. Executive Order 13132: Federalism

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

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

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

I. National Technology Transfer Advancement Act

J. Congressional Review Act

VII. Statutory Authority

VIII. Judicial Review

II. Overview

A. What Is the History of This Action?

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

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

Performance Track is a voluntary program. Decisions to accept and remove facilities are wholly discretionary to EPA, and applicants or potential applicants have no legal right to challenge EPA's decision. EPA has held seven Performance Track application periods—between August 2000 and October 2000; between February 2001 and April 2001; between August 2001 and October 2001; between February 2002 and April 2002; between August 2002 and October 2002; between

February 2003 and April 2003; and between August 2003 and October 2003. In the future, EPA plans to continue holding two application periods each year. There have been 508 facility applicants to Performance Track since its inception. A total of 409 facilities have been accepted into the Program as members. There are currently 344 members in the Program. Generally, facilities that are no longer members (65) have either closed, experienced a change in ownership, or have been dropped from membership in Performance Track for failing to continue to meet program standards.

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

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

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

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

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

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

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

B. How Have Stakeholders Been Involved?

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

This rule grew out of the stakeholders' collective interest in promoting incentives for participating facilities. Since the inception of the Program, EPA has held four meetings with state regulators: May 2000 in Denver, February 2001 in Chicago, November 2001 in Charleston, and January 2003 in Denver. At each of these meetings,

break-out sessions were held to solicit feedback from state personnel on potential incentives to be offered to Performance Track members.

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

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

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

EPA is also working with 23 trade organizations through the Performance Track network to further enhance participation in the Program. Performance Track Network Partners join in a partnership to educate top environmental performers about the value of participating in Performance Track. This partnership increases information available to top environmental performers and provides greater opportunities to them. Network Partners include the following organizations: Academy of Certified Hazardous Waste Managers, American Chemistry Council, American Furniture Manufacturers Association, American Textile Manufacturers Institute, Associated General Contractors (AGC) of America, the Auditing Roundtable, Cement Kiln Recycling Coalition, Global Environment & Technology Foundation Public Entity EMS Resource (PEER) Center, Greening of Industry Network (GIN), International Carwash Association, National Association of Chemical Distributors, National Paint and Coatings Association, National Defense Industrial Association, National Pollution Prevention Roundtable,

National Ready Mixed Concrete Association, National Stone, Sand and Gravel Association, NORA (an Association of Responsible Recyclers), North American Die Casting Association, Screenprinting and Graphic Imaging Association International, Steel Manufacturers Association (SMA), Synthetic Organic Chemical Manufacturers Association (SOCMA), Voluntary Protection Programs Participants' Association, and Wildlife Habitat Council.

C. What Incentives for Members Are Envisioned?

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

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

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

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

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

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

- Reducing the frequency of reports required under the CAA, and in some circumstances submitting an annual certification in lieu of an annual report. In this incentive, first EPA reduces the frequency of required MACT reporting for all eligible Performance Track facilities to an interval that is twice the length of the regular reporting period. This incentive does not apply to major air sources, but it does apply to area air sources if they are not required to hold CAA Title V permits. The second part of this air incentive provides Performance Track facilities with three options to submit an annual certification that all required monitoring and recordkeeping requirements have been met in lieu of the periodic report. For major air sources and area sources required to hold CAA Title V permits however, reports must still be submitted at least semi-annually in order to meet CAA Title V statutory requirements.

- Allowing large quantity hazardous waste generators who are members of the Performance Track up to 180 days (and 270 days if the waste must be transported 200 miles or more) to accumulate hazardous waste without a RCRA permit or interim status, provided that these generators meet certain

conditions. This incentive will result in fewer loads of hazardous waste being transported.

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

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

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

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

EPA believes that facilities who demonstrate top environmental performance through membership in the Performance Track Program should be provided with incentives, recognition and rewards for such behavior. By providing regulatory incentives only

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

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

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

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

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

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

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

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

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

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

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

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

Criminal Activity

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

- Ongoing criminal investigation/prosecution of corporation, corporate officer, or employee at the same facility for violations of environmental law.

Civil Activity

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

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

The EMS provisions in Performance Track are designed to ensure that member facilities will continue not only to meet their regulatory obligations, but also to perform better than required by regulation. The Performance Track criterion specifies that a qualifying facility must have an EMS that includes detailed elements in the following categories: Environmental policy (including compliance with both legal requirements and voluntary commitments), planning, implementation and operation, checking and corrective action, and management review. Additionally, qualifying EMSs must have been in full operation for at

least one review cycle (generally one year) and must have been audited. The EMS requirements are described in more detail in EPA's National Environmental Performance Track Program description at www.epa.gov/PerformanceTrack.

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

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

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

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

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

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

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

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

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

requirements. The public will be able to judge the nature and magnitude of these environmental benefits by examining the annual reports that Performance Track facilities are required to prepare and make public.

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

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

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

3. Will These Incentives Undercut Existing Environmental Protections?

The incentives in today's rule do not undercut existing environmental protections. EPA believes the 180-day accumulation period for hazardous waste and the reporting changes for MACT standards will have no direct deleterious effects on the environmental performance of Performance Track facilities. EPA and other regulatory bodies will receive compliance information from Performance Track facilities less frequently; however, all recordkeeping requirements remain in

effect. As a safeguard, EPA and the other governmental authorities retain their ability to take enforcement actions against any facility that fails to comply with permits or other obligations. The risk of a public removal from this Program for failure to comply adds an extra incentive to comply with Program requirements. EPA believes that this, and the fact that facilities may be perceived by the public and by governmental offices as better environmental performers than their competitors, reduces the risk that any environmental damages will result from this program or the regulatory changes EPA is adopting.

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

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

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

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

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

III. Final Rulemaking Changes

A. Maximum Achievable Control Technology (MACT)

1. Definition of Pollution Prevention

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

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

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

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

Subsequently, EPA changed its approach in a proposed rule on May 15, 2003. In that action, EPA proposed the statutory definition of P2 verbatim (68

FR 26249). This change stemmed from EPA's conclusion that the statutory definition of P2 was more appropriate for this rule than the Policy Statement definition.

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

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

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

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

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

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

For facility members in the Performance Track, EPA is reducing reporting frequency while assuring the continued availability of information

required for assessing compliance with MACT standards.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Background

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

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

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

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

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

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

3. What Is in Today's Final Rule?

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

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

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

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

for each new waste stream. EPA acknowledges this concern, clarifies that notifications are generally one-time events, and estimates that this burden will be of minimal impact to member facilities.

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

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

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

Section 3001(d)(6) of RCRA allows small quantity generators to accumulate hazardous waste on-site without a

permit or interim status for up to 270 days if the generator must transport the waste (or offer the waste for transport) more than 200 miles from the generating facility. While EPA does not necessarily consider the 200 mile exception under RCRA 3001(d)(6) for small quantity generators as an outer boundary on what would be permissible under today's rule, it does suggest that Congress was not comfortable with providing more flexibility for small quantity generators. Accordingly, EPA believes that the 200 mile exception is a reasonable boundary to maintain for large and small quantity generators under the Performance Track program. At least one commenter has stated that a 200 mile exception would encourage generators under the Performance Track program to utilize the closest treatment, storage or disposal facility, rather than the best facility. In response, EPA would like to note that any facility receiving hazardous waste from a generator under the Performance Track program must be a federally permitted or interim status facility and therefore should be able to handle the waste responsibly.

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

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

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

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

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

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

standard requirement for all LQGs of hazardous waste.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For today's Performance Track rule, EPA encourages States to expeditiously adopt Performance Track regulations and begin program implementation. To revise the federally-authorized RCRA

program, States need to seek formal authorization for the Performance Track rule after program implementation. EPA encourages States to begin implementing this incentive as soon as it is allowable under State law, while the RCRA authorization process proceeds.³

IV. Summary of Environmental, Energy, and Economic Impacts

A. What Are the Cost and Economic Impacts?

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

EPA has completed seven enrollment periods for the Performance Track Program. There are currently a total of 344⁴ facilities in the Program (mostly industrial facilities, but also a number of facilities in the service sector, several federal facilities and a POTW). The economic estimates for today's rule are based on the most recent data that EPA has obtained, and reflects Program membership through round six. EPA intends to solicit and to accept additional facilities into the Program generally, so therefore it is not possible to project cost and burden hour reductions with complete accuracy. Another factor that hinders such projections is that, just as membership in Performance Track is voluntary, it is up to the facilities themselves to decide which incentives apply to them and of which to avail themselves.

Maximum Achievable Control Technology: A total of 309⁵ facilities have been accepted into the Performance Track program during the first six open enrollment periods. Of those facilities, EPA estimates that 93 facilities are likely to be eligible for the MACT incentive in today's rule. Performance Track facilities likely to be eligible for the MACT incentive include those members permitted as minor or synthetic minor air sources and in a NAICS sector likely to be subject to a MACT requirement. An analysis of

EPA's IDEA database yielded 106 potential minor or synthetic minor air sources (See <http://www.epa.gov/compliance/planning/data/multimedia/idea/index.html>). EPA then screened out 13 Performance Track members in sectors unlikely to be subject to MACT requirements (*i.e.*, nine members in the Public Facilities and Institutions sector; two members in the Mining and Construction sector; and two members in the Wholesale Retail and Shipping sector). This analysis resulted in 93 eligible facilities in the current membership. EPA estimates the annual increase in Performance Track members likely to be eligible for the MACT incentive by applying the percentage eligible among the current membership (*i.e.*, 30 percent) to subsequent years.

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

Total Estimated Impact of Final Rule on Costs and Labor Hours

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

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

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

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

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

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

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

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

V. Effective Date for Today's Requirements

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

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

VI. Administrative Requirements

A. Executive Order 12866, Regulatory Planning and Review

The estimated cost and hour burden for respondents for today's rule in total is negative 7,954 hours over the three

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

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

B. Paperwork Reduction Act

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

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

The estimated cost and hour burden for respondents for today's rule in total is negative 7,954 hours over the three years of the Information Collection Request equating to a cost savings of \$706,846. The estimated cost and hour burden for respondents for today's rule, disaggregated, is negative 16.6 hours per facility per year, that is, a reduction of 16.6 hours from current requirements. The costs are negative \$1,350.80 per facility per year, that is, cost reductions/savings of \$1350.80. The frequency of the responses are a combination of one-time and annual, that is, there are different types of responses required. For instance, if a Performance Track facility seeks to extend its storage time under today's provisions, a one time notification is required. In addition, the facility must provide certain information on an annual basis to the authorized State. The estimated mean number of annual respondents between 2004 and 2006 is 277. The Paperwork

Reduction Act requires that the Agency report to the Office of Management and Budget only positive burden hours for Industry and States via its "83–I" reporting form. Therefore, the total burden hours reported to OMB is 8950. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

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

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

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

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

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 04-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written Statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written Statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative

was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Participation by facilities in the Performance Track is voluntary, and so is participation by State or local government agencies. There are no significant or unique effects on State, local, or Tribal governments, however there may be some minor effects incurred by these entities. EPA projects these costs to be very low. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. Nevertheless, as discussed in section I B and elsewhere, EPA did engage these stakeholders in the process of developing the National Environmental Performance Track Program.

E. Executive Order 13132: Federalism

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

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule provides incentives that States can adopt to provide benefits to their State member facilities in the National

Performance Track Program. As a voluntary program, Performance Track allows States the option to adopt the provisions in this rule. Thus, Executive Order 13132 does not apply to this rule.

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

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

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

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

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

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

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

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

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

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs all Federal agencies to use voluntary consensus standards instead of government-unique standards in their regulatory and procurement activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (such as materials specifications, test methods, sampling procedures, business

practices) that are developed or adopted by one or more voluntary consensus standards bodies. Examples of organizations generally regarded as voluntary consensus standards bodies include the American Society for Testing and Materials (ASTM), the National Fire Protection Association (NFPA), and the Society of Automotive Engineers (SAE). The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when an Agency does not use available and applicable voluntary consensus standards.

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

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This final rule is effective on April 22, 2004.

VII. Statutory Authority

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

VIII. Judicial Review

Under section 307(b)(1) of the Clean Air Act, judicial review of the MACT portion of this final rule is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by June 21, 2004. Any such judicial review is

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

List of Subjects

40 CFR Part 63

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

40 CFR Part 262

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

Dated: April 14, 2004.

Michael O. Leavitt,
Administrator.

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

PART 63—[AMENDED]

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

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

Subpart A—[Amended]

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

§ 63.2 Definitions.

* * * * *

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

- (1) *Source reduction* is any practice that:
 - (i) Reduces the amount of any hazardous substance, pollutant, or

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

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

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

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

* * * * *

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

* * * * *

■ 3. Section 63.10 is amended by:

- a. Revising paragraph (d)(1); and
- b. Adding paragraph (e)(3)(i)(D).

The revision and addition read as follows:

§ 63.10 Recordkeeping and reporting requirements.

* * * * *

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

* * * * *

- (e) * * *
- (3) * * *
- (i) * * *

(D) The affected source is complying with the Performance Track Provisions

of § 63.16, which allows less frequent reporting.

* * * * *

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

§ 63.16 Performance Track Provisions.

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

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

- (1) Reduced its total HAP emissions to less than 25 tons per year;
- (2) Reduced its emissions of each individual HAP to less than 10 tons per year; and
- (3) Reduced emissions of all HAPs covered by each MACT standard to at least the level required for full compliance with the applicable emission standard.

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

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

(2) If the emission standard to which the affected source is subject is based on add-on control technology, and the affected source complies by using pollution prevention, then all required

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

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

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

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

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

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

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

§ 262.34 Accumulation time.

* * * * *

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

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

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

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

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

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

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

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

(3) The waste is managed in:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) If the generator intends to accumulate hazardous wastes on-site for up to 270 days, a certification that a facility that is permitted (or operating

under interim status) under part 270 of this chapter to receive these wastes is not available within 200 miles of the generating facility; and

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

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

[FR Doc. 04-9042 Filed 4-21-04; 8:45 am]

BILLING CODE 5560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SW-FRL-7651-4]

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

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

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

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

COLORADO.—PM-10—Continued

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

* * * * *

[FR Doc. 04-23840 Filed 10-22-04; 8:45 am]
BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 262

[OA-2004-0004; FRL-7830-1]

RIN 2090-AA13

National Environmental Performance Track Program; Corrections

AGENCY: Environmental Protection Agency (EPA)

ACTION: Direct final rule; corrections.

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

The regulatory proposal of August 13, 2002 was published with a description in the preamble that was inconsistent with the proposed regulatory language.

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

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

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

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

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

DATES: This direct final rule is effective December 27, 2004 unless EPA receives adverse comments by November 24, 2004. If the Agency receives adverse

comments it will withdraw this direct final rule by publishing a timely withdrawal in the *Federal Register*.

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

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- Agency Web site: <http://www.epa.gov/edocket>. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

- Mail: Mr. Robert D. Sachs, Environmental Protection Agency, Mail code 1807T, 1200 Pennsylvania Avenue, Washington, DC 20460 telephone number 202-566-2884; fax number 202-566-0966; e-mail address: sachs.robert@epa.gov.

- Hand Delivery: Office of Environmental Information Docket, Environmental Protection Agency, EPA West Building, Room B102, 1301 Constitution Ave., NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. OA-2004-0004. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.epa.gov/edocket>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET,

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

Docket: All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Office of Environmental Information Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public

Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Office of Environmental Information Docket is (202) 566-1752.

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

SUPPLEMENTARY INFORMATION:

I. General Information

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

There is a parallel proposal to today's action. EPA is publishing this rule without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comment, since these provisions were previously proposed, the Agency accepted public comment, and no comments were received concerning the subject issues today's action addresses. However, in the "Proposed Rules" section of today's **Federal Register** publication, we are publishing a separate document that will serve as the proposal to revise the RCRA provisions described in this action if adverse comments are filed. This rule will be effective on December 27, 2004 without further notice unless we receive adverse comment by

November 24, 2004. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

B. Does This Action Apply to Me?

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

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

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

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

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

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

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

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

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

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

I. General Information

- A. Is there a parallel proposal to today's action?

- B. Does this action apply to me?

II. Overview

- A. What is the National Environmental Performance Track Program?

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II. Overview

A. What is the National Environmental Performance Track Program?

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

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

Performance Track also provides recognition, regulatory flexibility, and other incentives that promote high levels of environmental performance and provides a learning network where best practices can be shared. In addition, the program encourages continuous environmental improvement

through the use of environmental management systems, and fosters public outreach, community involvement, and performance measurement.

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

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

B. What Is the History of This Action?

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

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

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

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

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

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

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

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

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

1. Standards for Facilities To Notify States and EPA

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

The revised preamble section now reads as follows: "Initial Notice. Under § 262.34(j)(2), Performance Track generators need to give prior notice to EPA and the authorized State agency of their intent to accumulate hazardous waste in excess of 90 days in accordance with this rule. These notices will assist EPA and state agencies in monitoring implementation of this incentive. Public comments to the proposal expressed

concern that such notifications may place an additional burden on facilities with dynamic waste streams if re-notifications are required for each new waste stream. EPA acknowledges this concern, clarifies that notifications are generally one-time events, and estimates that this burden will be of minimal impact to member facilities."

2. Standards for Waste Management in Containers

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

3. Standards for Waste Management in Tanks

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Under section 3006 of RCRA, EPA may authorize a qualified State to administer and enforce a hazardous waste program within the State in lieu of the Federal program, and to issue and

enforce permits in the State. (See 40 CFR Part 271 for the standards and requirements for authorization.) Following authorization, a State continues to have enforcement responsibilities under its law to pursue violations of its hazardous waste program. EPA continues to have independent authority under RCRA sections 3007, 3008, 3013, and 7003.

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

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

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

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

IV. Summary of Environmental, Energy, and Economic Impacts

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

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

addresses completely the changes being made today.

A. What Are the Cost and Economic Impacts?

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

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

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

V. Effective Date for Today's Requirements

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

VI. Administrative Requirements

A. Executive Order 12866, Regulatory Planning and Review

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

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

B. Paperwork Reduction Act

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

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

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

C. Regulatory Flexibility Act

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

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

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities. Today's direct final rule corrects provisions finalized on April 22, 2004 (69 FR 21737) in 40 CFR § 262.34(j). The economic impact of RCRA § 262.34(j) is not changed by today's rulemaking. That is, the economic analysis conducted by EPA for the Performance

Track rule published in April 2004 at 69 FR 21737 addresses completely the changes being made today.

D. Unfunded Mandates Reform Act

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

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or to the private sector in any one year. Participation by facilities in the Performance Track is voluntary, and so is participation by State or local government agencies. There are no significant or unique effects on State, local, or Tribal governments. Today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

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

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

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

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

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

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

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

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

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

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

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

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

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs all Federal agencies to use voluntary consensus standards instead

of government-unique standards in their regulatory and procurement activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (such as materials specifications, test methods, sampling procedures, business practices) that are developed or adopted by one or more voluntary consensus standards bodies. Examples of organizations generally regarded as voluntary consensus standards bodies include the American Society for Testing and Materials (ASTM), the National Fire Protection Association (NFPA), and the Society of Automotive Engineers (SAE). The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when an Agency does not use available and applicable voluntary consensus standards.

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

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This final rule is effective on December 27, 2004.

VII. Statutory Authority

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

VIII. Judicial Review

Under section 6976(a) of the Resource Conservation and Recovery Act, judicial review of the RCRA-portion of this final rule is available only by the filing of a petition for review in the U.S. Court of

Appeals for the District of Columbia Circuit by December 27, 2004. Under this same section 6976(a) of RCRA, the requirements that are the subject of this final rule may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

List of Subjects in 40 CFR Part 262

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

Dated: October 19, 2004.

Michael O. Leavitt,
Administrator.

■ 40 CFR part 262 is amended as follows:

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

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

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

Subpart C—[Amended]

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

§ 262.34 Accumulation time.

* * * * *

(j) * * *

(3) * * *

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

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

* * * * *

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

* * * * *

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

BILLING CODE 6560-50-P

PUBLIC HEARING TRANSCRIPT

Public Hearing for Environmental Excellence Program Rule 60CSR8

6:00 p.m., Tuesday, July 19, 2005

DEP Headquarters

Charleston, WV

A Public Hearing for the proposed Environmental Excellence Program Rule – 60CSR8 was held on Tuesday, July 19, 2005, in the Dolly Sods Conference Room at the DEP Headquarters located at 601 57th Street, South East, Charleston, WV 25304. The proposed rule authorizes the West Virginia Department of Environmental Protection to establish the eligibility, procedures, standards, and legal documents required for developing and implementing an environmental excellence program as specified under West Virginia Code §22-25-4. The purpose of the proposed rule is to establish and administer an environmental excellence program that encourages, promotes, recognizes, and rewards businesses and organizations for superior environmental performance and enhanced public involvement throughout West Virginia.

The Public Comment Period ended on Tuesday, July 19, 2005.

There were no Public Hearing attendees. Public Comments were received via hand delivery on or before the end of the Public Comment Period on Tuesday, July 19, 2005, and response to comments are provided with this rule filing

I submit this transcript and swear that this is a true and accurate copy, to the best of my ability, of the public hearing held on Tuesday, July 19, 2005 for the Environmental Excellence Program Rule – 60CSR8.

Lalena Price, Public Information Specialist, Public Information Office

Wednesday, July 20, 2005

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July 19, 2005

VIA HAND DELIVERY

Mr. G. E. "Greg" Adolfsen
Deputy Administrator
Office of Innovation
West Virginia Department of Environmental
Protection
601 57th Street, SE
Charleston, WV 25304

Re: *West Virginia Department of Environmental
Protection Proposed Environmental
Excellence Rule (6/15/05).*

Dear Greg:

The above-referenced proposed rule follows a draft rule of May 3, 2005, circulated by the West Virginia Department of Environmental Protection ("WV DEP") regarding which the West Virginia Manufacturers Association ("WVMA") submitted comments under cover of my letter to you dated May 27, 2005. That letter, attached hereto, is also incorporated by reference and is to be considered as part of these formal comments of the WVMA on the proposed rule of June 15, 2005, as if fully set forth herein. Additionally, the WVMA provides below two additional comments on the June 15, 2005 rule as proposed.

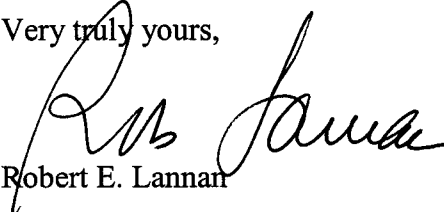
1. Section 18. Application Fees and Annual Renewal Fees. The WVMA believes that WV DEP should reconsider the fee structure of the proposed rule. While some members who desire to participate in the proposed Environmental Excellence Program may well be able to afford such fees, some members may find the proposed fees to be a barrier to participation in an otherwise laudatory program. We would accordingly request that the WV DEP re-examine the fee structure and, if possible, look for ways to run the program without charging fees to the regulated community. Alternatively, we would ask that WV DEP justify the levels of fees which it proposes to charge by an

examination of the proposed cost of the program in order to determine the most reasonable level of fee to be charged.

2. Section 4. Eligibility Criteria for Participation. Section 4 generally sets forth the various criteria for participation in the Environmental Excellence Program at the "Bronze Leaf" (Section 4.1), "Silver Leaf" (Section 4.2), and "Gold Leaf" (Section 4.3) levels. The stepwise approach proposed by WV DEP establishes a base level of Bronze Leaf which works up to an intermediate level, Silver Leaf, and culminates in an elite Gold Leaf level. The differences between the various levels appear to be driven from both a timing perspective and the number of projects or goals which are required to be complete before receiving the benefits of the next level. While it may, in some instances certainly be indicative of better environmental performance to perform both "faster" and "more", this may not always be the case. For example, particularly with regard to the "Gold Leaf" level, "more" is equated to include at least one capital improvement project designed to reduce discharges or emissions from the facility below the environmental performance baseline for the specified discharges or emissions. See Proposed Section 4.3.c. We would ask WV DEP to consider looking at performance metrics for each of the levels which allow for alternative Environmental Excellence projects not necessarily tied to a permit at a facility or capital improvement expenditures to be considered for eligibility criteria.

Once again, the WVMA appreciates the opportunity to comment on the proposed Environmental Excellence regulations. Please do not hesitate to contact me if you have any questions or comments.

Very truly yours,



Robert E. Lannan

Counsel for
West Virginia Manufacturers Association
Waste Team

REL:dlm
Enclosures

cc: Mr. Karen S. Price (w/enc.)
Mr. Dana L. Burns (w/enc.)
Ms. Alison A. Crane (w/enc.)

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May 27, 2005

VIA HAND DELIVERY

Mr. G. E. "Greg" Adolfson
Deputy Administrator
Office of Innovation
West Virginia Department of Environmental
Protection
601 57th Street, SE
Charleston, WV 25304

Re: *West Virginia Department of Environmental
Protection Draft Environmental Excellence
Rule (5/3/05).*

Dear Greg:

I am in receipt of a copy of the above-referenced draft rule (60 CSR ____), distributed under cover of your e-mail dated May 13, 2005. The West Virginia Manufacturers Association ("WVMA") is comprised of over 100 small, medium, and large manufacturing companies and related businesses located throughout the State of West Virginia devoted to the advancement of industrial manufacturing activities, while maintaining a desire to protect human health, safety, and the environment. The Association frequently offers comments on rules and regulations that are of interest to its members. The WVMA believes that its members would be affected by the draft Environmental Excellence Rule, and accordingly, submits the comments set out below. We submit these comments with the understanding that the draft rule is not yet a part of the official notice comment rulemaking provided for by Chapter 29A of the West Virginia Code, as is recognized in your May 18, 2005 e-mail. Therefore, the WVMA reserves the right to amend and/or supplement the comments contained herein.

As a general matter, the WVMA would like to state its overall support for this rulemaking initiative being undertaken by WV DEP. We believe that our members' history of commitment to environmental compliance and strong environmental

management systems will be well served by these regulations. More specific comments and suggestions are set forth in the numbered paragraphs which follow.

1. Definition of Community Advisory Panel. Section 2.3 of the draft Regulations provides for the establishment of a "Community Advisory Panel" and offers the following definition:

... a committee, task force, or board comprised of citizens affected by facilities that provides a public forum for community members to present and discuss their needs and concerns about the decision-making process at the facilities affecting it.

While public participation is clearly encouraged by the environmental excellence program statute, the WVMA believes that significant public involvement is already afforded by the duties and rights established by the provisions of the State Administrative Procedures Act found in W.Va. Code §29A *et seq.* and, more specifically, in Article 3 thereof. We urge the WV DEP to reconsider its position with regard to the compulsory establishment of community advisory panels.

2. Definition of Executive Management Review. Section 2.5 of the draft Regulations establishes a concept known as "Executive Management Review" and provides as follows:

... a structured process that must take place at regular intervals to discuss the functioning of the environmental excellence program and to take action to correct and prevent non-compliance and non-conformance as necessary, that includes Regular executive Management Review meetings, whereas it is the responsibility of executive management to ensure that this procedure is carried out and that related functions are reviewed at the highest possible level so that all levels of management are made aware of changes, updates, revisions, verification activities, policies, procedures, etc. pertaining to the environmental excellence program.

This definition appears unclear and somewhat cumbersome. Additionally it may place duties on companies' management involved in the environmental excellence program that are not necessarily required by the statute. We urge WV DEP to reconsider this definition.

3. Definition of "Pollution Prevention." The WVMA supports as a general matter pollution prevention activities. However, the definition of "pollution prevention" found at Section 2.8 of the draft Regulations, suggests that cross media pollution transfers which reduce hazards (but which may not necessarily involve net reductions in discharges or emissions), cannot be considered as pollution prevention. The WVMA would request clarification of this definition.

4. Definition of "Source." Section 2.8.a.2 provides for a definition of "source" as requiring both acceptance into the State environmental excellence program, as well as into the federal environmental excellence program as specified under the Pollution Prevention Act, 42 U.S.C. §13101 *et seq.* The WVMA questions whether the intent of the regulatory program is to preclude membership in the state environmental excellence program if one is not a member of the federal program as well. We believe that a company should be permitted to participate in the state environmental excellence program as a discretionary matter.

5. Definition of "Supplemental Environmental Project." Section 2.12 provides a somewhat cumbersome definition of Supplemental Environmental Project. The WVMA recommends that a more standardized definition of Supplemental Environmental Project as found in EPA's SEP guidance documents be utilized. (See *Final Supplemental Environmental Project Policy*, April 10, 1998; *Appropriate Penalty Mitigation Credit Under the SEP Policy*, April 14, 2000; *Supplemental Environmental Projects Policy*, March 22, 2002; *Expanding the Use of Supplemental Environmental Projects*, June 11, 2003; and *Project Ideas for Supplemental Environmental Projects*, January 5, 2004).

6. Eligibility Criteria for Participation. Section 4.3.c appears to have an incomplete sentence. The WVMA suggests the revision of this section to read as follows:

Already have developed and implemented three environmental performance goals and commit to develop and implement seven additional environmental performance goals, One of which is a capital improvement project designed to reduce discharges or emissions from the facility below the environmental performance baseline where the specified discharges or emissions;

7. Eligibility Criteria for Participation. Section 4.4 offers "credit" for applicants who are already registered or members of the environmental excellence programs established and maintained by US EPA, such as the National Environmental Performance Track. While dual membership in both federal and state environmental excellence programs is certainly a laudable goal, it appears inconsistent with the definition of "source" set forth at Section 2.8.a.2 which would appear to require such participation for an applicant to participate in the state program. The WVMA does not believe this to be the intent of the state environmental excellence program and accordingly urges DEP to offer an "either/or" approach, while permitting, but not mandating participation in both programs.

8. Environmental Performance Record. Section 5 of the draft Regulations relates to environmental performance records, and the application of its criteria as to whether or not an entity is entitled to membership in the environmental excellence

program is generally problematic. As an initial matter, it appears, though it is not expressly clear, that "existing facilities" (not defined) which apply for inclusion in the environmental excellence program will not be subject to review on a corporate-wide basis, but rather on a facility basis. However, it appears that "new facilities," (not defined, but see proposed Section 5.3), will be judged on the environmental performance records of "other facilities owned and/or operated by the same entity. . . ." The reason for the distinction between "existing" and "new" facilities is not clear nor is there any justification for such a distinction. Facilities should be judged on a site specific basis.

It additionally appears that if any of the stated conditions occur, i.e. criminal actions, (proposed Section 5.1.a), civil action (proposed Section 5.1.), or administrative actions (proposed Section 5.1.c.), the DEP Secretary does not have the flexibility to consider the factual circumstances surrounding the conditions as a basis for permitting inclusion in the environmental excellence program, rather than being forced to make a decision that a company may not be part of the program.

As a third matter, individual portions of this section raise interesting issues of law as to whether such a condition could validly be considered as applying to a facility. For example, would a plea of *nolo contendere* by an employee of a corporation to a negligent violation of the Clean Water Act (which in essence requires no criminal intent), be considered as a reason for not permitting the corporation to become a member of the state environmental excellence program? This potentially makes the corporation an insurer of the environmental performance of at will employees, a situation which the WVMA respectfully suggests should not be a grounds for failing to permit a corporation to join the program. Additionally, the monetary levels for civil fines, penalties, and/or supplemental environmental projects in civil actions of \$10,000 (proposed Section 5.1.b.1) and \$25,000 (proposed Section 5.1.c.), may effectively bar participation by most corporations in the state and, more importantly, particularly when it is not clear from the draft Regulation whether or not it is being judged on a "facility" or "corporate-wide" basis.

Finally, certain standards proposed by the DEP allow a corporation no information to be able to dispute the reason that such a factor would be considered in its environmental performance record. Proposed Section 5.1.c.2 provides that planned, but not yet filed administrative actions at a facility are, a bar to entry into the environmental performance program. How is a corporation to know that an enforcement action is "planned" but "not yet filed," given the enforcement discretion which the DEP possesses and the enforcement confidentiality which is normally maintained by the agency?

We suggest as a general matter that DEP consider revisiting this section and permitting a certain flexibility to exist such an exemplary corporate environmental compliance program that run afoul of the intricacies of environmental law in its interpretation are not automatically excluded for what is otherwise a valuable program.

9. Environmental Management Systems. Section 6 provides several references to "third party" environmental audits. This term is not defined, particularly as

it relates to whether internal environmental compliance audits performed by plant personnel would be considered such a "third party" audit or whether outside contractors would necessarily have to be utilized. Section 6.2.c provides that a "self audit" and/or "third party" audit should be utilized. This appears to be the only place in the proposed Regulations where a "self audit" can be utilized and may therefore need to be further defined and the inconsistency between this specific section and other audit language of Section 6 addressed.

10. Environmental Management System Certification. Section 6.2.a.5.A.1 requires that as part of an environmental excellence program application, a statement signed by responsible company officials must be included. The WVMA suggests that this language be compared to existing certifications required by other state and/or federal environmental laws and that the proposed certification under this section be no more stringent than such certifications as required by counterpart environmental laws.

11. Air Incentives. Section 9.3.a.2 provides for certain incentives "flexible" permitting and reduced reporting frequency of simplified reporting requirements. These incentives as a practical matter may have fairly minor impact on the regulated community. Reduced reporting may be granted to units covered by MACT standards, but this "incentive" covers as a practical matter comparatively few units in the State of West Virginia and is entirely discretionary with the Director. Title V requirements would still apply, so the "reduction" in reporting would not as a practical matter be significant. The commitment to work with sources to grant "flexible" permits is something that a source should be able to get now from DEP without having to enter into the environmental excellence program. DEP should be willing to expedite permitting time frames to the maximum extent possible as a matter of sound business sense, constrained only by the public notice limits provided otherwise by statutes and regulations and commit to complete action on Class I administrative amendments that do not require notice within 20 working days as a matter of course.

12. Water Incentives. The WVMA believes that, similar to the air incentives, the water incentives which are offered are, as a practical matter, of minor impact to the regulated community. We would urge the WV DEP to consider enhancing the incentives to reflect, for example, some mitigation aspect in penalty calculations or a favorable presumption in penalty calculations if a company is a member of the environmental excellence program.

13. Waste Incentives. Section 9.3.a.4.A provides that permitting requirements for "generators" of hazardous wastes will be "reduced." The WVMA suggests that technically this section should be reworded to reflect that, rather than reducing "permitting requirements," accumulation times for hazardous waste will be increased without having to obtain a permit.

14. Action on Applications. Section 12.6 seems to establish a procedure that is more stringent than the notice comment requirements of the State Administrative

Mr. G. E. "Greg" Adolfson

May 27, 2005

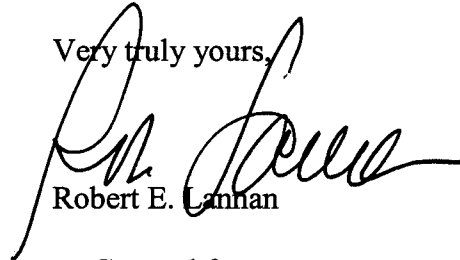
Page 6

Procedures Act of Chapter 29A of the West Virginia Code with regard to public participation. Additionally, it is unclear as to what the phrase "authorization to participate under the negotiations" means in the context of participation by "interested persons," insofar as these terms are not defined. The WVMA requests that this section be rewritten to provide that interested persons have the rights accorded to them under Chapter 29A of the State Administrative Procedures Act.

15. No More Stringent Than Provision. As a final matter, the WVMA suggests that language be included in the proposed program rule providing that nothing in the rule is intended to broaden powers otherwise accorded to DEP or other persons pursuant to existing environmental statutory or regulatory authorities, including, but not necessarily limited to specifically, rights to inspection, monitoring, enforcement (both private and by the agency) and confidential business information.

The WVMA appreciates the opportunity to comment on the proposed environmental excellence regulations and urges DEP to give its full and favorable consideration thereto. If you have any questions or comments, please do not hesitate to contact the undersigned.

Very truly yours,



Robert E. Lannan

Counsel for
West Virginia Manufacturers Association
Waste Team

REL:dlm

cc: Mr. Karen S. Price
Mr. Dana L. Burns
Ms. Alison A. Crane

{R0089830}



Union Carbide Corporation

A Subsidiary of The Dow Chemical Company
PO Box 8361
3200/3300 Kanawha Turnpike
South Charleston, WV 25303
U.S.A

July 19, 2005

Ms. Stephanie Timmermeyer, Secretary
WV Department of Environmental Protection
601 57th Street, S.E.
Charleston, WV 25304

Subject: Environmental Excellence Program Rule

Dear Ms. Timmermeyer:

Union Carbide Corporation, a subsidiary of The Dow Chemical Company has reviewed the Environmental Excellence Program Rule draft dated June 13, 2005 and respectfully submits the following changes and comments. As you know, we are currently in the Performance Track Program and have been a member for the past 3 years. Our comments reflect our experience and learnings from our participation in the program. The suggested changes reflect:

- No Fees for membership
- Keep the Environmental Excellence Program Silver Level totally consistent with Performance Track.
- Expectations of regulatory relief in the form of reduced reporting, record keeping, and/or inspections/visits to reduce transaction costs.

A marked-up copy of the Draft Rule and a document with all Comments listed in numerical order by section are attached.

Thank you for the opportunity to comment on this Environmental Excellence Program Rule. If you have any questions about our comments, please call me at (304) 747-3623 or Beverly Hudson at (304) 747-2125.

Sincerely yours,

Joseph A. Amos
Regulatory Affairs Leader

JAA/bsh
Attachments

cc: G. E. Adolfson (WV DEP Office of Innovation)
D. W. Bassage (WV DEP Office of Innovation)

**Union Carbide Corporation,
a subsidiary of The Dow Chemical Company Comments To
WV Environmental Excellence Program Rule**

Section 2.1 – We do not believe an application fee should apply. The perception of paying for recognition must be avoided.

What condition constitutes a waiver?

Section 2.3 – The concept of a Community Advisory Panel (CAP) is already established for large organizations such as Dow. However, the concept of a CAP for small entities that are also being targeted by the Environmental Excellence Program may be difficult or impractical.

Section 2.5 – Change **Executive Management Review** to **Management System Review**. Small entities that the Environmental Excellence Program is attempting to target may find it easier to meet the intent of Management System Review rather than Executive Management Review. Very few facilities have the ISO 14001 approach of Executive Management Review.

Section 3.2 – Why not just 2 levels like the VA program? The Gold level seems unattainable to most state organizations.

Section 4.1.a – Change **Provide documentation** to **Have documentation**. How does the Applicant provide this documentation other than the Certification by the Responsible Corporate Official (RCO) with the application? Agency should verify this with their Compliance Section the same way EPA does.

Section 4.1.f – Replace **annual** with **as needed**. Does the Agency have resources to offer annual visitation to all participants?

Section 4.2.a – Change **Provide documentation of** to **Have**. See comments to Section 4.1.a.

Section 4.2.c – Consideration should be given to goals and commitments for smaller businesses to align with Performance Track.

Section 4.2.f – Replace **annual** with **as needed**. See comments to Section 4.1.f.

Section 4.3.a – Change **Provide documentation** to **Have documentation**. See comments to Section 4.1.a.

Section 4.3.c – Seven commitments are unreasonable and may be a disincentive to prospective participants.

If this Gold Level remains, **with a more reasonable commitment level**, consideration should be given to fewer goals and commitments for smaller businesses.

The capital project should not be limited to monetary or the few items mentioned, but should allow for such things as resource commitment (e.g., employee man-hours expended toward environmental performance improvement.)

Section 4.3.f – Replace **annual** with **as needed**. See comments to Section 4.1.f.

Section 5.1 – Change by **providing documentation of to based on**. See comments to Section 4.1.a.

Section 6.1.b – Replace **executive management review** with **management system review**. See Comments to Section 2.5.

Section 6.1.d – Replace **executive management review** with **management system review**. See Comments to Section 2.5.

Section 6.2.c – Replace **executive management review** with **management system review**. See Comments to Section 2.5.

Section 6.2.h – Replace **executive management review** with **management system review**. See Comments to Section 2.5.

Section 9.3.a.1.C – Discounted permit fees for participating members are acceptable, but NO FEES should be charged for membership. See Comment to Section 2.1.

Section 9.3.a.2.B – Include **record keeping** as well as reporting frequency.

Section 9.3.a.2.C – This section should be added as follows: **Waiver of permit modification fees as specified under W. Va. Code of State Rules. Annual Operating Permit fees may be reduced by 1% for each year up to a maximum of 3%.**

Section 9.3.a.3.B – Change **quarterly** to **semi-annual**.

Section 9.3.a.3.C – This section should be added as follows: **Reduced frequency for filing DMR-QA Studies. Participants may be entitled to file DMR-QA Studies on a triennial basis.**

Section 9.3.a.4.B – This section should be added as follows: **Waiver of permit modification fees as specified under W. Va. Code of State Rules.**

Section 10.2 – Change **dates** to coincide with the two Performance Track Application Periods.

Section 10.3 – Have two application periods to coincide with Performance Track Application Periods. Otherwise, Silver Leaf participants may have to wait until the following year to participate in the Environmental Excellence Program; thus, being a Performance Track Member would not be “automatic.”

Section 11 – Delete entire section. This is too much like a regulatory permit application process rather than a Voluntary Partnership Agreement.

Section 13.2 – Delete **annual** from facility visitations. See Comments to 4.1.f. If annual visitations remain in the Rule, language should read “may”.

Delete fee language based on Comments to 2.1.

Sections 13.2 through 13.4 – For simplicity, the participant application process already includes Certification by the Responsible Corporate Official (RCO) and constitutes the agreement upon admission by the Secretary, unless modified.

Section 14.2.f – Delete this Section. Performance Track Annual Report does not require summary of facility's incentives.

Section 14.2.g – Delete this Section. See comments to 4.1.f. Also, if visits are made, Agency should have information on file. No need to report again.

§60-8-15 Annual Facility Visitations – Delete **annual**. See comments to Section 4.1.f.

Section 16.1 – The issues are “annual basis” and “at least 30 days before the anniversary date.” This is not consistent with Performance Track Program. This suggests an “annual agreement” rather than a “3-year commitment with annual progress reports.”

Section 16.4.h – Add **and submission** after “Failed to meet the requirements” and before “of the annual performance report...”

Section 16.4.i – Delete the word **annual**. See Comments to 4.1.f.

Section 18.1 – No fees. See Comments to 2.1.

Section 18.2 – No fees. See Comments to 2.1.

**TITLE 60
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
SECRETARY'S OFFICE**

**SERIES 8
ENVIRONMENTAL EXCELLENCE PROGRAM RULE**

§60-8-1. General.

1.1. Scope. -- This legislative rule establishes the eligibility, procedures, standards and legal documents required for establishing a voluntary environmental excellence program.

1.2. Authority. -- W. Va. Code §22-25-4.

1.3. Filing Date. -- _____ 2005.

1.4. Effective Date. -- _____ 2005.

§60-8-2. Definitions.

Unless the context in which used clearly requires a different meaning, the definitions contained in W. Va. Code §22-25-3 shall apply to the terms in this rule in addition to the definitions expressly set forth in this rule.

2.1. Applicant -- means an individual or entity who has fulfilled the department's requirements to be considered for admission (including payment or waiving of the application fee, if any) and who has been notified of one of the following actions: admission, non-admission, or application withdrawn (by applicant or department).

NOTE on 2.1: We do not believe an application fee should apply. The perception of paying for recognition must be avoided.

What condition constitutes a waiver?

2.2. Capital Improvement Project -- means a project that helps maintain or improve an asset to be included in the capital budget that is either:

2.2.a. New construction, expansion, renovation, or a replacement project for an existing facility or facilities and shall have a total cost of at least \$10,000.00 over the life of the project, and may include the cost of land, engineering, architectural planning, and contract services needed to complete the project; or,

2.2.b. Purchase of major equipment (assets) costing \$50,000.00 or more with a useful life of at least 10 years; or,

2.2.c. Major maintenance or rehabilitation project for existing facilities with a cost of \$10,000.00 or more and an economic life of at least 10 years.

2.3. Community Advisory Panel -- means a committee, task force, or board comprised of citizens affected by facilities that provides a public forum for community members to present and discuss their needs and concerns about the decision-making process at facilities affecting them.

NOTE on 2.3: The concept of a Community Advisory Panel (CAP) is already established for large organizations such as Dow. However, the concept of a CAP for small entities that are also being targeted by the Environmental Excellence Program may be difficult or impractical.

2.4. Environmental Management Program -- means an activity for achieving a facility's environmental objectives and environmental targets that includes designation of responsibility for achieving environmental objectives and environmental targets at relevant functions and levels within the facility, and the means and time-frame by which they are to be achieved.

2.5. Management System Review -- means a structured process that shall take place at regular intervals to discuss the functioning of the environmental excellence program and to take action to correct and prevent noncompliance and nonconformance as necessary, that includes regular Management System Review meetings, whereas it is the responsibility of executive management to ensure that this procedure is carried out and that all related functions are reviewed at the highest possible level so that all levels of management are made aware of changes, updates, revisions, verification activities, policies, procedures, etc. pertaining to the environmental excellence program.

NOTE to Section 2.5: Small entities that the Environmental Excellence Program is attempting to target may find it easier to meet the intent of Management System Review rather than Executive Management Review. Very few facilities have the ISO 14001 approach of Executive Management Review.

2.6. Facility -- means places, buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person, or by any person who controls, is controlled by, or is under common control with, such person that provides a particular service or is used for a particular industry; and also means the piece of land, with or without facilities, that is within the jurisdiction of federal, state, and/or municipal government.

2.7. Person -- means any and all persons, natural or artificial, including the State of West Virginia or any other State, the United States of America, any municipal, statutory, public, or private corporation, organized or existing under the laws of this or any other state or country, and any firm, partnership, or association of whatever nature.

2.8. Pollution Prevention -- means any practice that reduces the use of any hazardous substance or amount of a pollutant or contaminant prior to reuse, recycling, treatment, or disposal, and reduces the hazards to public health and the environment associated with the use and release of hazardous

substances, pollutants or contaminants; pollution prevention does not include cross-media pollution transfers that do not result in a net decrease of discharge, emission or impact to the environment, as specified under W. Va. Code §22-25-3; and includes:

2.8.a. Pollution Prevention, for the purpose of this rule, also means Source Reduction as specified under the Pollution Prevention Act (42 U.S.C. §§13101-13109).

2.8.a.1. Source Reduction means any practice that:

2.8.a.1.A. Reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal;

2.8.a.1.B. Reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants;

2.8.a.1.C. Includes equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, or inventory control; and,

2.8.a.1.D. Does not alter the physical, chemical, or biological characteristics or the volume of a hazardous substance, pollutant, or contaminant through a process or activity that itself is not integral to and necessary for the production of a product or the providing of a service.

2.8.a.2. Source means a major or area source located at a facility that has been accepted by the department for membership in the environmental excellence program and is still a member of the environmental excellence program

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as specified under the Pollution Prevention Act (42 U.S.C. §§13101-13109).

2.9. Public Entity -- means a political subdivision of the state, including a municipality and its subdivisions, a school district, a regional educational attendance area, an organization composed of political subdivisions of the state; and any department, agency, special purpose district, or other instrumentality of the state or local government.

2.10. Responsible Official -- means one of the following:

2.10.a. For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

2.10.a.1. The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding \$25 million (in second quarter 1980 dollars); or,

2.10.a.2. The secretary approves the delegation of authority to such representative in advance.

2.10.b. For a partnership or sole proprietorship: a general partner or the proprietor, respectively; or,

2.10.c. For a municipality, State, Federal, or other public agency: either a principal executive officer or ranking elected official. For the purposes of this rule, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of U.S. EPA).

2.11. National Environmental Performance Track -- means a United States Environmental Protection Agency program that is a public/private partnership recognizing top environmental performance among participating United States facilities of all types, sizes, and complexity, public and private.

2.12. Supplemental Environmental Project (SEP) -- means an environmentally beneficial project that a facility agrees to undertake in settlement of a civil action, but that the facility is not otherwise legally required to perform, and in return, a percentage of the SEP's value is considered as a factor in establishing the amount of a final cash penalty that results in enhancement of the environmental quality of communities that have been or may have been put at risk or impacted due to the violation of an environmental law, and while penalties play an important role in deterring environmental and public health violations, SEP's can play an additional role in securing significant environmental and public health protection and improvement.

§60-8-3. Purpose and Goals.

3.1. The purpose of this rule is to establish an environmental excellence program that promotes, rewards, and encourages superior environmental performance and enhanced public involvement.

3.2. Eligible facilities may participate at one of three levels: Bronze Leaf, Silver Leaf, and Gold Leaf. The level of participation and the incentives granted are based on the facility's environmental management system, environmental performance goals, and public involvement.

NOTE on 3.2 -- Why not just 2 levels like the VA program? The Gold level seems unattainable to most state organizations.

3.3. Nothing in this rule authorizes any violation of federal and/or state law, rule, regulation, and/or legislation.

§60-8-4. Eligibility Criteria for Participation.

4.1. Bronze Leaf environmental excellence program applicants shall:

4.1.a. Have documentation of a proven environmental performance record;

NOTE on 4.1.a: How does the Applicant provide this documentation other than the Certification by the Responsible Corporate Official (RCO) with the application? Agency should verify this with their Compliance Section the same way EPA does.

4.1.b. Develop and implement an environmental management system within one year of acceptance into the program;

4.1.c. Develop and implement one environmental performance goal within one year of acceptance into the program and two additional environmental performance goals within three years of acceptance into the program;

4.1.d. Develop and implement a plan for public participation within one year of acceptance into the program;

4.1.e. Prepare and submit an annual performance report; and,

4.1.f. Authorize the department to conduct facility visitations as needed.

NOTE to 4.1.f: Does the Agency have resources to offer annual visitation to all participants?

4.2. Silver Leaf environmental excellence program applicants shall:

4.2.a. Have a proven environmental performance record;

NOTE to 4.2.a: See comments to Section 4.1.a.

4.2.b. Already have developed and

implemented an environmental management system;

4.2.c. Already have developed and implemented two environmental performance goals and commit to develop and implement four additional environmental performance goals;

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Consideration should be given to goals and commitments for smaller businesses to align with Performance Track.

4.2.d. Already have developed and implemented a plan for public participation;

4.2.e. Already have prepared and published an annual performance report; and,

4.2.f. Authorize the department to conduct facility visitations as needed.

Deleted: annual

4.3. Gold Leaf environmental excellence program applicants shall:

4.3.a. Have documentation of a proven environmental performance record;

Deleted: Provide

NOTE to 4.3.a: See comments to Section 4.1.a

4.3.b. Already have developed and implemented an environmental management system;

Deleted: annual

4.3.c. Already have developed and implemented three environmental performance goals and commit to develop and implement seven additional environmental performance goals, one of which is a capital improvement project designed to reduce discharges or emissions from the facility below the environmental performance baseline for the specified discharges or emissions;
NOTE on 4.3.c: Seven commitments are unreasonable for large and small businesses and may be a disincentive to prospective participants.

Deleted: Provide documentation of

If this Gold Level remains, with a more reasonable commitment level, consideration should be given to fewer goals and commitments for smaller businesses.

The capital project should not be limited to monetary or the few items mentioned, but should allow for such things as resource commitment (e.g., employee man-hours expended toward environmental performance improvement.)

4.3.d. Already have developed and implemented a plan for public participation;

4.3.e. Already have prepared and published an annual performance report; and,

4.3.f. Authorize the department to conduct facility visitations as needed

NOTE to 4.3.f: See comments to Section 4.1.f.

4.4. Participation in, and recognition of, federal programs. If the applicant's facility is registered and/or a member of an environmental excellence program implemented by the United States Environmental Protection Agency, such as the National Environmental Performance Track, the applicant automatically qualifies to participate in the environmental excellence program at the Silver Leaf level unless the secretary determines that the applicant has not met all of the environmental excellence program eligibility criteria for participation at the Silver Leaf level as specified under subsection 4.2 of this rule.

§60-8-5. Environmental Performance Record.

5.1. All persons, who operate a facility in West Virginia, are eligible to seek entry into the environmental excellence program and/or retain environmental excellence program designation, and are required to demonstrate compliance with all environmental laws based on a proven environmental performance record. A facility has a proven record of compliance with environmental laws if none of the following criminal, civil, or administrative actions apply to the facility or its employees.

NOTE to 5.1: See comments to Section 4.1.a.

5.1.a. Criminal actions.

5.1.a.1. Corporate criminal conviction or plea for violations of environmental laws involving the corporation and/or corporate officer within the past 5 years;

5.1.a.2. Criminal conviction or plea of employee at the same facility for violations of environmental laws within the past 5 years;

5.1.a.3. Ongoing criminal investigation and/or prosecution of corporation, corporate officer, and/or employee at the same facility for violations of environmental laws;

5.1.a.4. Conviction of a felony criminal violation of any environmental law within a five-year period, or a misdemeanor violation of any environmental law within a three-year period before filing the initial environmental excellence program application; and,

5.1.a.5. Responsibility of a corporation, corporate officer, and/or employee, as determined by a court of appropriate jurisdiction, for an illegal action that caused substantial endangerment to the public health, safety, and/or welfare and/or to the environment.

5.1.b. Civil actions.

5.1.b.1. Assessment by an environmental appeals board or court of appropriate jurisdiction any civil fine, penalty, and/or supplemental environmental project (SEP) that the total amounts exceeds \$10,000.00 for violations of any environmental law within a three-year period before filing the initial environmental excellence program application; and,

5.1.b.2. Responsibility of a corporation, corporate officer, and/or employee, as determined by a court of appropriate jurisdiction, for an illegal action that caused substantial endangerment to the public health, safety, and/or welfare and/or to the environment.

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5.1.c. Administrative actions.

5.1.c.1. Administrative settlement, entered into with the department within a three-year period before filing the initial environmental excellence program application, that the total amounts of the administrative assessments, fines, penalties, and/or SEP's exceeds \$25,000.00; and,

5.1.c.2. Planned, but not yet filed, administrative action at the facility.

5.2. In the case of a change of ownership, the secretary shall consider the environmental performance record of the new owner or owners in determining whether the environmental excellence program applicant and/or current member meet the requirements of this rule.

5.3. In the case of a new facility, the secretary shall consider the environmental performance record of other facilities owned and/or operated by the same entity, and in such a case, an entity's overall environmental performance record shall be considered in determining the facility's ability to achieve superior environmental performance.

§60-8-6. Environmental Management System.

6.1. Environmental excellence program applicants and environmental excellence program members shall demonstrate conformance to environmental management system requirements through:

6.1.a. Registration or certification to an environmental standard, such as ISO 14001 or equivalent, as approved by the secretary; or,

6.1.b. Bronze Leaf environmental excellence program designation that includes a commitment to the development, implementation, and management of an environmental management system, by a date provided by the applicant and approved by the secretary, that shall operate in accordance with a one-year environmental management system cycle as evidenced by an environmental management system audit and

completed management system review; and, after one year in the environmental excellence program, already have developed, implemented, and managed an environmental management system; or,

NOTE to 6.1.b: See comments to Section 2.5.

6.1.c. Silver Leaf environmental excellence program designation that includes already developed, implemented, and managed environmental management systems, that operate in accordance with a one-year environmental management system cycle as evidenced by an environmental management system audit and completed executive management review; or,

6.1.d. Gold Leaf environmental excellence program designation that includes already developed, implemented, and managed environmental management systems, that operate in accordance with a one-year environmental management system cycle as evidenced by an environmental management system and completed management system review.

NOTE to 6.1.d: See comments to Section 2.5.

6.2. Environmental excellence program applicants and environmental excellence program members shall provide documentation of an environmental management system, appropriate to the nature, scale, and potential environmental impacts of the facility, that:

6.2.a. Adopts an environmental policy, approved by the responsible official or operate under an adopted corporate environmental policy, that shall demonstrate a high level of commitment to environmental management through the establishment of guiding principles, that:

6.2.a.1. Articulates the environmental excellence program member's mission, vision, and core values;

6.2.a.2. Emphasizes continual

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environmental improvement; and,

6.2.a.3. Promotes multi-media pollution prevention through the development, implementation, and management of an effective multi-media pollution prevention program that:

6.2.a.3.A. Adopts an environmental policy that documents the environmental excellence program member's philosophy of multi-media pollution prevention that promotes:

6.2.a.3.A.1. Eliminates or reduces wastes at the source of generation;

6.2.a.3.A.2. Reuses wastes, including purchases of recycled material; and,

6.2.a.3.A.3. Promotes environmentally sound, on-site and off-site, recycling.

6.2.a.3.B. Establishes and maintains a facility-specific multi-media pollution prevention program that:

6.2.a.3.B.1. Adopts and posts a multi-media pollution prevention policy, as specified under subparagraph 6.2.a.3.A of this rule that is signed by a responsible official;

6.2.a.3.B.2. Conducts periodic multi-media pollution prevention program assessments that identify opportunities for eliminating wastes at the source, and promotes reuse and recycling;

6.2.a.3.B.3. Establishes multi-media pollution prevention program goals that specify the environmental media and types of pollution to be prevented or reduced, implementation activities, and projected time frames; and,

6.2.a.3.B.4. Records and maintains reports to demonstrate progress on pollution prevention technologies.

6.2.a.3.C. Participates, formally, in the environmental excellence program by being a member in good standing in a recognized multi-media pollution prevention program.

6.2.a.4. Acknowledges the importance of and provide for communication with the public as specified under subdivision 6.2.j and section 8 of this rule;

6.2.a.5. Emphasizes environmental compliance, with relevant environmental laws, legislation, and regulations, that:

6.2.a.5.A. Demonstrates compliance with all applicable environmental laws, legislation, regulations and other environmental requirements that:

6.2.a.5.A.1. Provides to the department, as part of the environmental excellence program application, a statement signed by a responsible official that he or she has reviewed the environmental excellence program compliance record and that, to the best of his or her knowledge, the environmental excellence program member is in compliance with all applicable environmental requirements and has no outstanding unresolved past or current violation that has not been corrected or, in the case of renewal, resolved by the environmental excellence program member's adherence to a binding compliance schedule to abate the violation;

6.2.a.5.A.2. Addresses any violation cited in a notice of violation by resolving the violation, making a showing to the secretary that the violation did not occur, or in the case of a renewal, being in compliance with a binding schedule, agreed to by the secretary, to correct any violation specified in a notice of violation issued by the secretary; and,

6.2.a.5.A.3. Provides documentation that the facility has not been found by the secretary to be in violation of environmental requirements established by a local unit of government as specified under section 5 of this rule.

6.2.a.5.B. Provides a binding and significant or measurable reduction in wastes below what would otherwise be required by applicable environmental requirements or include a significant or measurable reduction of pollutants if the environmental excellence program member does not meet the requirements as specified under subparagraph 6.2.a.5.A of this rule, then the secretary shall consider an application for membership into the environmental excellence program; and,

6.2.a.5.C. Provides documentation of a proven environmental performance record in the case of a change of ownership and control whereas the secretary shall consider the environmental performance record of the new owner or owners in determining whether the requirements of this rule have been met and whether the secretary has approved membership into the environmental excellence program.

6.2.a.6. Recognizes that every individual at the facility can contribute to continual environmental performance and continual environmental improvement.

6.2.b. Establishes and maintains environmental management programs and procedures that:

6.2.b.1. Identifies the environmental aspects and environmental impacts of the environmental excellence program member's activities, products, and services over which the environmental excellence program member can be expected to have an influence to determine the activities, products, or services that have or can have significant impacts on the environment, and ensure that the impacts and opportunities for continual environmental improvement are considered in setting the environmental excellence program member's environmental objectives and environmental targets; and,

6.2.b.2. Develops and implements environmental objectives, environmental targets,

and environmental management programs within each organizational level of the environmental excellence program member's organizational hierarchy.

6.2.c. Establishes a procedure to provide for a regular environmental management system audit and completed management system review that assures that there is an effective mechanism in place to promptly and adequately respond to and address any noncompliance with applicable environmental laws and any nonconformance with environmental management system requirements that are found;

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NOTE to 6.2: See comments to Section 2.5.

6.2.d. Identifies specific organizational operations and activities, products, and services that have significant environmental impact or the potential for significant environmental impact, and have procedures in place that:

6.2.d.1. Monitors and measures the operations and activities, products, and services;

6.2.d.2. Assures that the operations and activities, products, and services remain within acceptable parameters;

6.2.d.3. Includes provisions to implement prompt correction if a deviation occurs; and,

6.2.d.4. Provides for systematic review of records and reports on environmentally related actions relative to the operations and activities, products, and services.

6.2.e. Establishes necessary reporting and record keeping that documents the environmental status of all operations and activities, products, and services;

6.2.f. Establishes and maintains procedures to identify and track the environmental training needs of all personnel who have responsibility or authority over activities, products, and services that

have significant environmental impact or the potential for significant environmental impact;

6.2.g. Establishes and maintains procedures to respond to and report, as appropriate, accidents, malfunctions, spills, upsets, and other emergency situations and to mitigate any associated environmental impacts, and provides for a review of the procedures after the occurrence of an accident or emergency;

6.2.h. Defines the authority, responsibility, and methodology for an environmental management system audit and a completed management system review for correcting and preventing nonconformance with the procedures set forth in the environmental management system;

NOTE to 6.2.h: See comments to Section 2.5.

6.2.i. Develops and maintains procedures for internal communication of the environmental management system and environmental issues between personnel across all functional and organizational levels; and,

6.2.j. Establishes and maintains an effective public communication process and procedures for communicating information on environmental issues, significant environmental impacts, and the environmental management system with the public, including the local community and environmental interest groups that facilitate and encourage public understanding and dialogue on environmental issues.

§60-8-7. Environmental Performance Goals.

7.1. The applicant shall propose environmental performance goals that it intends to implement and achieve for the achievement of superior environmental performance. Environmental performance goals may be achieved through the implementation of environmental management programs, capital improvement projects, or other discernable programs.

7.2. The applicant shall describe the program or project that it intends to implement to achieve superior environmental performance.

7.3. The applicant shall quantify the environmental performance goals that the proposed program or project shall achieve in terms of numerical standards or percent reductions.

7.4. The proposal shall include objective standards by which the environmental performance goal shall be monitored, measured, and evaluated with respect to the environmental performance baseline;

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§60-8-8. Public Participation.

8.1. Environmental excellence program applicants and environmental excellence program members shall demonstrate public participation through the development, implementation, and management of a public participation plan to ensure that the environmental performance goals are understood and supported.

8.2. Environmental excellence program applicants and environmental excellence program members shall develop a public participation plan that:

8.2.a. Identifies and assesses issues and concerns of the public that are affected by an environmental management program, capital improvement project, other discernable program, issue, or long-term plan;

8.2.b. Defines objectives of environmental excellence program member involvement effort that broadly addresses public concerns as well as planning and environmental management program, capital improvement project, or other discernable program development goals, where the objectives shall guide the outreach activities and can be established as part of the initial phase of public participation activities and usually do not change over the course of the effort;

8.2.c. Identifies pertinent public participation activities; including development, implementation, and management of a community advisory panel; that considers the target audience, intended message, and any environmental excellence program member budget constraints;

8.2.d. Evaluates environmental excellence program member efforts based on achievement of environmental excellence program member objectives with well designed milestones during the public participation process, and understands that issues and concerns change over time and that the environmental excellence program member public participation plan should reflect those changes; and,

8.2.e. Distributes annual performance report to the public on an annual basis as specified under section 14.6.e of this rule.

§60-8-9. Incentives

9.1. The department shall grant recognition and regulatory incentives that are commensurate with the quantity and quality of environmental performance goals selected by the member. Bronze Leaf members shall only be entitled to recognition incentives. Silver and Gold Leaf members are entitled to recognition and regulatory incentives.

9.2. Recognition Incentives.

9.2.a. The department shall issue a numbered certificate of recognition to each participant in the program that specifies the level of achievement, i.e. Bronze, Silver, or Gold Leaf, and a unique facility identification number;

9.2.b. The department shall identify each member on an internet site maintained by the department;

9.2.c. The department shall annually provide notice of the participation of each member in the program to newspapers in the area in which each member operates; and,

9.2.d. Members may use an environmental

excellence program logo selected by the department on written materials produced by the member.

9.3. Regulatory and Administrative Incentives.

9.3.a. Silver and Gold Leaf members shall be entitled to regulatory and administrative incentives that are commensurate with the degree of superior environmental performance achieved by the participating member.

9.3.a.1. General Incentives.

9.3.a.1.A. Low priority for routine inspections. The department shall conduct any inspections of the member's facility at the lowest frequency permitted under law, except that the department may conduct an inspection whenever it has reason to believe that a participant is out of compliance with the environmental performance agreement or any environmental law;

9.3.a.1.B. Single point of contact with department for all permitting actions. The department shall assign an employee to be the primary interface with the member to provide technical support and guidance on permitting actions and permitting activities;

9.3.a.1.C. ,

NOTE to 9.3.a.1.C: Discounted permit fees for participating members are acceptable, but NO FEES should be charged for membership. See comment to Section 2.1.

9.3.a.1.D. A network established to promote the environmental excellence program and its members to recognize the accomplishments of environmental excellence program members and to provide networking opportunities with department officials and other members; and,

9.3.a.1.E. Letter in good standing provided by the department to environmental excellence program member in order to obtain financial support from a financial investor that provides incentives to firms that promote

Deleted: Credit, dollar-for-dollar, for environmental excellence program annual and renewal fees towards annual permit fees;

environmental and social performance.

9.3.a.2. Air Incentives.

9.3.a.2.A. Flexible permits. The department shall work with members to design flexible permits that are designed to reduce permitting costs and uncertainty and allow for planned process changes for operating flexibility; and,

9.3.a.2.B. Reduced record keeping and reporting frequency and simplified reporting requirements for facilities governed by Maximum Available Control Technology (MACT). Facilities subject to MACT reporting requirements may be entitled to the reduced and simplified reporting provisions for National Environmental Performance Track members promulgated by the U.S. Environmental Protection Agency, 40 CFR §63.10 and §63.16.

9.3.a.2.C. Waiver of permit modification fees as specified under W. Va. Code of State Rules. Annual Operating Permit fees may be reduced by 1% for each year up to a maximum of 3%.

9.3.a.3. Water Incentives.

9.3.a.3.A. Waiver of permit modification fees as specified under W. Va. Code of State Rules §47-26-6; and,

9.3.a.3.B. Reduced frequency for filing discharge monitoring reports (DMR) with the department. Participants may be entitled to file DMRs on a semi-annual basis. Other required documents are to be kept on file at the facility and made available upon request.

9.3.a.3.C. Reduced frequency for filing DMR-OA Studies. Participants may be entitled to file DMR-OA Studies on a triennial basis.

9.3.a.4. Waste Incentives.

9.3.a.4.A. Reduced permitting

requirements for generators of hazardous wastes. Facilities that generate hazardous wastes may accumulate hazardous wastes up to 180 days, and in certain cases 270 days, without a Resource Conservation and Recovery Act (RCRA) permit or interim status provided the facility follows the Performance Track facility extended time requirements promulgated by the U.S. Environmental Protection Agency, 40 CFR §262.34.

9.3.a.4.B. Waiver of permit modification fees as specified under W. Va. Code of State Rules.

§60-8-10. Procedures for Application

10.1. To participate in the environmental excellence program, the facility shall submit an environmental excellence program application on a form provided by the department that includes information pertaining to the facility that demonstrates compliance with and conformance to the eligibility requirements as specified under section 4 of this rule, that includes:

10.1.a. Identification and contact information regarding the applicant facility; parent company; point-of-contact; street address; mailing address (if different from facility address); physical location and geographic boundary of the facility; city; state; zip code; phone number; facsimile number; electronic mail address; website address; environmental excellence program level applying for, whether Bronze Leaf, Silver Leaf, or Gold Leaf; and desired incentives;

10.1.b. Background and an identification of the environmental requirements that demonstrate the major federal, state, tribal, and/or local environmental laws that are applicable;

10.1.c. Environmental performance record that demonstrates compliance with all environmental laws as evidenced by an environmental compliance audit as specified under section 5 of this rule;

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10.1.d. Environmental management system that demonstrates conformance with the environmental excellence program, environmental management system audit, and completed executive management review requirements as specified under section 6 of this rule;

10.1.e. A description of the environmental performance goals and past achievements and future commitments that demonstrate superior environmental performance as specified under section 7 of this rule;

10.1.f. Public participation to ensure that the environmental excellence program is broadly supported, its environmental implications are fully understood, and provides for ongoing engagement of the public as specified under section 8 of this rule;

10.1.g. A Summary of public comments received by the applicant and the department during the public review period and the applicant's response to the comments received; and

10.1.h. Environmental excellence program application certification, signed by a responsible official, that demonstrates compliance with and conformance to the terms and conditions for eligibility criteria for participation, procedures for application, and incentives in the environmental excellence program as specified under this section and sections 4 and 9 of this rule.

10.2. The department shall distribute environmental excellence program requests for applications to potential environmental excellence program members and the public on July 1 of each year.

NOTE to 10.2: Change dates to coincide with the two Performance Track Application Periods.

10.3. Due date for submission of the environmental excellence program application to the department is October 1 of each year.

NOTE to 10.3 – Have two application periods to coincide with Performance Track Application Periods. Otherwise, Silver Leaf participants may have to wait until the following year to participate in the Environmental Excellence Program; thus, being a Performance Track Member would not be “automatic.”

§60-8-11. Notice.

11.1. NOTE to 11.1: Delete entire section. This is too much like a regulatory permit application process rather than a Voluntary Partnership Agreement.

§60-8-12. Action on Application.

12.1. The department shall complete its initial review of the environmental excellence program application within 14 days of receipt of the application that shall include a cursory review of the application inventorying the contents and issuing a letter to the applicant detailing any shortcomings or acknowledging its completeness.

12.2. The department shall publish, in the department calendar, a notice of receipt of the application and related documentation and of the availability of the application and related documentation for public review and comment not less than 30 days before the department makes a decision on the application.

12.3. Within 60 days of receipt of a complete application, unless an extension of time is requested by the applicant, the department shall consider public comments, determine whether the criteria of these rules has been met, and notify the applicant, in writing, whether the applicant is eligible to participate in the environmental excellence program.

12.4. The department shall provide public notice of its decision regarding the eligibility of the applicant to participate in the environmental

Deleted: Before submitting an application to the department, the applicant shall provide for a public review of the application and related documentation for a period of not less than 30 days. The applicant shall notify the department of its intention to submit an application for environmental excellence program designation not less than 30 days before the end of the public review period. Public review shall, at a minimum, include posting a notice in a local newspaper of the applicant's intent to file the environmental excellence program application and of the availability of the application and related documentation for review. The application and related documentation shall be made available at a local public library or other public building for not less than 30 days. The public notice shall allow for comments to be made to the applicant or the department.¶

excellence program within 30 days after rendering its decision concerning eligibility.

12.5. In cases where the department determines that the applicant is eligible to participate in the program, the department may hold an informational meeting on the applicant's proposal.

12.6. Within 30 days after the public notice as specified under subsection 12.4 of this rule, interested persons may request that the department grant them authorization to participate under the negotiations as specified under section 13 of this rule, whereas the secretary shall determine whether a person who makes a request under this section shall participate in the negotiations based on whether the person has demonstrated sufficient interest in the issues raised by the application for eligibility to warrant that participation.

12.7. Any person adversely affected by the secretary's eligibility determination may appeal to the environmental quality board, pursuant to the provisions of article one [§22B-1-1 et seq.], chapter twenty-two-b of the West Virginia Code.

12.8. The department shall determine whether the environmental excellence program applicant meets the requirements of this rule and shall inform the environmental excellence program applicant of acceptance into the environmental excellence program at the Bronze Leaf or Silver Leaf or Gold Leaf designation by January 1 of each year.

§60-8-13. Environmental Performance Agreement.

13.1. Upon the secretary's determination that the applicant is eligible to participate in the environmental excellence program, the department shall begin negotiations concerning an environmental performance agreement with the environmental excellence program applicant and any person or persons to whom the department granted permission as specified under subsection 12.6 of this rule.

13.2. The environmental performance

agreement shall include information pertaining to environmental performance record, environmental management system, environmental performance goals, public participation, incentives, annual performance report, and facility visitations.

NOTE to 13.2: See Comments to 4.1.f. and 2.1.

If annual visitations remain in the Rule, language should read "may".

13.3. The department shall conclude negotiations within 12 months of beginning negotiations unless the applicant and the department agree to an extension.

13.4. If negotiations as specified under subsection 13.1 of this rule result in a draft environmental performance agreement, the department shall provide public notice about the draft environmental performance agreement in the geographic area where the facility is located.

NOTE on 13.2 thru 13.4 -- For simplicity, the participant application process already includes Certification by the RCO and constitutes the agreement upon admission by the Secretary, unless modified.

13.5. After providing public notice of a draft environmental performance agreement, the department shall hold a public meeting in the geographic area in which the subject facility or activity, product, and service is located or performed to further discuss the draft environmental performance agreement.

13.6. The term of the environmental performance agreement shall be three years.

§60-8-14. Annual Performance Report.

14.1. Each member facility shall complete and submit an annual performance report that demonstrates to the department and the public the eligibility criteria for participation, environmental performance record, environmental management system, environmental performance goals, public participation, incentives, annual facility visitations,

Deleted: annual

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maintenance of the environmental performance agreement. For environmental excellence program Silver Leaf members that already participate in the United States Environmental Protection Agency National Environmental Performance Track, submission of the National Environmental Performance Track annual performance report may be accepted in lieu of this requirement as determined by the secretary.

14.2. Annual performance reports include:

14.2.a. Self-certification of the facility's environmental excellence program that demonstrates compliance with and conformance to environmental excellence program membership eligibility criteria for participation as specified under section 4 of this rule;

14.2.b. Summary of the facility's environmental performance record as specified under section 5 of this rule;

14.2.c. Summary of the facility's environmental management system assessment activities and progress towards meeting environmental management system requirements including environmental objectives, environmental targets, and environmental management programs, including brief descriptions of audits conducted and improvements made, as specified under section 6 of this rule;

14.2.d. Information on progress made in meeting the facility's environmental performance goals as specified under section 7 of this rule;

14.2.e. Summary of the facility's public participation plan and associated activities as specified under section 8 of this rule;

14.2.f. ~~DELETE.~~ NOTE to 14.2.f: Performance Track Annual Report does not require summary of facility's incentives.

NOTE to 14.2.g: See comments to 4.1.f.

If visits are made, Agency should have information on file. No need to report again.

14.3. Due date for the annual performance report is April 1 of each year, beginning with April 1st following the year in which an environmental excellence program applicant is accepted into the program, and annually thereafter, and therefore the annual performance report shall be based on a calendar year.

14.4. Confidential business information should not be included in the annual performance report as the department shall make the report available to the public.

14.5. Review of the annual performance report is performed by the department to identify significant problems, and if found, the annual performance report shall be revised and reviewed by the department, and if accepted, shall make the report available to the public.

14.6. Distribution of the annual performance report to the public is required by the environmental excellence program member on an annual basis and the department expects each facility to select and document a means consistent with situations and the public participation plan as specified under section 8 of this rule.

14.7. Supporting documentation shall be maintained on-site to enable the environmental excellence program member to prepare the annual performance report and to make the report readily accessible to the department upon request.

§60-8-15. Facility Visitations. (See comments to Section 4.1.f.)

15.1. The department shall conduct annual facility visitations with environmental excellence program members to evaluate the effectiveness of the environmental excellence program and

Deleted: Annual

Deleted: Summary of the facility's incentives as specified under section 9 of this rule; and,

Deleted: 14.2.g. Summary of the facility's annual facility visitation as specified under section 15 of this rule.

compliance with the environmental performance agreement.

§60-8-16. Procedures for Retention, Renewal, or Termination of Environmental Excellence Program Designation.

16.1. Retention of environmental excellence program designation requires that an environmental excellence program member, on an annual basis and at least 30 days before the anniversary date of the current environmental excellence program designation, submit a renewal request, supporting information, and a certification that the environmental excellence program member meets the requirements as specified under sections 4, 5, 6, 7, 8, 9, 14, and 15 of this rule.

NOTE to 16.1: The issues are "annual basis" and "at least 30 days before the anniversary date." This is not consistent with Performance Track Program. This suggests an "annual agreement" rather than a "3-year commitment with annual progress reports.

16.2. The supporting information as specified under section 14 of this rule includes an annual performance report that specifically describes the status of the activities, products, and services and details the actions undertaken to maintain and implement the environmental management system as specified under section 6 of this rule.

16.3. A renewal request shall include a statement by the responsible official that demonstrates that the environmental excellence program member is in compliance with and conforms to all applicable environmental requirements and has no outstanding unresolved violations, or is in compliance with and conforms to a binding schedule to correct and prevent any outstanding violations.

16.4. The secretary shall terminate the environmental excellence program designation if, after the effective date of the current environmental excellence program designation, the secretary determines that the environmental excellence

program member:

16.4.a. Failed to meet the requirements of the environmental performance record as specified under section 5 of this rule or:

16.4.a.1. Failed to promptly and adequately correct and prevent a violation of environmental requirements as specified under section 5 of this rule.

16.4.b. Failed to meet the requirements of the environmental management system as specified under section 6 of this rule;

16.4.c. Failed to meet the requirements of the environmental performance goals as specified under section 7 of this rule;

16.4.d. Failed to meet the requirements of public participation as specified under section 8 of this rule;

16.4.e. Failed to meet the requirements of the incentives as specified under section 9 of this rule;

16.4.f. Significantly or repeatedly abused its designation as an environmental excellence program member, by claiming or implying environmental excellence program designation for facilities and/or persons other than those identified in the application as specified under section 10 of this rule;

16.4.g. Failed to meet the requirements of the environmental performance agreement as specified under section 13 of this rule;

16.4.h. Failed to meet the requirements and submission of the annual performance report as specified under section 14 of this rule; and,

16.4.i. Failed to meet the requirements of facility visitations as specified under section 15 of this rule.

NOTE to 16.4.i: See comments to 4.1.f.

Deleted: annual

16.5. The secretary shall advise a facility of his or her intent to terminate the environmental excellence program designation not less than 30-days before terminating the environmental excellence program membership.

16.6. There is no appeal of the secretary's environmental excellence program membership termination decision.

16.7. A person operating a facility in West Virginia, that was a former environmental excellence program member, may reapply for environmental excellence program designation at any time as long as the environmental excellence program applicant meets the requirements of this rule.

§60-8-17. Impact on Incentives from Termination of Environmental Excellence Program Designation.

17.1. Upon the secretary's termination of an environmental excellence program designation, all incentives, provided to the former environmental excellence program member and as specified under section 9 of this rule, shall be terminated and/or restricted as provided in this section and as determined by the secretary.

§60-8-18. Application Fees and Annual Renewal Fees.

18.1. An application fee of one thousand dollars (\$1,000.00) shall be paid by the environmental excellence program applicant and is to be submitted at the time the application is filed in the form of a check payable to the West Virginia Department of Environmental Protection for deposit in the Environmental Excellence Program Administrative Fund. Provided that the application fee shall be waived for all public entities seeking membership in the environmental excellence program.

NOTE to Section 18.1: NO FEES. See comments to Section 2.1

18.2. An annual renewal fee of five hundred dollars (\$500.00) shall be paid by the environmental excellence program member and is to be submitted at the time the renewal is filed in the form of a check payable to the West Virginia Department of Environmental Protection for deposit in the Environmental Excellence Program Administrative Fund. Provided that the annual renewal fee shall be waived for all members that are public entities.

NOTE to Section 18.2: NO FEES. See comments to Section 2.1

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The comment period for the West Virginia Department of Environmental Protection (DEP) Environmental Excellence Program Rule, 60CSR8, closed July 19, 2005, with the Public Hearing. No persons appeared at the Public Hearing, however comments were received, via hand delivery, from the West Virginia Manufacturers Association (WVMA) and the Union Carbide Corporation, a subsidiary of The Dow Chemical Company (DOW).

COMMENTS I. WVMA:

COMMENT 1: Definition of "Community Advisory Panel." Section 2.3 of the draft Regulations provides for the establishment of a "Community Advisory Panel" and offers the following definition:

"a committee, task force, or board comprised of citizens affected by facilities that provides a public forum for community members to present and discuss their needs and concerns about the decision-making process at the facilities affecting it."

While public participation is clearly encouraged by the environmental excellence program statute, the WVMA believes that significant public involvement is already afforded by the duties and rights established by the provisions of the State Administrative Procedures Act found in W.Va. Code §29A et seq. and, more specifically, in Article 3 thereof. We urge the WV DEP to reconsider its position with regard to the compulsory establishment of community advisory panels.

RESPONSE 1: The "State Administrative Procedures Act" only provides the public with the opportunity to comment on the agency's proposed rules. It does not provide any meaningful right for the public to be engaged through this "Environmental Excellence Program." Moreover, the federal counterpart program, known as the "United States Environmental Protection Agency National Environmental Performance Track", strongly encourages the development, implementation, and management of a "Community Advisory Panel."

COMMENT 2: Definition of "Executive Management Review." Section 2.5 of the draft Regulations establishes a concept known as "Executive Management Review" and provides as follows:

"a structured process that must take place at regular intervals to discuss the functioning of the environmental excellence program and to take action to correct and prevent non-compliance and non-conformance as necessary, that includes regular Executive Management Review meetings, whereas it is the responsibility of executive management to ensure that this procedure is carried out and that related functions are reviewed at the highest possible level so that all levels of management are made aware of changes, updates, revisions, verification activities, policies, procedures, etc. pertaining to the environmental excellence program."

This definition appears unclear and somewhat cumbersome. Additionally it may place duties on companies' management involved in the environmental excellence program that are not necessarily required by the statute. We urge WV DEP to reconsider this definition.

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RESPONSE 2: The DEP agrees and has deleted any reference to “Executive Management Review” within subsection 2.5 and subdivisions 6.1.b, 6.1.c, 6.1.d, 6.2.c, 6.2.h, and 10.1.d. The DEP believes that the “Environmental Management System Audit” requirement, under section 6 of the rule, satisfies the intent of the “Executive Management Review.”

COMMENT 3: Definition of “Pollution Prevention.” The WVMA supports as a general matter pollution prevention activities. However, the definition of “pollution prevention” found at Section 2.8 of the draft Regulations, suggests that cross media pollution transfers which reduce hazards (but which may not necessarily involve net reductions in discharges or emissions), cannot be considered as pollution prevention. The WVMA would request clarification of this definition.

RESPONSE 3: The definition of “Pollution Prevention” in the rule is verbatim from W. Va. Code §22-25-3, including the language “pollution prevention does not include cross-media pollution transfers that do not result in a net decrease of discharge, emission or impact to the environment”, so additional clarification cannot be made.

COMMENT 4: Definition of “Source.” Section 2.8.a.2 provides for a definition of “source” as requiring both acceptance into the State environmental excellence program, as well as into the federal environmental excellence program as specified under the Pollution Prevention Act, 42 U.S.C. §13101 *et seq.* The WVMA questions whether the intent of the regulatory program is to preclude membership in the state environmental excellence program if one is not a member of the federal program as well. We believe that a company should be permitted to participate in the state environmental excellence program as a discretionary matter.

RESPONSE 4: The DEP agrees that membership in both programs is not mandatory and has added the definition of “Source at a United States Environmental Protection Agency National Environmental Performance Track Member Facility” as specified under the Pollution Prevention Act (42 U.S.C. §§13101–13109) as paragraph 2.8.a.2. The DEP changed the definition of “Source” to “Source at an Environmental Excellence Program Member Facility” and deleted “as specified under the Pollution Prevention Act (42 U.S.C. §§13101–13109) as paragraph 2.8.a.3.

COMMENT 5: Definition of “Supplemental Environmental Project.” Section 2.12 provides a somewhat cumbersome definition of Supplemental Environmental Project. The WVMA recommends that a more standardized definition of Supplemental Environmental Project as found in EPA’s SEP guidance documents be utilized. (*See Final Supplemental Environmental Project Policy*, April 10, 1998; *Appropriate Penalty Mitigation Credit Under the SEP Policy*, April 14, 2000; *Supplemental Environmental Projects Policy*, March 22, 2002; *Expanding the Use of Supplemental Environmental Projects*, June 11, 2003; and *Project Ideas for Supplemental Environmental Projects*, January 5, 2004).

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RESPONSE 5: The DEP agrees and has changed the definition of “Supplemental Environmental Project” to reflect the United States Environmental Protection Agency definition found in the “Issuance of Final Supplemental Environmental Projects Policy, April 10, 1998.”

COMMENT 6: Eligibility Criteria for Participation. Section 4.3.c appears to have an incomplete sentence. The WVMA suggests the revision of this section to read as follows:

“Already have developed and implemented three environmental performance goals and commit to develop and implement seven additional environmental performance goals, One of which is a capital improvement project designed to reduce discharges or emissions from the facility below the environmental performance baseline where the specified discharges or emissions;”

RESPONSE 6: The DEP addressed this comment and revised it as recommended as part of the “Environmental Excellence Program Rule Pre-Comment Period.”

COMMENT 7: Eligibility Criteria for Participation. Section 4.4 offers “credit” for applicants who are already registered or members of the environmental excellence programs established and maintained by US EPA, such as the National Environmental Performance Track. While dual membership in both federal and state environmental excellence programs is certainly a laudable goal, it appears inconsistent with the definition of “source” set forth at Section 2.8.a.2 which would appear to require such participation for an applicant to participate in the state program. The WVMA does not believe this to be the intent of the state environmental excellence program and accordingly urges DEP to offer an “either/or” approach, while permitting, but not mandating participation in both programs.

RESPONSE 7: The DEP did not intend to require participation in the “United States Environmental Protection Agency National Environmental Performance Track” as a prerequisite for participation in the “Environmental Excellence Program.” However, where a facility has chosen to participate in the “United States Environmental Protection Agency National Environmental Performance Track”, which is comparable to the “Silver Leaf Environmental Excellence Program Designation”, the DEP believes that there is no sound reason to make the facility go through the application process under section 12 of this rule.

COMMENT 8: Environmental Performance Record. Section 5 of the draft Regulations relates to environmental performance records, and the application of its criteria as to whether or not an entity is entitled to membership in the environmental excellence program is generally problematic. As an initial matter, it appears, though it is not expressly clear, that “existing facilities” (not defined) which apply for inclusion in the environmental excellence program will not be subject to review on a corporate-wide basis, but rather on a facility basis. However, it appears that “new facilities,” (not defined, but see proposed Section 5.3), will be judged on the environmental performance records of “other facilities owned and/or operated by the same entity. . . .” The reason for the distinction between “existing” and “new” facilities is not clear nor is there any justification for such a distinction. Facilities should be judged on a site-specific basis.

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It additionally appears that if any of the stated conditions occur, i.e. criminal actions, (proposed Section 5.1.a), civil action (proposed Section 5.1.), or administrative actions (proposed Section 5.1.c.), the DEP Secretary does not have the flexibility to consider the factual circumstances surrounding the conditions as a basis for permitting inclusion in the environmental excellence program, rather than being forced to make a decision that a company may not be part of the program.

As a third matter, individual portions of this section raise interesting issues of law as to whether such a condition could validly be considered as applying to a facility. For example, would a plea of *nolo contendere* by an employee of a corporation to a negligent violation of the Clean Water Act (which in essence requires no criminal intent), be considered as a reason for not permitting the corporation to become a member of the state environmental excellence program? This potentially makes the corporation an insurer of the environmental performance of at will employees, a situation which the WVMA respectfully suggests should not be a grounds for failing to permit a corporation to join the program. Additionally, the monetary levels for civil fines, penalties, and/or supplemental environmental projects in civil actions of \$10,000 (proposed Section 5.1.b.1) and \$25,000 (proposed Section 5.1.c.), may effectively bar participation by most corporations in the state and, more importantly, particularly when it is not clear from the draft Regulation whether or not it is being judged on a “facility” or “corporate-wide” basis.

Finally, certain standards proposed by the DEP allow a corporation no information to be able to dispute the reason that such a factor would be considered in its environmental performance record. Proposed Section 5.1.c.2 provides that planned, but not yet filed administrative actions at a facility are, a bar to entry into the environmental performance program. How is a corporation to know that an enforcement action is “planned” but “not yet filed,” given the enforcement discretion which the DEP possesses and the enforcement confidentiality which is normally maintained by the agency?

We suggest as a general matter that DEP consider revisiting this section and permitting a certain flexibility to exist such an exemplary corporate environmental compliance program that run afoul of the intricacies of environmental law in its interpretation are not automatically excluded for what is otherwise a valuable program.

RESPONSE 8: It is true that there is a distinction between “existing” and “new” facilities under this section and that “new” facilities are examined on a “corporate-wide” basis as per subsection 5.3. The DEP believes that it is appropriate to hold “new” facilities to a higher standard and entities under the same corporate structure should be examined as a whole for participation in the “Environmental Excellence Program.”

The DEP disagrees with the comment concerning flexibility to consider individual facts under section 5. This section relates to determining eligibility for participation in the “Environmental Excellence Program” and requires clear objective criteria, as opposed to fact-specific evaluations that would be extremely cumbersome for the DEP to make.

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The commenter questions whether a corporation should be deprived of membership in the “Environmental Excellence Program” based upon its employees’ criminal violations. The DEP believes this is an appropriate standard for participation in the “Environmental Excellence Program” and points out that the same standard applies to the “United States Environmental Protection Agency National Environmental Performance Track.” Regarding the amounts of civil fines and penalties in the rule, the DEP believes the amounts are certainly more than de minimis amounts and are appropriate for the eligibility criteria under the “Environmental Excellence Program.” Regarding any ambiguity, the rule is clear that all of subsection 5.1 applies “facility-wide,” whereas subsection 5.3 applies “corporate-wide.”

The DEP acknowledges that a facility may not always know that an enforcement action is “planned.” However, if the agency itself knows an enforcement action is imminent, this is sufficient grounds to conclude the facility should not be permitted to participate in the “Environmental Excellence Program.”

The DEP has carefully reviewed the entire section and has made several clarifications to the language.

COMMENT 9: Environmental Management System. Section 6 provides several references to “third party” environmental audits. This term is not defined, particularly as it relates to whether internal environmental compliance audits performed by plant personnel would be considered such a “third party” audit or whether outside contractors would necessarily have to be utilized. Section 6.2.c provides that a “self audit” and/or “third party” audit should be utilized. This appears to be the only place in the proposed Regulations where a “self audit” can be utilized and may therefore need to be further defined and the inconsistency between this specific section and other audit language of Section 6 addressed.

RESPONSE 9: The DEP addressed this comment and revised it as recommended as part of the “Environmental Excellence Program Rule Pre-Comment Period.” The DEP deleted “self-audit and/or a third party” from section 6 of the rule. The DEP believes that the “Environmental Management System Audit” requirement, under section 6 of the rule, satisfies the intent of the “self-audit and/or a third party audit”

COMMENT 10: Environmental Management System Certification. Section 6.2.a.5.A.1 requires that as part of an environmental excellence program application, a statement signed by responsible company officials must be included. The WVMA suggests that this language be compared to existing certifications required by other state and/or federal environmental laws and that the proposed certification under this section be no more stringent than such certifications as required by counterpart environmental laws.

RESPONSE 10: The DEP disagrees with the commenter since the DEP has aligned the “Environmental Excellence Program” with the “United States Environmental Protection Agency National Environmental Performance Track.” The “United States Environmental Protection Agency National Environmental Performance Track” requires an “Application and Participation Statement” for the facility to certify that the information reported in the application is true,

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accurate, and complete, and that the facility continues to adhere to all the criteria for participation. The person who signs the form must be the senior manager with responsibility for the facility; be fully authorized to execute the statement on behalf of the corporation or other legal entity whose facility is part of the "United States Environmental Protection Agency National Environmental Performance Track"; and have examined and be familiar with the information contained in the application. The "Application and Participation Statement" will also be a requirement of the "Environmental Excellence Program".

COMMENT 11: Air Incentives. Section 9.3.a.2 provides for certain incentives "flexible" permitting and reduced reporting frequency of simplified reporting requirements. These incentives as a practical matter may have fairly minor impact on the regulated community. Reduced reporting may be granted to units covered by MACT standards, but this "incentive" covers as a practical matter comparatively few units in the State of West Virginia and is entirely discretionary with the Director. Title V requirements would still apply, so the "reduction" in reporting would not as a practical matter be significant. The commitment to work with sources to grant "flexible" permits is something that a source should be able to get now from DEP without having to enter into the environmental excellence program. DEP should be willing to expedite permitting time frames to the maximum extent possible as a matter of sound business sense, constrained only by the public notice limits provided otherwise by statutes and regulations and commit to complete action on Class I administrative amendments that do not require notice within 20 working days as a matter of course.

RESPONSE 11: The DEP has made significant progress in reducing air permitting time frames and will continue these efforts. The "significance" of the incentives under this paragraph of the rule remains to be seen, but DEP believes they should serve to encourage participation in the "Environmental Excellence Program".

COMMENT 12: Water Incentives. The WVMA believes that, similar to the air incentives, the water incentives which are offered are, as a practical matter, of minor impact to the regulated community. We would urge the WV DEP to consider enhancing the incentives to reflect, for example, some mitigation aspect in penalty calculations or a favorable presumption in penalty calculations if a company is a member of the environmental excellence program.

RESPONSE 12: Like all of the incentives under the "Environmental Excellence Program," their significance remains to be seen. The DEP will make revisions to the "Environmental Excellence Program" in the future if determined necessary.

COMMENT 13: Waste Incentives. Section 9.3.a.4.A provides that permitting requirements for "generators" of hazardous wastes will be "reduced." The WVMA suggests that technically this section should be reworded to reflect that, rather than reducing "permitting requirements," accumulation times for hazardous waste will be increased without having to obtain a permit.

RESPONSE 13: The DEP points out that this language is consistent with the incentive language under the "United States Environmental Protection Agency National Environmental Performance Track," and although technically not a "reduction" in permitting requirements, the

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incentive constitutes an “exemption” to permitting requirements and is therefore generally accurate.

COMMENT 14: Action on Application. Section 12.6 seems to establish a procedure that is more stringent than the notice comment requirements of the State Administrative Procedures Act of Chapter 29A of the West Virginia Code with regard to public participation. Additionally, it is unclear as to what the phrase “authorization to participate under the negotiations” means in the context of participation by “interested persons,” insofar as these terms are not defined. The WVMA requests that this section be rewritten to provide that interested persons have the rights accorded to them under Chapter 29A of the State Administrative Procedures Act.

RESPONSE 14: See **COMMENTER I, RESPONSE 1.**

As stated in **COMMENTER I, RESPONSE 1:** the “State Administrative Procedures Act” only governs rulemaking public notice requirements and is not directly applicable to the public notice requirements under the DEP’s various programs. Regarding the comment about further defining the terms used in this subsection, the DEP believes the meaning is clear without further definition.

COMMENT 15: No More Stringent Than Provision. The WVMA suggests that language be included in the proposed program rule providing that nothing in the rule is intended to broaden powers otherwise accorded to DEP or other persons pursuant to existing environmental statutory or regulatory authorities, including, but not necessarily limited to specifically, rights to inspection, monitoring, enforcement (both private and by the agency) and confidential business information.

RESPONSE 15: The DEP believes the language of the rule speaks for itself and there is no need for any such qualifying language.

COMMENT 16: Section 18. Application Fees and Annual Renewal Fees. The WVMA believes that WV DEP should reconsider the fee structure of the proposed rule. While some members who desire to participate in the proposed Environmental Excellence Program may well be able to afford such fees, some members may find the proposed fees to be a barrier to participation in an otherwise laudatory program. We would accordingly request that the WV DEP re-examine the fee structure and, if possible, look for ways to run the program without charging fees to the regulated community. Alternatively, we would ask that WV DEP justify the levels of fees which it proposes to charge by an examination of the proposed cost of the program in order to determine the most reasonable level of fee to be charged.

RESPONSE 16: The DEP believes that it is important to provide for a means of sustaining the “Environmental Excellence Program” and the enabling statute at W. Va. Code §22-25-11 expressly authorizes this approach. We have re-examined the particular dollar amounts to be assessed and have added lower fees for “small businesses.” The DEP believes that the amounts are appropriate to effectively administer the “Environmental Excellence Program.”

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COMMENT 17: Section 4. Eligibility Criteria for Participation. Section 4 generally sets forth the various criteria for participation in the Environmental Excellence Program at the “Bronze Leaf” (Section 4.1), “Silver Leaf” (Section 4.2), and “Gold Leaf” (Section 4.3) levels. The stepwise approach proposed by WV DEP establishes a base level of Bronze Leaf which works up to an intermediate level, Silver Leaf, and culminates in an elite Gold Leaf level. The differences between the various levels appear to be driven from both a timing perspective and the number of projects or goals which are required to be completed before receiving the benefits of the next level. While it may, in some instances certainly be indicative of better environmental performance to perform both “faster” and “more”, this may not always be the case. For example, particularly with regard to the “Gold Leaf” level, “more” is equated to include at least one capital improvement project designed to reduce discharges or emissions from the facility below the environmental performance baseline for the specified discharges or emissions. See Proposed Section 4.3.c. We would ask WV DEP to consider looking at performance metrics for each of the levels which allow for alternative Environmental Excellence projects not necessarily tied to a permit at a facility or capital improvement expenditures to be considered for eligibility criteria.

RESPONSE 17: See **COMMENTS II, RESPONSE 25.**

See **COMMENTS II, RESPONSE 28.**

COMMENTS II. DOW:

COMMENT 18: Section 2.1. We do not believe an application fee should apply. The perception of paying for recognition must be avoided.

What condition constitutes a waiver?

RESPONSE 18: See **COMMENTS I, RESPONSE 16.**

In addition, although “recognition” is certainly an important component of the “Environmental Excellence Program,” a participant receives much more benefit than that. “Silver Leaf and “Gold Leaf” “Environmental Excellence Program” members will receive more benefits under the “Regulatory and Administrative Incentives” subsection of this rule in the form of reduced regulatory requirements and consequent cost-savings. Additionally, “Environmental Excellence Program” will cost some amount to effectively administer and the fees are designed to recover that amount.

COMMENT 19: Section 2.3. The concept of a Community Advisory Panel (CAP) is already established for large organizations such as Dow. However, the concept of a CAP for small entities that are also being targeted by the Environmental Excellence Program may be difficult or impractical.

RESPONSE 19: See **COMMENTS I, RESPONSE 1.**

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In addition, the DEP agrees that it may be more difficult for a “small business” to engage the public through a “Community Advisory Panel”, however we think that it is important to the success of the “Environmental Excellence Program” for the small business to do so.

COMMENT 20: Section 2.5. Change “Executive Management Review” to “Management System Review.” Small entities that the Environmental Excellence Program is attempting to target may find it easier to meet the intent of Management System Review rather than Executive Management Review. Very few facilities have the ISO 14001 approach of Executive Management Review.

RESPONSE 20: See **COMMENTS I, RESPONSE 2.**

In addition, the “United States Environmental Protection Agency National Environmental Performance Track” and the “Environmental Excellence Program” both require all facilities to implement an “Environmental Management System” within their operations. We recognize, however, that the scope and the level of formality of the “Environmental Management System” will vary, depending on the nature, size, and complexity of the facility.

COMMENT 21: Section 3.2. Why not just 2 levels like the VA program? The Gold level seems unattainable to most state organizations.

RESPONSE 21: The DEP supports an Environmental Excellence Program that goes beyond other states’ programs and the “United States Environmental Protection Agency National Environmental Performance Track.”

COMMENT 22: Section 4.1.a. Change “Provide documentation” to “Have documentation.” How does the Applicant provide this documentation other than the Certification by the Responsible Corporate Official (RCO) with the application? Agency should verify this with their Compliance Section the same way EPA does.

RESPONSE 22: The DEP agrees to some extent with the commenter and has changed “provide” to “have” in some sections of the rule. The DEP realizes that the requirement to “provide” documentation of a proven “Environmental Performance Record” may be too cumbersome in certain instances. However, the applicant and the facility must “have” this documentation readily accessible and be prepared to “provide” this documentation to the DEP and/or the United States Environmental Protection Agency for review.

During the application review process, the “Application and Participation Statement” required by the “United States Environmental Protection Agency National Environmental Performance Track” and the “Environmental Excellence Program” will serve to certify that the information reported in the application is true, accurate, and complete, and that the facility continues to adhere to all the criteria for participation.

During the application review process and the “Annual Facility Visitations”, the DEP will verify the “Environmental Performance Record” through, at a minimum, federal and state files and

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databases, and coordination with the various environmental media compliance and enforcement sections.

In addition, the DEP wants to emphasize that subsection 10.1 and subdivision 10.1.c do require the applicant to submit to the DEP the “Environmental Excellence Program” application that includes the facility’s “Environmental Performance Record” that must be in conformance with section 5 of the rule.

COMMENT 23: Section 4.1.f. Replace “annual” with “as needed.” Does the Agency have resources to offer annual visitation to all participants?

RESPONSE 23: The DEP does have the financial, human, and technical resources available within the department to perform “annual facility visitations.” The DEP also has the cooperation of the “United States Environmental Protection Agency National Environmental Performance Track.”

COMMENT 24: Section 4.2.a. Change “Provide documentation of” to “Have documentation.” See comments to Section 4.1.a.

RESPONSE 24: See **COMMENTS II, RESPONSE 22.**

COMMENT 25: Section 4.2.c. Consideration should be given to goals and commitments for smaller businesses to align with Performance Track.

RESPONSE 25: The DEP added a definition for “Small Business” as subsection 2.10 of this rule and added new “Eligibility Criteria for Participation” under subdivisions 4.2.c and 4.3.c of this rule for a small business.

COMMENT 26: Section 4.2.f. Replace “annual” with “as needed.” See comments to Section 4.1.f.

RESPONSE 26: See **COMMENTS II, RESPONSE 23.**

COMMENT 27: Section 4.3.a. Change “Provide documentation” to “Have documentation.” See comments to Section 4.1.a.

RESPONSE 27: See **COMMENTS II, RESPONSE 22.**

COMMENT 28: Section 4.3.c. Seven commitments are unreasonable and may be a disincentive to prospective participants.

If this Gold Level remains, with a more reasonable commitment level, consideration should be given to fewer goals and commitments for smaller businesses.

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The capital project should not be limited to monetary or the few items mentioned, but should allow for such things as resource commitment (e.g., employee man-hours expended toward environmental performance improvement).

RESPONSE 28: See **COMMENTER II, RESPONSE 25.**

In addition, the DEP revised the “Eligibility Requirements for Participation” to reflect more reasonable and achievable “Environmental Performance Goals” and the requirement to already have developed and implemented an additional “Environmental Performance Goal” that shall be a “Capital Improvement Project”

The DEP revised the definition for “Capital Improvement Project” to include language that the “Capital Improvement Project” is “designed to reduce discharges and/or emissions from the facility below the environmental performance baseline for the specified discharges and/or emissions, and/or promotes sustainability.” The DEP also added language to the types of acceptable Capital Improvement Projects to reflect that “cash and/or in-kind contributions that are realized in goods, commodities, and/or services, etc.” are acceptable means meeting the cost requirements. The DEP also added to the definition an additional Capital Improvement Project option of a “Sustainability project.”

COMMENT 29: Section 4.3.f. Replace “annual” with “as needed.” See comments to Section 4.1.f.

RESPONSE 29: See **COMMENTER II, RESPONSE 23.**

COMMENT 30: Section 5.1. Change “by providing documentation of” to “based on.” See comments to Section 4.1.a.

RESPONSE 30: The DEP agrees with commenter, however the DEP has changed “providing” to “having” to reflect similar changes made to subdivisions 4.1.a, 4.2.a, and 4.3.a.

See **COMMENTER II, RESPONSE 22.**

COMMENT 31: Section 6.1.b. Replace “executive management review” with “management system review.” See Comments to Section 2.5.

RESPONSE 31: See **COMMENTER I, RESPONSE 2.**

COMMENT 32: Section 6.1.d. Replace “executive management review” with “management system review.” See Comments to Section 2.5.

RESPONSE 32: See **COMMENTER I, RESPONSE 2.**

COMMENT 33: Section 6.2.c. Replace “executive management review” with “management system review.” See Comments to Section 2.5.

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RESPONSE 33: See **COMMENTER I, RESPONSE 2.**

COMMENT 34: Section 6.2.h. Replace “executive management review” with “management system review.” See Comments to Section 2.5.

RESPONSE 34: See **COMMENTER I, RESPONSE 2.**

COMMENT 35: Section 9.3.a.1.C. Discounted permit fees for participating members are acceptable, but NO FEES should be charged for membership. See Comment to Section 2.1.

RESPONSE 35: See **COMMENTER I, RESPONSE 16.**

COMMENT 36: Section 9.3.a.2.B. Include “record keeping” as well as reporting frequency.

RESPONSE 36: The DEP disagrees with the commenter. The “United States Environmental Protection Agency National Environmental Performance Track” only allows for “reduced reporting frequency” and “simplified reporting requirements” as promulgated by the United States Environmental Protection Agency under 40 CFR §63.10 and §63.16. Additional incentives may be included in the future as the “United States Environmental Protection Agency National Environmental Performance Track” and the “Environmental Excellence Program” develop new incentives that support the missions of the programs and result in substantive benefits for participants.

COMMENT 37: Section 9.3.a.2.C. This section should be added as follows: “Waiver of permit modification fees as specified under W. Va. Code of State Rules. Annual Operating Permit fees may be reduced by 1% for each year up to a maximum of 3%.”

RESPONSE 37: The DEP disagrees with the commenter. Since the “Environmental Excellence Program” is in its inception, additional incentives may be included in the future as the “Environmental Excellence Program” develops new incentives that support the mission of the program and result in substantive benefits for participants.

COMMENT 38: Section 9.3.a.3.B. Change “quarterly” to “semi-annual.”

RESPONSE 38: The DEP disagrees with the commenter. Since the “Environmental Excellence Program” is in its inception, the DEP believes that the “quarterly” reporting requirement for “Discharge Monitoring Reports” is sufficient at this time. Additional incentives may be included in the future as the “Environmental Excellence Program” develops new incentives that support the mission of the program and result in substantive benefits for participants.

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COMMENT 39: Section 9.3.a.3.C. This section should be added as follows: “Reduced frequency for filing DMR-QA Studies. Participants may be entitled to file DMR-QA Studies on a triennial basis.”

RESPONSE 39: See **COMMENTS II, RESPONSE 37.**

COMMENT 40: Section 9.3.a.4.B. This section should be added as follows: “Waiver of permit modification fees as specified under W. Va. Code of State Rules.”

RESPONSE 40: See **COMMENTS II, RESPONSE 37.**

COMMENT 41: Section 10.2. Change “dates” to coincide with the two Performance Track Application Periods.

RESPONSE 41: The DEP changed “July 1” to “November 1 and May 1” to coincide with the “United States Environmental Protection Agency National Environmental Performance Track.”

COMMENT 42: Section 10.3. Have two application periods to coincide with Performance Track Application Periods. Otherwise, Silver Leaf participants may have to wait until the following year to participate in the Environmental Excellence Program; thus, being a Performance Track Member would not be “automatic.”

RESPONSE 42: The DEP changed “date” to “dates”, deleted “the”, changed “application” to “applications”, deleted “is”, added “are February 1 through April 30 and August 1 through”, and changed “October 1” to “October 31” to coincide with the “United States Environmental Protection Agency National Environmental Performance Track.”

COMMENT 43: Section 11. Delete entire section. This is too much like a regulatory permit application process rather than a Voluntary Partnership Agreement.

RESPONSE 43: The DEP disagrees with the commenter. The “Environmental Excellence Program”, under W. Va. Code §22-25-6, requires the applicant to make the “Environmental Excellence Program” application available for public review, and thus the requirement of the public notice for the purpose of soliciting public comments on the “Environmental Excellence Program” application.

COMMENT 44: Section 13.2. Delete “annual” from facility visitations. See Comments to 4.1.f. If annual visitations remain in the Rule, language should read, “may”.

Delete fee language based on Comments to 2.1.

RESPONSE 44: See **COMMENTS II, RESPONSE 23.**

See **COMMENTS I, RESPONSE 16.**

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In addition, The DEP has deleted any reference to “nonrefundable” as it relates to fees in this subsection of the rule, given that an “Environmental Excellence Program” incentive will result in dollar-for-dollar credits of permit fees toward application fees and triennial renewal fees, etc.

COMMENT 45: Sections 13.2 through 13.4. For simplicity, the participant application process already includes Certification by the Responsible Corporate Official (RCO) and constitutes the agreement upon admission by the Secretary, unless modified.

RESPONSE 45: The DEP disagrees with the commenter. While it is true that some of the elements of the agreement are also required in the application, the “Environmental Performance Agreement” is the shared commitment cooperative agreement between the DEP and the “Environmental Excellence Program” member that specifies the member’s commitment to superior environmental performance, enhanced public involvement, and the incentives to be provided.

COMMENT 46: Section 14.2.f. Delete this Section. Performance Track Annual Report does not require summary of facility’s incentives.

RESPONSE 46: The DEP disagrees with the commenter. Even though the “United States Environmental Protection Agency National Environmental Performance Track” does not require a “summary of the facility’s incentives,” the “Environmental Excellence Program” does. The DEP’s intent here requires the “Environmental Excellence Program” participant to summarize the “incentives” awarded and the benefits of those “incentives.”

COMMENT 47: Section 14.2.g. Delete this Section. See comments to 4.1.f. Also, if visits are made, Agency should have information on file. No need to report again.

RESPONSE 47: The DEP disagrees with the commenter. Even though the “United States Environmental Protection Agency National Environmental Performance Track” does not require a “summary of the facility’s annual facility visitation,” the “Environmental Excellence Program” does. The DEP’s intent here requires the “Environmental Excellence Program” participant to summarize the “annual facility visitation” and the benefits of the “annual facility visitation.”

COMMENT 48: §60-8-15 Annual Facility Visitations. Delete “annual.” See comments to Section 4.1.f.

RESPONSE 48: See **COMMENTER II, RESPONSE 23:** The DEP does have the financial, human, and technical resources available within the department to perform “annual facility visitations.” The DEP also has the cooperation of the “United States Environmental Protection Agency National Environmental Performance Track.”

COMMENT 49: Section 16.1. The issues are “annual basis” and “at least 30 days before the anniversary date.” This is not consistent with Performance Track Program. This suggests an “annual agreement” rather than a “3-year commitment with annual progress reports.”

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RESPONSE 49: The DEP agrees with the commenter and has deleted “on an annual basis and”, however, the DEP will continue to support the reference to “at least 30 days before the anniversary date” that coincides with the three year “Environmental Excellence Program” membership term anniversary date.

COMMENT 50: Section 16.4.h. Add “and submission” after “Failed to meet the requirements” and before “of the annual performance report...”

RESPONSE 50: The DEP disagrees with the commenter. Section 14.3 references “submission” of the “Annual Performance Report” with “Due date for the annual performance report is April 1 of each year, beginning with April 1st follow the year in which an environmental excellence program applicant is accepted into the program...”.

COMMENT 51: Section 16.4.i. Delete the word “annual.” See Comments to 4.1.f.

RESPONSE 51: See **COMMENTER II, RESPONSE 23.**

COMMENT 52: Section 18.1. No fees. See Comments to 2.1.

RESPONSE 52: See **COMMENTER I, RESPONSE 16.**

COMMENT 53: Section 18.2. No fees. See Comments to 2.1.

RESPONSE 53: See **COMMENTER I, RESPONSE 16.**